STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Todd Fee,

Petitioner,

vs.

NO: 09 WC 48188

14IWCC0157

Olin Brass,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 2013, is hereby affirmed and adopted.

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

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

14IWCC0157

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: MAR 04 2014
TJT:yl
o 2/25/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FEE, TODD
Employee/Petitioner

Case# **09WC048188**

OLIN BRASS
Employer/Respondent

14IWCC0157

On 6/7/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
TODD J SCHROADER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0299 KEEFE & DEPAULI PC
MICHAEL F KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

14IWCC0157

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Todd Fee
Employee/Petitioner

v.

Olin Brass
Employer/Respondent

Case # 09 WC 48188

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 William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 25, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0157

FINDINGS

On July 24, 2009, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $47,486.40; the average weekly wage was $913.20.

On the date of accident, Petitioner was 45 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $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 amounts paid under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's conclusions of law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

June 2, 2013
Date

JUN - 7 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on July 24, 2009. According to the Application, Petitioner was pulling a man saver and hurt both of his hands and arms which caused disability to the left and right extremities. Respondent disputed liability in this case on the basis of accident and causal relationship.

Petitioner worked for Respondent as a crane operator and worked in that capacity for 17 of the 23 years he has been employed by Respondent. Petitioner testified that his job of a crane operator required him to control the movement of the cranes by using a remote control type box that hangs around the operator's waist. This box has a number of plastic covered switches that are approximately two inches in length. Moving these switches directs the crane to lift, grasp, release and move the various heavy objects in the plant.

Petitioner testified that he operates the cranes every day and that his work day starts at 8 AM. Petitioner's first task is to inspect the cranes to make certain that they are in proper working order. Petitioner will then check the work orders to determine what needs to be moved. Petitioner testified that he rarely gets any breaks while at work, has lunch at 12 PM and clocks out at 4 PM. Petitioner also stated that his job includes operating a motorized pallet jack and moving pallets.

Respondent tendered into evidence a DVD of approximately 20 minutes in length which showed other employees operating the control box and pallet jack as well as driving a forklift. The video showed that the control box was hanging from a harness and the top of it was just at or below the belt level. The arms of the individual operating the control box hang not quite to full extension and the elbows are slightly flexed with the fingers operating the levers. There is no observable repetitive motion of the elbows when this device is being operated. The video also showed the operation of the pallet jack. This device is operated with a handle that rises to waist level. The jack appeared to move easily on the floor whether it was empty or with pallets. The elbows are slightly bent during the operation of the pallet jacks; however, no repetitive movement of the elbows was observable. Finally, the video showed another employee driving a forklift; however, this is not a task that Petitioner performs on any regular basis. At trial, Petitioner testified that he watched the video and that it was not accurate because he was required to work at a much faster pace than what it depicted.

Petitioner testified that over time he began to experience problems in this elbows and tingling in his hands, in particular, the ring and little fingers of both hands. While Petitioner believes that he developed these upper extremity issues over a period of time, he also stated that something happened on July 24, 2009, when he pulled apart a man saver. However, he testified he had experienced some symptoms prior to that date.

Petitioner completed an accident report on July 24, 2009, and that report was received into evidence at trial. The report stated that after the Petitioner pulled on the man saver with his hands that he experienced an onset of tingling in both of his hands afterwards. In the report there was no mention of any symptoms prior to July 24, 2009, nor was there any reference to elbow symptoms. As stated herein, the Application for Adjustment of Claim stated that the accident of

July 24, 2009, was the cause of the injury, there was no allegation of this being a repetitive trauma injury.

Petitioner was initially seen by Dr. Shaping Sun, Respondent's Medical Director, (his records were not tendered into evidence) who referred him to Dr. Dan Phillips for nerve conduction studies. Dr. Phillips saw Petitioner on August 4, 2009, and noted that Petitioner previously underwent bilateral carpal tunnel release surgeries by Dr. Crandall in 2005. At that time, Petitioner reported to Dr. Phillips that he had a 100% relief of symptoms following the surgery until a work event of July 24, 2009. Dr. Phillips' report noted "He reports pulling at work and indicates he suddenly developed tingling in both upper extremities at the same time, worse on the left which had never experienced before. He also reports bilateral hand, but not elbow pain."

On August 27, 2009, Petitioner was evaluated by Dr. Mitchell Rotman, an orthopedic surgeon. This evaluation was also at the request of Dr. Sun. Petitioner informed Dr. Rotman that he previously had carpal tunnel surgery in 2005 and that when he was pulling on a man saver on July 24, 2009, his fingers went numb, primarily the ring and little fingers. Dr. Rotman examined Petitioner and reviewed the nerve conduction studies that had been performed by Dr. Phillips on August 4, 2009. When Petitioner was examined by Dr. Rotman, he showed him the position of his arms when operating the crane operator control box. Dr. Rotman noted that there was nothing about the positioning of Petitioner's elbows that would irritate the ulnar nerve at the elbow. Dr. Rotman noted that the nerve conduction studies were only mildly positive and he opined that Petitioner's operating the crane box would not put the ulnar nerves at the elbow level at any risk.

On April 5, 2010, Petitioner sought medical treatment from Dr. Michael Beatty and completed an information sheet which described his use of the remote control box to operate the cranes. Petitioner described this as requiring repetitive motion of the crane box levers. There was no reference to Petitioner having an onset of symptoms when he pulled the man saver apart on July 24, 2009. Dr. Beatty's records of April 5, 2010, described the exam findings as "basically negative" and he recommended that Petitioner have another set of nerve conduction studies performed. Respondent declined to authorize the studies on the basis that they were not for a work-related condition. Dr. Beatty's entry of April 28, 2010, described the condition as being bilateral carpal tunnel syndrome.

Dr. Beatty was deposed on November 2, 2010, and his deposition was tendered into evidence at trial. Dr. Beatty opined that Petitioner had recurrent carpal tunnel syndrome and he opined that Petitioner's work activity as a crane operator either caused or aggravated the condition. In regard to the elbows, Petitioner had no complaints and examination of the elbows was negative. When Dr. Beatty saw Petitioner on November 11, 2010, he examined the elbows and this time, the examination was positive for cubital tunnel syndrome.

Dr. Rotman examined Petitioner for the second time on November 15, 2010. In addition to examining the Petitioner, Dr. Rotman also reviewed medical records and the DVD of other employees performing Petitioner's job duties. Dr. Rotman's examination was negative for bilateral carpal tunnel syndrome but he did agree that Petitioner had bilateral cubital tunnel syndrome for which transposition surgeries might be indicated. In regard to causality, Dr.

Rotman opined that it was not related either to the specific pulling incident of July 24, 2009, or the repetitive use of the crane control box.

Dr. Beatty was deposed again on August 2, 2011, and this deposition testimony was also received into evidence at trial. Prior to his being deposed, Dr. Beatty also watched the DVD of other employees performing Petitioner's job duties. Dr. Beatty opined that Petitioner's upper extremity conditions (both carpal tunnel and cubital tunnel syndromes) were related to his repetitive work activities; however, Dr. Beatty stated that he did not know if Petitioner's bilateral hands/elbows complaints came on gradually or suddenly. At that time, Dr. Beatty recommended that Petitioner have both carpal tunnel and cubital tunnel surgeries performed. Petitioner remained under Dr. Beatty's care and Dr. Beatty performed cubital tunnel release surgeries on the right and left elbows on March 21 and April 18, 2012, respectively. Petitioner recovered from the surgeries and was released by Dr. Beatty to return to work without restrictions on June 4, 2012.

Dr. Rotman was deposed on January 31, 2011, and his deposition testimony was received into evidence at trial. Dr. Rotman's testimony was consistent with his medical reports and he reaffirmed his opinion that Petitioner's upper extremity problems were not related to either a single incident or repetitive activities.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner did not sustain an accidental injury either as a result of a specific event or repetitive trauma arising out of and in the course of his employment for Respondent and that his condition of ill-being is not related to any work activities.

In support of this conclusion the Arbitrator notes the following:

Based upon the testimony and the information contained in the record it is unclear whether Petitioner claims his bilateral cubital tunnel syndrome was caused by a specific accident or repetitive trauma.

The Application for Adjustment of Claim alleges only a specific accident; however, Dr. Beatty only opined that repetitive trauma caused the condition. There were no medical records tendered into evidence which indicated a gradual onset of symptoms. Further, when Dr. Beatty saw Petitioner on April 5, 2010, the only diagnosis was that of carpal tunnel syndrome because there were no positive findings in respect to the elbows.

Dr. Rotman examined Petitioner on two separate occasions and opined that neither a specific event nor a repetitive trauma was the cause of Petitioner's elbow conditions.

The Arbitrator finds the opinion of Dr. Rotman to be more credible than the opinion of Dr. Beatty.

The Arbitrator watched the DVD and notes that the work activities are not particularly strenuous and that the elbows are not flexed to any significant degree. Even if the work is, in fact, performed at a faster pace than what was observed in the video, it should not change how strenuous the activity is or the flexion of the elbows.

In regard to disputed issues (J), (K) and (L), the Arbitrator makes no conclusions of law because these issues are rendered moot.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

☒ 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

Nicholas Thompson,

Petitioner,

vs.

NO: 11 WC 36742

14IWCC0158

Bridgestone America, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 19, 2013, is hereby affirmed and adopted.

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

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

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

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

DATED: MAR 0 4 2014
TJT:yl
o 2/25/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Daniel R. Donohoo

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

THOMPSON, NICHOLAS
Employee/Petitioner

Case# **11WC036742**

BRIDGESTONE AMERICA, INC
Employer/Respondent

14IWCC0158

On 6/19/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
124 S W ADAMS ST SUITE 200
PEORIA, IL 61602

0481 MACIOROWSKI SACKMANN & ULRICH
JEREMY SACKMANN
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

14IWCC0158

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

NICHOLAS THOMPSON,
Employee/Petitioner

v.

BRIDGESTONE AMERICA, INC.,
Employer/Respondent

Case # 11 WC 36742

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **November 27, 2012.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other: _____

14IWCC0158

FINDINGS

On the date of accident, **August 19, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$28,600.00**; the average weekly wage was **$550.00**.

On the date of accident, Petitioner was **25** years of age, *single* with **one** dependent child.

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

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

Respondent shall be given a credit of $ **684.96** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **684.96**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$366.66**/week for **1-3/7** weeks, commencing **August 20, 2011** through **September 1, 2011,** after deduction of the three (3) day statutory waiting period, as provided in Section 8(b) of the Act.

All other periods of temporary total disability benefits claimed by Petitioner in this matter during this hearing are hereby denied.

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

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

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

Signature of Arbitrator JOANN M. FRATIANNI

June 14, 2013
Date

ICArbDec19(b)

JUN 19 2013

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

Petitioner worked for Respondent as a tire builder. Petitioner testified he began employment with Respondent on July 11, 2011, working primarily the night shift. While so employed, Petitioner on August 19, 2011 fell over a CAT track while performing his job as a tire builder. Following this incident, Petitioner testified he experienced immediate pain in his left leg, thigh and groin area, and noticed a bruise to his left knee.

Petitioner sought treatment at the emergency room of St. Joseph Hospital. A history was recorded of falling over a CAT track. Petitioner was examined, prescribed crutches, medication and was released.

Petitioner testified that Respondent then referred him to St. Joseph Occupational Health Clinic. Petitioner was seen there on August 23, 2011, and was prescribed medication and crutches, and referred to Dr. Lawrence Nord, an orthopedic surgeon. Petitioner was diagnosed with a left groin and knee sprain along with a thigh contusion.

Petitioner saw Dr. Nord on August 25, 2011. Dr. Nord recorded a history of injury consistent with Petitioner's testimony in this matter. Dr. Nord diagnosed left lower extremity contusion with quadriceps muscle strain. Dr. Nord prescribed therapy, ice, medications, and crutches

Based upon the above, the Arbitrator finds that Petitioner sustained an accidental injury that arose out of and in the course of his employment with Respondent on August 19, 2011.

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

Prior to this accident, Petitioner testified that he suffered an injury on November 18, 2009, when a header fell on his back that weighed 600-700 pounds. Petitioner received treatment with Dr. Moody, an in-plant physician, and Dr. Hughes, his personal physician, and also saw Dr. Russo, an orthopedic surgeon. Petitioner received physical therapy and multiple tests including CT and MRI scans. Petitioner testified the primary focus of treatment was to his lower back, but when he experienced back pain it would travel to his left groin, hip and thigh. Petitioner settled this case for 5% disability to his person on May 18, 2011.

Petitioner testified that following that back injury, he was released for restricted work in the form of a 30 pound lifting restriction. He found work with Meyer Zephyr Services working on small engines and cars, which he performed for a few months starting in April of 2010. Petitioner also performed tire changes and testified he would experience back pain, left groin pain and hip pain.

Petitioner then applied for work with Respondent. He underwent a required pre-employment physical examination that he passed. Petitioner testified he then began working as a tire builder on July 11, 2011. This job required him to grab sheets of rubber with another employee. One person was at each end of the sheet pulling it so that it did not fold. Petitioner estimated these sheets weighed 10-15 pounds. Petitioner testified that prior to his hiring on July 11, 2011, he did not experience left hip, groin, leg or back pain.

Petitioner testified that after a period of training he began working nights for a day or two prior to the injury date. Following this accident, Petitioner reported to his supervisor that he injured his left knee and thought he mentioned the left hip. Petitioner denied taking medication just prior to this accident, which testimony was contradicted by the emergency room records of St. Joseph Hospital, which indicated he was taking Oxycodone, Percocet and Hydocodone. Petitioner reported pain on the front of his left thigh and his left knee only which was recorded by a pain drawing.

When Petitioner saw Dr. Mary Yee Chow at St. Joseph Occupational Health Clinic on August 23, 2011, he gave a history of injury to his left testicle, knee, ankle and the left side of his body. No mention of the hip was made. Dr. Chow diagnosed left groin strain, left thigh contusion and left knee sprain, and referred Petitioner to Dr. Nord.

Petitioner saw Dr. Nord on August 25, 2011, who also failed to record a history of injury or symptoms to the left hip. Petitioner testified Dr. Nord prescribed physical therapy and a left hip x-ray. Petitioner commenced physical therapy on August 29, 2011 and Dr. Nord released him to return to work with no restrictions on September 1, 2011. The physical therapist on August 31, 2011 recorded that the left leg felt much better and that he stopped taking Vicodin days ago. Petitioner indicated his left knee popped when bending with tightness while cycling.

Petitioner testified he returned to work after September 1, 2011. He worked a partial shift and experienced an increase in his pain symptoms. Petitioner saw Dr. Nord on September 6, 2011, who diagnosed a left lower extremity contusion, and quadriceps muscle strain. Dr. Nord referred Petitioner to see Weiland for a hernia examination. Petitioner did not return to see Dr. Nord after that date.

Petitioner saw Dr. Weiland on September 7, 2011, and complained of sharp groin pain that worsened with leg movement. Petitioner also complained of abdominal pain. Petitioner indicated to Dr. Weiland that his groin pain developed while undergoing physical therapy prescribed by Dr. Nord. Dr. Weiland diagnosed a left inguinal hernia with possible femoral components and prescribed surgery. On October 4, 2011, Dr. Weiland authored a letter indicating he would not be performing the surgery and he transferred care to another surgeon. A CT scan peformed of the left femur was performed on September 30, 2011. This was described as being negative for a femoral hernia.

Respondent introduced into evidence a surveillance video (Rx17) performed on September 7, 2011, while Petitioner was leaving Dr. Weiland's office. Petitioner is seen leaving the office using a crutch and having difficulty walking. A few hours later, Petitioner was filmed walking into a local Wal-Mart with no limitations as to his mobility.

Petitioner then saw Dr. Grieco for the hernia condition, who found no evidence of a hernia. Petitioner was advised to follow up with his personal physician. Following the CT scan, Dr. Grieco reexamined Petitioner on October 3, 2011, who again noted no hernia and advised him to see his personal physician.

Petitioner then sought treatment with Dr. Rians at Great Plains Orthopedics. No history of injury was recorded. Petitioner then saw Dr. Maurer on November 8, 2011, and denied any symptoms to his left hip. An MRI arthrogram to the left hip was also performed and was described as being normal. Petitioner last saw Dr. Maurer in January, 2012.

Dr. Maurer testified by evidence deposition that he reviewed an MRI arthrogram and felt it was normal for the left hip. X-rays were also reviewed which revealed good joint space maintenance with no significant arthritis. A positive cross over sign was noted on an x-ray and Petitioner walked with a flexed hip limp. Range of motion to the hip was quite limited. Dr. Maurer prescribed femoroacetabular impingement. Dr. Maurer administered an injection to the left hip that created a relief of symptoms. According to Dr. Maurer, this indicated the symptoms were from the hip. Dr. Maurer testified that 20% of MRI results are false negatives and believed Petitioner had a labral tear. A proposed arthroscopy would confirm such a diagnosis.

Dr. Maurer testified that the condition of ill-being to the left hip was caused by this accidental injury and that he based this opinion on the history Petitioner provided to him which included no previous hip difficulties. Dr. Maurer admitted that he did not review records of treatment after this accident other than Dr. Rian's notes.

Dr. Maurer also admitted that if Petitioner had a similar condition in 2009, that condition could have recurred without trauma. Dr. Maurer testified that a positive cross over sign revealed a developmental abnormality that can create the same hip pain without trauma.

Dr. Maurer further testified that all radiographic tests and MRI's performed on Petitioner were negative with the exception of a cam deformity and the positive cross over. Dr. Maurer testified that the cam deformity and cross over were not caused by this accidental injury nor aggravated by it.

Dr. Maurer was also shown the surveillance tapes (Rx17) and felt Petitioner's ability to walk clearly improved from the first portion of the video to the end. Dr. Maurer noted that early in the video outside Dr. Weiland's office, Petitioner was not moving his left leg at all and was using a crutch. Later, he looked like he was moving pretty good. Dr. Maurer testified that having viewed the tape, it would cause him to pause and rethink whether surgery was recommended.

Respondent introduced into evidence the opinion of Dr. Cohen who felt there was no change in the underlying left hip condition as a result of this accidental injury. Dr. Cohen did review all prior medical records of treatment and those medical records of treatment following this accident in arriving at his opinion.

Based upon the above, the Arbitrator does not find the opinion of Dr. Maurer that the left hip condition was caused by this accidental injury to be credible based upon his failure to review the prior medical records of treatment and those medical records of treatment following this accident.

Based upon the above, the Arbitrator finds the condition of ill-being to the left hip as diagnosed above is not causally related to the accidental injury of August 19, 2011. Based further upon the above, the Arbitrator finds that the claimed condition of ill-being in the form of a hernia as diagnosed above is not causally related to the accidental injury of August 19, 2011. It appears that the existence of the hernia has been ruled out. Based further upon the above, the Arbitrator finds that the condition of ill-being to the lower back is not causally related to the accidental injury of August 19, 2011. The Arbitrator further notes that Petitioner suffered from symptoms relating to his left hip, a hernia and lumbar spine prior to this accidental injury.

Finally, based upon the above, the Arbitrator finds the condition of ill-being to the left knee to be causally related to the accidental injury of August 19, 2011.

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

Petitioner introduced into evidence medical charges that were incurred after this accident, and after September 1, 2011, which remain outstanding.

See findings of this Arbitrator in "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses incurred for treatment rendered after September 1, 2011 are hereby denied. The Arbitrator notes that no additional treatment to the left knee was rendered after that date and all other conditions claimed by Petitioner are found not causally related to this accidental injury.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "F" above.

Based upon the findings of this Arbitrator in "F" above, the Arbitrator further finds the prescription for additional medical care, surgery and treatment to the left hip is not causally related to this accidental injury. On the basis of this finding, the Arbitrator declines to award any prospective medical care and treatment to the left hip in this case.

L. What temporary benefits are in dispute?

Petitioner claims as a result of this accidental injury he was temporarily and totally disabled from gainful employment as a result of this injury for the period commencing August 20, 2011 through November 27, 2012, and is entitled to receive compensation from Respondent for this period of time.

Respondent claims that Petitioner was only temporarily and totally disabled from gainful work as a result of this injury commencing August 20, 2011 through September 1, 2011.

See findings of this Arbitrator in "F" above.

Petitioner was initially treated for left knee symptoms and a thigh contusion and was kept off of work for these conditions until September 1, 2011. On that date, Dr. Nord released him to restricted work.

Based upon the above, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits from Respondent commencing August 20, 2011 through September 1, 2011. All other claims of such compensation made by Petitioner in this matter are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAWN RUNDGREN,

Petitioner,

vs.

NO: 11 WC 43740

14IWCC0159

ADVOCATE GOOD SAMARITAN HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, prospective medical treatment and temporary total 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. The Commission further remands this case to the Arbitrator for additional proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We modify the Decision of the Arbitrator with respect to prospective medical treatment for Petitioner's right shoulder and deny such treatment. The Arbitrator awarded Petitioner prospective medical treatment as ordered by Dr. McNally and Dr. Freedberg for her lumbar spine

14IWCC0159

and right shoulder conditions. The Commission affirms the Arbitrator's award of prospective medical treatment for Petitioner's lumbar spine as ordered by Dr. McNally.

We decline to award Petitioner prospective medical treatment from Dr. Freedberg for her right shoulder. On May 23, 2012, Dr. Freedberg noted that despite Petitioner's persisting complaints of some pain, her shoulder pain continued to improve and her range of motion and strength were much better. Dr. Freedberg found Petitioner reached maximum medical improvement with respect to her right shoulder and released her to return to work without right shoulder restrictions. Dr. Freedberg discharged Petitioner from his care as of May 23, 2012, with follow up as needed. Since Petitioner is no longer treating with Dr. Freedberg and she reached maximum medical improvement with respect to her right shoulder, no prospective medical treatment is currently necessary. As such, we do not award Petitioner prospective medical treatment for her right shoulder as provided by Dr. Freedberg. Petitioner is entitled to prospective medical treatment only for her lumbar spine from Dr. McNally.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $448.98 per week for a period of 37-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,371.87 for medical expenses and prospective medical treatment for Petitioner's lumbar spine under §8(a) of the Act.

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

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

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

14IWCC0159

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 5 2014
TJT: kg
O: 1/14/14
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

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

RUNDGREN, DAWN M
Employee/Petitioner

Case# **11WC043740**

ADVOCATE GOOD SAMARITAN HOSPITAL
Employer/Respondent

14IWCC0139

On 2/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0311 KOSIN LAW OFFICE LTD
DAVID X KOSIN
134 N LASALLE ST SUITE 1340
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
SEAN ABERNATHY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

14IWCC0159

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DAWN M. RUNDGREN
Employee/Petitioner

v.

ADVOCATE GOOD SAMARITAN HOSPITAL
Employer/Respondent

Case # **11** WC **43740**

Consolidated cases: **NONE**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **August 17, 2012 and February 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other ___

FINDINGS

On the date of accident, **November 7, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

14IWCC0159

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

In the year preceding the injury, Petitioner earned **$35,020.63**; the average weekly wage was **$673.47**.

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

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

Respondent shall be given a credit of **$10,326.54** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,326.54**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$448.98**/week for **37-6/7** weeks and continuing, commencing **11/8/11 through 2/12/12** and from **3/3/12 through 8/17/12,** the first date if hearing, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$10,326.54** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$8,371.87**, as provided in Section 8(a) of the Act. The parties have stipulated that the medical bills will be paid directly to the providers, subject to Section 8.2 of the Act.

Respondent shall authorize and pay the reasonable costs of (subject to Section 8.2 of the Act) the treatment ordered by Dr. Thomas McNally and Dr. Howard Freedberg for petitioner's low back and right shoulder conditions.

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

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

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

Brian T. Cronin

Signature of Arbitrator

2/13/2013

Date

ICArbDec19(b)

FEB 14 2013

Dawn M. Rundgren

v. **Case # 11 WC 43740**

Advocate Good Samaritan Hospital

14IWCC0159

FINDINGS OF FACT:

On November 7, 2011, the petitioner, Dawn M. Rundgren, was a Unit Information Coordinator for the respondent, Advocate Good Samaritan Hospital. Petitioner's duties included performing clerical work, data input and patient intake. She estimates that 50% of her time was spent on her feet and 50% was seated clerical work.

Petitioner candidly admits to sustaining an unrepaired right shoulder labral tear in 2002, for which she pursued a claim under the Illinois Workers' Compensation Act. Petitioner testified that leading up to her injury on November 7, 2011, she continued to experience some limitation of motion from her previous shoulder injury, but that her pre-existing condition did not prevent her from performing all the duties of her job with the respondent.

Petitioner also testified that she was involved in a motor vehicle accident ("MVA"), which occurred on December 11, 2009. Petitioner testified that the auto accident caused a low back injury, which, in turn, caused her to experience pain and numbness from her low back into her right leg. She also admitted to experiencing some transitory numbness into her left lower leg and foot. Petitioner offered unrebutted testimony that she was able to return to work from her December 2009 automobile injury in March 2010, and that her injuries did not prevent her from performing all the duties of her job with the respondent up to the date of this stipulated accident, November 7, 2011.

With respect to the auto accident, petitioner treated with Dr. Thomas McNally of Suburban Orthopaedics. (PX2) Those records show that the petitioner was last seen prior to her work injury on June 9, 2011. At that time, she had no complaints to her left leg as she had full motion without any pain.

The record did show that the petitioner had positive sciatic notch tenderness on her right side as well as positive straight leg raise. Consistent with those records, the petitioner testified that immediately prior to her stipulated work injury of November 7, 2011, she was not experiencing continuing pain or numbness into her left leg or foot. She admitted to experiencing some pain and numbness down her right leg at the time of her work injury. Again, petitioner testified, and the medical records confirm, she was fully capable of performing the functions of her job with the respondent prior to November 7, 2011.

The parties have stipulated that on November 7, 2011, the petitioner sustained an accident that arose out of and in the course of her employment. On that date, she was struck from behind by a falling patient while she was standing at the nurse's station. Petitioner testified that the patient slammed into her left arm while falling. The petitioner twisted around and caught the patient. The petitioner testified that she first used her right hand, and then both hands, to catch the patient. She then had to suspend the patient's weight while trying to gently lower her to the ground for emergency services. Petitioner testified that she spent the next ½ hour attending to this emergency situation. She began to feel pain in her left shoulder and arm and into her lower back. She was advised to report to the emergency department of the hospital.

In the emergency room, the petitioner provided a history consistent with her testimony. (PX1) She complained of left shoulder pain and lower back pain. She denied any new numbness and tingling into her lower legs and did advise the hospital personnel that she had previously been diagnosed with a "bulging disc". X-rays were taken of her left arm. She was provided pain medication and advised to follow up with occupational health. Petitioner remained under the care of respondent's occupational clinic for two more treatments. It is stipulated that she remained off of work through February 12, 2012.

Petitioner continued to experience increased pain in her low back radiating into both hips and into both shoulders. She sought treatment from Dr. McNally of Suburban Orthopaedics due to his familiarity with her prior condition. (PX 2) Dr. McNally first saw petitioner for her work injury on November 14, 2011. He examined her and prescribed physical therapy, which petitioner performed at Good Samaritan Hospital. She returned to Dr. McNally on November 28, 2011. Petitioner stated that the pain in her back since the work injury of November 7, 2011 was worse than it had been following the MVA. She described her prior pain as "background noise" compared to what she was experiencing now. The pain was now radiating to the left hip also. She further complained of the onset and worsening of pain in her right shoulder. Dr. McNally continued the petitioner off of work and referred her to his associate, Dr. Howard Freedberg, for her right shoulder complaint.

On November 28, 2011, the petitioner was seen by Dr. Freedberg. Petitioner told Dr. Freedberg that she initially felt some increased pain in her right shoulder after the accident of November 7, 2011, but that the pain increased over the next week. The original pain in her left shoulder/arm had subsided. Petitioner also stated that on that date she was suffering from bronchitis and that her coughing was making the shoulder pain worse. Dr. Freedberg noted that the petitioner already had a pre-existing unrepaired right labral tear and tendonitis. Petitioner was continued in physical therapy and told to remain off of work. Per Dr. Freedberg's order, an MR images of petitioner's right shoulder were taken on December 7, 2011.

On December 8, 2011, the petitioner returned to Dr. McNally who ordered an MRI and EMG of petitioner's lumbar spine. The EMG was performed on December 20, 2011 and showed chronic L5-S1 changes on the right and early L5-S1 changes on the left, as well as mild denervation on the left at L5-S1. The MRI was administered on December 23, 2011 showed a small disc protrusion at L4-5 with mass effect on the L4 nerve root.

Petitioner returned to Dr. McNally on January 5, 2012 with complaints of constant low back pain. She experienced intermittent numbness in both feet. Dr. McNally read the MRI and EMG and found them to be consistent with petitioner's complaints. Dr. McNally opined that the petitioner had manageable low back pain and right hip pain after her motor vehicle collision of December 11, 2009. Her pain was tolerable until the stipulated work injury of November 7, 2011, which aggravated the low back pain and caused new onset of left leg pain. Dr. McNally went on to state that the November 7, 2011 accident did not cause the degenerative changes in the petitioner's lumbar spine, but certainly aggravated and accelerated the pre-existing, previously asymptomatic degenerative lumbar spine condition that now caused her current condition of ill-being. Petitioner was referred to Dr. Eugene Lipov for pain management.

On January 9, 2012, the petitioner was seen by Dr. Freedberg for her right shoulder. Dr. Freedberg noted improvement and released the petitioner to light duty. However, it is stipulated that the petitioner was not yet released to return to work by Dr. McNally for her lower back and leg complaints.

On January 27, 2012, the petitioner received the first epidural steroid injection to her lower back from Dr. Lipov. On February 2, 2012, the petitioner returned to Dr. McNally to discuss the results of her first injection. Petitioner noted that her leg symptoms improved a little, but her back pain continued. Petitioner asked to be released to return to work. Dr. McNally released petitioner with the restriction of no lifting over 30 pounds and advised her to re-commence physical therapy and to continue with Dr. Lipov.

Petitioner testified that she returned to work as a Front Desk Assistant. This job required her to spend 80% of her day on her feet. The pain and soreness in her lower back and into her legs increased. Petitioner was only able to work until March 2, 2012, at which time TTD was restarted.

On March 6, 2012, the petitioner returned to Dr. McNally and stated that her back pain increased down her buttocks bilaterally through her hips and into her feet, which go numb after five to ten minutes. She reported difficulty driving due to the numbness in her feet. Dr. McNally advised the petitioner to discontinue physical therapy and to continued treatment with Dr. Lipov. Dr. McNally opined that the petitioner was unable to return to work. Petitioner also saw Dr. Freedberg on March 7, 2012 at which time she complained of right-sided neck pain. Dr. Freedberg returned petitioner to full-duty work with respect to her neck and shoulder symptoms only.

Petitioner received her second lumbar epidural steroid injection on March 13, 2012 and returned to Dr. McNally on March 20, 2012. Petitioner reported two to three days of good relief until her symptoms returned to baseline. Petitioner continued to experience numbness into her feet making driving difficult. Numbness also made walking up and down stairs difficult. Petitioner was advised to return to Dr. Lipov for another injection and to resume physical therapy. Various possible surgical procedures were also discussed. Petitioner remained unable to return to work. Petitioner received her third lumbar epidural steroid injection from Dr. Lipov on April 10, 2012. Again, the injection provided limited temporary relief.

On April 23, 2012, the petitioner was seen by Dr. Jay Levin, pursuant to §12 of the Act. Dr. Levin noted that the petitioner had constant back pain with tingling in her toes and the bottom of her feet. She had difficulty driving and walking stairs. He noted severe range of motion deficiencies as well as a positive Faber's sign for low back pain and positive Hoover's sign bilaterally. Dr. Levin also noted various pathologies on the MRI of December 23, 2011. Despite these findings, Dr. Levin opined that as a result of the incident of November 7, 2011, petitioner suffered a lumbar myofascial strain. He then dismissed the MRI findings as long-standing and not related to the stipulated work injury. Dr. Levin referred to OGD guidelines for "Sprains and Strains of Other and Unspecified Parts of Back" without further discussion. It was Dr. Levin's opinion that the petitioner was at maximum medical improvement

("MMI") and was able to return to work at full duty. Based upon Dr. Levin's opinions, the petitioner's benefits under the Act were stopped as of May 15, 2012.

Petitioner was re-examined by Dr. McNally on May 17, 2012. Dr. McNally noted that the petitioner continued to experience lower back pain, weakness in the right leg and weakness in the left calf as well as shooting pain down her right leg into her foot. Dr. McNally reviewed the report of Dr. Levin and noted his disagreement with the assessment that the petitioner had reached MMI. Dr. McNally opined that the petitioner's pain may be originating from the L4-5 & L5-S1 discs, facet joints, nerve root impingement or a combination of those structures. Dr. McNally ordered a closed MRI of the lumbar spine because the last MRI was over six months old. Because petitioner had lost all her benefits, she asked to be returned to work in a limited capacity. Dr. McNally released her with significant restrictions of no lifting over 10 pounds, no stooping, kneeling, repeated bending or climbing.

Petitioner returned to the respondent and sought an accommodation of her light-duty restrictions. Petitioner provided unrebutted testimony that she was told that there were no jobs available within the respondent's entire network of facilities, either within her restrictions or at any level. Petitioner was told to re-apply for a position within her restrictions, which she did. No suitable light-duty employment has been offered. Respondent has further refused to offer the petitioner a full-duty return to work based upon Dr. Levin's opinions.

Petitioner has been forced to seek additional medical attention through her medical insurance. Petitioner's primary care physician, Dr. Andreoni, referred the petitioner to spine specialist, Dr. Mataragas. Dr. Mataragas also ordered a new lumbar MRI, which was administered on June 28, 2012. Dr. Mataragas has referred the petitioner for chiropractic care, which petitioner has yet to schedule as of the date of the arbitration hearing.

Petitioner testified that she continues to experience increased low back pain since the accident of November 7, 2011. The pain has increased the radicular symptoms in her right leg and has caused

new numbness and tingling in her left leg down to her feet. It is difficult for her to stand for long periods or drive a car. Her condition is not improving. Her treating physicians have returned her to work with significant restrictions, which the respondent cannot accommodate. Petitioner wishes to continue her treatment with Dr. McNally and Dr. Freedberg of Suburban Orthopaedics.

CONCLUSIONS OF LAW

F.

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

The Arbitrator finds that the petitioner's current conditions of ill-being of her low back, right shoulder and left arm/left shoulder are causally related to the stipulated accident of November 7, 2011. The petitioner told Dr. Freedberg that the original pain in her left arm/shoulder had subsided. The petitioner candidly testified that she had previously sustained an injury to her right shoulder in 2002, which resulted in an unrepaired labral tear and tendonitis. She further admitted to the fact that her range of motion in the right arm was compromised prior to the time of the stipulated work injury. Petitioner also admitted to injuries sustained in the MVA, which occurred on December 11, 2009. That accident caused lower back pain and leg pain mostly to the petitioner's right leg and occasional, transitory numbness to her left foot. These facts are confirmed in the records of Dr. McNally.

However, the petitioner offered unrebutted testimony that she returned to work with the respondent in March 2010 after recovering, for the most part, from her injuries sustained in the automobile accident. She candidly testified to ongoing complaints of low back pain, which she characterized as "background noise". Petitioner did not deny experiencing some radicular pain in the right leg and occasional numbness into her left foot. It is unrebutted that these issues did not prevent her from performing all the functions of her job with the respondent from March 2010 through the date of her stipulated work injury, November 7, 2011. Further, the medical records show that the petitioner

had not been seen by her treating physician, Dr. McNally, since June 9, 2011 for any complaints arising from the MVA. The medical records from that date show minimal complaints to the petitioner's right leg and none to the left.

It is stipulated that the petitioner sustained an accident on November 7, 2011 when she was struck by, and then caught, a falling patient. The petitioner has consistently testified that since the accident, she has experienced increased pain in her low back, right leg and a new onset of numbness and tingling into her left leg down to the toes. The condition limits her ability to stand and walk stairs. It interferes with her ability to sleep and drive.

Respondent offered into evidence the report of Dr. Jay Levin. (RX 1) That report is inconsistent and incomplete. Specifically, Dr. Levin noted that the petitioner continues to suffer from pain in her low back and radicular symptoms in her legs. He noted positive findings during his exam and on the MRI. Yet, Dr. Levin still opined that the petitioner only suffered a sprain/strain injury. Dr. Levin's report goes to great lengths to ignore the main issue in this matter: whether petitioner's pre-existing condition was exacerbated or accelerated by the work injury. Classifying petitioner's injury as a mere strain/sprain, without discussion of the effects of that injury on her pre-existing lumbar and radicular condition, is of little probative value. Further, Dr. Levin's reference to OGD Guidelines is irrelevant when those guidelines also do not consider the petitioner's accepted pre-existing condition, which is the crux of the matter before the Commission.

The Arbitrator finds the opinions of the petitioner's treating physician, Dr. Thomas McNally, to be more persuasive than those of respondent's examining physician, Dr. Jay Levin. Dr. McNally has treated the petitioner since July 20, 2010, including treatment following petitioner's December 2009 MVA. (PX 2) He is intimately familiar with petitioner's condition prior to the stipulated accident of November 7, 2011, including the fact that the petitioner had not been treated by Dr. McNally for any right shoulder, low back or leg complaints since June 9, 2011. At that time, the petitioner complained of

right hip soreness, a bulge on the right side of her neck and a pulling pain down her right arm. An examination of both lower extremities noted minimal complaints to the right leg and no complaints to the left.

Even if one of the medical witnesses was equivocal on the question of causation, it is for the Commission to decide which medical view is to be accepted, and it may attach greater weight to the opinion of the treating physician. International Vermiculite v. Indus. Comm'n, 77 Ill. 2d 1, 394 N.E.2d 1166, 31 Ill. Dec. 789 (1979) *citing* Holiday Inns of America v. Indus. Comm'n (1969), 43 Ill. 2d 88, 89-90; Proctor Community Hospital v. Indus. Comm'n (1969), 41 Ill. 2d 537, 541.

Dr. McNally has continued to treat petitioner since the stipulated accident of November 7, 2011. He is the only physician to comment upon the petitioner's current condition as it relates to her pre-existing condition. Dr. McNally has opined as follows:

> The work related injury on 11/7/11 did not cause the degenerative changes in the patient's lumbar spine. To a reasonable degree of medical and surgical certainty, the work related injury on 11/7/11 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, caused them to become symptomatic and require treatment.

(PX 2; office note of 11/23/11, 12/8/11, 1/5/12, 2/2/12, 3/6/12, 3/20/12 & 5/15/12)

The MRI of December 23, 2011 exhibits a focal disc protrusion toward the left at L4-5, which correlates clinically with the petitioner's left radicular complaints as per Dr. McNally's opinion. Further, the EMG of December 20, 2011 shows bilateral chronic L5-S1 radiculopathy, more prominent on the right and by Dr. McNally's interpretation, early acute left-sided L4-L5 radiculopathy. These findings are all consistent with the petitioner's current complaints of ill-being. Dr. McNally concluded that the petitioner had chronic low back pain and right lower extremity pain after the MVA of December 11, 2009. The pain was tolerable until the stipulated work accident of November 7, 2011, which aggravated her lower back pain and caused new onset of left leg pain. Dr. McNally's opinions appear to be consistent with the facts contained in the medical records and with petitioner's testimony. Dr. McNally

further opined that the petitioner is not at maximum medical improvement, requires additional treatment and is only able to return to work in a light-duty capacity of no lifting greater than 10 pounds, no stooping, no bending, no kneeling and no climbing.

To result in compensation under the Act, a claimant's employment need only be a causative factor in his condition of ill-being; it need not be the sole cause or even the primary cause. Tower Automotive v. Illinois Workers' Comp. Comm'n, 943 N.E.2d 153, 407 Ill. App.3d 427, 347 Ill. Dec. 863 (1st Dist. 2011) *citing* Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." Caterpillar Tractor Co. v. Indus. Comm'n, 92 Ill. 2d 30. 36, 440 N.E.2d 861, 65 Ill. Dec. 6 (1982)

With respect to the petitioner's right arm and shoulder, the Arbitrator notes that Dr. Freedberg opined in his office note of February 2, 2012, that such condition does not limit petitioner's ability to return to work. Petitioner testified that the accident occurred on November 7, 2011 at "8:00, 8:30 p.m." Petitioner first presented to Good Samaritan Hospital Emergency Room at 11:48 p.m. The Good Samaritan Hospital ER records contain the following Nursing Triage Note:

"11/07/11 22:48 Chief Complaint pt is c/o left shoulder/elbow and lower back pain s/p a patient falling on her at work here, pt works on psych. pt denies any new numbness/tingling to lower legs, pt has a bulging disc to lower back. cms intact, distal pulses noted. No ohter (sic) complaints"

The Good Samaritan physician ordered x-rays of the left humerus, prescribed medication, advised her to follow up with her primary care physician and discharged her.

Petitioner testified that after the accident, her "left arm and shoulder up here were throbbing where she had flown into me." She further testified that her low back pain "was more like a dull ache before; and now it was - - it was even harder pain" and "it was more intense."

When asked about her right shoulder, petitioner testified that she experienced "increased pain" in her right arm and shoulder, and that such pain first started to "increase" on the day after the accident. On redirect examination of the petitioner, the following exchange took place:

Q: All right. Describe the progress of the right shoulder pain after the November 7, 2011 incident.

A: The pain in my right shoulder progressed slowly. I did have the exacerbation of - - an increase in pain because I was sick, and I did have bronchitis; and it was aggravating my whole right side. I couldn't even breathe without having pain in my rib cage and my shoulder, my clavicle area. So it was an increase in symptoms.

Q: Is it the right arm that you caught the young lady with?

A: Yes.

In an Employee Report of Occupational Illness or Injury that petitioner completed on the date of accident, for "Part of Body Injured", Petitioner wrote: "Lt Arm/Elbow Shoulder Low Back." On November 8, 2011, at the occupational clinic, x-rays were ordered for bilateral shoulders. In a Suburban Orthopaedics pain diagram of November 11, 2011, petitioner indicated that she had aching pain in both shoulders. She gave the following history: "Was Injured when a patient with my back to hers and hers to mine had a seizure. Patient Fell Full Force Into My left arm. I turned around to catch her. Injured Shoulder and Low back." When Dr. Andreoni saw the petitioner on November 21, 2011, she wrote, in relevant part, the following: "11/7 injury at work. "caught patient who was having a seizure" strained her back and right shoulder and upper back."

The petitioner had not been treated by Dr. McNally for any right shoulder, low back or leg complaints since June 9, 2011.

The Arbitrator finds, by a mere preponderance of the weight of the credible evidence, that the petitioner's current condition of ill-being with respect to her right shoulder/arm is causally related to the stipulated accident of November 7, 2011.

L.

What temporary benefits are in dispute?

The Arbitrator finds that the petitioner is entitled to TTD benefits from November 8, 2011 through February 12, 2012 and again from March 3, 2012 through August 17, 2012. It is further agreed that benefits under the Act were discontinued by the respondent on May 15, 2012 based solely upon the report of Dr. Levin, who found the petitioner to be at maximum medical improvement with no permanent restrictions.

As indicated above, the Arbitrator finds Dr. McNally's opinions to be more persuasive than those of Dr. Levin. Dr. McNally has found that the petitioner is not at maximum medical improvement and he continues to restrict her to light-duty work. It is uncontested that the petitioner has made herself available to the respondent to return to work within the restrictions provided by her treating physician. Respondent cannot accommodate those restrictions. Respondent cited its internal policy of not providing employment, after the passage of a certain period of time, to those injured in the course of their employment.

Petitioner's treating physician, Dr. McNally, has released petitioner to return to work for respondent with the restrictions of avoiding bending, stooping, lifting over 10 pounds and repetitive activities. During recross examination, petitioner testified that her work as a Unit Information Coordinator would not require her to perform such physical activities. She testified that she is, therefore, able to perform the essential job functions of a Unit Information Coordinator.

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement. Interstate Scaffolding, Inc. v. Indus. Comm'n, 236 Ill.2d 132 (2010) (citing Westin Hotel v. Indus. Comm'n 372 Ill.App.3d 527, 542 (2007)); Land & Lakes Co. v. Indus. Comm'n, 359 Ill.App.3d 582, 594 (2005); F & B Manufacturing Co. v. Indus. Comm'n, 325 Ill.App.3d 527, 531 (2001), Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill.2d 107, 118 (1990)).

Notwithstanding the fact that petitioner is physically capable of returning to work as a Unit Information Coordinator (which job is no longer available), the Arbitrator finds that her condition has not yet stabilized, that is, she has not yet reached MMI. Therefore, the Arbitrator finds that petitioner is entitled to TTD benefits from November 8, 2011 through February 2, 2012 and from March 3, 2012 through August 17, 2012, which was the first date of the arbitration hearing.

J.

Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator notes that the respondent's only objection to the medical bills (PX 5, group exhibit) is to liability. Based upon the Arbitrator's decision above, the respondent is ordered to pay those medical charges contained in PX 5. Pursuant to stipulation, the respondent shall pay these bills, in accordance with Section 8(a) and subject to Section 8.2 of the Act, directly to the providers. Respondent is entitled to any credit for payments previously made.

K.

Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that the petitioner has yet to reach maximum medical improvement and is entitled to continuing treatment with Dr. McNally and Dr. Freedberg. The Arbitrator bases this finding

upon the previous finding that the opinions of Dr. McNally and Dr. Freedberg are consistent with the facts presented herein and that the petitioner has yet to attain maximum medical improvement. Dr. McNally specifically notes that there is more treatment to be offered to help cure or relieve the petitioner's condition of ill-being. Therefore, the Arbitrator orders the respondent to authorize, and pay the reasonable charges for, the treatment that Dr. McNally and Dr. Freedberg have recommended for petitioner's low back and right shoulder, subject to Section 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHERLYN ALLEN,

Petitioner,

14IWCC0160

vs.

NO: 12 WC 20058

LAIDLAW TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Petitioner sustained no permanent partial disability as the result of her September 19, 2011 work-related accident.

Ms. Allen sustained an undisputed work-related accident while working as a bus aide. On September 19, 2011, the bus in which the Petitioner was riding made an emergency stop causing her to stumble forward. Petitioner was seen by Dr. Ronald Hickombottom of MedWorks Occupational Health on September 20, 2011. Dr. Hickombottom diagnosed Petitioner with a left quadriceps strain, left rotator cuff sprain with mild impingement, left knee sprain and a mild left lumbar sprain. RX.4. Ms. Allen presented for follow-up with Dr. Hickombottom on September 27, 2011. She reported overall improvement in regards to her left thigh, left shoulder, left knee and left lumbar area. Examination of the left quadriceps revealed very mild tenderness on direct palpation. Both internal and external rotation of the hip along with abduction and adduction were normal. She could bear full weight without any significant pain. There was good alignment of the left shoulder with very minimal tenderness. Examination of the lumbar spine revealed good

14IWCC0160

alignment. There was no evidence of lateral shift or scoliosis. The impression was resolved left quadriceps strain, left rotator cuff sprain, left knee sprain and lumbosacral sprain. She was discharged from care and advised that she could work full-duty without restriction. PX.27. Ms. Allen testified that there is nothing from the September 19, 2011 accident that still bothers her. T.40.

The evidence establishes that the Petitioner suffered minor sprains as the result of the accident. Her injuries resolved shortly after the accident. The Petitioner's testimony establishes that she has no permanent injury as the result of the accident. Therefore, the Commission modifies the Decision of the Arbitrator and awards the Petitioner no permanent partial disability benefits as the result of the September 19, 2011 accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 15, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 5 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 2-11-14
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0160

ALLEN, CHERLYN
Employee/Petitioner

Case# **12WC020058**

07WC051218

LAIDLAW TRANSIT AUTHORITY
Employer/Respondent

On 4/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
SUSAN FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

1120 BRADY CONNOLLY & MASUDA PC
LEO PLUCINSKY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

14IWCC0160

☐ 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

Cherlyn Allen
Employee/Petitioner

v.

Laidlaw Transit Authority
Employer/Respondent

Case # 12 WC 20058

Consolidated cases: 07 WC 51218

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **December 17, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0160

On **9/19/2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$9,028.24**; the average weekly wage was **$173.62**.

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

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

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

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

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

ORDER

Respondent shall pay Petitioner the sum of **$173.62**/week for a further period of 12.5weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **2-1/2% loss of use of man as a whole.**

Per stipulation, the Respondent has agreed to pay the medical charges incurred from this accident.

Respondent shall pay Petitioner compensation that has accrued from **September 19, 2011** through **December 17, 2012**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

4/12/13
Date

ICArbDec p. 2

APR 15 2013

FINDING OF FACTS:

Petitioner was a 37 year old female, married with one child at the time of the accident. Petitioner testified that she was in good physical condition prior to October 24, 2007. She had never injured or had problems with her back before, and had been able to clean her house, go shop on a regular basis, walk, and drive without difficulty. She has been obese her entire life and on the date of hearing weighed about 465 pounds. Petitioner stated that on and before October 24, 2007, she weighed less, about 320 pounds. Petitioner provided that even though obese, she still was able to do every day activities as stated above. Petitioner had a work accident on
July 10, 2006 that involved her right foot and her right knee, which is one of the same body parts that she injured in this accident. There are however limited records from this incident. Her back was not involved. She also had carpal tunnel releases prior to the accident she had on September 19, 2011, both of which are not related to this claim.

On September 19, 2011, Petitioner was involved in a second work related vehicle accident. Petitioner testified that she was checking on one of the children on the bus when the driver slammed on the brakes. Petitioner stated she was thrown forward and she hit her left leg. She provided that the pain shot from her left leg up. She also provided that the incident irritated her back.

After the accident, Petitioner went to Silver Cross Hospital emergency room where she was treated and released. She then went to Med Works, a company clinic, on September 20 and September 27, 2011.

After this accident, Petitioner visited the ER at Silver Cross Hospital two more times, on December 22, 2011 and March 9, 2012. (PX 29) Her main complaints of pain on these visits were her right leg (only on December visit) and back. She also has been at regular work for Respondent since April 6, 2009.

On September 22, 2011, Dr. Butler authored a Section 12 examination report. Dr. Butler reported that an examination revealed Petitioner's lumbar spine was non-tender; her posture was normal; her straight leg raise testing was negative; she had no sciatic notch tenderness; and there was no paraspinal muscle spasm. Dr. Butler reported that Petitioner had normal strength in both legs, and no evidence of sensory loss. Her deep tendon reflexes in both legs had been normal. Dr. Butler diagnosed Petitioner as having a lumbar strain. Dr. Butler opined that Petitioner's current lumbar conditions were at her baseline level of comfort, and that Petitioner's current complaints were primarily related to her morbid obesity and physical deconditioning. Dr. Butler opined that Petitioner did not require work restrictions for her lower back. (RX 4) Petitioner admitted that she had again seen Dr. Butler on behalf of Respondent. She however stated that she was asked questions, but was not examined.

In support of the Arbitrator's findings relating to (F), is the Petitioner's present condition of ill-being causally related to the accident/injury of September 19, 2011, the Arbitrator finds the following facts:

Petitioner's present conditions are causally related to the work accident she had on September 19, 2011. The Arbitrator refers to his Decision in 07 WC 51218 for a full recitation of the medical history prior to the accident involved herein, and the subsequent treatment not directly related to this accident. The Arbitrator notes that while there were only three medical visits for this claim, this accident affected Petitioner's preexisting conditions from the October 24, 2007 case.

The Arbitrator finds that Petitioner was credible in her testimony and said testimony was unrebutted. Petitioner was still recovering from her October 24, 2007 work incident, when this accident happened. The work accident itself of September 19, 2011 is stipulated to/undisputed.

On September 19, 2011, Petitioner was checking on one of the children on the bus when the driver slammed on the brakes. Petitioner stated she was thrown forward and she hit her left leg. She provided that the pain shot from her left leg up. She also provided that the incident irritated her back. Petitioner went to Silver Cross Hospital ER. Upon presentation to the hospital, Petitioner was making lower back, left thigh, left knee and left shoulder complaints. She was discharged the same day. (PX 29)

On September 20, 2011, Petitioner went to the company clinic, MedWorks Occupational Health, for further medical care. After giving a consistent history, including disclosing she was on Naprosyn, Flexeril and ibuprofen, Petitioner was examined by Dr. Hickombottom who found some mild tenderness and impingement in the left shoulder, and tenderness and pain in the left knee, thigh and lower back regions. Dr. Hickombottom diagnosed left quadriceps strain; left rotator cuff strain with mild impingement; left knee sprain; and mild left lumbar strain. Petitioner was prescribed pain and inflammatory medication. The doctor recommended physical therapy to help her left quadriceps and left rotator cuff injury. Dr. Hickombottom also felt "this injury does meet the criteria to justify as a work related injury." (PX 27)

Petitioner followed up at MedWorks on September 27, 2011 and was doing much better. She only had mild tenderness and pain complaints in the areas injured. She was discharged without physical therapy and was to follow up only on a per needed basis. Dr. Hickombottom diagnosed Pettitioner as having an essentially resolved left quadriceps strain, a left rotator cuff sprain, left knee sprain, and lumbosacral strain. (PX 27)

Based on the sequence of events, Petitioner's credible testimony and the opinion of Dr. Hickombottom, the Arbitrator finds that Petitioner's condition of ill-being, left quadriceps strain, a left rotator cuff sprain, left knee sprain, and lumbosacral strain, are causally related to the accident of September 19, 2011.

In support of the Arbitrator's findings relating to (L), what is the nature and extent of the injuries the Petitioner sustained, the Arbitrator finds the following facts:

For the reasons as stated above, the Arbitrator finds that as result of accidental injuries sustained on September 19, 2011, Petitioner is permanently disabled to the extent of 2-1/2% under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHERLYN ALLEN,

Petitioner,

14IWCC0161

vs.

NO: 07 WC 51218

LAIDLAW TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Decision of the Arbitrator and finds that Petitioner reached maximum medical improvement (MMI) as of March 12, 2009. The Commission further finds that the medical treatment after March 12, 2009 was not reasonable or necessary. The Commission awards the Petitioner 2.5% loss of use of the person-as-a-whole for her October 24, 2007 work-related injury and vacates the permanent partial disability award for the right leg.

Ms. Allen worked as a bus aide for Laidlaw. She was responsible for the safety of the kids on the bus. T.21. On October 24, 2007, Ms. Allen was sitting in the third seat of the bus when the bus was t-boned by another vehicle. T.22. She testified that her whole body was jarred and she struck her knees on the back of the seat. The seats were cushioned but there was a pole inside the seat. T.23.

Petitioner presented to Silver Cross Hospital on October 24, 2007 with complaints of bilateral knee and lumbar pain. She had low back pain and painful range of motion. The

examination revealed no sign of serious injury, but she was advised to watch for any new symptoms that might be signs of a hidden injury. PX.7. X-ray of the knees revealed bilateral degenerative changes of the patellofemoral joint. X-ray of the lumbar spine revealed degenerative changes with no evidence of an acute injury. PX.8. The diagnosis was lumbar sprain and a knee contusion/sprain. She was discharged in good condition and prescribed Naprosyn. *Id.* She was able to return to regular work. PX.7.

Petitioner completed an auto injury questionnaire prior to seeing Dr. D'Souza on October 30, 2007. She noted that the vehicle was moving slowly at the time of the accident. Her body was thrown sideways as the result of the accident. She denied losing consciousness. She had pain and stiffness in her neck, upper and lower back and lower extremity. PX.7.

Petitioner underwent an initial consultation with Dr. Melvin D'Souza on October 30, 2007. She was 6'0" and weighed 330 pounds. Ms. Allen reported that she was experiencing back pain and had a headache. She had moderate to severe neck symptoms that she described as generally achy, but occasionally sharp in nature. She described moderate to severe thoraco-lumbar symptoms and moderate to severe lower back symptoms. She also had moderate to severe left posterior knee symptoms, which were dull, achy and stiff in quality. She had moderate to severe right posterior knee symptoms. The primary diagnoses were cervical intervertevral disc syndrome, thoracic sprain/strain, lumbar intervertebral disc syndrome with lumbar myofascitis, and a knee sprain/strain. PX.6. Dr. D'Souza opined that Petitioner's condition was the result of the accident.

Ms. Allen treated with Dr. D'Souza thirty times and was discharged on May 6, 2008. T.25. She testified that she never specifically had treatment to her knees. *Id.* Her left knee is now okay and her right knee generally bothers her when her low back hurts. T.26. She testified that the treatment with Dr. D'Souza was not helpful in anyway. T.27.

Petitioner underwent a lumbar MRI on February 28, 2008. The MRI revealed a small disc herniation at L4-L5 that extended inferiorly with associated narrowing of the central canal. She also had disc dessication changes. PX.6.

Petitioner underwent an IME with Dr. Mukund Komanduri on March 3, 2008. Dr. Komanduri was deposed on September 17, 2009. He noted the February 28, 2008 lumbar MRI revealed a L4-L5 disc that was large enough to cause some radicular pain. It appeared to be acute and not a chronic degenerative disk. PX.12. pg.12. He opined that Petitioner was at a risk for a disk herniation because of her weight and would have a higher incident of back pain. While her weight was a contributing factor to her risk for a disk herniation, it was not the cause. PX.12. pg.13. He opined that the disc herniation was caused by the accident. *Id.* Dr. Komanduri noted that the herniation was putting some mild pressure on the thecal sac on the nerve roots, but it barely hit the nerve. The disk desiccation at L3-L4 and L4-L5 was pre-existing. PX.12. pg.23. He recommended a course of epidural injections and outpatient physical therapy. He opined that Petitioner would reach MMI in three to four months. She did not require surgery and could return to work. She was advised to avoid heavy lifting. He noted that only 4 to 6 weeks of chiropractic care was reasonable. PX.2.

Ms. Allen was seen by Dr. Michel Malek on March 10, 2008 on referral from Dr. D'Souza. Petitioner reported that sitting, standing and walking aggravated her condition. She had no prior history of back injury. She had a negative straight leg raise and negative Patrick's maneuver. He diagnosed Petitioner with work-related lumbar radiculopathy. He recommended an epidural injection and an EMG/NCV of the bilateral lower extremities. He prescribed Ultram, Soma, and Naprosyn. She could work modified duty. PX.6.

Petitioner treated with Dr. Malek through August 3, 2009. T.27. During this period, Dr. Malek provided Petitioner with three epidural injections. Petitioner testified that the injections provided about a week of relief. Dr. Malek was deposed on August 5, 2009. He opined that Petitioner had a pre-existing degenerative condition that was silent and asymptomatic, and needed no treatment prior to the accident. Her condition became aggravated, accelerated to the point where it needed treatment beyond the natural progression following the injury. PX.13. pg.10. She was returned to work on a trial basis but that failed. PX.13. pg.12. He has not released Petitioner back to work due to her symptoms. He reviewed Dr. Butler's report and agreed that Petitioner had a sprain and strain that resolved. However, he stated that was only part of her problem and that was not her current pain. She had lumbar radiculopathy that could not be explained on the basis of a lumbar sprain or strain. PX.13. pg.15. Dr. Malek noted that the MRI findings are consistent with the clinical pathology. All this goes against a muscle sprain/strain and in favor of lumbar radiculopathy or discogenic pain. PX.13. pg.16. He conceded, however, there was no major difference between the October 24, 2007 MRI and February 28, 2008 MRI.

Petitioner underwent an IME with Dr. Jesse Butler on March 12, 2009. Dr. Butler was deposed on November 6, 2009. Examination revealed that Petitioner was 6 feet tall and weighed 390 pounds. She had a straight spine with mild tenderness to palpation of the left paraspinal muscle. No paraspinal spasms were noted. She could forward flex her hands to the distal tibia and extend 30 degrees. Neurologically she had normal strength, sensation and reflexes. She had good hip range of motion and a negative straight leg raise. He noted the MRI revealed disc dehydration at L3-L4 and L4-L5 without disc herniation. There was no significant spinal stenosis throughout the lumbar spine. There was no nerve compression throughout the lower back. RX.3. pg.9. He diagnosed Petitioner with a lumbosacral strain with ongoing back pain and intermittent tingling into the right foot. He recommended Petitioner return to work in a regular duty capacity without restriction. She was at MMI. He opined that Ms. Allen suffered a lumbosacral strain as the result of the accident and her ongoing symptoms were likely related to her morbid obesity and severe physical deconditioning. RX.3. She did not require any additional chiropractic care or treatment and did not require surgery. RX.3. pg.13. He found no evidence of symptom magnification.

Dr. Butler opined that given Petitioner had such a minimal response to the injections and the pathology on the MRI did not really show a herniation or stenosis, it was not necessary to perform three injections. RX.3. pg.22. He noted that the twenty treatments of chiropractic care were excessive. RX.3. pg.23. The additional chiropractic care from March 11, 2008 to May 6, 2008 did not make sense. RX.3. pg.24. He disagreed with Dr. Malek's opinion that riding on the bus was aggravating her condition. He further noted that her current condition was related to her obesity.

Petitioner underwent 45 chiropractic sessions with Dr. John Kravarik from March 20, 2009 through January 13, 2010. *See* PX.10. Petitioner testified that she selected Dr. Kravarik on her own. Dr. Kravarik referred Petitioner to Dr. Shameer Sharma.

On April 21, 2009, Ms. Allen was seen by Dr. Malek. Dr. Malek reviewed Dr. Butler's IME of March 12, 2009. He found Dr. Butler's IME to be invalid. Dr. Malek noted that Dr. Butler found Petitioner could return to work. However, Dr. Malek noted Petitioner tried to return to work, but could not. He took her off work. Dr. Malek noted that Dr. Butler found that Petitioner's problem is related to a muscle sprain and that her issue is morbid obesity. Dr. Malek noted that given her weight has not changed as before the accident, her weight was excluded as the cause. Dr. Malek's diagnosis remained lumbar radiculopathy with preponderance of back pain with symptoms in mid-lumbar distribution. He recommended sedentary work with no driving. PX.8.

Petitioner underwent an EMG and NCV on November 6, 2009. The test revealed no evidence of polyneuropathy in the lower extremities, no evidence of denervation in the left lower extremity muscle and no clear evidence of lumbar radiculopthy. No evidence of electrodiagnostic evidence of peroneal neuropathy or multiple mononeuropathy was seen in the left leg. PX.15.

Petitioner underwent a lumbar MRI on November 11, 2009. The MRI revealed mild multilevel degenerative changes with prominent degenerative changes centered at the posterior facets in the mid-lumbar region. The findings did not result in anything more than mild-to-moderate spinal stenosis and no more than mild neural foraminal narrowing. PX.15.

Petitioner was seen by Dr. Samir Sharma on January 13, 2010 with low back pain and lumbar radiculopathy. Her pain was primarily in the upper, mid, and lower lumbar spine. The diagnosis was low back pain and lumbar radiculopathy. Petitioner had 8 visits with Dr. Sharma. T.30. She received an injection on January 18, 2010 and February 9, 2010. T.30.

Dr. Sharma performed radiofrequency ablation (RFA) of the sacro-lliac joint strip lesion on March 19, 2010. Petitioner reported that the procedure provided 50 percent relief. PX.17. Petitioner underwent a second RFA procedure on April 7, 2010. The second procedure provided about 90 percent relief. *Id.*

William Sobodas of ATI performed an FCE on July 5, 2010. The FCE represented a valid representation of Ms. Allen's present physical capabilities. She demonstrated functional capabilities at the light physical demand level. Her current job was considered light duty. PX.24. Petitioner underwent 14 physical therapy sessions with ATI from May 12, 2010 June 17, 2010. PX.25.

Petitioner was seen by Dr. H.A. Metcalf on August 14, 2010 on referral from Dr. Sharma. Examination revealed a tender neck, and weakness of the lower back. The diagnoses were cervical sprain, thoraco lumbar sprain and L4-L5 radiculitis. He recommended physical therapy at his office three to four times a week. Petitioner treated with Dr. Metcalf twenty-five times through January 15, 2011. T.34. Petitioner reported that she was seventy-five percent better

when she last treated with Dr. Metcalf. She was able to sit and walk around more. She was able to do more house cleaning without as much pain. T.36.

Petitioner underwent a motor nerve conduction study on August 22, 2010. The test suggested compression of peroneal motor at the ankle. It also suggested C5-C6 radiculopathy. PX.19.

Petitioner was seen by Dr. Sharma on December 17, 2010. Her symptoms had improved since the last visit. Examination revealed a normal back, normal palpation, normal sensory exam of T12 through S5, and normal muscle strength. She had full active range of motion, extension, flexion, left lateral bending, right lateral bending, left rotation, right rotation and full passive range of motion. She had a negative bilateral straight leg raise, negative valsalve maneuver, negative bilateral Faber test, and a negative piriformis stretch. The assessment was low back pain and lumbar radiculopathy. She was advised to return to work full-duty, without restrictions. PX.22.

Ms. Allen underwent a second IME with Dr. Butler on September 22, 2011. Dr. Butler noted Petitioner had no symptoms relating to her cervical spine and no issue with the cervical spine related to the accident. She required no restrictions for her neck. Dr. Butler opined that Petitioner's current lumbar condition was at her baseline level of discomfort and her current condition was not causally related to the accident. Her complaints were related to her morbid obesity and physical deconditioning. He further opined that the treatment since November 2009 had not been medically necessary for her lumbar strain. The performance of facet blocks and rhizotomies were not reasonable or necessary. She required no work restrictions for her lower back. RX.4.

The Petitioner testified that she is six feet tall and currently weighs 465 pounds. She weighed 320 pounds at the time of the first accident. While she has been obese most of her life, she has been able to clean her house on a regular basis, go shopping, walk the malls, drive on a regular basis and do a lot of walking. T.15. She did not have any prior low back issues and never had any prior medical treatment to her back. Petitioner stated that she is about 75 percent better. She takes over-the-counter muscle relaxers if she is going to perform extensive house cleaning. T.41. She has been off all pain medication since May 2012. T.36. She has to shop in moderation. She gets back pain maybe once or twice a week. T.44. She develops right knee pain if the weather changes or if she goes up or down the stairs. *Id.* Between her first accident and second accident, she had two surgeries for carpal tunnel. T.19. She stated that the bumping of the bus and the vibration irritated her back. T.38. Petitioner testified that she visited the ER 57 times between October 24, 2007 and September 7, 2012. She visited the ER 48 of the 57 times from March 16, 2009 (date of Dr. Butler's IME) through September 7, 2012. T.53.

The Commission is not bound by the arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981). Interpretation of medical testimony is

particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972). It is well established that if undisputed facts upon any issue permit more than one reasonable inference, the determination of such issues presents a question of fact, and the conclusion of the Commission will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Caterpillar Tractor Co. v. Industrial Comm'n* (1989), 129 Ill. 2d 52, 541 N.E.2d 665.

The Commission finds that the Petitioner was involved in a motor vehicle accident on October 24, 2007. Ms. Allen sustained a lumbar strain and a knee contusion as the result of the accident. In support of its finding, the Commission notes that Petitioner was discharged in good condition from Silver Cross Hospital following the accident. She was diagnosed with a lumbar sprain and a knee contusion/sprain. She was returned to regular work.

The Commission finds that Ms. Allen reached MMI as of March 12, 2009. In support of its Decision, the Commission finds the opinions of Dr. Butler more persuasive than the opinions of Dr. D'Souza, Dr. Malek, Dr. Kravarik, Dr. Sharma and Dr. Metcalf.

Dr. Butler placed Ms. Allen at MMI and noted she could return to her regular work duties as of March 12, 2009. Dr. Butler's opinions are support by the evidence. His examination revealed a negative straight leg raise, mild tenderness to palpation of the left paraspinal muscle and no paraspinal spasms. She had neurologically normal strength and good range of motion. The Petitioner also had a negative straight leg raise during Dr. Malek's March 10, 2008 examination. Further, Dr. Butler noted that the February 28, 2008 lumbar MRI revealed disc dehydration at L3-L4 and L4-L5 without disc herniation. There was no nerve compression.

Testing after March 12, 2009 further supports Dr. Butler's MMI finding. The November 6, 2009 EMG was normal. The MRI of November 11, 2009 revealed nothing more than mild-to-moderate spinal stenosis and neural foraminal narrowing. She had a negative bilateral straight leg raise, normal strength and full range of motion during Dr. Sharma's December 17, 2010 examination. Furthermore, Dr. Butler opined that her morbid obesity was the cause of her ongoing symptoms. The Petitioner weighed in excess of 400 pounds. Dr. Komanduri testified that her weight would place her at a higher risk for back pain. Based on the lack of credible objective evidence supporting Petitioner's subjective complaints, the Commission modifies the Decision of the Arbitrator and finds Petitioner reached MMI as of March 12, 2009.

The Commission further finds that the medical treatment after March 12, 2009 was not reasonable, necessary or related to the accident of October 24, 2007. As of March 12, 2009, Dr. Butler found Petitioner had a normal neurological exam including a negative straight leg rise. There is no credible objective evidence supporting the necessity of ongoing treatment after March 12, 2009. The Commission notes that certain bills were paid by Illinois Department of Healthcare and Family Services. Those bills were for treatment received after March 12, 2009 that was not reasonable or necessary.

The Commission finds that Petitioner sustained 2.5% loss of the person-as-a-whole as the result of her injury. She did not sustain any permanent partial disability as the result of her knee injury.

14IWCC0161

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 15, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $230.00 per week for a period of 12.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 2.5% loss of use of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $11,420.00 for medical expenses under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 5 2014

MJB/tdm
O: 2-11-14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0161

ALLEN, CHERLYN
Employee/Petitioner

Case# **07WC051218**

12WC020058

LAIDLAW TRANSIT AUTHORITY
Employer/Respondent

On 4/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
SUSAN FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

1120 BRADY CONNOLLY & MASUDA PC
LEO PLUCINSKY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

14IWCC0161

☐ 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

Cherlyn Allen
Employee/Petitioner

v.

Laidlaw Transit Authority
Employer/Respondent

Case # **07** WC **51218**

Consolidated cases: **12 WC 20058**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **December 17, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0161

On **10/24/2007**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**12,035.40**; the average weekly wage was $**231.45**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **1** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner the sum of $**231.45**/week for a further period of 97.25 weeks, as provided in Section **8(d)2 and 8(e)** of the Act, because the injuries sustained caused **17-1/2% loss of use of man as a whole and 5% loss of use of the right leg (knee)**.

Respondent shall pay reasonable and necessary medical services of $80,537.21, as provided in Section 8(a) of the Act. See the Attachment.

Respondent shall pay Petitioner compensation that has accrued from **October 24, 2007** through **December 17, 2012**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

4/12/13
Date

APR 15 2013

STATEMENT OF FACTS:

Petitioner was a 33 year old female, single with one child at the time of the accident. Petitioner testified that she was in good physical condition prior to October 24, 2007. She had never injured or had problems with her back before, and had been able to clean her house, go shop on a regular basis, walk, and drive without difficulty. She has been obese her entire life and on the date of hearing weighed about 465 pounds. Petitioner stated that on and before October 24, 2007, she weighed less, about 320 pounds. Petitioner provided that even though obese, she still was able to do every day activities as stated above. Petitioner had an accident on July 10, 2006 that involved her right foot and her right knee (records indicate that it was not a work accident but was from walking for eight hours at a family reunion. See Petitioner's Exhibit, hereinafter referred to simply as "PX" 29). Her back was not involved. She also had carpal tunnel releases between the accident herein, and the accident she had on September 19, 2011, both of which are not related to this claim, nor the September claim under case no. 12 WC 20058.

On October 24, 2007, Petitioner was working for Respondent from 6:30 am to 9:00 am, and from 1:15 pm to about 4:00 pm. While the bus company Petitioner worked for had two other names (Crawford and Grand Prairie-actually separate entities) before Laidlaw, Petitioner was a bus aide the entire time, going back to August, 2000. Laidlaw has now become First Student, which is irrelevant for the purposes herein.

Petitioner worked for Respondent as a bus aide. Her job duty was making sure the kids are safe and secure on the bus, i.e. to get to school and home safely. Sometimes Petitioner would sit and sometimes she would be standing, especially if there was a problem with a child.

On October 24, 2007, the bus Petitioner was working on, was involved in a motor vehicle accident, whereby the front door towards the front seat of it was struck. Petitioner testified that she was sitting on the passenger side of the bus, in the third seat from the front door. Petitioner described the impact as heavy and a T-boning type incident. Petitioner provided that her knees went into the back of the seat in front of her, and her whole body was jarred.

Post accident, Petitioner was seen at Silver Cross Hospital, where she was treated and released. After examination, Petitioner was diagnosed with back and bilateral knee contusions. (PX 29)

Petitioner utilized her first choice physician on October 30, 2007, when she saw Dr. Melvin D'Souza. (PX 6) She had 30 visits with this doctor, receiving chiropractic care, and was discharged on May 6, 2008. Id. Dr. D'Souza treated Petitioner for her lower back and her right knee. Petitioner stated that while her left knee was also struck and was painful for some time, it had resolved itself for the most part after time. Petitioner testified that her right knee bothered her when her back bothered her, and pain would radiate into her right leg.

Petitioner testified that while treating with Dr. D'Souza, her symptoms continued and the doctor referred her to Dr. Michel Malek. Petitioner started treating with Dr. Malek on March 10, 2008. She saw him nine (9) times through August 3, 2009. Not included in these visits were 3 additional visits whereby Petitioner was given epidural steroid injections on November 6, 2008, February 5, 2009 and February 19, 2009. (PX 8) Petitioner stated the injections helped temporarily, but the pain would come back after one week. Petitioner also had an MRI during this time.

Petitioner utilized her second choice physician on March 20, 2009 by commencing treatment with Dr. John Kravarik, of Will County Medical Associates. Petitioner had 45 visits with this chiropractor, ending on January 13, 2010. (PX 10) Dr. Kravarik referred Petitioner, during this time, to Dr. Shameer Sharma, a pain and spine physician.

By prescription of her doctors, Petitioner had an EMG on November 6, 2009, an MRI on November 11, 2009, both at done Provena Saint Joseph Medical Center, and an FCE on July 5, 2010. (PX 15, PX 25)

Petitioner had 8 visits with Dr. Sharma, not including injections and procedures he performed. On January 18, 2010 and February 9, 2010, Petitioner received more injections, but this time from Dr. Sharma.(PX 17) In March and April of 2010, Petitioner described a procedure done by Dr. Sharma, whereby a laser pen was used to remove the arthritis in her lower sacrum. (PX 17) Petitioner testified that she started to feel better after the procedure.

Petitioner testified that before Dr. Sharma treated her, she had pain in her lower back five out of seven days. She took Norco, muscle relaxers, Soma and Ibuprofin. Petitioner stated that prior to her second work accident, she went to the emergency room at Silver Cross Hospital fourteen times for pain management. (Also see PX 29)

Dr. Sharma referred Petitioner to ATI for work conditioning and physical therapy. She treated there from May 14, 2010 to June 17, 2010. (PX 24) Petitioner testified that this medical care was making her feel worse. As a result, Dr. Sharma referred her for different therapeutic/chiropractic care with Dr. Metcalf. She treated with this doctor from August 14, 2010 to January 15, 2011 for a total of 25 visits. (PX 21) Petitioner stated that as of January 15, 2011, she was feeling about 75% better. She was able to sit more, walk around more, and start doing house cleaning without as many pills and as much pain.

Petitioner stated that as of the date of her testimony, she was only taking over the counter Tylenol once or twice a week, going back to May, 2012. She also provided that she was restricted from working on the bus from September, 2008 to April 9, 2009 as the "bumping of the bus" or vibration of the same was irritating her back.

On September 19, 2011 Petitioner had another accident while working for Respondent. (See case no. 12 WC 20058 for the Facts Section regarding this incident). After this accident, Petitioner visited the ER at Silver Cross Hospital two more times, on December 22, 2011 and March 9, 2012. Her main complaints of pain on these visits were her right leg (only on December visit) and back. (PX 29)

Petitioner testified that the aggravation of the injuries she sustained in her October, 2007 accident, in the accident involved herein, resolved. She however has many problems in her daily life activities, part of which may have been impacted with this second accident. Petitioner provided that walking (especially around the mall) still bothered her. She can walk approximately four blocks before the pain begins. She continues to try to do it and get better. Petitioner stated that she takes over-the-counter medication before she attempts significant house cleaning chores. Shopping can only be done in moderation. Petitioner testified that she gained about 120 pounds since the initial accident she sustained in 2007. Petitioner provided that she "can't walk like I use too." She stated the "pain medication would put me out." She would not take them before work, but after, and then eat and go to sleep. Her activity level was very low. She stated that it was only after treatment with Dr. Sharma that her daily activities have gotten better.

As to complaints Petitioner still has today, she testified that she still gets back pain one to two times a week. She still gets right knee pain with weather changes or if she is going up and down stairs a lot. She also has had swelling in her bilateral legs, but does not know if this particular symptom is from either work accident she had. She also has been at regular work for Respondent since April 6, 2009.

In support of the Arbitrator's findings relating to (F), is the Petitioner's present condition of ill-being causally related to the accident/injury of October 24, 2007, the Arbitrator finds the following:

The Arbitrator finds that a causal relationship exists between her conditions of ill-being and the accident sustained on October 24, 2007.

The Arbitrator finds that Petitioner was credible in her testimony and said testimony was unrebutted. Evidence submitted suggests Petitioner was in fairly good health, although she was obese, prior to the this work accident. There is no evidence in the record that Petitioner ever had problems with her lower back or her left knee until she sustained the work accident involved herein. Petitioner admitted to injuring her right knee in an accident at work on July 10, 2006, but limited records are available as to this, and Petitioner was working full duty after the same. The work accident itself is stipulated to/undisputed.

After the accident of October 24, 2007, Petitioner went to Silver Cross Hospital where she mainly complained of bilateral knee, and lumbar pain. A laceration was also found on Petitioner's right hand, and numbness and tingling in the right forearm. (PX 29) The Arbitrator makes specific note that several hospital visits were entered as part of this exhibit, prior to this accident, going back to July 10, 2006. Petitioner had full range of motion as to her back region, and all exams of the same were normal. There were obviously no preexisting back conditions. On the date of the accident herein, Petitioner had x-rays taken of her lumbar spine, and bilateral knees, which were essentially normal except for degenerative changes, and she was discharged the same day. Id. Petitioner was given Vicodin while at the hospital, and upon being released was given prescriptions for Naprosyn and Flexeril. Id.

On October 30, 2007, Petitioner exercised her first choice physician and started treating with Dr. Melvin D'Souza of St. Anthony's Spine and Joint Institute. (PX 6) Her main complaints were her entire lumbar spine and her bilateral knees. Dr. D'Souza ordered a course of physical therapy which lasted until May 6, 2008, for a total of 30 visits.

While treating with Dr. D'Souza, Petitioner had bilateral knee complaints until November 27, 2007. After this date, her main problem was her entire back, but primarily in the lumbar region. In a two page questionnaire filled out on January 3, 2008, Petitioner indicated that her lifting, walking, sitting, standing, sleeping, sex life, social life and traveling were affected by her lower back injury. Upon reevaluation by Dr. D'Souza on this date, it was determined that only Petitioner's neck and back were the injuries of concern with the neck improving. Petitioner was referred for an MRI and to Dr. Michel Malek for pain management. (PX 6) Chiropractic care/physical therapy continued.

On March 15, 2008, Petitioner was again reevaluated and answered another questionnaire. She was getting worse at this point as to her lower back. Petitioner's last visit with Dr. D'Souza was on May 6, 2008, whereby her pain was slowly improving but still prominent. She was treating at this time with Dr. Malek. Dr. D'Souza's last diagnoses of the Petitioner, found in the note of 1/3/08, were basic strain sprain type injuries to the lumbar region and the cervical region, but with acknowledgment that further testing and care was needed. (PX 6)

Petitioner began treating with Dr. Michel Malek on March 10, 2008. After taking her history, Dr. Malek noted that the pain in Petitioner's back was intolerable with radiation down both extremities to about the knee with tingling and numbness and weakness down the left side. Petitioner's upper back and neck were still somewhat painful. (PX 8 and PX 13, at 6-7) A MRI was performed on 2/28/08 which, according to Dr. Malek, showed evidence of desiccation at the L3-4 and L4-5 levels of her lumbar spine. There was also evidence of some retrolisthesis of L4 on L5. (PX 13, at 7-8) His diagnosis of Petitioner was lumbar radiculapathy consistent with her MRI findings. (PX 8 and PX 13, at 9) Dr. Malek prescribed Ultram, a muscle relaxant and anti-inflammatory. Epidural injections were to be considered. (PX 8) Petitioner was given modified duty at work. Per her testimony Petitioner continued to work full duty at this time. (See PX 11, notes from Dr. Malek for the time Petitioner did not work on the bus and was on modified duty and the note that Dr. D'Souza issued that authorized Petitioner off work in March 11, 2008)

On April 23, 2008, Petitioner was reevaluated by Dr, Malek, and he noted she was miserable. Bilateral L3-4 and L4-5 foraminal epidural injections were prescribed, along with an EMG/NCV lower extremities. He continued her Ultram, Soma and Naprosyn prescriptions. (PX 8) Petitioner did not return to Dr. Malek until September 3, 2008 and it was noted that upon returning to work after the summer, her condition was aggravated. Her low back pain was still present and Dr. Malek's prescription was the same. Id.

Petitioner had her first epidural injection on November 26, 2008 with Dr. Malek. It was uneventful. She followed up with Dr. Malek on December 3, 2008 and two additional injections were recommended as Petitioner had a partial response to the first one. These were done on February 4, 2009 and February 18, 2009. After the second injection, Petitioner had a reaction with headaches. This required a visit at the emergency room on February 12, 2009 at Silver Cross Hospital. The Arbitrator notes that this treatment is not disputed and the resulting ER visit is related. (PX 8 and PX 29)

On March 11, 2009, Petitioner returned to Dr. Malek for follow-up. He noted that she had an IME set with Dr. Jesse Butler the next day, but was still having pain in her back to her lower extremities. He recommended an EMG/NCV and another MRI. He thought Petitioner should continue treatment with Dr. D'Souza. He was still awaiting the IME report on April 8, 2009. (PX 8)

Petitioner exercised her second choice physician by going to Dr. John Kravarik of Will County Chiropractic & Rehabilitation. (PX 10) His care was to replace that of Dr. D'Souza. Petitioner treated with Dr. Kravarik from March 20, 2009 to January 13, 2010 for a total of 45 visits. Id. Per Dr. Malek, this care was reasonable and necessary for treatment of Petitioner's symptoms as further medical care was not authorized. (PX 13)

Dr. Kravarik provided therapy in the form of EMS, heat, and intersegmental traction. He also gave authorization for Petitioner to be off work completely. He noted continuously that Petitioner still had pain, spasm, numbness and tingling, all stemming from her lumbar region and traveling into her legs. Petitioner also had a decreased range of motion. (PX 10) The Arbitrator finds this care reasonable and necessary and causally related to the accident of October 24, 2007. Per Dr. Malek, and even Dr. Komanduri to an extent (see below), Petitioner needed therapy while testing and care was denied. The Arbitrator finds Petitioner's current condition at this time, related to the accident herein. The Arbitrator notes Petitioner's testimony that Dr. Kravarik's care helped her and she demonstrated improvement.

Petitioner returned to Dr. Malek on April 21, 2009. He had reviewed Dr. Butler's IME report at this time and did not agree with Dr. Butler's opinions. Dr. Butler indicated that Petitioner's problems were weight related and deconditioning. Dr. Malek unequivocally stated that this cannot be the cause of Petitioner's symptoms as

her weight was the same before the accident as it was when he was treating her. (PX 8 and PX 13) The Arbitrator notes that Dr. Malek is credible in his opinions. The Arbitrator further notes that Petitioner was on modified duty during this time (September, 2008 to April, 2009). This is not an issue in the Decision herein as this was stipulated to by the parties.

On August 3, 2009, Petitioner returned to Dr. Malek. He noted that Petitioner was seeing Dr. John Kravarik instead of Dr. D'Souza, and Petitioner reported that this was helping her significantly. Dr. Malek could not give any further recommendations at this time as Petitioner still needed to have the MRI and EMG NCV done. This was the last time Dr. Malek saw Petitioner. (PX 8) Petitioner in fact had these tests done at Provena Saint Joseph Medical Center on November 6, 2009 and November 11, 2009. The EMG was essentially normal and the MRI the same. (PX 15)

Dr. Michel Malek testified in this case. He is a board certified Neurological Surgeon in good standing. He gave the opinion, based on a reasonable degree of medical and neurological certainty that "at the time of 10/24/07 Mrs. Cherlyn Allen already had pre-existing degenerative condition that was silent and asymptomatic and needed no treatment, but as a result of the injury [here], that condition became symptomatic by aggravation, acceleration, or precipitation to the point where it [became] in need of treatment beyond the natural progression of degenerative disease absent the injury [herein]." (PX 13, at 10) He further opined (as stated above) that weight is not a factor in this case as the day before the accident Petitioner was fine, and after, symptomatic. (PX 13, at 10-11)

Dr. Malek testified that the three epidural injections, identified above, were reasonable and necessary, and incurred because of the accident Petitioner had on October 24, 2007. (PX 13, at 11-12) In addition, Dr. Malek had Petitioner on sedentary restrictions as of the last visit. (PX 13, at 13-14) While not significant for TTD herein, as that is not an issue, it is relevant for the purpose of demonstrating Petitioner's determination to work beyond these restrictions, and goes to her credibility. Finally, Dr. Malek testified that his final diagnosis, as of August 3, 2009 was "lumbar radiculapathy, mid lumbar in distribution with preponderance of back pain with MRI scan showing L3/L4, L4/L5 pathology. And failure of conservative management. I do believe as well that [Ms. Allen] had muscular ligamentous strain that has resolved and no longer a factor in her pain." (PX 13, at 14) The Arbitrator finds Dr. Malek's opinions credible and relies on these. The Arbitrator further finds that as of August 3, 2009, Petitioner met her burden and proved that her current condition was causally related to the accident of October 24, 2007.

Due to Petitioner's ongoing complaints to her lower back, Dr. John Kravarik, who was providing chiropractic care/therapy, referred Petitioner to a pain management specialist, Dr. Samir Sharma. (PX 17 and PX 18) Petitioner presented to Dr. Sharma on January 13, 2010. While the lower back was Petitioner's main complaint, she was still having trouble throughout her spine. Id. She was also still having radiating pain, with stiffness, numbness in the legs, and weakness of the legs. After initial examination, where Dr. Sharma found positive results, he diagnosed Petitioner with low back pain and lumbar radiculopathy. Id. He prescribed a Facet diagnostic medial branch block of the sacral L4, L5, S ala; S1, S2, S3 medial branch nerves under fluoroscopic guidance. The only history that Dr. Sharma related this to was Petitioner's work accident of October 24, 2007. Id.

On January 18, 2010, Petitioner had the injection, as described above, completed. It was uneventful. Id. Petitioner returned for follow-up on February 9, 2010 and reported 75% improvement. Another injection was done on this day. Id. Petitioner had another follow-up on February 24, 2010 where she now reported 90% relief. She was still taking Flexeril, Norco and Naproxen. Id. She also had pain that remained with extended walking. Id. Due to this, Dr. Sharma prescribed a Radio-Frequency Ablation of the medial branch nerves of the Sacro-

Iliac Joint strip lesion, under fluoroscopic guidance. Id. This was a more permanent solution to Petitioner's ongoing nerve problems and pain complaints. Id. This procedure was done on March 19, 2010 (approach from the right side) and April 7, 2010 (approach from the left side). Id.

Petitioner followed up again with Dr. Sharma on May 5, 2010 and June 22, 2010 and reported a 90% improvement again. She still felt muscle spasms in the low back. Id. After refilling Petitioner's Flexeril medication, Dr. Sharma referred Petitioner to ATI for physical therapy. She was to follow up with the doctor after completing this. Id.

Petitioner began first work hardening at ATI on May 14, 2010, and had five (5) sessions of this. (PX 24) After this last fifth session, regular physical therapy in the form of E-stim, Hot/Cold Packs, Manual Therapy, and Therapeutic Exercises were done. Petitioner had nine (9) such sessions, the last one ending on June 17, 2010. Id. Petitioner testified that this treatment was not too helpful to her and she felt an increase in her pain and radicular symptoms.

Petitioner had an FCE on July 5, 2010. As Petitioner is not claiming any lost time from work, or a change in her vocation, this test is of little value. Nevertheless, the FCE was deemed valid with Petitioner demonstrating a functional capacity at the light physical demand level. (PX 25)

When Petitioner returned on July 21, 2010 to Dr. Sharma, as stated above, she had a gradual return of the radicular symptoms into her right lower extremity, that had disappeared after the last RFA. Rather than continue at ATI for physical therapy, Dr. Sharma referred Petitioner to Dr. Metcalf for an alternative type of therapy and placed her on work restrictions. (PX 17 and PX 18)

Petitioner first saw Dr. H. Metcalf on August 14, 2010. (PX 21) She had therapy on this date and on August 19, 20, 21 (with an EMG/NCV done on this date suggestive of a C5-6 radiculapathy), 24, 25, 26, 28; on September 2, 9, 10, 16, 17, 18, 23, 24, 25, 28, 30; on October 6, 7, 8, 12, 13, 2010; and was discharged with much improvement on January 15, 2011. Id. Petitioner testified that this chiropractic care helped her quite a bit and she was able to completely stop taking any type of medications for pain. She was also back to work full duty and had been since the beginning of the school year.

Petitioner also had follow up with Dr. Sharma on August 9, 2010 (feeling 95% improvement), September 28, 2010 (PX 17), and December 17, 2010 (PX 22). As of the December visit, Petitioner was MMI and was only to return to the doctor on a p.r.n. basis. (PX 22) A refill of Norco was given to Petitioner. Per her testimony she stopped taking all prescription medications shortly after this time. Dr. Sharma's final diagnosis was low back pain and lumbar radiculopathy. Id.

Petitioner was examined by two physicians on behalf of Respondent. Petitioner did not testify about Dr. Mukund Komanduri, but his report is part of the record as (PX 2) Dr. Komunduri's report unequivocally stated that Petitioner has a "clinically significant L4-5 disc herniation" which is work related. Id. He stated that epidural injections and work restrictions are related and reasonable. Id. Finally, he stated that Petitioner had radiculapathy. He did not state that Petitioner's weight was in any way a factor. Id. His testimony was also taken. (PX 12) He testified that on March 3, 2008, when he saw Petitioner, due to her lack of symptoms prior to the accident of October 24, 2007, he did not feel that her condition was chronic. (PX 12, at 10) He examined her and found a positive straight leg test. Id, at 11. He reviewed the MRI films of February 28, 2008, and found the disc herniation at L4-5, aka, said disc putting mild pressure on the thecal sac on the nerve roots. Id, at 12-13. He opined that this condition and the need for the injections, was directly caused by the work accident of October 24, 2007. (PX 12)

Dr. Jesse Butler also examined Petitioner on two occasions and his testimony was taken. Dr. Malek read Dr. Butler's initial IME report after an examination of 3/12/2009 and testified that while Petitioner did sustain a strain/sprain, as was Dr. Butler's opinion, this resolved and only a radiculapathy was left. He further indicated that Dr. Butler had no explanation for the radicular symptoms and no explanation for the fact that the epidural injections provided some partial and temporary relief. He noted that if Petitioner only had a strain/sprain, these would not have impacted her at all. When posed as to whether Petitioner's weight was the cause of her symptomology, the doctor replied, "...this is a common cop-out for people, ...I would ask Dr. Butler did the accident of 10/24/07 cause a weight gain that resulted in pain. She was the same weight before and after. Mrs. Allen on 10/23/07 wasn't a thin person and yet she did not have pain. So why would the accident of 10/27/07 all of a sudden cause pain because of obesity which was there before. It doesn't really make sense." (PX 13, at 15-17)

Dr. Butler testified in this matter regarding his two visits with Petitioner, March 12, 2009 (RX 1) and September 22, 2011 (RX 4). Petitioner testified that he never examined her in the latter. His opinions remained unchanged between the March, 2009 and September, 2011 visits. He testified that Petitioner had a strain of her cervical and lumbar region and these were resolved as of March 12, 2009. (RX 3, at 13) On cross examination, Dr. Butler admitted he did not know Petitioner had a prior IME with Dr. Komunduri. Id, at 18. Further, Dr. Butler stated he had no reason to doubt Petitioner when she indicated that she had radicular pain. Id, at 19. He also testified that all treatment (besides some excessive chiropractic sessions) was reasonable, necessary and related to the accident of October 24, 2007. Id, at 23-24. When asked about Petitioner's weight, Dr. Butler assumed on the date of accident she weighed 330 pounds, but had been 265 pounds shortly before that as that was what was indicated on Petitioner's drivers' license. Id, at 25. Finally, Dr. Butler stated that being a bus monitor was a sedentary job and would not in any way aggravate a person's back, who had sustained injury. Id, at 24.

Petitioner admitted that she had been to the emergency room at Silver Cross Hospital on several occasions for her back pain. Records show she went there on the date of the accident, on 1/8/08, on 2/12/09 and 2/13/09, all of which have been stipulated as related to the accident involved herein. Arb. Exh. 5. After this time, Petitioner went back to Silver Cross Hospital on 6/22/09, 9/9/09, 9/16/09, 9/22/09, 2/8/10, 3/8/10, 7/17/10, 7/20/10, 7/22/10, 3/30/11, 8/20/11, 9/19/11 (for other work accident which is stipulated to also), 12/22/11, and 3/9/12. (PX 29) Upon review of the medical records of the hospital, the Arbitrator finds these visits related to the accident of October 24, 2007 as Petitioner was treated for chronic lower back pain in each of them.

Based on all the above, the Arbitrator finds that Petitioner's condition of ill-being as defined by Dr. Malek, Dr. Komunduri, and Dr. Sharma is causally related to the work injury she sustained on October 24, 2007. The Arbitrator is not persuaded by the opinions of Dr. Butler.

In support of the Arbitrator's findings relating to (J), were the medical services that were provided to the Petitioner reasonable and necessary, and were they paid, the Arbitrator finds the following facts:

The Arbitrator finds that Respondent is liable for the medical services that were provided to the Petitioner as they were reasonable and necessary, and related to the accident of October 24, 2007.

Respondent stipulated that an accident occurred in the course of Petitioner's employment with Laidlaw Transit. However, there are bills not paid. Based on records and reports from Dr. D'Souza, Dr. Malek, Dr. Kravarik, Dr. Sharma, Dr. Metcalf, and Dr. Komunduri, the company IME, the medical bills from the treatment are awarded.

Petitioner's Exhibit 4, a medical bill from EM Strategies, was admitted into evidence for treatment rendered at the emergency room at Silver Cross Hospital where Petitioner went on August 20, 2011 with complaints of low back pain. The Arbitrator therefore awards Petitioner the amount of this bill or $319.00. It is noted that this bill is awarded but Respondent will pay according to the fee schedule or $242.18.

Petitioner's Exhibit 5 is a medical payment lien from the Illinois Department of Healthcare and Family Services in the amount of $3,017.08 for various dates of care Petitioner has had and for medications disbursed, which is all related to the accident herein. The Arbitrator therefore awards Petitioner the amount of this lien/bill or $3,017.08. It is noted that any charges that are reflected on other bills awarded as stated in this decision, will mean a credit to Respondent from this award of the IDHFS lien amount.

Petitioner's Exhibit 7 is a medical bill from Dr. Michel Malek in the amount of $7,386.98 for treatment Petitioner received from Dr. Malek. For the reasons stated above and herein, the Arbitrator awards Petitioner the amount of this bill or $390.00. Per the stipulation of the parties, Arbitrator Exhibit 5, Respondent has already agreed to pay for $6,996.98 of the bill submitted. The Arbitrator awards the remaining balance for the three visits that occurred after March, 2009. It is noted that this bill is awarded but Respondent will pay according to the fee schedule or $265.50.

Petitioner's Exhibit 9, a medical bill from Will County Chiropractic & Rehabilitation Center, was admitted into evidence for treatment rendered by Dr. John Kravarik. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards Petitioner the amount of this bill or $9,292.00. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

Petitioner's Exhibit 14, a medical bill from Provena Saint Joseph Medical Center, was admitted into evidence for testing done at said hospital per order of Dr. Malek. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards the Petitioner the amount of this bill or $4,140.00. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

Petitioner's Exhibit 16, a medical bill from the Pain & Spine Institute, was admitted into evidence for treatment rendered by Dr. Sharma. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards Petitioner the amount of this bill or $28,109.00. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

Petitioner's Exhibit 19, a medical bill from Equi-Med, was admitted into evidence for medications given to Petitioner as prescribed by Dr. Malek. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards Petitioner the amount of this bill or $815.05. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

Petitioner's Exhibit 20, a medical bill from Dr. H. Metcalf, was admitted into evidence for treatment rendered by Dr. Metcalf. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards Petitioner the amount of this bill or $13,190.21. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

Petitioner's Exhibit 23, a medical bill from ATI Physical Therapy, was admitted into evidence for therapy performed as by prescription of Dr. Sharma. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards Petitioner the amount of this bill or $6,064.67. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

Petitioner's Exhibit 26, a printout of medications Petitioner has received, related to this accident, was admitted into evidence. No award is necessary.

Finally, Petitioner's Exhibit 28, a medical bill from Silver Cross Hospital, was admitted into evidence for emergency room visits Petitioner had. This bill is from care the Arbitrator has awarded as related to Petitioner's work accident. The Arbitrator therefore awards Petitioner the amount of this bill or $15,200.00. It is noted that this bill is awarded but Respondent will pay according to the fee schedule.

The total to be paid by Respondent to Petitioner is $80,537.21, subject to the fee schedule.

In support of the Arbitrator's findings relating to (L), what is the nature and extent of the injuries the Petitioner sustained, the Arbitrator finds the following facts:

For the reasons as stated above and herein, the Arbitrator finds that Petitioner met her burden of proving she was permanently disabled as to her lower back to the extent of 17-1/2% loss of use of man as a whole, and to the extent of 5% loss of use of her right leg/knee. Petitioner has had three epidural injections by Dr. Malek, and two injections and two RFA procedures as performed by Dr. Sharma. She testified that she has never been the same since this accident happened in that her walking is curtailed, her house cleaning more difficult, and every day activities can be painful without over-the-counter medications. While working full duty, every other aspect of Petitioner's life has been modified to accommodate the injury sustained to her lower back region. The Arbitrator has considered this in his award and finds Petitioner credible in her testimony.

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIA LUNA,

Petitioner,

vs.

NO: 12 WC 15073

14IWCC0162

GROUP O,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical treatment and temporary total disability benefits, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below. The Commission remands this case to the Arbitrator for further proceedings for a determination of an additional amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

It is undisputed that Petitioner injured herself while working for Respondent on February 20, 2012. She fell and injured her right shoulder, arm, wrist and knee. Petitioner immediately sought medical attention and continued treatment for those conditions until they resolved. Petitioner's right shoulder, arm, wrist and knee are not at issue.

The Arbitrator held that Petitioner's low back condition was causally connected to her work related accident on February 20, 2012. The Arbitrator awarded Petitioner temporary total disability benefits for 36-1/7 weeks, from May 15, 2012 through January 23, 2013, medical expenses of $961.00, and prospective medical treatment.

14IWCC0162

The Commission reverses the decision of the Arbitrator and finds that Petitioner's lumbar spine condition is not causally connected to the work related accident. We therefore do not award Petitioner medical expenses or prospective medical treatment. However, we award Petitioner temporary total disability benefits for 6-2/7 weeks, from May 15, 2012, through June 27, 2012, when Petitioner treated for issues related to the her right shoulder, arm, wrist and knee, which she injured during the work related accident and which are causally connected to said accident.

Petitioner alleged she injured her low back, not during the original accident but as a direct result of her other injuries. We find that Petitioner did not prove her low back complaints were causally connected to the work accident. While Petitioner originally injured herself on February 20, 2012, she did not voice back complaints until May 15, 2012, nearly three months after the accident. Petitioner's initial medical records contain no complaints of low back pain. She even testified that she did not initially experience low back pain but later claimed that it was a result of her other injuries. Petitioner suggests that her knee complaints traveled up to her low back and caused her additional pain. However, we question Petitioner's credibility. During her testimony, Petitioner answered questions regarding the origin of her low back complaints evasively. On cross examination, when Petitioner was asked if she hurt her back on February 20, 2012, she responded that she fell on her right side and "[t]here is a consequence of that too." Then after being accused of being evasive, Petitioner admitted that she did not hurt her back on February 20, 2012. Petitioner's testimony was not fully credible.

Moreover, the evidence shows that Petitioner is exaggerating her symptoms and that she is not experiencing as much pain as she claims. None of the medical providers could relate Petitioner's subjective complaints of pain to any objective finding. Respondent's Section 12 report from Dr. Graf points out multiple times that he cannot relate Petitioner's pain complaints to her physical exam or any other objective evidence. Petitioner's own treating physicians stated in multiple records that her pain is diffuse and cannot be explained by objective testing. Dr. Sterbe evaluated Petitioner for her shoulder complaints on June 21, 2012, and he wrote that he cannot explain her diffuse pain that does not relate to objective testing. Dr. Mathew wrote in his June 29, 2012, note that the MRI findings of her lumbar spine do not show evidence of nerve root impingement that could explain her severe pain. Dr. Matthew added that her pain is definitely out of proportion and does not correspond with the MRI findings. Even Petitioner's own treating physicians cannot explain her diffuse pain complaints based on objective testing and her physical exam. Petitioner appears to be malingering and exaggerating her symptoms.

Therefore, we hold that Petitioner's low back condition is not causally connected to her work related injury. She did not complain of any back issues until almost three months after the initial work injury. When she did begin treating for her lumbar spine condition, Petitioner's treating physicians and Respondent's Section 12 examiner could not explain her diffuse complaints of severe pain. Multiple physicians suggested that Petitioner was malingering and exaggerating her symptoms. Therefore, Petitioner is not entitled to prospective medical treatment

14IWCC0162

for her low back, medical expenses or temporary total disability benefits while treating exclusively for her low back.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed with respect to Petitioner's lumbar spine. Petitioner's lumbar spine condition is not causally connected to the work related injury and benefits with respect to that condition are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $416.60 per week for a period of 6-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 6 2014
TJT: kg
O: 1/14/14
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

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

LUNA, MARIA
Employee/Petitioner

Case# **12WC015073**

GROUP O
Employer/Respondent

14IWCC0189

On 4/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4642 O'CONNOR & NAKOS LTD
MATT WALKER
120 N LASALLE ST 35TH FL
CHICAGO, IL 60602

1337 KNELL & KELLY LLC
CHARLES D KNELL
504 FAYETTE ST
PEORIA, IL 61603

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Maria Luna
Employee/Petitioner

Case # **12** WC **15073**

v.

Consolidated cases: **n/a**

Group O
Employer/Respondent

14IWCC0162

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Ottawa, Illinois**, on **January 23, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 20 ,2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,494.80**; the average weekly wage was **$624.90**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$8,497.73** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$8,497.73**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $416.60/week for 36-1/7 weeks, commencing May 15, 2012 through January 23, 2013, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $8,495.73 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $961.00, as provided in Sections 8(a) and 8.2 of the Act. All other medical bills as put forth in Petitioner's Exhibit #6 have been paid by Respondent.

Respondent shall authorize prospective medical as recommended by Dr. Mathew in her chart note of June 29, 2012, that being "a diagnostic and therapeutic right L4 and L5 epidural steroid injection to be followed by a return to work with limitations to Petitioner's spine and left shoulder if needed, or a functional capacity evaluation depending on the results of the injection."

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

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

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

Signature of Arbitrator

4/24/13
Date

ICArbDec19(b)

APR 25 2013

14IWCC0162

Statement of Facts:

Petitioner has been employed by Respondent since October 18, 2010. Respondent is a temporary agency that provides workers for Caterpillar. Petitioner worked at the Caterpillar plant in Montgomery, Illinois. On February 20, 2012, Petitioner was employed as an inventory specialist at the Caterpillar Plant in Montgomery. For the approximate one year and three months that Petitioner worked for Respondent she had various jobs. Group O places at various stages parts for the building of Caterpillar equipment. At the time of the occurrence she was working in inventory. Part of her job was to check part numbers, the location of the part number and the quantity. She would work in six or seven areas during the day. During her job she would climb ladders, operate a scissor lift and also operated a standup forklift. The parts that she might lift during the day would vary from less than a pound up to fifty pounds.

Petitioner testified that on February 20, 2012 she performed inventory in several different areas. As she was walking towards area PL-178, she tripped on a rock in the designated walkway. Petitioner stated that she twisted her left ankle, and fell onto the right side of her body. Petitioner provided that she put her right arm out to avoid striking a metal box when she fell. Immediately after the fall, she noted that her pants had ripped and that her knee was hurting. She also had grease all over her pants and on her hands. She went into the bathroom to clean herself and checked her leg on the right side. She had some scratches on her right knee.

Petitioner testified that she reported the work accident to her supervisor, Maria Ramirez. After a safety investigation, Petitioner was sent by Respondent to Provena for medical treatment.

On February 20, 2012, Petitioner presented to Provena Mercy Center where she was seen by Dr. Charles G. Woodward. Records show that Petitioner's chief complaints were right knee pain, right shoulder pain and right wrist pain. Petitioner provided that she stepped on a rock, inverted her ankle and fell on her right side. Petitioner also indicated that she fell with an outstretched hand. X-rays taken of the right wrist and right knee were both negative for acute bony pathology. Petitioner was assessed with multiple contusions secondary to fall. She was prescribed an icing program, and returned to restricted work, sitting only. (PX 1) Petitioner testified that her restrictions were accommodated.

Petitioner continued to follow up with Provena Occupational Health. On March 5, 2012, Petitioner presented complaining of ongoing right knee pain, swelling and instability. Petitioner also complained of right shoulder pain at the anterior superior aspect of the shoulder. A MRI of the right knee was ordered and her work restrictions were continued. (PX 1)

Petitioner underwent the right knee MRI on March 12, 2012. The study showed osteoarthritic changes involving the knee joint and patellofemoral joint with some articular cartilage changes of the patellofemoral joint. The findings were suggestive of some injury to the proximal aspect of the lateral collateral ligament. Same was felt to represent a strain rather than disruption. (PX 1)

Petitioner returned to the Occupational Health Clinic on March 14, 2012. At that time, physical therapy was prescribed. Her restrictions were changed to no lifting over 20lbs, no ladder climbing, ambulation as tolerated and use of the right arm as tolerated. Her diagnosis was contusion/sprain right knee and right shoulder strain. (PX 1)

Petitioner continued treating at the Occupational Health Clinic through April 23, 2012. At that time, Petitioner complained of worsening right shoulder pain. She also complained of continuing right knee pain.

Petitioner was referred to "Orthopedics" for further evaluation and treatment of the right shoulder pain and knee pain due to "the chronicity of her symptoms and failure to progress with conservative treatment." Petitioner was placed on restrictions of no lifting over 10 pounds with the right arm, no pushing or pulling over 10 lbs., no climbing vertical ladders, ambulation as tolerated and use of the right arm as tolerated. (PX 1) Respondent continued to accommodate her restrictions.

On May 4, 2012, Petitioner was seen by Dr. Aaron Bare, an orthopedic surgeon, at Orthopedic Associates of DuPage. Dr. Bare noted that Petitioner was a "280 pound, 40 year old female who works in inventory. She sustained an injury on 2/20/2011. She was working as an inventory counter. She slipped as she was walking. She believes she stepped on a rock. Her left leg twisted. She lost balance and fell on her right side. As she fell she extended the right arm and the hand. As she rolled to the ground, she believes she struck the right knee and right shoulder on the pavement." Petitioner complained of right sided numbness; problems with overhead reaching and lifting of the right shoulder and occasional numbness down the right leg. Petitioner denied any neck pain or radicular symptoms. Dr. Bare diagnosed Petitioner with a "right knee exacerbation of medical compartment osteoarthrosis and right shoulder tendinitis." Dr. Bare noted that Petitioner "does have very diffuse complaints, especially in and around the leg and the knee that appear not to be isolated to a certain compartment or certain location. She has pain down the entire leg..." He recommended continued physical therapy for both the knee and the shoulder. At that time, he anticipated a return to full duty work over the course of the next two months. The doctor also noted that if physical therapy did not improve her symptoms, a follow-up with physiatry was warranted. Petitioner was continued on light duty restrictions. (PX 2)

Petitioner testified that on May 14, 2012 she was required to work full duty. Petitioner testified that when she started working full duty she noticed pain in her back and groin. She also provided that her leg was getting numb and she had terrible pain, rating same at 10/10.

On May 15, 2012, Petitioner returned to Orthopedic Associates of DuPage where she was observed by Dr. Vinita Mathew. Petitioner provided that "...yesterday her supervisor made her do regular job with weight restrictions. She therefore had to lift tubes weighing about 20 pounds up to 60 times as she works 8 hours a day. She also had to walk all around doing inventory..." Petitioner relayed that due to the repetitive motion, her right shoulder and knee pain became severe. Petitioner also reported groin pain and right knee pain that radiated up the lateral thigh into the buttocks. Petitioner described the pain in her thigh as a burning sensation which caused intermittent numbness. Petitioner further complained of some low back pain. It was noted the pain did not radiate below the knee. Petitioner was assessed with 1.) hip – osteoarthritis; 2.) lumbar spondylolisthesis – acquired; 3.) knee pain; 4.) shoulder pain; and 5.) rotator cuff syndrome. It was noted that Petitioner's right thigh and knee pain was probably due to lumbar radiculitis and the hip osteoarthritis also contributed to the pain. Dr. Mathew wrote, " I explained to the patient that she has a significant spondylolisthesis, which can contribute to lumbar spinal stenosis. That could result in lumbar radiculitis or sciatica. This could explain some of the nonspecific burning and numbness that she has in the thigh. In addition, to the lateral thigh pain, she also reports groin pain on the hip range of motion. Hip range of motion also reproduces the knee pain. I therefore believe that her knee pain is multifactorial. There is an element of lumbar radiculitis, hip pathology and local knee pathology all contributing to the pain. She also has an acute exacerbation of pain which is activity based."
Dr. Mathew placed Petitioner on restrictions of light duty with no lifting or carrying in excess of 20 pounds, no bending, twisting or standing for prolonged periods, and a work limit of only up to 4 hours per day. Dr. Mathew continued Petitioner in physical therapy, prescribed anti-inflammatory medical and advised to ambulate with a cane. (PX 2)

The next visit took place on May 21, 2012. Dr. Mathew noted Petitioner reported an onset of numbness radiating from the right buttocks down the calf. She reported low back pain, mainly in the buttocks, that radiates down the "whole leg." Petitioner described burning pain associated with tingling. Petitioner reported that although she continued with right shoulder pain, her main concern was her leg pain. Dr. Mathew felt that

because Petitioner presented with more neuropathic symptoms in her right leg, a MRI of the lumbar spine was warranted to evaluate for lumbar nerve root impingement. Dr. Mathew took Petitioner off work, continued her in physical therapy, and recommended proceeding with a diagnostic and therapeutic epidural steroid injection after obtaining the MRI. (PX 2)

The MRI of the right hip was performed on May 25, 2012. It was unremarkable. Petitioner followed up with Dr. Mathew on June 5, 2012. Dr. Mathew noted that the hip MRI was ordered by Work Comp, and that she had ordered an MRI of the lumbar spine. Dr. Mathew explained in her chart note that Petitioner's exam was consistent with lumbar radiculitis probably due to lumbar stenosis caused by the spondylolisthesis seen in the x-rays. Dr. Mathew went on to opine that "[l]umbar stenosis is usually a chronic condition, but the injury probably made an otherwise asymptomatic condition symptomatic." In addition to the exam on June 5, 2012, Dr. Mathew injected Petitioner's right shoulder with 1cc of Celestone 6 mg mixed with 2cc of Marcaine 0.5%. Petitioner was continued on light duty restrictions. (PX 2)

A MRI of the right shoulder was done on June 12, 2012. It revealed moderate tendinosis of the supra and infraspinatus tendons with ill-defined interstitial delaminated tearing involving only 30 to 40% of the tendon cranio-causal thickness. The radiologist also documented mild to moderate tendinosis and low grade partial interstitial delaminated tearing of the subscapularis, with a small intrasubstance ganglion cyst at the myotendinous junction. There was mild osteoarthrosis of the AC joint with lateral downsloping, mild subacromial subdeltoid bursitis, and fibrillation of the superior labrum. Minimal medial perching of the long head biceps tendon was noted adjacent to the lesser tuberosity. (PX 2)

Records submitted show Dr. Mathew reviewed the MRI. In a noted dated June 14, 2012, Dr. Mathew recommended that Petitioner follow up with Dr. Sterba for further shoulder treatment recommendations. On June 15, 2012, Dr. Mathew continued to recommend a lumbar MRI. The doctor noted that "If MRI is not done in 1 week, I can't put her off work further without any evidence, as pain is subjective and investigations so far don't explain the severe leg pain." (PX 2)

Petitioner presented to Dr. William Sterba on June 21, 2012. He noted a 40-year-old, morbidly obese female referred for evaluation of right shoulder pain that had been ongoing since February 20th. He charted symptoms including a painful, burning sensation in the front of the shoulder, along with numbness and tingling down the arm into the fingers. On examination Petitioner complained of diffused pain symptoms and signs throughout the exam. Petitioner pointed to anterolateral shoulder, lateral shoulder, top of shoulder, paracervical spine and rotating over to the left side. Dr. Sterba reviewed the right shoulder MRI and questioned the MRI report that suggested that there was no dislocation of the biceps tendon. The doctor felt that there may be a subtle amount of subluxation into the superior border of the subscapularis tendon. Dr. Sterba assessed right shoulder pain of unclear etiology. He recommended Petitioner remain off work until he had the opportunity to discuss further workup with Dr. Mathew. Dr. Sterba stated Petitioner had symptoms that were above and beyond that which would be explained from her biceps tendon. He could not explain the subjective tingling and numbness that she had going down into the hand with respect to the shoulder complaint. (PX 2)

A MRI of the lumbar spine was performed on June 25, 2012. It revealed 3mm anterolisthesis with bilateral L5 spondyloysis at L5-S1. Mild disc bulging with superior extension of the disc into each neural foramen was noted. Moderate left foraminal stenosis with mild flattening of the exiting left L5 nerve root was documented. Also at L5-S1 was mild to moderate right foraminal stenosis without right L5 nerve root impingement, along with a small right posterolateral disc protrusion without neural impingement. At L4-5, there was a small right foraminal disc protrusion with minimal right foraminal stenosis and no nerve root impingement. At L3-4, there was a small left foraminal disc protrusion without stenosis. (PX 2)

On June 29, 2012, Dr. Sterba reported that after conferring with the radiologist regarding the right shoulder MRI, he did not have good evidence to support that Petitioner's pathology was coming from the shoulder. He stated that her pain was so diffused that he would have great reservation in suggesting surgical intervention. (PX 2)

Petitioner returned to see Dr. Mathew on June 29, 2012. Dr. Mathew charted that Petitioner's back pain was worse. Dr. Mathew also noted that Dr. Sterba would defer from recommending any surgical intervention to the shoulder due to Petitioner's diffuse complaints not limited to shoulder movements. Dr. Mathew informed Petitioner that the MRI revealed small, right-sided disc protrusions at L4-5 and L5-S1 along with a chronic listhesis at L5-S1 which could irritate the exiting right L4 and L5 nerve roots. There was no evidence of nerve root impingement that could explain her severe pain. Dr. Mathew noted that the pain was out of proportion and did not correspond to the MRI findings. Dr. Mathew provided that her only recommendation at that time was a diagnostic and therapeutic right L4 and L5 epidural steroid injection. Dr. Mathew also noted that an FCE may be required to evaluate the validity and reliability of Petitioner's symptoms and to assess her functional capabilities. Dr. Mathew took Petitioner off work until 2 weeks after the lumbar epidural steroid injections could be performed. (PX 2)

On July 17, 2012, Petitioner called to request a referral for a second opinion. On August 17, 2012, Dr. Mathew recommended Petitioner see DuPage Medical Group spine surgeons Dr. Paul or Dr. Matagaras for a second opinion.

At Respondent's request, Petitioner saw Dr. Carl Graf for a Section 12 examination on November 7, 2012. Dr. Graf is a Board Certified Orthopedic Spinal Surgeon, a Fellow of the American Academy of Orthopedic Surgery and a Diplomat of the American Board of Orthopedic Surgeons. Dr. Graf took a history from Petitioner, performed a physical examination of Petitioner's cervical spine, did a neurological evaluation, did a shoulder examination, a lumbosacral evaluation, and a neurological evaluation of the lower extremities. He reviewed medical records from the initial date of accident of February 20, 2012 of Dr. Woodward from Provena, reviewed additional medical records from Provena through the end of April of 2012 and further reviewed Dr. Bare's records concerning his evaluation of the right shoulder and right knee. He also reviewed medical records from Dr. Mathew from an office of May 15, 2012 pertaining to her complaints of back pain. Additional records of Dr. Mathew were reviewed concerning treatment to the low back as well as the MRI that was performed.

Dr. Graf concluded as follows:

> "Ms. Maria Luna is a 41-year-old female who claims injury in February of 2012. Ms. Luna has multiple subjective complaints of shoulder pain, arm pain, back pain, bilateral leg pain, hip pain and knee pain. It should be clearly noted that there was no report of back pain, with her injury solely being a wrist, knee and strained shoulder. It is evident that Ms. Luan presented to see a physiatrist, Dr. Vinita Matthew at which time she was given multiple diagnoses including that of hip osteoarthritis, acquired lumbar spondylolisthesis, knee pain, shoulder pain and rotator cuff syndrome, in addition to lumbar radiculitis.
>
> On physical examination Ms. Luna demonstrates an examination with pain out of proportion and multiple nonorganic pain signs. Her subjective complaints of pain cannot be objectively substantiated given the lack of objective findings. Further, her multiple nonorganic pain signs bring forward the likelihood of symptom magnification and/or fabrication.

Regarding Ms. Luna's lumbar spine, there is no evidence of any complaints initially following the evaluation for many months. Therefore, it is my opinion that this be considered outside of the claim. Further, I am unable to substantiate her subjective complaints of pain given the lack of objective findings. Again, the number of nonorganic pain signs and gross pain out of proportion brings forth the likelihood of symptoms and/or fabrication.

Regarding the lumbar spine, it is my opinion that there is no objective reason why Ms. Luna is unable to return to her full duty level job without restriction. It is further my opinion that there is no permanency regarding her lumbar complaints.

SPECIFIC INTERROGATIVES

1. What is the current diagnosis, and how does it relate to the 02/20/12 injury? Are her current subjective complaints related to any pre-existing condition or related to the injury sustained on 02/20/12?

Answer: Ms. Luna has multiple diagnoses outside of the realm of this independent medical evaluation, that of the spine. She has multiple complaints of pain regarding the cervical and lumbar spine which cannot be objectively substantiated. She does have a preexisting lumbar spondylolysis at L5. This would not cause her various and diffuse complaints of pain.

2. What are your treatment recommendations as relates to the injury sustained on 02/20/12?

Answer: Again, I am unable to substantiate Ms. Luna's still complains of pain given the lack of objective findings. It is my opinion she is at maximum medial improvement.

3. Is this injured worker capable of working her full duty activities. If not, is she capable of working modified duty? With what restrictions?

Answer. Regarding the lumbar spine, it is my opinion that there is no objective reason why Ms. Luna cannot return to her full duty job without restrictions.

4. When will this injured worker reach maximum medical improvement for the injury sustained on 02/20/12?

Answer: Essentially, it is my opinion that this is not applicable, as it is my opinion that Ms. Luna's lumbar complaints are in no way related to the injury in question. If it is somehow deemed that her lumbar complaints are related to the injury in question, it is my opinion she would be considered at maximum medical improvement at this point." (RX 12, RX 13)

On November 13, 2012, Petitioner was seen by Dr. Paul at DuPage Medical Group. Dr. Paul noted the following: Petitioner is a 41 year old female, who complains of severe back pain with bilateral lower extremity radiating pain after a work injury on February 20, 2012. She reports that she fell on her right side landing on her shoulder/hip. For this, went to see Dr. Bare/Dr. Mathew who referred her to an orthopedic surgeon from OAD-Dr. Sterba. She was treated conservatively for her right shoulder/hip/knee. She describes her pain as constant,

stabbing, burning pain across the back/buttock, which has not changed since the fall. She finds she has occasional shooting pain and numbness down the hips/sometimes groin/front/back of both legs into the feet, Left greater than right. She denies weakness with climbing stairs or walking, however is in pain. She was ordered an MRI of her lumbar spine with shows B pars defects at L5S1/G1 anterolisthesis, as a result has mild to moderate central neuroforaminal stenosis from a disc herniation which favors the left side. She was offered PT for core stabilization, ROM and gait training. She found little relief with this, and in fact some days her pain seemed wors[e]..." After performing an examination and reviewing diagnostic studies, Dr. Paul had the following impression: Lumbar spine: Lumbar Herniated disc, Lumbar Spinal Stenosis and Spondylolisthesis, Degenerative. Dr. Paul's plan was to try a round of lumbar epidural steroid injections at L5-S1. Dr. Paul also briefly reviewed an L5-S1 lumbar decompression with fusion, but no surgical recommendations were made on November 13, 2012. (PX 4)

Petitioner testified that she is continuing to seek treatment using her group insurance, and is scheduled to see Dr. Espinosa and Dr. Hejna in the near future.

With respect to (F.) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds as follows:

The dispute is the matter centers around whether Petitioner's low back condition of ill-being is causally related to the accident on February 20, 2012. The record is clear Petitioner did not specifically complain of low back pain until May 15, 2012 when she was seen by Dr. Mathew at the Orthopedic Associates of DuPage. At that time Petitioner provided that "...yesterday her supervisor made her do regular job with weight restrictions. She therefore had to lift tubes weighing about 20 pounds up to 60 times as she works 8 hours a day. She also had to walk all around doing inventory..." Petitioner relayed that due to the repetitive motion, her right shoulder and knee pain became severe. Petitioner also reported groin pain and right knee pain that radiated up the lateral thigh into the buttocks. Petitioner described the pain in her thigh as a burning sensation which caused intermittent numbness. Petitioner further complained of some low back pain. It was noted the pain did not radiate below the knee. Petitioner was assessed with 1.) hip – osteoarthritis; 2.) lumbar spondylolisthesis – acquired; 3.) knee pain; 4.) shoulder pain; and 5.) rotator cuff syndrome. It was noted that Petitioner's right thigh and knee pain was probably due to lumbar radiculitis and the hip osteoarthritis also contributed to the pain. Dr. Mathew wrote, " I explained to the patient that she has a significant spondylolisthesis, which can contribute to lumbar spinal stenosis. That could result in lumbar radiculitis or sciatica. This could explain some of the nonspecific burning and numbness that she has in the thigh. In addition, to the lateral thigh pain, she also reports groin pain on the hip range of motion. Hip range of motion also reproduces the knee pain. I therefore believe that her knee pain is multifactorial. There is an element of lumbar radiculitis, hip pathology and local knee pathology all contributing to the pain. She also has an acute exacerbation of pain which is activity based."

Prior to that visit Petitioner saw Dr. Bare, one of her treating physicians, who noted that Petitioner complained of pain down "the entire leg" accompanied by "complaints of burning in the front of and back of the knee" on May 4, 2012. He also noted "occasional numbness down the right leg."

On her next visit with Dr. Mathew on May 21, 2012, Petitioner reported an onset of numbness radiating from the right buttocks down the calf. She reported low back pain, mainly in the buttocks, that radiates down the "whole leg." Petitioner described burning pain associated with tingling. Petitioner reported that although she continued with right shoulder pain, her main concern was her leg pain. Dr. Mathew felt that because Petitioner presented with more neuropathic symptoms in her right leg, a MRI of the lumbar spine was warranted to evaluate for lumbar nerve root impingement. Dr. Mathew took Petitioner off work, continued her in physical therapy, and recommended proceeding with a diagnostic and therapeutic epidural steroid injection after obtaining the MRI.

Petitioner followed up with Dr. Mathew on June 5, 2012. Dr. Mathew explained in her chart note that Petitioner's exam was consistent with lumbar radiculitis probably due to lumbar stenosis caused by the spondylolisthesis seen in the x-rays. Dr. Mathew went on to opine that "[l]umbar stenosis is usually a chronic condition, but the injury probably made an otherwise asymptomatic condition symptomatic."

A MRI of the lumbar spine was performed on June 25, 2012. It revealed 3mm anterolisthesis with bilateral L5 spondyloysis at L5-S1. Mild disc bulging with superior extension of the disc into each neural foramen was noted. Moderate left foraminal stenosis with mild flattening of the exiting left L5 nerve root was documented. Also at L5-S1 was mild to moderate right foraminal stenosis without right L5 nerve root impingement, along with a small right posterolateral disc protrusion without neural impingement. At L4-5, there was a small right foraminal disc protrusion with minimal right foraminal stenosis and no nerve root impingement. At L3-4, there was a small left foraminal disc protrusion without stenosis.

Petitioner returned to see Dr. Mathew on June 29, 2012. Dr. Mathew informed Petitioner that the MRI revealed small, right-sided disc protrusions at L4-5 and L5-S1 along with a chronic listhesis at L5-S1 which could irritate the exiting right L4 and L5 nerve roots. There was no evidence of nerve root impingement that could explain her severe pain. Dr. Mathew noted that the pain was out of proportion and did not correspond to the MRI findings. Dr. Mathew provided that her only recommendation at that time was a diagnostic and therapeutic right L4 and L5 epidural steroid injection. Dr. Mathew also noted that an FCE may be required to evaluate the validity and reliability of Petitioner's symptoms.

To obtain compensation under the Act, a claimant must prove that some phase of her employment was a causative factor in her ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n,* 359 Ill.App.3d 582, 592 (2005). An accidental injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n, 207* Ill.2d 193, 205 (2003).

Dr. Graf served as Respondent's Section 12 examining physician. Dr. Graf wrote that there was "no evidence of any complaints initially following the evaluation for many months" as it relates to Petitioner's lumbar spine. He further noted that he was unable to substantiate her subjective complaints of pain given the lack of objective findings.

Petitioner's treating physician, Dr. Mathew, has opined that the knee pain that has been present since the date of injury is due to multiple pathologies, to include lumbar stenosis, which Dr. Mathew charted was probably made symptomatic as a result of the work injury. Dr. Graf did not comment on Dr. Mathew's opinion that the knee pain was the result of multiple pathologies. He merely noted that complaints of back pain did not occur for "many months".

The Arbitrator finds the opinion of Dr. Mathew to be persuasive. The fact that the knee is the result of multiple pathologies to include issues with Petitioner's lumbar spine is reasonable in light of Petitioner's mechanism of injury and consistent complaints of knee and leg pain since the date of the work accident. The Arbitrator finds that based upon the mechanism of injury as described by Petitioner, the medical records, and the opinions of Dr. Mathew, Petitioner has proven by a preponderance of credible evidence that her condition is related to the work accident that occurred on February 20, 2012.

With respect to (J.) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRITE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds as follows:

Relying on the findings in issue (F.), the Arbitrator finds that all of the medical services provided to Petitioner has been reasonable and necessary. The Arbitrator awards medical bills as follows:

- Dr. Roselia Herrera: $530.00
- DuPage Medical Group: $431.00

These bills are to be paid in accordance with the Illinois Workers' Compensation Act Fee Schedule. The Arbitrator notes that the bills from Provena Mercy Medical, OAD Orthopedics and ATI Physical Therapy were paid by Respondent.

With respect to (K.) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, the Arbitrator finds as follows:

Petitioner is in the midst of a conservative course of treatment with Dr. Mathew. Both Dr. Mathew and Dr. Graf note concern over Petitioner's subjective complaints exceeding the objective findings in this claim. In light of these concerns, Dr. Mathew has recommended additional conservative management for Petitioner's lumbar complaints in the form of a "diagnostic and therapeutic right L4 and L5 epidural steroid injection." Dr. Mathew noted that if this failed to improve Petitioner's symptoms, then a functional capacity evaluation could be done in order to evaluate "the validity and reliability of her symptoms and to assess her functional capabilities." This recommended course of treatment should address any concerns that Petitioner is magnifying her complaints of pain.

The Arbitrator awards prospective medical care as recommended by Dr. Mathew in the form of a diagnostic and therapeutic right L4 and L5 epidural steroid injection to be followed by a return to work with limitations to Petitioner's spine and left shoulder if needed, or a functional capacity evaluation depending on the results of the injection in accordance with Dr. Mathew's recommendations on June 29, 2012.

With respect to (L.) WHAT TEMPORARY BENEFITS ARE IN DISPUTE (TEMPORARY TOTAL DISABILITY BENEFITS), the Arbitrator finds as follows:

A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of her injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n,* 138 Ill.2d 107 (1990). To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Interstate Scaffolding, Inc. v. Illinois workers' Compensation Comm'n,* 236 Ill.2d 132, 148 (2010).

Petitioner is still off work per the recommendations of Dr. Mathew and Dr. Paul. Petitioner is entitled to temporary total disability benefits from May 15, 2012 thru the date of the hearing on January 23, 2013 for a total of 36-1/7 weeks. Respondent is entitled to a credit for TTD already paid in the amount of $8,495.73.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Craig B. Baker,

Petitioner,

14IWCC0163

vs.

NO: 12 WC 02688

Con-Way Freight, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 18, 2013 is hereby affirmed and adopted.

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

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

14IWCC0163

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,000.00. 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: MAR 0 7 2014

DLG/gal
O: 3/6/14
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BAKER, CRAIG B
Employee/Petitioner

Case# **12WC002688**

14IWCC0163

CON-WAY FREIGHT INC
Employer/Respondent

On 6/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0563 WILLIAMSMcCARTHY LLP
JOHN J SHEPHERD
120 W STATE ST SUITE 400
ROCKFORD, IL 61105-0219

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
MARK P RUSIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0163

Craig B. Baker
Employee/Petitioner

Case # 12 WC 2688

v.

Con-Way Freight, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rockford**, on **May 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0163

FINDINGS

On **October 21, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$49,863.32**; the average weekly wage was **$958.91**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

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

Respondent ***has*** paid all appropriate temporary total disability benefits

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$575.35**/week for **62.5** weeks, because the injuries sustained caused the **12.5%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Arbitrator Anthony C. Erbacci

June 10, 2013
Date

JUN 18 2013

14IWCC0163

FACTS:

On October 21, 2011, the Petitioner sustained an undisputed accidental injury arising out of and in the course of his employment with the Respondent as a truck driver. The Petitioner testified that on that date, he was exiting the cab of his truck, using both of his hands to hold himself, when his foot slipped causing him to fall. The Petitioner testified that as he fell, he pulled both of his arms and shoulders, and dangled for a time with his legs hanging. He testified that he immediately had pain in both shoulders, more particularly on the right side, but he continued to work the rest of the day. He testified that his pain increased over night and he reported the incident to his supervisor the following day. The Petitioner then sought medical treatment at Illinois Valley Community Hospital on October 24 2011, which was the Monday following the Friday accident.

An MRI of the Petitoner's right shoulder was performed on November 3, 2011 and was reported to demonstrate the presence of a partial thickness tear of the rotator cuff, anterior subacromial impingement on the rotator cuff, and a glenoid labrum SLAP tear. Conservative treatment was recommended and the Petitioner attended therapy for a few weeks and took medication as well.

The Petitioner then came under the care of Dr. Bryan Bear of Rockford Orthopedic Associates. Dr. Bear initially provided conservative treatment and he subsequently released the Petitioner to return to full duty work in December 2011. The Petitioner testified that he did return to work but that he continued to have right shoulder pain, especially with overhead movement of his arm, On April 26, 2012 the Petitioner returned to see Dr. Bear complaining of increased right shoulder pain. At that point, Dr. Bear felt that the Petitioner had failed conservative treatment and he recommended surgery. On May 30, 2012 the Petitioner underwent the prescribed surgery which consisted of a gleniod humeral joint debridement, arthroscopic debridement of a partial thickness subscapular superior edge tear, arthroscopic subacromial decompression bursectomy, and an arthroscopic assisted medial biceps tendon subpectoral tenodesis.

Following the surgery, the Petitioner underwent a course of physical therapy and followed up care with Dr. Baer. The Petitioner was given a light duty release on June 26, 2012 and was returned to his regular work on September 19, 2012. The Petitioner followed up with Dr. Bear on October 2, 2012 and Dr. Bear's examination of the right shoulder was reported to show good motion and strength. The doctor indicated that the Petitioner was doing well and essentially discharged him from care.

The Petitioner did return to see Dr. Bear for visits in January and February 2013 for a complaint of right hand numbness. However, it does not appear Dr. Bear believed this condition or the need for evaluation was related to the Petitioner's right shoulder injury and surgery. Dr. Bear suggested an EMG to evaluate the Petitioner for carpal tunnel or cubital tunnel syndrome, and an evaluation of the Petitioner's cervical spine was also suggested.

On November 21, 2012 the Petitioner was evaluated by Dr. Bear's associate, Dr.

Borchardt. The "History of Present Illness" noted in Dr. Borchardt's consultation notes indicates a left index finger injury in early April of 2009. There is no mention of the Petitioner's October 2011 right shoulder injury. Dr. Borchardt did note that the Petitioner underwent right shoulder surgery, although he indicated that it occurred on May 12, 2012. Dr. Borchardt reported that his examination of the Petitioner demonstrated grip strength of 73 pounds on the righ as compared to 90 pounds on the left and biceps circumference on the right of 17 inches and the left of 18 inches. Dr. Bear noted that the Petitioner's right shoulder showed no swelling, discoloration or tenderness and good range of motion, but that there were trace amounts of pain in the biceps and impingement area. Dr. Borchardt analyzed the Petitioner's shoulder condition pursuant to the AMA Guidelines Sixth Edition and concluded that the Petitioner had sustained "7% Impairment of the Upper Extremity. Whole Person Impairment of 4%." Dr. Borchardt did not provide any causation opinion. to Dr. Borchardt's report. No other evidence of an impairment rating was offered by either party.

The Petitioner testified that although he has returned to regular work, he avoids any lifting above shoulder level with his right arm and he now uses his left arm more than he did prior to the injury. The Petitioner testified that he currently continues to experience pain in his right shoulder region at the end of the work day, as well as loss of grip strength and loss of range of motion.

The Petitioner further testified that he is currently unable to perform certain activities that he performed prior to the injury. He testified that he attempted to bowl once but there was too much pain involving with the lifting of the bowling ball and he dropped the ball in the gutter. He testified that he also attempted to play golf but could not swing a golf club because of limitation of motion and pain in his right shoulder and arm. The Petitioner further testified that his day to day living activities are limited due to loss of strength in the right shoulder and arm, as well as loss of range of motion.

The Petitioner also testified that he had not sustained any other accident or injury involving his right shoulder prior to October 21, 2011 nor had he sustained any other accident or injury involving his right shoulder subsequent to October 21, 2011.

CONCLUSIONS

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner sustained an undisputed accidental injury to his right shoulder on October 21, 2011 when he slipped while exiting the cab of his truck, causing him to fall while holding on to the two hand rails with his upper extremities. This caused a pulling sensation in both upper extremities and the Petitioner noted the onset of pain thereafter. The following morning, he reported the incident. The Petitioner then sought medical attention for his

shoulder pain and was referred for an MRI that was performed less than two weeks after the date of the accident. The MRI had findings consistent with a rotator cuff tear, as well as a Slap II tear of the glenoid labrum, biceps tendinitis, and subacromial impingement syndrome. Subsequent treatment was rendered by Dr. Bear which included a surgical procedure to alleviate the conditions that he noted in the MRI and his physical findings.

The Arbitrator notes that the Petitioner was apparently able to perform all of the duties of his employment prior to his undisputed accidental injury and that he sought medical treatment for his shoulder almost immediately after the accident occurred and underwent a continuing course of medical treatment from that time through his release to return to work on September 19, 2012. There was no evidence presented which rebutted, contradicted, or conflicted with the testimony of the Petitioner, which the Arbitrator finds to be credible. While the Respondent disputed the issue of causal relation, the Respondent offered no evidence which would suggest the lack of a causal relationship between the Petitioner's injury of October 21, 2011 and his condition of ill-being.

The Arbitrator finds that the credible testimony of the Petitioner and the medical records in evidence support the conclusion that the petitioner's right shoulder condition and need for medical treatment and surgery is causally related to the October 21, 2011 work accident.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the injury of October 21, 2011.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

On October 21, 2011, the Petitioner sustained an undisputed accidental injury to his right shoulder which required medical care including surgical intervention. An MRI of the Petitioner's shoulder revealed the presence of partial thickness tear of the rotator cuff, anterior subacromial impingement on the rotator cuff, and a glenoid labrum SLAP tear. Conservative treatment was unsuccessful and surgery consisting of gleniod humeral joint debridement, arthroscopic debridement of a partial thickness subscapular superior edge tear, arthroscopic subacromial decompression bursectomy, and an arthroscopic assisted medial biceps tendon subpectoral tenodesis was carried out on May 30, 2012. The Petitioner underwent a course of postoperative physical therapy and was ultimately released to return to his regular work.

As this claim involves an accident occurring after September 1, 2011, the Act requires the determination of permanent partial disability to be based upon consideration of five factors: (1) the reported level of impairment pursuant to AMA Guidelines; (2) the occupation of the injured employee; (3) the age of the employee at the time of the injury; (4) the employee's

future earning capacity; and (5) evidence of disability corroborated by the treating medical records.

Dr. Borchardt analyzed the Petitioner's shoulder condition pursuant to the AMA Guidelines Sixth Edition and concluded that the Petitioner had sustained "7% Impairment of the Upper Extremity. Whole Person Impairment of 4%." The Petitioner is employed as a truck driver and he has been released to return to his normal job without restrictions. The Petitioner testified that although he has returned to his normal work, he has pain with any lifting above shoulder level with his right arm and he now uses his left arm more than he did prior to the injury. The Petitioner testified that he currently continues to experience pain in his right shoulder region at the end of the work day, as well as loss of grip strength and loss of range of motion. The Petitioner was 45 years old at the time of trial and there was no evidence that the Petitioner's future earnings have been reduced as a result of this accident.

The Petitioner testified that he has pain in his right shoulder with any lifting above shoulder level with his right arm and he now has to use his left arm more than he did prior to the injury. The Petitioner testified that he currently continues to experience pain in his right shoulder region at the end of the work day, as well as loss of grip strength and loss of range of motion. The Petitioner further testified that he is currently unable to perform certain activities that he performed prior to the injury, such as bowling and golfing because of limitation of motion and pain in his right shoulder and arm. The Petitioner further testified that his day to day living activities are limited due to loss of strength in the right shoulder and arm, as well as loss of range of motion.

The Arbitrator finds the testimony of the Petitioner to be credible, persuasive, and corroborated by the treating medical records introduced into the record. The Arbitrator further finds the report of Dr. Borchart to be of questionable reliability. In so finding, the Arbitrator notes that Dr. Borchardt's note contains no mention of the Petitioner's undisputed shoulder injury, an inaccurate accident date, and an inaccurate history of injury.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, including the credible and corroborated testimony of the Petitioner and the treating medical records in evidence, the Arbitrator finds that, as a result of the Petitioner's accidental injury of October 21, 2011, the Petitioner sustained a 12.5% disability to his whole person, as provided in Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stanley Frank,

Petitioner,

14IWCC0164

vs.

NO: 11 WC 14143

Nestle, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 5, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $53,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 7 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/27/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FRANK, STANLEY
Employee/Petitioner

Case# **11WC014143**

14IWCC0164

NESTLE INC
Employer/Respondent

On 7/5/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2934 JOHN V BOSHARDY & ASSOCIATES PC
1610 S SIXTH ST
SPRINGFIELD, IL 62703

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
JASON H PAYNE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0164

STANLEY FRANK
Employee/Petitioner

v.

NESTLE, INC.
Employer/Respondent

Case # 11 WC 14143

Consolidated case: 10 WC 32969

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 10, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0164

FINDINGS

On **March 16, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$39,923.52**; the average weekly wage was **$767.76** .

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

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

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

Respondent shall be given a credit for $0 for TTD, $0 for TPD, $0 for maintenance, and **$1,404.00** for other benefits, for a total credit of **$1,404.00.**

Respondent is entitled to all applicable credit under Section 8(j) of the Act. (See Joint Exhibit 1, Stipulation of the Parties).

ORDER

Respondent shall pay for all reasonable and related medical services, as set forth in Petitioner's Exhibit 6 (and as more fully discussed in the Memorandum of Decision of Arbitrator), and as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group health provider pursuant to Section 8(j) of the Act, and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the medical fee schedule, Section 8.2 of the Act, and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

Respondent shall pay Petitioner temporary total disability benefits of $511.84/week for 6 3/7 weeks, commencing October 15, 2011 through November 28, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $460.66/week for 112.5 weeks, because the injuries sustained caused the 22.5% loss of the person as a whole as provided in Section 8(d)2 of the Act.

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

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

Signature of arbitrator

07/01/2013
Date

JUL 5 - 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

14IWCC0284

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

STANLEY FRANK
Employee/Petitioner

v.

Case # 11 WC 14143
Consolidated Case: 10 WC 32969

NESTLE, INC.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Stanley Frank, has been employed by Respondent, Nestle, Inc., since November 1979. In 1977, two years prior to being hired by Respondent, Petitioner underwent a lumbar spine laminectomy. Petitioner admitted to having episodes of back pain before March 16, 2011. Petitioner was prescribed Tramadol after it was recommended by Respondent's company physician in 1999, but had been receiving these medications from his family doctor. In 2008, Petitioner underwent a right hip replacement. Respondent submitted medical records indicating that in the thirty years before the work accident at issue, Petitioner sought treatment for occasional back pain and right hip pain. (Respondent's Exhibit (RX) 2). Petitioner was never referred to a spinal surgeon for lower back complaints arising out of any of these visits until after an accident of April 12, 2010, which is addressed in companion case number 10 WC 32969. (See RX 2). Petitioner did not report that accident initially as he suspected the symptoms were related to his right hip. That claim was denied in companion case number 10 WC 32969, which was tried in a consolidated hearing with the instant claim.

On April 12, 2010, Petitioner testified that he dismounted a forklift on the left side when he felt a sharp pain in his back. The forklift is depicted in Petitioner's Exhibit 11. There is a two foot drop between the floor of the fork truck, where Petitioner's feet sit flat while seated and driving the forklift, and the floor. There is a step approximately a foot off the ground between the floor of the forklift and the concrete plant floor.

Petitioner sought treatment from his primary care physician, Dr. Allen Gerberding, at a regularly scheduled appointment for his blood pressure medication on May 10, 2010, and mentioned he had right leg and thigh pain for the past few weeks. (PX 3). Petitioner testified he did not think he reported his claimed April 2010 work injury to Dr. Gerberding, and the doctor's records further confirm this. (See PX 3). X-rays of the lumbar spine were ordered and performed. (PX 3; PX 4). Dr. Gerberding ordered a MRI of Petitioner's lower back, which was scheduled for May 19, 2010. (PX 4). Dr. Gerberding referred Petitioner to Dr. Barry Werries, the orthopedic surgeon who replaced his right hip in 2008. (PX 3).

The MRI report of May 19, 2010 indicated that Petitioner had complaints of right leg pain and numbness of the right foot. The MRI showed multi-level degenerative disc disease with L4-5 and L5-S1 disc protrusion. (PX 4).

Dr. Werries examined Petitioner on June 9, 2010, reviewed the MRI, and determined Petitioner's symptoms were emanating from his lumbar spine rather than the right hip. Petitioner was referred to Dr. Timothy Van Fleet. (PX 5).

Dr. Van Fleet testified that Petitioner had been experiencing pain for several years and that he thought it might have started around the time of a right hip replacement a couple of years before. (PX 12, p. 8). Dr. Van Fleet noted that Petitioner reported a recent event in which he stepped off a high platform on April 12, 2010 with a twelve inch drop. (PX 12, pp. 8-9). While Dr. Van Fleet's report of June 11, 2010 does not reference an accident at work, Petitioner's intake form titled "Spine Sheet" drafted that day indicates that Petitioner "stepped off a high platform, about a 12" drop." (See PX 5). Further, the records from that day indicate that when asked about the current problem, specifically "when and where did injury occur?," the report states, "April 12 2010 back strain." (See PX 5). Dr. Van Fleet felt the MRI showed a small staple on the left side at the L4-5 level, consistent with his previous surgical procedure, and "high-grade" central stenosis at both L3-4 and L4-5. Dr. Van Fleet noted Petitioner continued to work. (PX 5). Petitioner testified that the back pain he experienced after stepping off of the fork truck was worse than the pain he had been experiencing before, and that it went down his leg. Petitioner informed Dr. Van Fleet of his prior surgeries and medical history. Dr. Van Fleet diagnosed Petitioner with spinal stenosis and recommended L3-4 and L4-5 hemilaminotomies. (PX 5).

Petitioner was referred to his doctor for cardiac clearance for surgery. (PX 5). Dr. Van Fleet explained that the surgical procedure was cancelled due to a cardiac clearance necessity. (PX 12, p. 11). Petitioner stated that he received treatment for his cardiac condition and did not have the surgery recommended by Dr. Van Fleet in 2011.

Petitioner testified that after this initial consultation he continued to work without restrictions. Further, the evidence indicates Petitioner did not seek further orthopedic care for his lumbar spine after his appointment with Dr. Van Fleet on June 11, 2010 until over a year later.

Petitioner testified that following the June 11, 2010 appointment with Dr. Van Fleet, he notified James McManus, his supervisor (who Petitioner believed was no longer employed with Respondent as of the time of trial), of his claimed accident. Petitioner testified that he also had a conversation with a production manager for Respondent, John Keech, on May 4, 2010. Petitioner testified that Mr. Keech asked him why he was limping, and that Petitioner responded that he had hurt his back or hip when dismounting a forklift. Mr. Keech testified that said conversation occurred in May 2010, but that it occurred on May 18, 2010, as Petitioner told Mr. Keech that he was having a MRI the following day (May 19, 2010). As stated, *supra*, Petitioner did undergo the MRI on May 19, 2010. (PX 4). The MRI would not have been ordered until at least May 10, 2010. Mr. Keech did not recall Petitioner relating any problem to an employment-related issue. An accident report was made on June 9, 2010, concerning the alleged April 12, 2010 accident. (See PX 11; RX 4).

On July 15, 2010, Petitioner returned to Dr. Gerberding, where it was noted that due to a cardiac issue Petitioner did not have the back surgery, and had been walking 4 to 5 miles a day and felt 90% improvement. (PX 4). Petitioner testified that he was happy that he did not have the surgery and did in fact feel improvement during this time period due to home exercises and daily walking. Petitioner was seen by Dr. Gerberding again on September 9, 2010, and these records are void of any reference to continued low back or leg pain. (PX 3).

The parties stipulated that on March 16, 2011, Petitioner sustained an accident that arose out of and in the course of his employment with Respondent when he again dismounted the same fork truck and felt the recurrence of the pain he experienced after the claimed accident of April 12, 2010. (Arbitrator's Exhibit (AX) 2; PX 7). The parties further stipulated that Petitioner notified Respondent of the work accident of March 16, 2011, within the time limits set forth in the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"). (AX 2; PX 7).

Petitioner returned to Dr. Gerberding on May 5, 2011, noting that he had to increase his Tramadol to 4 to 5 per day due to back pain. (PX 3). Petitioner returned to Dr. Van Fleet on September 21, 2011. Petitioner filled out a health history questionnaire on that date, indicating the reason for his visit was a "back problem" and that his injury was work-related. On that date Petitioner complained of bilateral lower extremity pain. Dr. Van Fleet noted that the one symptom that had persisted from his 1977 accident was left leg numbness. Dr. Van Fleet

recommended bilateral laminotomies at L3-4, L4-5 and L5-S1. (Dr. Van Fleet's treatment plan was changed from that of June 11, 2010 to include an L5-S1 laminotomy along with laminotomies at L3-4 and L4-5). (PX 5).

Petitioner requested that Respondent authorize the procedure under its workers' compensation insurance and Respondent refused. (See PX 13). Petitioner proceeded with the surgery using his own health insurance as permitted under Section 8(j) of the Act. (PX 13).

Dr. Van Fleet performed bilateral L3-4, L4-5, and L5-S1 hemilaminotomies, a partial medial facectomy, and foraminotomies on October 17, 2011. (PX 5; PX 12, p. 12). Dr. Van Fleet removed Petitioner from work after that procedure. (PX 12, p. 13). The doctor maintained Petitioner's work restrictions on October 28, 2011, and then released him to return to work without restrictions on November 29, 2011. (PX 5). Dr. Van Fleet released Petitioner from his care on January 11, 2012. (PX 5; PX 12, p. 13). On that date, Dr. Van Fleet advised Petitioner that he could return to the doctor if any problems persisted. Petitioner has not returned to Dr. Van Fleet since his last appointment in January 2012. (PX 12, pp. 13-14). Petitioner returned to his previous job as a forklift driver with Respondent after his work release from Dr. Van Fleet.

Dr. Van Fleet's deposition testimony was taken on July 18, 2012. (PX 12). Dr. Van Fleet explained that stenosis is diminished space available for the nerve roots and it can occur for a number of different reasons. Dr. Van Fleet further explained that spinal stenosis is acquired over a number years and can remain asymptomatic. (PX 12, p. 10). Dr. Van Fleet agreed there were no acute findings depicted on the MRIs and x-rays, and that there was no pathologic change after the accidents in April 2010 and March 2011. (PX 12, p. 19). Dr. Van Fleet stated that if after recommending surgery in June 2010, Petitioner told Dr. Gerberding on July 15, 2010 that he was 90% improved, it would be fair to say that any aggravation would have resolved by July 15, 2010. (PX 12, pp. 19-20).

Dr. Van Fleet stated that if Petitioner was operating a forklift where he was seated about three feet off of the ground and his feet were a couple of feet off the ground, and in the process of getting off, he jumped or stepped down about a foot and landed awkwardly on his left leg, that this could have resulted in an aggravation of the spinal stenosis and resulted in the radiculopathy that was identified. (PX 12, p. 14). Dr. Van Fleet was of the opinion that after Petitioner performed the same maneuver on March 16, 2011, he had a recurrence of the same lower back and leg pain, and this event could have also aggravated the stenosis condition. (PX 12, pp. 14-15). Dr. Van Fleet opined that the accident of March 16, 2011 could have aggravated the pre-existing stenosis at L3 through L5 and resulted in a recurrence of radiculopathy and contributed to the need for Petitioner's surgery. (PX 12, p. 22). Dr. Van Fleet agreed that there was an element of pre-existing and degenerative problems that contributed to Petitioner's need for surgery. (PX 12, p. 15). However, Dr. Van Fleet did feel that the work accidents contributed to the need for his surgery. (PX 12, pp. 16, 22).

Dr. Edward Goldberg provided medical records reviews at Respondent's request on March 16, 2011 and March 28, 2012. Dr. Goldberg testified on behalf of Respondent on March 18, 2013. Dr. Goldberg testified that Petitioner had a prior history of a discectomy at L4-5 in 1997, though he did not review that operative report. (RX 1, p. 10). Dr. Goldberg noted Petitioner had physical therapy at Passavant for low back pain on November 9, 1992. (RX 1, pp. 10-11). Dr. Goldberg reviewed a CT scan from September 2, 2004, noting moderate to severe spinal stenosis at L3-4 and a postoperative left L4 laminectomy. (RX 1, p. 13). Dr. Goldberg admitted that the CT scan performed around September 2, 2004 was ordered by Dr. Gerberding. (RX 1, p. 44). Dr. Goldberg testified that on July 17, 2003, Dr. Gerberding noted a fall out of a chair the same month, which would be fourteen months prior to the CT scan. (RX 1, p. 44). Dr. Goldberg admitted that Dr. Gerberding's notes of May 3, 2007 contained no lumbar complaints. (RX 1, pp. 44-45).

Dr. Goldberg explained that an L4 laminectomy would be performed to cure nerve compression, whether due to stenosis or disc herniation. (RX 1, pp. 13-14). Dr. Goldberg also noted that Petitioner had hip arthritis based upon the CT scan performed on September 2, 2004, and that Petitioner underwent a right total hip replacement on March 19, 2008. (RX 1, pp. 14-15, 38).

Dr. Goldberg noted that prior to the hip replacement, on February 4, 2008, Dr. Werries noted complaints of pain traveling down the right lower extremity with numbness. (RX 1, p. 15). Again, Dr. Goldberg agreed that Petitioner had a total hip replacement on March 19, 2008. (RX 1, p. 38). On cross-examination, Dr. Goldberg admitted that as of May 1, 2008, Dr. Werries noted Petitioner was having no leg or groin pain, and that nothing relating to back pain was reported. (RX 1, p. 38). Dr. Goldberg admitted that Dr. Werries had noted back pain when present. (RX 1, p. 39). Dr. Goldberg also admitted to reviewing records that showed that Dr. Gerberding's records from August 1, 2008 recorded that Petitioner reported no problems. (RX 1, p. 39).

Dr. Goldberg noted that Petitioner complained of right leg pain in the back of the thigh on May 10, 2010. (RX 1, p. 16). Dr. Goldberg agreed that when Petitioner returned to Dr. Gerberding on May 10, 2010, complaining of right leg pain, that there was some concern that the pain may have been emanating from the right total hip replacement, but that Dr. Werries had determined that the pain was not emanating from the hip but from the lower back or lumbar spine. (RX 1, pp. 39-40). Dr. Goldberg agreed that a person with pathology in the lumbar spine may have symptomology that is referred out of the back into the hip, buttocks, and leg, and that Petitioner had that symptomology. (RX 1, pp. 40-41).

Dr. Goldberg reviewed lumbar spine x-rays dated May 10, 2010, after the accident in case number 10 WC 32969, which noted post-operative change with the L4 laminectomy defect, disc space narrowing at L3-4, L4-5, and L5-S1, and no acute pathological change. (RX 1, p. 16). Dr. Goldberg also reviewed a lumbar spine MRI dated May 19, 2010, that showed significant spinal stenosis at L3-4 and L4-5, without a herniation. (RX 1, p. 17). Dr. Goldberg also noted Petitioner was born with a small canal called congenital spinal stenosis, L2-3 through L4-5, and postoperative change on the left at L4-5. (RX 1, p. 17).

Dr. Goldberg reviewed Dr. Werries' June 9, 2010 office note which recorded increasing hip pain and back pain. (RX 1, pp. 17-18). Dr. Goldberg stated that hip complaints and low back complaints overlap, and it is not uncommon for complaints of hip pain to be emanating from the lumbar spine, and vice-versa. (RX 1, p. 18).

Dr. Goldberg reviewed a note dated July 15, 2010 from Dr. Gerberding which stated Petitioner had been walking 4 to 5 miles a day and reported 90% improvement, and was pleased that he did not have surgery. (RX 1, p. 21). Dr. Goldberg admitted that the records showed Petitioner's symptoms appeared to be significantly improved as of July 15, 2010. (RX 1, p. 42).

Dr. Goldberg agreed that spinal stenosis is a condition where symptoms may wax and wane, and he saw documentation of issues with spinal stenosis for Petitioner. (RX 1, pp. 35-36).

Dr. Goldberg agreed that spinal stenosis, whether acquired or congenital, can remain asymptomatic for long periods of time or one's lifetime. (RX 1, p. 41). Dr. Goldberg did not feel that the surgeries performed by Dr. Van Fleet were related to Petitioner's claimed work injury of March 16, 2011. (RX 1, p. 34). Dr. Goldberg based his opinion on not seeing any accident report regarding March 16, 2011. (RX 1, p. 34). Dr. Goldberg did feel that the surgery performed by Dr. Van Fleet was necessary for the underlying spinal stenosis. (RX 1, p. 35).

Dr. Goldberg agreed that after March 16, 2011, Petitioner's symptoms were not limited to just the right leg, as after the April 12, 2010 accident, but involved both legs. (RX 1, p. 43). Dr. Goldberg agreed that the MRI showed impingement bilaterally, and that Dr. Van Fleet operated on Petitioner to address the canal stenosis. (RX 1, pp. 43-44). Dr. Goldberg admitted that Dr. Van Fleet did not operate on a herniated disc. (RX 1, p. 44).

Petitioner testified that his back currently hurts when he traverses over a dock plate at work. Further, if he sits or lies down too long (approximately 5-10 minutes), his back will hurt. He still takes Tramadol for the pain. He testified that his right leg pain is essentially resolved, and that the pain he currently experiences is basically focused in the low back. Petitioner is still working for Respondent.

Petitioner testified that from his back surgery in 1977 until following his alleged April 2010 work accident, he did not see any surgeon for his low back or receive any treatment to his low back, with the exception of x-rays, CT scans and medication prescriptions.

Petitioner submitted medical bills that he claims he incurred as a result of the work accident as Petitioner's Exhibit 6. The parties offered Joint Exhibit 1, which is a stipulation concerning Respondent's credit under Section 8(j) of the Act and further agreement to hold Petitioner harmless from any claim of reimbursement from Respondent's group medical plan for bills under which credit for payment was taken.

CONCLUSIONS OF LAW

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

It is well settled law that an employer takes its employees as it finds them, and a pre-existing condition does not bar compensation for an injury if the employment was also a causative factor of the condition of ill-being. *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779, 787, 601 N.E.2d 1339 (2d Dist. 1992). Further, a work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (2003).

The Arbitrator notes that both medical experts agreed that Petitioner had severe, or advanced, lumbar stenosis which predated the work accident. The Arbitrator also notes that this condition did not cause Petitioner to miss work on any sustained basis after his prior back surgery in 1977. The Arbitrator notes that the accident of April 12, 2010 caused at most a temporary aggravation of this pre-existing condition and Petitioner was not held off of work for more than one week after April 12, 2010, from May 10, 2010 through May 17, 2010. (PX 3). The medical records note a lack of ongoing lower back and leg complaints after the symptoms resolved as of July 2010. (PX 3).

Both medical experts agreed that spinal stenosis can remain asymptomatic. The Arbitrator notes however, that Respondent presented no medical evidence or testimony that Petitioner's spinal stenosis had deteriorated to such a point that any activity of daily living would have resulted in the need for the bilateral hemilaminotomies that Dr. Van Fleet ultimately performed.

Petitioner sustained an aggravation to his low back, and promptly reported this accident on March 16, 2011. Respondent stipulated that Petitioner sustained the accident of March 16, 2011. The medical records establish that it was only after the accident of March 16, 2011 that Petitioner's symptoms returned and progressed to include bilateral leg pain. The medical records further establish that bilateral leg pain did not exist as a complaint before either the April 12, 2010, or March 16, 2011 accidents.

The Arbitrator notes Dr. Van Fleet's credible testimony that Petitioner's lumbar spinal stenosis was aggravated by the work accident of March 16, 2011, and his lumbar spine surgery was brought about by a combination of his pre-existing, acquired spinal stenosis, and the accident of March 16, 2011. The Arbitrator finds this opinion is credible, supported by the medical records, and further finds Petitioner's lumbar spinal stenosis and need for the three level bilateral hemilaminotomy surgeries to be causally related to the accident of March 16, 2011.

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

Petitioner submitted medical bills as Petitioner's Exhibit 6. The Arbitrator awards the causally related, reasonable medical expenses incurred from the date of accident as follows:

Dr. Allen Gerberding, 5/5/11-10/10/11	$ 334.00
Passavant Area Hospital, 9/26/11	$ 3,491.69
Passavant Area Hospital, 10/11/11	$ 623.81
Clinical Radiologists, 9/26/11	$ 545.50
Orthopedic Center of Illinois, 6/11/10-10/17/11	$18,602.00

Clinical Pathologists of Central IL, 10/11/11	$ 44.50
St. John's Hospital, 10/17/11	$12,778.92
Sangamon Associated Anesthesiologists, 10/17/11	$ 1,760.00
Total:	**$38,180.42**

The parties submitted a joint stipulation entered into evidence as Joint Exhibit 1. The parties stipulate that if there is an award for medical bills in this case, that Respondent shall be entitled to a credit pursuant to Section 8(j) of the Act for the medical bills paid by Respondent's group medical plan. Respondent's liability for the medical bills is limited to the amounts set forth in the medical fee schedule, Section 8.2 of the Act. After re-pricing the bills under the medical fee schedule, and after taking said credit under Section 8(j) of the Act, Respondent shall pay the remainder of the medical bills awarded, if any, to Petitioner. Petitioner agrees to cooperate with Respondent in obtaining properly coded medical bills and in obtaining any other information necessary to properly adjudicate the bills. By taking a Section 8(j) credit, Respondent agrees to hold Petitioner safe and harmless from any claim for reimbursement from Respondent's group medical plan for the payment of reasonable, necessary, and related medical expenses for which Section 8(j) credit was taken.

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner was temporarily and totally disabled from October 15, 2011 through November 28, 2011, a period of 6 3/7 weeks, as a result of the low back surgery. Petitioner received non-occupational disability benefits of $1,404.00 during this time period for which Respondent is entitled to credit.

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

As a result of the work accident, Petitioner underwent surgery consisting of bilateral L3-4, L4-5, and L5-S1 hemilaminotomies, a partial medial facectomy and foraminotomies on October 17, 2011. Petitioner returned to work for Respondent without restrictions, and has not returned to see his physician, Dr. Van Fleet, since the doctor's release of Petitioner in January 2012. Petitioner notes that his back will hurt after he drives his fork truck over a dock plate. He continues to take Tramadol for his pain. If he sits or lies down for too long, he will experience low back pain. Petitioner's right leg pain is essentially resolved, and the pain he currently experiences is basically focused in the low back. As a result of the foregoing, the Arbitrator finds that the injury sustained resulted in the 22.5% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Mark Brock,

14IWCC0165

Petitioner,

vs. NO: 11 WC 32721

Southern Illinois University,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 5, 2013 is hereby affirmed and adopted.

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

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: MAR 0 7 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/27/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BROCK, STEPHEN MARK
Employee/Petitioner

Case# **11WC032721**

14IWCC0165

SOUTHERN ILLINOIS UNIVERSITY
Employer/Respondent

On 8/5/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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:

0355 WINTERS BREWSTER CROSBY ET AL
LINDA J BRAME
111 W MAIN ST
MARION, IL 62959

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
KYLEE JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

AUG 5 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC1165

Stephen Mark Brock
Employee/Petitioner

v.

Southern Illinois University
Employer/Respondent

Case # **11** WC **032721**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **June 6, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEPHEN MARK BROCK,	)	14IWCC0165
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 32721
	)	
SOUTHERN ILLINOIS UNIVERSITY,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

Procedurally, this matter was consolidated with 12 WC 02487 on April17, 2013. Arb.Ex.III-IV. On June 6, 2013, case number 12 WC 02487 was voluntarily dismissed by the claimant. Arb.Ex.V. This matter thereafter proceeded to hearing that day.

STATEMENT OF FACTS

The claimant is a right hand dominant man who works as an IT Technical Associate at Southern Illinois University. He has worked there as a computer programmer and informational technical specialist since November 2008. He testified that he worked approximately fifty hours per week for approximately ten months after he was first hired, and then a standard 37.5 hour week thereafter. The petitioner described his job as involving a substantial amount of computer usage, the precise percentage of which was somewhat disputed. He asserts bilateral carpal tunnel syndrome incurred through repetitive trauma with an effective accident date of August 16, 2011. The petitioner testified that he began noticing tingling sensations in January 2011 which had become significant in July 2011.

The petitioner's treating medical records were introduced as PX1. The first record present is from August 16, 2011, when he underwent EMG testing at the recommendation of his primary care physician. That study demonstrated moderate bilateral carpal tunnel syndrome with no evidence of ulnar neuropathy. PX1, pp.29-32.

The petitioner then presented to Dr. Kosit Prieb, a hand surgeon with Vascular & Hand Surgery, on August 25, 2011. He reported a history of symptoms of approximately seven months. Ultrasound imaging of the wrists was performed that day demonstrating dilation of the nerves consistent with carpal tunnel syndrome. PX1 p.24. Dr. Prieb assessed bilateral carpal tunnel syndrome and injected each wrist. He also provided night splints. PX1, pp.14, 21.

On September 22, 2011, he returned to Dr. Prieb and reported one day's relief from the injection. He also reported numbness in the little and ring fingers. Dr. Prieb recommended EMG studies to evaluate ulnar nerve involvement. PX1, pp.13, 20.

Repeat nerve conduction studies were performed on September 29, 2011. While the results do not appear to have been compared to the August EMG, the findings were reported as demonstrating bilateral carpal tunnel syndrome with no evidence for ulnar neuropathy (cubital tunnel syndrome). PX1, pp.25-28.

The petitioner followed up with Dr. Prieb on October 6, 2011. Dr. Prieb reviewed the repeat EMG, provided elbow splints and recommended bilateral carpal tunnel release surgery. PX1, pp.12, 19. He renewed those recommendations on November 3, 2011. PX1 pp.11, 18.

On November 29, 2011, Dr. Prieb performed surgical decompression of the petitioner's right carpal tunnel. No complications are noted in the surgical report. PX1 p.23. The petitioner was prescribed off work until December 15 pending a postoperative follow-up. PX1 p.37.

On December 12, 2011, the petitioner reported he had no numbness or pain in the right hand since the surgery. Dr. Prieb released the petitioner to full duty work at that time and noted the petitioner would schedule the left hand surgery. PX1, pp. 10, 17, 35.

The left wrist surgery took place on January 10, 2012, without complications. PX1 p.22. On January 23, 2012, the petitioner reported no further numbness in his hands. Dr. Prieb noted good results, released him to work and instructed him to follow up in three months for an evaluation. PX1 pp 9, 16, 33.

On April 23, 2012, the petitioner saw Dr. Prieb. He noted some persistent pain in his hands but Dr. Prieb assessed him as healing well with good range of motion in the fingers. The petitioner was discharged with instructions to return as needed. PX1 p.15.

The respondent commissioned a Section 12 evaluation with Dr. Anthony Sudekum on November 5, 2012. See generally RX7. Following evaluation of the petitioner and review of the petitioner's job duties, Dr. Sudekum noted the petitioner's multiple non-work-related risk factors for carpal tunnel syndrome included age, obesity, hypertension, smoking, and hypercholesterolemia. Dr. Sudekum concluded that the petitioner's work activities did not serve as the primary cause of the condition, but that if the petitioner had in fact been engaging in effectively constant computer keyboard data entry at the rate of 95% of his day, the job duties may have aggravated the condition.

The respondent introduced job descriptions (RX4, RX5) suggesting the petitioner's job involved fine manipulation between 34-66% of the day and that his duties included software analysis and modification approximately 60% of the time. The petitioner admitted his keyboard usage was less than 95% of the time.

OPINION AND ORDER 14IWCC0165

Accident and Causal Relationship

The petitioner is relying on a repetitive trauma theory. In such cases, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987). The causation of carpal tunnel syndrome via repetitive trauma has been deemed to fall in the area of requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill.2d 438 (1982). This has not been done.

First, the treating physician provided no opinion of any sort relative to accident or causal relationship. Nothing in the medical records indicates that Dr. Prieb was ever informed of the claimant's occupational duties and he provides no indication of what, if anything, gave rise to the condition. The only information he noted was of the petitioner's comorbidities, including the smoking history and blood pressure information.

The Section 12 examiner noted that the work activities "may have" served as an aggravating factor, if the petitioner was in fact engaging in keyboarding activities 95% of the time. The Commission has noted "'[c]ould be a possible aggravating factor' is not a definitive medical opinion establishing causation." *Jeffrey Miller v. Menard Correctional Center*, 12 IWCC 1182. Moreover, the petitioner acknowledged that 95% is an excessive percentage. This is further corroborated by the job analysis suggesting a far lower percentage with a less repetitive schedule.

The respondent did pay benefits and had, at one point, offered a settlement to the claimant. However, the furnishing of medical and/or disability benefits is specifically noted under Section 8 of the Act to not be evidence of liability, and offers of settlement are not evidence of liability or case valuation under Illinois Rule of Evidence 408. The only medical opinion submitted was decidedly tentative and based on an exaggerated and inaccurate description of the petitioner's employment duties. This is not sufficient to prove a causal link between the petitioner's employment and his claimed injuries, as the right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill.2d 24 (1977).

Notice, Medical Services, Temporary Total Disability and Nature and Extent

These issues are moot given the above findings.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melissa A. Wagner,

Petitioner,

vs. NO: 13 WC 01726

Community Care Systems, Inc.,

14IWCC0166

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 9, 2013 is hereby affirmed and adopted.

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 7 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/27/14
45

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

14IWCC0166

WAGNER, MELISSA A
Employee/Petitioner

Case# **13WC001726**

COMMUNITY CARE SYSTEMS INC
Employer/Respondent

On 9/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0834 KANOSKI BRESNEY
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

0332 LIVINGSTONE MUELLER ET AL
KEN BIMA
620 E EDWARDS PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0166

Melissa A. Wagner
Employee/Petitioner

v.

Community Care Systems,Inc.
Employer/Respondent

Case # 13 WC 01726

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **July 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 14IWCC0166

On the date of accident, **11/27/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$16,060.20**; the average weekly wage was **$308.55**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **1** dependent child.

ORDER

Petitioner failed to prove she sustained an accident on November 27, 2012 that arose out of and in the course of her employment with Respondent or that her current condition of ill-being is causally connected to her alleged accident. Petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

September 4, 2013
Date

ICArbDec19(b)

SEP 9 - 2013

The Arbitrator finds:

Petitioner has worked for Respondent for the past seven years. She works as a home health aide which requires Petitioner to travel to each participant's home and assist the participants with activities of daily living. While working at the participant's residence, Petitioner would earn $10.65 per hour. While traveling between participants, Petitioner would be reimbursed $0.40 a mile and be paid an hourly rate of $8.25. Petitioner testified that she would not be reimbursed for mileage or paid for time when she is traveling outside her route from one participant to another.

On November 27, 2012, Petitioner left her first participant in Nebo and then drove to 613 Jill Street in Pittsfield for a visit with her second participant. Petitioner testified that she was at this participant's residence from 10:30 a.m. – 12:30 p.m. Petitioner testified that at the time that she left this participant's home she was not thirsty. Petitioner was next scheduled to see a participant located outside of Nebo at 1:00 p.m. Petitioner left her second participant's home in Pittsfield and proceeded to travel on County Highway South to Vin Fiz Highway. Petitioner testified that she became thirsty and decided to stop for a soda in between visits. Petitioner testified that it was in between pay periods and she only had $0.90.

Once Petitioner arrived at the intersection of Vin Fiz Highway, instead of turning left or east towards the next participant, Petitioner elected to turn west or right onto Vin Fiz Highway until she got to Pine Street. Petitioner took a left on Pine Street and as she was proceeding south on Pine Street, she was struck by another vehicle that was backing out of his residence (RX1). Petitioner testified that at the time of the accident she was heading towards the Nebo Community Center which is located on Carol Street and Smith's Alley to the soda machine. Petitioner testified that her residence is located about three blocks from the Nebo Community Center. Petitioner testified that despite the fact that she was down to her last $0.90 she was not planning to go to her residence to get a glass of water as she was not supposed to do personal errands during work hours. Petitioner testified that her supervisor gave her extra time in between participants to allow her to get something to eat or drink. Petitioner testified that they were allowed to bring something to eat while at a participant's residence and were allowed to drink the participant's water. Petitioner testified that it took approximately 15 minutes to get from the second participant's residence in Pittsfield to her third participant's home outside of Nebo. Petitioner testified that she did not want to get a drink of water at the participant's home outside of Nebo as she was unsure if that participant had well or city water. Petitioner testified that there were other locations in route that she could have stopped to buy a soda.

Petitioner testified that the motor vehicle accident took place at approximately 12:50 p.m. Petitioner testified that a police officer arrived at the scene and interviewed her. Petitioner was asked what time the accident took place. The police report notes that the accident took place at 1:05 p.m. and the police arrived at 1:15 p.m. Petitioner disputes this. Petitioner testified that when the vehicle backed into her, her head swung and struck the side window of the car which jarred her. Approximately 10 minutes after it happened, she experienced pain in her neck. Petitioner was transported by ambulance to the Illini Community Hospital in Pittsfield.

Regarding the accident, police officer Doug Zulauf completed an Illinois Traffic Crash Report. His report states:

> "On 11/27/12 at approximately 1:15 p.m., I (Tpr. Doug Zulauf) was called to a minor accident on Pine St. In Nebo, Illinois. When I arrived I spoke with the drivers involved who stated the accident occurred at approximately 1:05 p.m. The driver

of unit #1, Carl D. Neese (1/11/56), was attempting to back out of his driveway onto Pine Street, just north of Smith Alley Street. Neese stated he looked both ways and started backing out. Neese advised he did not see unit #2 until just before impact. Neese struck unit #2, which was s/b on Pine Street. From Pike County Highway 10 (Vin Fiz Highway). The driver of unit #2, Melissa A. Wagner (5/05/80) struck the rear of unit #1 as it was backing into Pine Street. Wagner complained of stiffness/soreness at the time of my arrival and requested an ambulance. Pike County Ambulance arrived and Wagner was taken to Illini Community Hospital to be treated for minor injuries. Both drivers stated they were wearing their seatbelts at the time of the accident and no air bags deployed in either vehicle. Both drivers stated they did not need a tow for their vehicles and both units were driven from the scene. A friend of Wagner's, Bruce W. Richards (10/04/55), removed unit #2 from the scene." (RX1)

Petitioner testified that she called Tammy Booth after the accident and indicated that she did not know if she was going to be able to make it to her next participant due to the motor vehicle accident. The following day Petitioner met with the area administrator, Connie Claybourn, and brought her a copy of the police report and completed an accident report the following day. In the incident report, Petitioner noted that the location where the incident occurred was on Pine Street/Smith Bridge Street "outside in motor vehicle in route to participant's home" (PX6). Petitioner also completed a "travel trip log" for the date in question Petitioner listed her miles between participants and stated "In route to participant's home when crash occurred" (RX2).

Records from Illini Community Hospital document that Petitioner was seen in the emergency department on November 27, 2012, following a motor vehicle accident. (PX 4, p. 3) She reported pain at the base of her neck. Petitioner reported improvement of pain after being given Torodol. A CT scan of her cervical spine showed no acute findings. According to the medical records, Petitioner denied hitting her head. (PX 4)

Medical records show that the Petitioner was seen on the following day at Quincy Medical Group where she saw Dr. Raif, her primary care physician. (PX 2, pp. 92-94) Dr. Raif recorded a consistent history of accident and noted that Petitioner reported severe pain, stiffness and an inability to move her neck. Petitioner reported an inability to sleep the previous night and was suffering a headache. On examination, it was noted that Petitioner's gait was abnormal and that her neck was tender. She was diagnosed with a neck strain following a motor vehicle accident at work. Petitioner was advised to use ice and heat, was provided with a soft cervical collar, was prescribed Torodol for pain and advised to remain off work until follow up on December 3. Petitioner did return to Dr. Raif on December 3, 2013, reporting that she was still having significant pain down the right side of her neck and across her right shoulder with intermittent numbness in her right arm, as well as swelling in her right hand. (PX 2, pp. 88-90) Petitioner reported stabbing pains in her spine. On examination, Dr. Raif noted that the Petitioner's posture, gait, ability to climb onto the examination table and ability to change position smoothly were all abnormal. Petitioner's neck was tender and her cervical range of motion was abnormal. Petitioner was diagnosed with a neck pain and cervical strain. Petitioner was advised to continue her medications and soft collar and an MRI of the cervical spine was ordered. Petitioner was continued off work until her next appointment on December 7. (PX 2 , p . 118) An MRI of the cervical spine taken that same day showed minimal soft tissue edema and mild degenerative disc disease. (PX 2, p. 120) In a handwritten note, Dr. Raif's nurse practitioner advises that she should begin physical therapy. Petitioner returned to Dr. Raif's office on December 7, 2013, reporting continued pain in the back and right side of her neck that travels across and under her right scapula. (PX 2, pp. 76-78) Petitioner reported an episode the previous night when pain had radiated into her head and had awoken her. Petitioner reported that her employer had advised her that she could not return to work until she had a full release. On examination, Petitioner was noted to have an abnormal gain with neck tenderness. Her cervical spine was noted to be tender to palpation with muscle tightness and

tenderness noted. Petitioner had limited motion of her neck due to pain. Petitioner also had tenderness in her right shoulder and pain along her right clavicle, with limited motion of her right shoulder. Petitioner was advised to continue her current medication and set up physical therapy. Petitioner was advised to remain off work until re-evaluated on December 21. (PX 2, p. 116)

On 12/11/2012, Petitioner provided a recorded statement to the adjuster. In the recorded statement, Petitioner indicated that the accident took place when she was on the county highway and turning onto Vin Fiz Highway. Petitioner did not report that the accident took place on Pine Street or that she was on her way to get a soda at the time of the accident (RX4). Petitioner testified that when she provided the recorded statement, she was on medication and did not realize that she was providing a recorded statement.

Records from Illini Community Hospital show that the Petitioner did undergo an initial evaluation for therapy on December 17, 2012. (PX 4, pp. 64-65) Petitioner provided a consistent history of onset with her motor vehicle accident on November 27, 2012, and reported pain in her head, neck and right arm with numbness and tingling. She reported requiring assistance with ordinary daily activities such as doing her hair and difficulty raising her arms over her head.

Petitioner returned to Dr. Raif's office on December 21, 2012, complaining of continued pain in her cervical spine after trying to do more normal activities. (PX 2, pp. 72-74) She complained that her muscles were very tight. A referral to a neurosurgeon in Hannibal was planned. Petitioner was kept off work pending that referral until January 11, 2013. (PX 2, p. 113) Petitioner returned to Dr. Raif's office on January 11, 2013, reporting continued difficulty and increased pain with activities of daily living. (PX 2, pp. 64-66) The therapist was recommending continued therapy treatments. Petitioner reported numbness and tingling in her right side and arm. Petitioner was having difficulty obtaining an appointment with a neurosurgeon. Petitioner was kept off work pending that appointment and further therapy and assistance was to be provided in setting an appointment.

Petitioner was seen by Dr. Basho on January 15, 2013 for neck and right arm pain. (PX 3, pp. 3-4) Petitioner provided a consistent history of onset. Dr. Basho noted some decreased sensation in the right C5 dermatome, and found significantly limited rotation to the left with "exquisite tenderness" over the C7 and T1 spinous processes. After reviewing the prior MRI and CT scans, Dr. Basho concluded that Petitioner was suffering from a soft tissue sprain of the cervical spine and advised there was no need for surgical intervention. He recommended further physical therapy and that if her pain persisted when she returned in six weeks, he would recommend pain management. Dr. Basho provided Petitioner with an off work slip. (PX 3, p. 6)

Petitioner returned to Dr. Raif's office on February 1 and February 25, 2013. (PX 3, pp. 56-59, 48-51) Petitioner was continuing to experience pain in her neck despite continued therapy and use of medication. A TENS unit was recommended by the therapist. Petitioner remained off work. (PX 2, p. 104)

Petitioner returned to Dr. Basho's office on March 7, 2013, reporting some gains with therapy but persistent pain, and reported continued difficulty with activities of daily living. (PX 3, p. 2) Dr. Basho opined that surgery was not appropriate, but that she should be referred to pain management. He stated that she could perform only seated duties at a desk with no significant lifting, pushing or pulling. (PX 3, p. 5)

Petitioner returned to Dr. Raif's office on March 8, 2013, reporting continued neck pain with stiffness, reduced range of motion and weakness of her arms. She complained particularly of headaches, pain in the right side of her neck and right shoulder. Petitioner had been able to obtain a TENS unit and she was instructed to continue to use it and a referral to Blessing Pain Management was made. It was noted that Petitioner could not return to

her normal work duties and that she was not able to safely drive and turn her head to see other vehicles, and could not sit for more than 2 hours at a time without neck stiffness and pain. It was therefore recommended that she remain off work.

On April 24, 2013, Petitioner was seen for an initial evaluation at Blessing Pain Management. (PX 1, pp. 7-8) Petitioner provided a history of neck pain since a motor vehicle accident in November . She reported pain rated at 5/10 at rest and 9/10 with activity. Petitioner reported that her pain was aggravated by sitting, standing or any movement, particularly turning her head to the left. On examination, Petitioner was very tender at the lower neck and upper thoracic areas, particularly on the right. Her right trapezius was "very spasmed" and limited motion was noted. Dr. Meyer adjuster her pain medications with the plan to reduce her pain so that she could resume physical therapy once the pain was controlled.

Petitioner returned to Dr. Raif's office on May 3, 2013, who noted that the Petitioner was using a different medication prescribed by the pain clinic. (PX 2, pp. 17-20) Petitioner indicated that she was still having a moderate amount of pain, at a 6/10 level. Dr. Raif noted that Petitioner was not permitted to drive with this medication and was still on restrictions of no lifting, pushing or pulling, and was still kept off work.

Petitioner returned to the pain clinic at Blessing Hospital again on May 24, 2013, reporting that she was continuing to suffer from pain in her scapula and middle of the spine that had been there since her accident. (PX 1, pp. 36) Petitioner reported that her pain was aggravated by sitting, standing, bending, lifting, pushing and pulling. Dr. Meyer kept Petitioner on the same medications to allow her body to adjuster before changing any of them, and her medications were refilled. Petitioner's medications were refilled and she was advised to return in two months.

Petitioner returned to Dr. Raif's office on May 31, 2013, reporting that her current medications were making her sleepy. (PX 2, pp. 12-15) On examination, it was noted that the Petitioner's remained abnormal and her neck was tender. Her grip strength and range of motion remained decreased on the right. She had tenderness with palpation of the cervical spine and right scapula with very limited range of motion of the cervical spine, which was unchanged. Petitioner's medications were continued and she was advised to follow up in one month. Petitioner returned to Dr. Raif's office on June 28, 2013, noting that her pain management continued and that she had an appointment set for July 30, 2013 to follow up with the pain management. (PX 2, pp. 126 – 128) Petitioner reported that she was still experiencing pain in her neck and right shoulder and that earlier that week it had begun to go down the left side of her neck as well, with spasms in her hand. It was noted that the Petitioner remained unable to drive or work.

On direct examination Petitioner denied having any prior cervical problems; however, Petitioner acknowledged on cross-examination that she had had a CT scan of her neck previously in 2008 following a prior accident when she had been run off the road. Petitioner testified that she had no ongoing problems with her neck or any further medical treatment following that incident.

Petitioner testified that the physical therapy and the TENS unit that she received have not provided her with relief of her pain. Petitioner testified that she is currently receiving pain management treatment through Blessing Hospital, and has appointments schedule there as well as a return appointment with Dr. Raif. Petitioner testified, consistent with the medical records, that she has not been released to return to work since her accident. She testified that she continues to have a lot of stiffness and pain. She testified that she tosses and turns all night and has difficulty getting enough sleep. She testified that she is unable to do basic household chores for a long period without increasing pain. She testified that she tried sweeping and mopping but was unable to move the next day. She confirmed that these are the same kind of activities that she would be required

to perform in her work. Petitioner testified that she remains on pain medication (Vicodin and Gabapentin" and that she has been told that she should not drive while taking these medications. Petitioner testified that someone else had driven her to the hearing site that day.

Ms. Connie Claybourn testified on behalf of Respondent. She has worked for the Respondent since 1998. Her current job title is area administrator in the Pittsfield office. She has worked in that capacity for the past eight years. Part of her job duties involved handling workers' compensation claims. Ms. Claybourn testified that she first spoke with Petitioner following the motor vehicle accident at approximately 4:15 p.m. – 4:30 p.m. on the date of the accident. Ms. Claybourn testified that Petitioner advised her that the accident took place on Vin Fiz Highway while she was in route to see a participant. Ms. Claybourn testified that she was surprised the following day to learn that the accident took place where it did. Ms. Claybourn testified that it was never mentioned that Petitioner was getting a soda at the time of the accident. Ms. Claybourn testified that Petitioner is allowed to get a drink of water at participants' homes. Ms. Claybourn testified that Tammy Booth no longer works for Community Care Systems.

Ms. Lynn Ottwell testified on behalf of Respondent. She will have worked for Respondent two years in September. Currently she works in billing and payroll. When she first started she worked as a field supervisor for approximately one year. As a field supervisor, Ms. Ottwell would go to participants' homes and do quality visits every six months and assess how the home care aide was doing.

Ms. Ottwell has lived in Pike County all her life and as a field supervisor she traveled to all the towns. Ms. Ottwell is familiar with the participants that were referenced on Jill Street and outside of Nebo. The participant on Jill Street had city water. The participant outside of Nebo had well water and she was not aware of any water issues with either participant. Ms. Ottwell testified that the Nebo Community Center was on Main Street, however it could have moved. Ms. Ottwell testified that she has traveled from the participant's residence in Jill Street to the participant's residence outside of Nebo. She estimated that it would take 15 minutes to get from Pittsfield to the intersection at the Vin Fiz Highway and then approximately 8-10 minutes to go to the participant's residence in rural Nebo. Ms. Ottwell testified that it is Respondent's policy that whenever a home health aide stops to get something to drink they are to report it because they are not to be paid for any personal time. Also, the home health aides are to stay on a strict schedule when seeing participants. Ms. Ottwell testified that there are several locations directly on route where Petitioner could have stopped to buy a soda. The first is directly across Jill Street where there is a park with a vending machine. Ms. Ottwell also testified that Barb's Café is located directly at the intersection where County Highway from Pittsfield meets Vin Fiz Highway.

The Arbitrator Concludes:

1.Petitioner's Credibility.

A pivotal issue in this case is Petitioner's credibility. The Arbitrator having seen and listened to Petitioner and having reviewed the record in its entirety cannot conclude that Petitioner was a credible witness. As will be pointed out below there were many discrepancies between her testimony and the other evidence in the record, the latter of which has been given more weight as it appears inherently more trustworthy.

2.Accident .

The parties do not really dispute that Petitioner was a "traveling employee" at the time of her accident. For that matter, they do not really dispute that she was involved in a motor vehicle accident. The issue is whether that accident is a compensable one under the Illinois Workers' Compensation Act. The test for determining whether an injury to a traveling employee arose out of and in the course of her employment is the reasonableness of the conduct in which she was engaged and whether the conduct might normally be anticipated or foreseen by the employer. *Howell Tractor & Equipment Company v. Industrial Commission*, 778 Ill.2d 567, 573-74, 403 N.E.2d 215, 38 Ill.Dec.127 (1980). Petitioner testified that in between participants she went off route and intended to buy a soda at the time of the accident. The Arbitrator, however, does not find this testimony to be credible.

The evidence does not support Petitioner's testimony that she was traveling to the Nebo Community Center to purchase a soda at the time of the motor vehicle accident. The contemporaneous documents fail to support this. Ms. Claybourn testified that on the date of the accident, Petitioner advised her that the accident took place on Vin Fiz Highway while she was traveling to see a participant. Ms. Claybourn testified that the following day after she received the police report with the actual location of the accident, Petitioner at no time indicated that she was traveling to the Community Center to buy a soda. In her incident report completed by Petitioner the following day, there is no mention that Petitioner was traveling to the Community Center to buy a soda. Petitioner simply noted that she was in route to a participant's home at the time of the accident. In her travel log on the date of the motor vehicle accident, there is no mention that Petitioner was traveling to the Community Center to buy a soda. Instead, Petitioner documented that she was in route to a participant's home when the crash occurred. On 12/11/2012 Petitioner provided a recorded statement to the adjuster. Similarly, in her recorded statement, Petitioner made no mention that she was traveling to the Community Center to purchase a soda at the time of the crash. Instead, Petitioner advised that the accident took place when she was on the county highway and turning onto Vin Fiz Highway. According to the Illinois Motorist Report, she was going straight when she observed another car backing up. The Arbitrator finds it significant that the crash took place blocks from Petitioner's residence. Petitioner failed to prove that her actions were reasonable and foreseeable by Respondent. Petitioner's claim for compensation is denied.

3. Causal Connection.

Even assuming, arguendo, that Petitioner's accident was compensable Petitioner has failed to prove that her current condition of ill-being is causally connected to the accident. The bottom line is that the Arbitrator does not believe that Petitioner was injured to the extent she is claiming at the time of the accident. Again, this is based upon Petitioner's credibility. In support thereof, the Arbitrator notes that the investigating police officer described the accident and Petitioner's injuries as "minor." When seen at the emergency room Petitioner specifically denied hitting her head on anything. However, as the investigation and claim has progressed, Petitioner's description of the accident and the injuries she sustained therein have increased. For example, by the time she gave her recorded statement, she stated she "slammed" on her brakes and her head hit the window. While Petitioner testified at arbitration she was on medication when she gave her statement, the transcript does not suggest any impairment or confusion. Additionally, Petitioner denied any prior cervical problems on direct examination; however, when asked on cross-examination about it she acknowledged undergoing a CT scan in 2008. Her 2012 Cervical MRI clearly references a cervical CT scan being performed in August of 2008. Additionally, there is reference to cervical spine x-rays taken on September 7, 2012 just a few months before this accident. Petitioner's lack of forthrightness on direct examination is concerning and undermines her credibility overall. Furthermore, the records from Petitioner's primary physician, Dr. Raif, do not pre-date November 27, 2012. The Patient Information Sheet printed on June 11, 2013 indicates Petitioner's

"problem list" includes thoracic and chronic low back pain pre-dating the motor vehicle accident by just a few weeks. (PX 2) All in all, Petitioner's ongoing complaints of pain seem out of proportion for the nature of the accident (based upon police reports and the initial hospital visit) and, therefore, the Arbitrator is unable to conclude Petitioner's current condition of ill-being is causally related to the accident. All other issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lewis Bebout,

Petitioner,

14IWCC0167

vs. NO: 10 WC 45768

State of Illinois/ Pinckneyville Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 5, 2013 is hereby affirmed and adopted.

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

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

DATED: MAR 0 7 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/27/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BEBOUT, LOUIS Case# **10WC045768**
Employee/Petitioner

SOI/PINCKNEYVILLE CORR CTR
Employer/Respondent

On 8/5/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0588 ASSISTANT ATTORNEY GENERAL
MOLLY WILSON-DEARING
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

AUG 5 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0167

Lewis Bebout
Employee/Petitioner

v.

State of Illinois/Pinckneyville Corr. Ctr.
Employer/Respondent

Case # **10** WC **45768**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **6/6/13**. 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 _____

FINDINGS 14IWCC0167

On **11/22/10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$86,812.00**; the average weekly wage was **$1,669.46**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any medical benefits that have been paid through its group carrier, but shall hold petitioner harmless for any recoupment efforts for same, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,112.97/week for 16 & 6/7 weeks, the period of 9/27/11 through 1/22/12, inclusive, as provided in Section 8(b) of the Act. Respondent shall have credit for any salary, extended benefits or temporary total disability benefits already paid.

Respondent shall pay Petitioner permanent partial disability benefits of $669.64/week for 91.6 weeks, because the injuries sustained caused the 10% loss of the left and right hands (41 weeks) and the 10% loss of the left and right arms (50.6 weeks), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

August 4, 2013
Date

AUG 5 - 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEWIS BEBOUT,	)	14IWCC0167
Petitioner,	)	
vs.	)	No. 10 WC 45768
STATE OF ILLINOIS/PINCKNEYVILLE C.C.,	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner began employment at the Pontiac Correctional Facility as a corrections officer in November 1984. He served there in that capacity until being promoted to sergeant in 1992, and then to lieutenant in 1995. In 1998, he transferred to Pinckneyville Correctional Center as a lieutenant. He remained in that capacity until 2008, and then was promoted to major. He remained at that rank until his retirement in December 2012. The petitioner asserts bilateral carpal and bilateral cubital tunnel syndrome incurred via repetitive trauma with an effective date of loss of November 22, 2010, filing his Application for Adjustment of Claim on November 30, 2010.

The petitioner testified that he did not have substantial and persistent symptoms while working as a lieutenant at Pinckneyville. However, symptoms regarding the carpal and cubital tunnel syndrome began to manifest following the promotion to major. He noted that the duties of a major did overlap somewhat with the duties of a lieutenant, but involved substantially more administrative duties, including handwritten paperwork and computer work. He described his duties as a major involving the development and preparation of rosters, daily activity logs, movement charts, and overtime hour reports. He testified the paperwork and office work actually provoked his symptoms more than some of the more stereotypically physically rigorous duties he faced in his lower ranks.

On November 22, 2010, the petitioner saw Dr. David Brown, a hand specialist. He discussed the job history and noted a history of symptoms beginning in approximately March 2010. Dr. Brown noted clinical signs of carpal and cubital tunnel syndrome and prescribed EMG testing. PX3. The EMG study was done that day and demonstrated moderate carpal and cubital tunnel syndrome, bilaterally. PX4. The petitioner also had a symptomatic right forearm cutaneous neuroma from a laceration approximately eleven years prior. Dr. Brown prescribed splints and medication and instructed him to follow up. On December 20, 2010, the petitioner described no relief from conservative management, and Dr. Brown recommended surgery. PX3.

The respondent secured a Section 12 records review from Dr. James Williams in April 2011. Following review of a job analysis of a Pinckneyville corrections officer he concluded that the job duties would not have caused or accelerated the condition of carpal or cubital tunnel syndrome. RX12.

The petitioner thereafter sought treatment with Dr. Paletta on August 17, 2011. Dr. Paletta echoed Dr. Brown's diagnosis and treatment recommendation. PX5. On September 27, 2011, Dr. Paletta performed left carpal and cubital tunnel release surgery. On November 15, 2011, Dr. Paletta performed the same procedure on the right elbow and wrist. PX7. The petitioner was prescribed standard postoperative rehabilitation.

On December 5, 2011, Dr. Paletta noted healing of the surgical sites and the petitioner was released to light duty with no cell-house work. On January 23, 2012, the petitioner reported substantial relief of symptoms and Dr. Paletta released him to regular duty work. On April 18, 2012, the petitioner noted "he is feeling great" and "[v]irtually, all his pain has resolved." Dr. Paletta noted an excellent outcome with a normal physical examination, placed him at MMI and discharged him from care. PX5.

Dr. Williams performed a supplemental records review of the claimant's medical records. He opined that the job duties would not have caused the claimant's condition, but concurred with the medical diagnosis, treatment course and surgical intervention. He maintained those opinions in deposition. RX7.

Dr. Paletta testified in deposition in support of a causal connection and the treatment course. PX11. Dr. Paletta noted that there are a number of idiopathic comorbidities which are linked to increased risk of carpal and/or cubital tunnel syndrome, such as hypertension, diabetes, thyroid imbalance, and obesity, and that the claimant did not suffer from these conditions. He concluded that the petitioner's employment duties had played a causal role in the development of the condition, prompting the surgeries.

OPINION AND ORDER

Accident, Causal Connection, and Manifestation Date

Given the overlapping issues between these points, the Arbitrator will address them jointly. The petitioner is relying on a repetitive trauma theory, as opposed to an acute injury. In such cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953).

The Arbitrator notes that the credibility of the petitioner's testimony was not bolstered by his courtroom demeanor. His responses on cross-examination demonstrated both a bellicosity that could not be simply explained by the strain of the litigation

process, as well as evasiveness on certain issues related to his job activities. However, the claimant's testimony that was credible surrounded two important points: first, that the duties of a major were significantly more administrative in nature than those duties he faced in lower ranks, including substantially increased computer usage and paperwork; and, second, that it was these duties which increasingly prompted the claimant's symptoms, rather than some more physically robust ones he had previously faced.

Both Dr. Paletta and Dr. Williams note a general lack of comorbidities which would normally spur such conditions, as well as concurring in the diagnosis and treatment plan. Having reviewed the medical records as well as the depositions, the Arbitrator finds Dr. Paletta somewhat more persuasive in this instance and finds that the claimant has demonstrated accident and causal relationship, and further has established November 22, 2010 as a not inappropriate manifestation date within the guidance of *Durand v. Industrial Commission*, 224 Ill.2d 53 (2006).

Notice

Given the manifestation date established above, the claimant provided timely notice of his accident within the 45 days required by the Act by both reporting it and filing the Application for Adjustment of Claim. See RX2 and Arb.Ex.II.

Medical Services Provided

The medical services provided were disputed based on accident and causal relationship, not the reasonableness of the care. Given the above findings, the respondent is directed to pay the medical bills identified in PX1 pursuant to Section 8(a) and subject to the limits of Section 8.2 of the Act. Respondent shall receive credit for any and all amounts previously paid but shall hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments.

Temporary Total Disability

The respondent disputed TTD based upon its accident and causal relationship disputes. The petitioner was prescribed off work from September 27, 2011, through December 5, 2011, and restricted work from then until his full duty release on January 23. The work restriction was against cell house work; it is not clear whether this is effectively full duty work for a major. The Arbitrator cannot infer such, though the stipulation sheet claiming only 12 & 3/7 weeks of TTD liability certainly suggests he was working during at least some part of that time, as the period of restriction from September 27 through January 22, inclusive, comes to 118 days, or 16 & 6/7 weeks.

The respondent shall pay the petitioner TTD benefits of $1,112.97 per week for 16 & 6/7 weeks. The respondent shall have credit for any temporary total disability or

extended benefits paid to the claimant during this period, as well as credit for any salary paid if the claimant did return to work during that period. Should a group disability carrier demand reimbursement for any such benefits paid during that period, the respondent shall hold the petitioner harmless for any credit claimed, pursuant to Section 8(j) of the Act.

Nature and Extent of the Injury

The Arbitrator finds the petitioner's employment resulted in the development of the carpal and cubital tunnel syndrome in each elbow and wrist, which was corrected surgically. Dr. Paletta noted an excellent outcome with effectively complete symptom relief, and the claimant returned to his regular job activities for almost a year before his seniority-based retirement.

The respondent shall pay the petitioner the sum of $669.64/week for a further period of 91.6 weeks, as provided in Section 8(e) of the Act, as the injuries sustained caused permanent loss of use of each of the petitioner's arms to the extent of 10% thereof, as well as each of the petitioner's hands to the extent of 10% thereof.

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Reuter,

Petitioner,

14IWCC0168

vs. NO: 09 WC 42924

LCN Closers, a/k/a Ingersoll Rand,

Respondent.

DECISION AND OPINION ON REVIEW

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

After a complete review of the record, the Commission finds that Petitioner's claim that her right lateral epicondylitis was arose out of and in the course of her employment with Respondent due to overuse and repetitive work and is causally related to her work for Respondent is not supported by the evidence. In finding so, the Commission notes that Petitioner was laid off from Respondent's employ on August 7, 2009. (T.25) The Commission also notes that Petitioner initially testified that she started to have right arm symptoms in March 2010. (T.28) However, Petitioner later testified that she notified the company nurse about her right arm symptoms a short time after she was laid off (T.45-46), contradicting her earlier testimony that she started having right arm symptoms about eight months after she stopped working for Respondent. The Commission further notes that the medical records indicate that Petitioner complained of only left arm symptoms between August 2009 and March 2010 (PX2, PX9), which also contradicts Petitioner's claim that she had right arm symptoms shortly after being laid off. Furthermore, Petitioner's treating physician, Dr. George Lane, testified at his evidence deposition that it is unusual for a patient to start having symptoms of epicondylitis after the patient has stopped performing repetitive activity. (PX8-pg.20) Dr. Lane explained that, in general terms, lateral epicondylitis injury is a result of overuse and, while still opining that

Petitioner's work for Respondent contributed to Petitioner's lateral epicondylitis, explained that "months after quitting work she must have—something else must have irritated it further along." (PX8-pgs.20,23) In light of Dr. Lane's explanation, the Commission finds Dr. Lane's opinion that Petitioner's right lateral epicondylitis is causally related to her work for Respondent questionable since, as noted earlier, Petitioner's symptoms appeared eight months after she stopped working for Respondent and that even Dr. Lane felt that since Petitioner had stopped working something else must have irritated/aggravated Petitioner's right arm condition.

Instead, the Commission finds the findings and opinions of Dr. John Fernandez, Respondent's Section 12 examiner, more persuasive than those of Dr. Lane. Dr. Fernandez found no objective findings indicating that Petitioner was suffering from right lateral epicondylitis. (RX2) Dr. Fernandez explained that Petitioner "does not have a traumatic mechanism and...despite the fact that she had been off work for nearly a year her symptoms have actually worsened in severity and she has even developed similar symptoms on the right side while off work. I simply have no way to explain or connect the two. Therefore...I cannot consider her condition as work related." (RX2) Based on the timeline of Petitioner's development of right arm symptoms and Dr. Fernandez's findings, the Commission finds that Dr. Fernandez's opinion that Petitioner's right arm condition is not causally related to her work with Respondent is supported by the record.

Therefore, based on the totality of the evidence, Petitioner has failed to establish that she suffered a work-related right arm injury as a result of her work for Respondent. The Commission hereby reverses the Arbitrator's finding on the issue, finds that Petitioner did not sustain accidental injuries to her right arm arising out of and in the course of her employment with Respondent on October 15, 2008 and that her right arm condition is not causally related to her work for Respondent, and vacates the award of medical expenses for treatment of Petitioner's right arm and the permanency award of 12.5% loss of use of the right arm.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 28, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $320.00 per week for a period of 69-1/7 weeks, from August 7, 2009 through December 3, 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 $320.00 per week for a period of 25.3 weeks, as provided in §8(e)10 of the Act, for the reason that the injuries sustained caused the 10% loss of use of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay all reasonable and necessary medical expenses regarding Petitioner's left arm condition only, as provided in §8(a) and §8.2 of the Act.

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

interest under §19(n) of the Act, if any.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 07 2014
DRD/ell
o-02/25/14
68

Daniel R. Donohoo

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0168

REUTER, JENNIFER
Employee/Petitioner

Case# **09WC042924**

LCN CLOSERS A/K/A INGERSOLL RAND
Employer/Respondent

On 1/28/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0190 LAW OFFICES OF PETER F FERRACUTI
JENNIFER KIESEWETTER
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

1860 CACCHILLO LAW GROUP LLC
ANDREW THOMAS
180 N LASALLE ST SUITE 2850
CHICAGO, IL 60601

14IWCC0168

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

- [ ] 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

Jennifer Reuter
Employee/Petitioner

v.

LCN Closers a/k/a Ingersoll Rand
Employer/Respondent

Case # **09** WC **42924**

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 **George Andros**, Arbitrator of the Commission, in the city of **Ottawa**, on **11/29/2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0168

FINDINGS

On **10/15/2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$22,880.00**; the average weekly wage was **$440.00**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,396.56**.

Respondent is entitled to a credit of **$5,542.55** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $320.00/week for 69 1/7 weeks, commencing 8/7/2009 through 12/3/2010, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $5,316.06, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $320.00/week for 56.925 weeks, because the injuries sustained caused the 12.5% loss of the right arm and 10% loss of the left arm, as provided in Section 8(e) of the Act.

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

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

#01 George J. Andros
Signature of Arbitrator

January 25, 2013
Date

JAN 28 2013

FINDINGS OF FACT REUTER V. LCN 09 WC 42924

Petitioner Jennifer Reuter began working at LCN Closers in 2007. She testified that she was first an employee of Manpower doing temporary work but was eventually hired on as a regular employee by LCN in 2007. The first two to three months of her employment, her job required folding boxes.

Ms. Reuter testified that she was then moved to the 40/40 line where she remained until she began to have her left arm symptoms. On the 40/40 line, she was the lead of line which required her to take the orders off the computer, printout the orders, and take 8 pound cylinders, lay them on a table, and put each part into the cylinders. She testified that she would have a quota of 1,257 parts per shift. She was handling the parts with both hands and would have to push totes full of the cylinders down the line. Some of the parts, including the door arms, may weigh up to 2 pounds each. The orders varied. She estimated that she would push nearly 200 boxes of parts down the line per hour. She would work with her right arm to put the parts into the totes and push the totes down the line with her left arm. This movement would physically require her to push the totes using her left arm from elbow to wrist across a rough surfaced table. She was not working on a conveyor belt surface.

Petitioner testified that prior to her employment at LCN Closers she had never had right or left arm symptoms of this type. She began to develop symptoms that her left arm was on fire and swollen from the elbow to the wrist. She would use over the counter Motrin. On October 15, 2008, she testified that she reported her symptoms to John Jensen, a utility worker, who advised her that he would report it to her supervisor. She was told this was the reporting procedure.
On or about October 18, 2008, she was approached by Ken Colton, her supervisor, who advised her to report to the company nurse.

Upon direction of the company nurse, the Petitioner testified that she then followed up with her family physician. She was also moved by the company to another line, the 40/10 line, where she was advised to use her right arm and hand to put screws in boxes at the end of the line.

Petitioner saw Dr. Martin Faber in Princeton, Illinois, on November 21, 2008. (PX2). He indicated that the pain started three weeks prior from lifting, and diagnoses her with left epicondylitis. (PX2). Petitioner returned to Dr. Faber on January 9, 2009, February 13, 2009, and March 20, 2009. (PX2).

Petitioner started physical therapy at Perry Memorial Hospital on January 14, 2009, and completed 48 visits. (PX9). Petitioner was discharged on June 2, 2009. (PX9). On that date, Petitioner was still reporting some discomfort with certain jobs. (PX9).

Petitioner saw Dr. Lisa Snyder at the Institute of Physical Medicine and Rehabilitation in Peoria, Illinois, on May 7, 2009 for an EMG. (PX11). The EMG was normal. Dr. Snyder indicated that Petitioner had a recent flare-up about two weeks prior and thought it was related to the changes in her job. Petitioner was placed on a work restriction that limited lifting to 5 pounds, and was encouraged to alternate her jobs to minimize the amount of repetitive activity at one time.

On August 6, 2009, Petitioner testified that she was laid off from her employment with LCN Closers. Shortly following her layoff, she testified that she contacted human resources at LCN inquiring about coverage under workers' compensation due to right arm symptoms that she was now experiencing as well as her left arm continued treatment. Up until this time, her medical care was being covered by Respondent.

Dr. George Lane, orthopedic surgeon of Comprehensive Orthopedics in Peoria, Illinois, testified via evidence deposition on December 20, 2010. (PX8). Petitioner first saw Dr. Lane on October 20, 2009. (PX7, PX8 at 5). At that time, Petitioner complained of pain, numbness, and tingling in her left arm. (PX7, PX8 at 6). Petitioner had stated that she injured her arm at work well over a year before she saw Dr. Lane. (PX7, PX8 at 6). After reviewing an EMG and doing an examination, Dr. Lane recommended an anti-inflammatory Feldene and a repeat EMG. (PX7, PX8 at 8).

On June 8, 2010 Dr. John Fernandez performed a section 12 exam at the behest of the Respondent herein. Although Dr. Fernandez confirmed her work tasks may be highly repetitive and also admitted that she had bilateral arm pain, he did not feel that her symptoms were work-related. He was unable to give an actual diagnosis, but did not seem to suggest or indicate in any way that Petitioner was not having legitimate pain symptoms.

Petitioner next saw Dr. Lane on June 24, 2010. (PX7, PX8 at 8). At that time, Petitioner was complaining of pain, numbness, and tingling in both arms. She stated at that time that her left arm had been bothering her for about two years around the elbow. (PX7, PX8 at 8).
Dr. Lane made the medical diagnosis of bilateral carpal and cubital tunnel syndrome that had gone untreated for almost two years and was getting worse. (PX7, PX8 at 9). He recommended an anti-inflammatory Relafen and another EMG. (PX7, PX8 at 9).

Petitioner again saw Dr. Snyder for another EMG on July 15, 2010. (PX11). The EMG was normal.

On the next visit with Dr. Lane on July 20, 2010, Petitioner had full range of motion in both arms but complained of aching in the wrist and elbow. She stated that most of her pain was on the lateral side. (PX7, PX8 at 10). Dr. Lane's diagnosis was lateral epicondylitis. (PX7, PX8 at 10). Dr. Lane recommended another anti-inflammatory Mobic and Darvocet for pain, and suggested that if those did not help, they would consider corticosteroid injections. (PX7, PX8 at 10). On the next visit August 3, 2010, Petitioner was doing a little better. It was recommended that she continue with Mobic. (PX7, PX8 at 10). On August 24, 2010, Petitioner stated that the Mobic was not helping, it upset her stomach, and she was in pain again, so the medication was discontinued. Dr. Lane recommended going to the pain clinic and getting MRI's of both elbows. (PX7, PX8 at 11).

On August 31, 2010, Dr. Lane reviewed the MRI, which showed inflammation and neuritis of both ulnar nerves. (PX7). Dr. Lane testified that it is consistent with the cubital tunnel complaints. (PX8 at 11). Petitioner stated that since being off Mobic the arms had been bothering her more. (PX7). At that time, Dr. Lane recommended that she get back on the Mobic since it helped and advised her to go to the pain clinic. (PX7, PX8 at 12).

Dr. Lane testified that on December 20, 2010, his current diagnosis was lateral epicondylitis, and that this was not something that would show up on the EMG. (PX8 at 25-26).

Dr. Lane testified that Petitioner's repetitive work at her job could have contributed to the conditions of ill-being in her arms. He stated that repetitive work in certain circumstances can irritate the hands and wrists and elbows and the median and ulnar nerve. (PX8 at 13). Dr. Lane further stated that the condition can worsen even though she's removed from the work environment if it was irritated enough. (PX8 at 13). At that time, Dr. Lane testified that he believed Petitioner could return to work but under restrictions. (PX8 at 15). Dr. Lane would recommend no repetitive work, no vibratory or air tools, and lifting restrictions to a weight limit of 30-35 pounds. (PX8 at 15).

Petitioner saw Dr. Randipsingh (Randy) Bindra at Loyola University Medical Center on September 20, 2010. (PX13 at 9). Dr. Bindra's opinion was that Petitioner may have started out with lateral epicondylitis. (PX13 at 10). Dr. Bindra recommended a pain clinic or acupuncture. He did not think surgery would be helpful because Petitioner's pain fluctuated and was not constant and present in one spot. (PX13 at 11).

Petitioner went to the pain clinic on November 5, 2010, at Illinois Valley Community Hospital in Peru, Illinois, and saw Dr. Ronald Kloc. (PX12 at 8). Dr. Kloc diagnosed her with lateral tendonitis a/k/a tennis elbow in both elbows. He recommended injections for tennis elbow. (PX12 at 8). Petitioner returned to Dr. Kloc on November 11, 2010, for injections in both elbows. (PX12 at 23). Petitioner returned to Dr. Kloc on December 3, 2010. (PX12 at 35).
At that time, Petitioner rated her pain at 1/10 in her right elbow and 4/10 in her left, which were similar to the ratings she gave when she first saw Dr. Kloc. At that time, Dr. Kloc told her there were no other injections or interventions he could do.

On January 14, 2011, Petitioner accepted employment as a CNA. She testified that between August 7, 2009 through January 13, 2011, she had not worked and had continued under medical care.

Respondent offered a surveillance video at hearing which showed Petitioner at a car wash using a power washing hose to spray her car. The visual observation did not show any significant
rotational or extreme extension or flexion at the impaired joints to indicate upon observation that she was violating medical orders or is a type if symptom magnifier, to use the jargon of the industry.

Petitioner returned to Dr. Lane on April 1, 2011. (PX19 at 4). In his notes, Dr. Lane indicated that patient went to the pain clinic in November 2010, had injections, tried NSAID and cream without results, and now has a job

and her bilateral elbow pain has flared up again. At that time, Petitioner was advised to begin physical therapy, and if no improvement she would be placed on light duty work. (PX19 at 4). Petitioner started another round of physical therapy at Perry Memorial Hospital on April 20, 2011, and completed 12 sessions. (PX20 at 25).

On June 14, 2011, Petitioner again saw Dr. Lane, complaining of bilateral elbow pain, the left worse than the right. (PX19 at 2).

He recommended that she get a second opinion regarding her elbows and need for surgical release of tennis elbow. He referred her to Dr. Jason Anane-Sefah at Great Plains Orthopaedics in Peoria, Illinois. (PX19 at 3).

Petitioner first saw Dr. Anane-Sefah on July 27, 2011. (PX14 at 49). Dr. Anane-Sefah diagnosed her with elbow pain with lateral epicondylitis and medial epicondylitis. The plan was to obtain an inflammatory workup. On August 10, 2011, Dr. Anane-Sefah again saw Petitioner. (PX14 at 46). The laboratory results revealed a negative ANA screening. Petitioner received injections in both issues for her bilateral lateral epicondylitis. Because of Petitioner's elevated ESR, she was sent for evaluation to rheumatology. At this time, Dr. Anane-Sefah prescribed her off work. (PX14 at 6).

Petitioner returned to Dr. Anane-Sefah on April 9, 2012. (PX22 at 1). Petitioner stated that she received approximately two months of relief from her lateral epicondylar injection. Petitioner stated that the pain now had slowly increased and was worse than before. At that time his diagnoses were bilateral elbow pain with sensitivity, bilateral lateral epicondylitis, and concern for inflammatory arthritis. Dr. Anane-Sefah discussed with Petitioner her pain at light touch and stated this may be consistent with fibromyalgia. Petitioner wanted to repeat injections.

At hearing, Ms. Reuter testified that she does have braces that she wears as needed for her arms. She has not returned to Dr. Anane-Sefah and has not had any long term relief from the medications or injections. She is able to continue work as a CNA but does have some days that are worse than others regarding pain and her ability to perform her work.
She testified that her arms are really tense and feel tight. She finds it hard to bend them at times as it feels like her tendons are pulled. She has difficulty sleeping.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision as to C. **WHETHER AN ACCIDENT OCCURRED WHICH AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT**, the Arbitrator finds the following:

Petitioner testified as to a repetitive job which would require her to place parts up to 2 pounds into cylinders which weighed 8 pounds at a rate of at least 1,257 parts per day. She testified that she would have to use her right arm to place the parts into the cylinders and her left arm to push the totes across a rough surface to the other workers on the line. She estimated on average she would push 200 boxes of parts down the line per hour. The boxes were put into totes that she would push. The was the subject of precise, insightful cross examination on each and every detail of her job in a well prepared fashion. Notwithstanding, the worker showed a clear and convincing knowledge of the repetitive nature of her work in terms of repetitiveness, duration and body mechanics. She was very very articulate not always seen in that venue.

On October 15, 2008, Ms. Reuter testified that her left arm symptoms were so bad that she reported to a utility worker that she was having pain. A few days later, she was advised by her supervisor to see the company nurse. None of this testimony was rebutted. Respondent did not offer any witnesses from the plant regarding the events surrounding October 15, 2008.

Petitioner's medical treatment records all contain a consistent history of Petitioner relating her left arm symptoms to beginning at work on or about October 2008 and her right arm symptoms beginning in 2009 after she had been placed on a different line which required her to almost exclusively use her right arm to fill cylinders with screws..

Based upon the totality of the evidence, including but not limited to the credible testimony of Petitioner as to her highly repetitive job duties, the sequence of events, the lack of any testimony to the contrary, and the consistent medical treatment records, the Arbitrator finds as a matter of fact and as a conclusion of law that Petitioner herein sustained repetitive trauma accidental injuries which arose out and in the course of her employment with Respondent and manifested on October 15, 2008.

That is the manifestation date ascribed by the Arbitrator as the date that her symptoms became so bad that she reported her complaints to her employer and was referred for medical treatment.

In support of the Arbitrator's Decision as to E. **WHETHER TIMELY NOTICE OF THE ACCIDENT WAS GIVEN**, the Arbitrator finds the following:

The Petitioner testified that she gave notice to a utility worker on October 15, 2008 and that a few days later she was approached by Ken Colton, her supervisor, and advised to follow up with the company nurse. Respondent did not offer the testimony of any of these people to rebut the testimony of Petitioner.

Further, Petitioner testified that she was put on restrictions by Dr. Faber and moved to another line of the factory where she was able to use predominately her right hand and arm. This also was not rebutted.

Based upon the totality of the evidence including credible testimony of Petitioner and the lack of any evidence to the contrary, the Arbitrator finds as a matter of fact and as a conclusion of law that Petitioner gave proper notice to Respondent of the symptoms that she was experiencing due to her repetitive work tasks.

In support of the Arbitrator's Decision as to F. **WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE ACCIDENT**, the Arbitrator finds the following:

Petitioner testified to job duties which included significant repetitive activity with both upper extremities particularly from the elbow and wrist areas. Dr. Faber and Dr. Snyder both mention the repetitive job in their initial medical treatment records. In fact, Dr. Snyder specifically notes that Petitioner's condition has flared up and that she should alternate her work activities to avoid the repetitive duties in an attempt to manage her symptoms.

Petitioner testified that she did not have any symptoms similar to these types of symptoms prior to her employment with LCN Closers. The only suggestion in the medical records to any symptoms prior was years prior to her employment with a brief visit to a family physician when she worked at KFC.

There was no medical opinion giving any indication that the minor visit years prior to this even included the same type of symptoms or condition or was in any way significant to these specific symptoms several years later. Petitioner did not even recall having any prior medical treatment.

Dr. Lane testified he felt that Petitioner's current bilateral arm conditions were causally related to her repetitive work duties with LCN Closers. He testified that these are the types of activities that could cause or aggravate these median and ulnar nerve conditions and symptoms.

Dr. Faber, Dr. Snyder, Dr. Lane, Dr. Bindra, Dr. Kloc, and Dr. Anane-Sefah all rendered a diagnosis of lateral epicondylitis.

Respondent's section 12 examiner, Dr. Fernandez, could not render a diagnosis. Although he admitted that Petitioner's job appeared to be highly repetitive, he felt that she may have another condition and recommended other testing. He did not deny or state that he had any suspicion as to the validity of her pain complaints.

Based upon the greater weight of the evidence, the credible testimony of Petitioner, the testimony of Dr. Lane, and the consistent medical treatment records of all of her other treating physicians as to the diagnosis of bilateral lateral epicondylitis, the Arbitrator finds that Petitioner has proven with a preponderance of the evidence Petitioner's current condition of ill-being regarding her bilateral upper extremities is as a matter of fact and law , causally related to her repetitive work activities manifested on the date ascribed above and in the Award.
The prevailing medical opinions above are more persuasive in this particular case than those of Dr. Fernandez. Giving due to Dr. John Fernandez, the Arbitrator notes the condition is truly multi factorial, however.

In support of the Arbitrator's Decision as to J. **WHAT AMOUNT OF REASONABLE, NECESSARY, AND RELATED MEDICAL EXPENSES SHOULD BE AWARDED**, the Arbitrator finds the following:

Petitioner's Exhibit #1 is a compilation of medical expenses related to Petitioner's bilateral upper extremity conditions. Based upon the Arbitrator's finding of liability, the Arbitrator finds that Petitioner shall be entitled to an award of these medical expenses.

Therefore, the Arbitrator finds that Petitioner shall be entitled to total medical expenses of $25,701.06, with Respondent to receive credit for Section 8(j) payments of $5,542.55 as well as direct payments of $13,374.73 and adjustments of $1,467.72, leaving a balance of $5,316.06 due and owed to Petitioner subject to the limitations of the medical fee schedule of Section 8.2 of the Act and all adopted rules and regulations.

In support of the Arbitrator's Decision as to **K. WHAT AMOUNT OF TEMPORARY TOTAL DISABILITY SHOULD BE AWARDED, the Arbitrator finds the following:**

Petitioner testified that she was laid off from her employment with LCN Closers on August 6, 2009. Prior to that time, she had been working under the restrictions last placed by Dr. Snyder and no physician had lifted those restrictions. She did not obtain other employment until January 14, 2011.

In the meantime, she continued under the care of Dr. Lane and eventually Dr. Kloc for pain management injections and treatment. She remained under active medical care including advice as treatment through December 3, 2010, at which time Dr. Kloc advised her that he did not have any other treatment options for her. She did not again return to Dr. Lane until April 2011 after her symptoms had flared up again and at a time when she was performing full duty work as a CNA.

Thus, the Arbitrator finds based upon the totality of the evidence as a matter of fact and as a conclusion of law, this Petitioner is entitled to temporary total disability benefits from the Respondent herein from August 7, 2009, following her lay off through December 3, 2010, when it appears that for the time being she had reached a point of stability nowadays given the industry moniker of maximum medical improvement.. She did not seek other treatment until after she became employed and had a flare up. Thus, the Arbitrator finds that there would be no basis for awarding temporary total disability from December 3, 2010 through her employment begin date of January 14, 2011, given that she was not under medical care and had been released from care until the symptoms reappeared.

The Arbitrator orders as a matter of law as follows: Petitioner shall be awarded TTD from August 7, 2009 through December 3, 2010, a period of 69 1/7 weeks, at the minimum rate for a married individual with 3 dependents on her date of accident of $320.00, or a total of $22,125.71.

In support of the Arbitrator's Decision as to L. **THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:**

Dr. Lane testified that Petitioner would have restrictions of no repetitive work, no use of air or vibratory tools, and no lifting over 30 to 35 pounds. Petitioner testified that she was able to find alternative employment as a CNA and that she is able to perform the job duties but does have some days that are worse with pain than others.

She testified that she continues to wear her elbow braces as needed and continues to have a pulling sensation in the tendons in her arms as well as pain. She does sometimes have difficulty bending her arms.

Based upon the greater weight of the evidence, the clinical diagnosis by many physicians of bilateral lateral epicondylitis, the medical treatment rendered of medication, physical therapy, and pain management, and the credible testimony of Petitioner as to her continued pain complaints, the Arbitrator finds as a matter of law that Petitioner is entitled to an award of 12.5% loss of use of the right arm, or a total of 31.625 weeks, and 10% of the left arm, or a total of 25.3 weeks, for the nature and extent of her injuries. Using the minimum rate of permanency of $320.00, this is a total of $18,216.00.

In support of the Arbitrator's Decision as to M. **WHAT AMOUNT OF PENALTIES AND FEES SHOULD BE AWARDED, the Arbitrator finds the following:**

The Arbitrator finds the Respondent made a good faith challenge to the payment of compensation by the cross examination of the worker plus the basic opinion of Dr. John Fernandez. Its clear the Petitioner's condition was multi factorial.The Arbitrator finds that Respondent's reliance on that opinion was not unreasonable. It appears from the medical expenses and Petitioner's testimony that her medical treatment was covered directly by Respondent until after her lay off. After that time, she was able to use her group insurance for medical care. Penalties are denied as a matter of law.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas McCarville,
Petitioner,

vs.

NO. 06 WC 09654

14IWCC0169

R & D Thiel, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 5, 2012 is hereby affirmed and adopted.

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

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

14IWCC0169

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 07 2014

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

o-02/19/14
mb/wj
52

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McCARVILLE, THOMAS
Employee/Petitioner

Case# **06WC009654**
06WC009147

R & D THIEL INC
Employer/Respondent

14IWCC0169

On 11/5/2012, 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 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0013 DUDLEY & LAKE LLC
PETER SCHLAX
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LIBERTYVILLE, IL 60048

0481 MACIOROWSKI SACKMANN & ULRICH LLP
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10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

14IWCC0169

THOMAS McCARVILLE
Employee/Petitioner

v.

R & D THIEL, INC.
Employer/Respondent

Case # **06** WC **9654**

Consolidated cases: **06 WC 9147**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Waukegan**, on **Octobr 2, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 5, 2004** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,644.04**; the average weekly wage was **$1,127.77**.

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

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

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

Respondent shall be given a credit of **$115,672.12** for TTD, **$0.00** for TPD, **$14,459.70** for maintenance, and **$0.00** for other benefits, for a total credit of **$130,131.82**.

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

ORDER

THE ARBITRATOR HEREBY AWARDS 225 WEEKS OF BENEFITS, COMMENCING OCT 2, 2012 AT THE RATE OF $567.87 PER WEEK, BECAUSE THE INJURY HAS CAUSED LOSS OF USE OF THE MAN AS A WHOLE TO THE EXTENT OF 45 % AND THE RESPONDENT SHALL ALSO PAY TO THE PETITIONER MEDICAL COSTS OF $6,680.05.

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

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

Signature of Arbitrator

11/1/12
Date

NOV - 5 2012

The petitioner had a lower back injury caused by lifting in the course of his work as a carpenter. Dr. Bernstein recommended back surgery. Dr. Ghanayem agreed, that the petitioner required lower back fusion surgery. The operation was done December 12, 2006 by Dr. Avi Bernstein.

The petitioner had a course of physical therapy at Occucare.

Dr. Barron's report of September 15, 2010 shows the fusion is technically successful and well healed. R X 3 page 3.

The petitioner does have a permanent lifting limit of 30 pounds from the floor to the waist and 20 pounds above the waist. Rx 6, Dr Vasudevan, page 7.

Petitioner's exhibit 9:

This is a bill from the Carpenter's Union Health and Welfare Fund, showing payments of $2,625.68 for physical therapy services. These services do not appear to have been paid by respondent. Tower Automotive v Illinois Workers Compensation Commission applies, such that the amount received by the providers is the amount the respondent is required to pay. The amount awarded on this exhibit is $2,625.68

Petitioner's Exhibit 10:
Occucare Physical therapy, 3/1/2005- 8/25/2005: this set of bills is not paid and is awarded in the sum of 2,144.32.

Rehab Physicians, (Dr Jayaprakash), $260.00 for two visits 10/14/2004 and 11/4/2004- this is awarded.

Libertyville Imaging, 5/29/2006 MRI- this is awarded in the sum of $1,000.00

Dr Jayaprakash, the respondent did not pay for the visits of 9/7/06 and 11/8/06 and 1/31/2007 and 2/1/2007.These were billed at $157.00 but an adjustment of 39.25 was granted. The fee schedule would call for a payment of 76 % of the 157.00 = 119.32 or the reduced bills issued by the provided, 117.75, whichever is less. The Arbitrator awards, 4 X 117. 75 = $ 471.00 for these bills.

The bills issued by Dr. Jayaprakash for services on and after 4/26/2007 were billed under the name of Wheaton Franciscan and all these were paid by the respondent.

Petitioner's Exhibit 11:

Dr. Painter's bill of $350.00 for services of 12/5/2006 was paid by the respondent on 4/2/2007. P X 11, page 1. Compare, R X 10

Dr. Painter's bill of 12/5/2006 to 12/12/2006 for his assistance in lumbar fusion surgery was issued on March 19, 2007. Respondent paid for the same services, per a fee schedule and/ or PPO on 6/18/2007- amount paid

was $3,779.27. Petitioner does not present a bill of a more recent date than the payment, the Arbitrator must conclude that the payment was the proper amount and the account is satisfied. PX 11 page 2, compare RX 10.

Midwest Diagnostics, $16.00 for service of 12/5/2006- this was paid on 4/5/2007. P X 11, page 3, compare RX 10

Midwest Diagnostics, $94.00 for services of 12/14/2006 does not appear to be paid, this bill is awarded. P X 11, page 4. Page 5 is just a copy of page 4.

Samar F. Najjar, M.D. $65.00 for hospital services, this was paid by respondent on 2/8/2007 PX 11, page 6.Compare RX 10.

Advanced Radiology, date of services 12/12/2006, $65.00 was billed 2/3/07 and was paid by respondent on 2/5/2007 for $20.19. There is no bill more recent than the payment, the provider must have been paid correctly per fee schedule or PPO. P X 11, page 7. Compare RX 10

Park Ridge Anesthesiology, has billed $360.00 for service 99252 on 12/12/2006 and another $270.00 under code 99232 for services on 12/13/2006. The respondent did pay $99.63 plus $115.23 for the services. The fee schedule calls for $184.20 for 99252 plus $119.97 for 99232, the sum being $304.17; the respondent paid, $214.86. The amount awarded is $304.17-$214.86 = $89.31. P X 11 page 8, Compare RX 10

Park Ridge Anesthesiology charged $180.00 for a visit by Dr. Soder on 12/14/2006; the fee schedule amount for that visit is $89.74. P X 11 page 9

Petitioner's exhibit 11 includes duplicative bills by Dr. Painter for 12/5/2006 which respondent did pay on 4/2/2007. PX 11 pages 10- 13 are included in P X 11 page 1. Compare, RX 10.

Lutheran General, bill of 90.47 for services of 12/5/2006; this was paid by respondent on 1/5/2007. P X 11, page 14.Compare, RX 10.

Lutheran General Surgery bill of $68,791.50; this was billed on 2/4/2007 and paid by the respondent in the sum of $57,096.94 on 2/14/2007. It appears this bill has been resolved by a proper payment. PX 11, page 15. Compare, RX 10.

Occucare, for services of 9/17/2004 to 10/21/2004; the respondent did make 8 payments for these dates of services, totaling $3,632.92. The payments do appear to be consistent with the amount reflected for the charges incurred on these dates. So no further payments are awarded on this account. P X 11, page 16-18. Compare, RX 10.

Occucare, for the services of 4/23/2007 to 7/27/2007; respondent made many payments on this account and appears to have covered all these charges. PX 11, page 20. Compare, RX 10.

Rehab Physicians, this is Dr Jayaprakash again, a repeat of charges included in P X 10. P X 11, page 21-22

Wheaton Franciscan, Dr Jayprakash, 2/28/2008, this was covered by the respondent. R X 10.

The sum of unpaid bills awarded is therefore, $6,680.05.

The petitioner has a limitation of his lifting ability such that he can lift 30 pounds from floor to waist and 20 pounds waist to overhead.

The petitioner had a vocational consultation with Gary Wilhelm.

Almost immediately, he started work with Silent Construction.

Wilhelm suggested the petitioner could from computer tutoring. It was evident from the testimony on redirect, the Respondent did offer the tutoring, petitioner did not accept it. The petitioner explained, he is working full time with Silent Construction. Petitioner does not feel that he wants to take computer tutoring on Saturdays.

Petitioner testified, he now works in Silent Construction. Petitioner says the company is owned by his nephew. Petitioner drives a pick-up truck, to go to stores and lumber yards, for supplies and takes the supplies to job sites. He takes tools to job sites. He also meets some prospective customers to discuss their projects.

Petitioner did not really test the market for what he could earn.

The family operated business could be paying less or more than the market would be.

For this reason, the wage difference formula under Section 8(d)(1) is not well proven.

The Arbitrator awards compensation in the amount of 45% MAW under Section 8(d)(2) for a lumbar spine injury with a fusion resulting in a loss of the ability to perform the duties of the usual and customary occupation. The respondent shall pay benefits commencing Oct 2, 2012 for 225 weeks at the maximum permanent partial disability rate for injuries of July 1, 2004-June 30, 2005, which is $567.87 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Chapman,
Petitioner,

vs. NO. 11 WC 45254

14IWCC0170

Nevco Scoreboard Company.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 6, 2013 is hereby affirmed and adopted.

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

14IWCC0170

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $13,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 0 7 2014

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

o-02/25/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHAPMAN, JEFFERY L.
Employee/Petitioner

Case# **11WC045254**

NEVCO SCOREBOARD COMPANY LLC
Employer/Respondent

14IWCC0170

On 3/6/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
NATHAN A BECKER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

2871 LAW OFFICES OF PATRICIA M CARAGHER
WILLIAM E PAASCH
1010 MARKET ST SUITE 1510
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jeffery L. Chapman
Employee/Petitioner

v.

Nevco Scoreboard Company, LLC
Employer/Respondent

Case # **11** WC **045254**

Consolidated cases: _____

14IWCC0170

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **12-20-12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10-26-11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$36,440.82**; the average weekly wage was **$700.79**.

On the date of accident, Petitioner was 49 years of age, ***married*** with 0 child under 18.

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

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

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

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

ORDER

The Arbitrator finds Petitioner's condition of ill-being, severe spinal stenosis at L3-4 and L4-5 with unstable spondylolisthesis at L4-5, is causally connected to his work injury of October 26, 2011. The Arbitrator bases this opinion on the testimony of Petitioner and Dr. Kennedy. The Arbitrator finds Dr. Kennedy's testimony to be more credible than that of Dr. Lehman.

The Arbitrator finds the prospective medical treatment proposed by Dr. Kennedy, a decompression and fusion at L3-4 and L4-5, to be reasonable and necessary and causally related to Petitioner's October 26, 2011 work accident. Therefore the Arbitrator orders Respondent to approve and pay for the proposed medical treatment, including appropriate surgical intervention, to Petitioner's lumbar spine.

The Arbitrator finds that Respondent shall pay reasonable and necessary medical services for Petitioner's severe spinal stenosis at L3-4 and L4-5 with unstable spondylolisthesis at L4-5, pursuant to the medical fee schedule of $15,661.71 to Multi-Care Specialists and $2,400.76 to Professional Imaging, as provided in Section 8(a) and 8.2 of the Act. The Arbitrator bases this on the testimony of Dr. Kennedy.

Respondent shall pay Petitioner temporary total disability benefits of $467.19/week for 28 and 1/7 weeks, commencing 6/7/2012 through 12/20/2012, as provided in Section 8(b) of the Act. Petitioner's treating physicians have held him off of work from the date of accident to the time of trial. Respondent has not accommodated or offered to accommodate work within the restrictions recommended by the IME doctor. The parties stipulated that Petitioner was paid all owed TTD benefits from the date of accident until 6/6/2012, therefore this award covers the period of TTD after 6/6/2012 and is not offset by the amounts paid to Petitioner prior to 6/7/2012

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.

Earl Lee
Signature of Arbitrator

3/4/13
Date

MAR 6 - 2013

Jeffery L. Chapman vs. Nevco Scoreboard Company, LLC
11-WC-045254

The Arbitrator hereby finds the following facts:

Petitioner, Jeffery Chapman, is a 50 year-old production worker for Respondent, Nevco Scoreboard Company. On October 26, 2011, Petitioner injured his low back while lifting a piece of sheet aluminum into a machine. Petitioner described moving the aluminum from his left to right and twisting his back. Petitioner testified that he had an immediate shooting/stabbing pain in his lower left back. Shortly after the incident, he began having symptoms down his left leg.

Petitioner first sought medical treatment from Mark Eavenson D.C. in Granite City, Illinois. Px3at1. The history of injury reported to Chiropractor Eavenson was: "[Petitioner] was sliding a piece of material that weighed 60 to 80 pounds into a machine in a twisting type motion. He felt a sharp stabbing pain in his lower back and then began having pain in his left lower extremity." Px3at1. The physical examination demonstrated a positive straight leg test on the left and a negative straight leg test on the right. Id. Petitioner was diagnosed with lumbar disc protrusion with left lower extremity radiculitis. Following that visit, Petitioner was held off of work and an MRI of the lumbar spine was ordered. Id. The medical records of Chiropractor Eavenson indicate, and Petitioner testified, that Petitioner had been treated for low back pain prior to October 26, 2011.

Petitioner underwent an MRI of his lumbar spine on October 27, 2011 at Imaging Partners of Missouri. Px4.

On November 3, 2011, Petitioner began treating with Dr. David Kennedy, a neurosurgeon in St. Louis, Missouri. Px1at1. Dr. Kennedy is a board certified neurosurgeon, with his practice confined strictly to the spinal cord. Px7at6. He performs between 250 and 300 lumbar surgeries per year. Px7at7. By history, "[petitioner] was lifting a piece of metal into a machine and while twisting to move this he had a sharp pain in the left lower back area, and then it began to radiate into the left leg associated with numbness and tingling." Px7at8. Dr. Kennedy interpreted the MRI as showing stenosis at L4-5, with L4 slipped forward of L5, that was producing pretty significant central stenosis, as well as foraminal encroachment on both sides. Px7at9. Following that visit, Dr. Kennedy recommended epidural steroid injections and physical therapy. Petitioner was held off of work. Id

At the direction of Dr. Kennedy, Petitioner underwent three epidural steroid injections into his lumbar spine. Px5.

Following the last injection, Petitioner saw Dr. Kennedy on February 23, 2012. Px7at11. The records indicate and Petitioner testified that he did not receive satisfactory relief from these injections. At this time, Petitioner reported he was starting to experience numbness in his feet if he walked or stood for more than a few minutes. Id. The records and testimony show that Petitioner's symptoms progressed from low back pain with left leg symptoms to low back pain with bilateral leg symptoms. Believing Petitioner had failed conservative treatment, Dr. Kennedy ordered a myelogram of Petitioner's lumbar spine. Px7at11.

Petitioner underwent a myelogram on March 7, 2012. Px6. Dr. Kennedy explained the significant findings from the myelogram:

> "The notable findings that L-4 were still slipped forward on L-5, but it also moved between flexion and extension, so that there is actual mechanical instability at that level, and associated with the instability was severe spinal stenosis.

> In other words, his spinal canal was reduced by about 90 percent, that's why he was getting the pain with walking or standing for [more] than a few minutes.
>
> There was also some fairly significant stenosis at L3-4, not as bad as L4-5, but still very significant. These findings were verified on the CT portion of the study, wherein the L4-5 level was severely stenosed, really to a critical level. And again, there was also significant stenosis at L3-4, not as bad as at L4-5, but definitely both of those levels, in light of his symptoms, require decompression and fusion." Px7at12-13.

Petitioner's subjective complaints were noted to be consistent with the myelographic findings. Px7at13. Dr. Kennedy recommended a decompression and fusion at L3-4 and L4-5. Id. At the time of his deposition, Dr. Kennedy testified Petitioner's diagnosis is severe spinal stenosis at L3-4 and L4-5 with unstable spondylolisthesis at L4-5 causing his leg pain. Px7at17.

Petitioner testified that he had a prior episode with low back pain with minor symptoms into his left leg. Prior to the October 26, 2011 injury he very rarely had numbness down to his left foot. Prior pain complaints were successfully treated with physical therapy and only two lumbar injections; Petitioner declined a third injection because he had satisfactory resolution of his symptoms. Further, Petitioner had never been referred for a surgical consult before. Dr. Kennedy testified that it is unlikely that Petitioner had instability between L4-5 associated with his prior lumbar condition, because instability would not have stabilized with injections. Px7at32.

Petitioner testified that initially after the October 26, 2011 injury he had symptoms in his left leg. His symptoms progressed over the next several months to include symptoms in his bilateral legs. Petitioner testified that his symptoms since the October 26, 2011 injury are substantially more severe than any prior lumbar issues he has experienced. Now he suffers from persistent left leg pain, numbness, and tingling. Also he now has substantial and persistent left foot numbness. Prior to this injury Petitioner had never experienced right leg symptoms. Now he has symptoms in his right leg and foot, but they are much less severe than the symptoms in this left leg and foot.

Dr. Kennedy testified he believes Petitioner's October 26, 2011 work injury aggravated his underlying lumbar condition sufficiently to cause the symptoms he is currently experiencing. Px7at17. Further, Dr. Kennedy testified the mechanism of injury was consistent with this type of aggravation. Px7at18. Specifically, Dr. Kennedy opined the instability between L4-5 was acutely caused by the work injury of October 26, 2011, which in turn is aggravating Petitioner's underlying stenosis. Px7at30

Dr. Kennedy opined the work injury caused instability at Petitioner's L4-5. Px7at37-39. He based this opinion on the diagnostic studies, Petitioner's prior and current medical history, and the progression of symptoms. Instability superimposed on degenerative stenosis can cause rapid progression of symptoms. Px7at39. Symptom progression caused by degenerative factors alone occurs over a much longer period of time. Id. Therefore, Petitioner's quick progression of symptoms, to include is bilateral legs, is explained by the acutely caused instability.

Dr. Kennedy testified that all of the treatment, to date, has been reasonable and necessary to cure or relieve Petitioner's low back condition. Additionally, the recommended surgery is reasonable and necessary. Px7at14.

Petitioner testified that he continues to have substantial daily symptoms. He is aware of the recommendation for surgery by Dr. Kennedy and wishes to proceed. Petitioner has been held off of work since the date of accident, until the present. Respondent has not offered light duty work within the IME doctor's restrictions.

Dr. Richard Lehman performed an Independent Medical Examination on June 7, 2012. Dr. Lehman testified that he treats patients for lumbar conditions conservatively and refers surgical lumbar patients to a neurosurgeon or spine specialist. Rx1at24. Following the visit, Dr. Lehman opined that Petitioner should have a permanent 50 lbs. lifting restriction and should avoid any rotational stress lifting with the lumbar. Rx1at27-28. Regarding surgical treatment, Dr. Lehman believes Petitioner would be best served by a decompression and fusion from the L2 to the S1 levels. Rx1at41

The Arbitrator finds the following:

1. The Arbitrator finds Petitioner's condition of ill-being, severe spinal stenosis at L3-4 and L4-5 with unstable spondylolisthesis at L4-5, is causally connected to his work injury of October 26, 2011. The Arbitrator bases this opinion on the testimony of Petitioner and Dr. Kennedy. The Arbitrator finds Dr. Kennedy's testimony to be more credible than that of Dr. Lehman.

2. The Arbitrator finds the prospective medical treatment proposed by Dr. Kennedy, a decompression and fusion at L3-4 and L4-5, to be reasonable and necessary and causally related to Petitioner's October 26, 2011 work accident. Therefore, the Arbitrator orders Respondent to approve and pay for the proposed medical treatment, including appropriate surgical intervention, to Petitioner's lumbar spine.

3. The Arbitrator finds that Respondent shall pay reasonable and necessary medical services for Petitioner's severe spinal stenosis at L3-4 and L4-5 with unstable spondylolisthesis at L4-5, pursuant to the medical fee schedule of $15,661.71 to Multi-Care Specialists and $2,400.76 to Professional Imaging, as provided in Section 8(a) and 8.2 of the Act. The Arbitrator bases this on the testimony of Dr. Kennedy.

4. Respondent shall pay Petitioner temporary total disability benefits of $467.19/week for 28 and 1/7 weeks, commencing 6/7/2012 through 12/20/2012, as provided in Section 8(b) of the Act. Petitioner's treating physicians have held him off of work from the date of accident to the time of trial. Respondent has not accommodated or offered to accommodate work within the restrictions recommended by the IME doctor. The parties stipulated that Petitioner was paid all owed TTD benefits from the date of accident until 6/6/2012; therefore this award covers the period of TTD after 6/6/2012 and is not offset by the amounts paid to Petitioner prior to 6/7/2012.

Dated: 3/4/13

Ed Lee

Honorable Ed Lee

STATE OF ILLINOIS)
)
SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Konrad Zochowski,
Petitioner,

vs. NO: 08 WC 010483

14IWCC0171

Christopher Solarczyk individually and d/b/a Active Contract Carriers, Artur Robak, Piotr Musialik, and Illinois State Treasurer as ex-officio custodian of IWBF,
Respondents.

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 jurisdiction, employment, accident, notice, benefit rate, medical expenses, occupational disease, temporary disability, penalties and fees and statute of limitations, and being advised of the facts and law, modifies the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner appeals the February 20, 2013 Decision of Arbitrator Williams finding that no named Respondent was operating under and subject to the automatic coverage provision of Section 3 of the Act or any other provision of the Act in regard to Petitioner's employment on December 5, 2007. The Arbitrator further found that there was an employee-employer relationship that existed between Petitioner and the Respondent Arthur Robak on December 5, 2007, but no such relationship existed with any other named Respondent and Petitioner. The Arbitrator denied Petitioner's request for compensation under the Act and dismissed the claim.

After considering the entire record, the Commission affirms and adopts the Decision of the Arbitrator with regard to jurisdiction and modifies the remainder of the Decision of the Arbit

14IWCC0171

Petitioner, a truck driver, claims an injury to his low back after a motor vehicle accident on December 5, 2007. Respondent Robak leased a truck from Respondent Musialik. Respondent Robak contracted with Respondent Active Contract Carriers, owned by Respondent Solarczyk, to transport goods in the leased truck. Robak and Petitioner drove the leased truck to deliver the contracted goods. Petitioner was paid by Respondent Robak and controlled by Robak alone.

The Workers' Compensation Act applies automatically to any undertakings, enterprises, or businesses that are deemed "extra hazardous" under Section 3 of the Act. Further, any enterprise or business in Illinois may elect to come under the provisions of the Workers' Compensation Act. 820 ILCS 305/2. The Act applies to all workers in the state who are covered either by the Act's automatic application or by election. Section 3 of the Act sets forth the businesses that are considered to be extra hazardous and subsection 3 establishes as extra hazardous "an employer engaged in carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor vehicle where the employer employs more than 2 employees in the enterprise or business."

There is no evidence that any named Respondent elected coverage under the Act. Petitioner stated in his brief before the Commission that he did not allege Respondent Musialik to be an employer operating under and subject to the Act. The Arbitrator found the same and the Commission affirms. Respondent Active Contract Carriers is a State of Illinois corporation in good standing owned and operated solely by Respondent Solarczyk, The business does not have any employees and uses contracted independent truck drivers to move freight for third parties. The Arbitrator found and the Commission affirms that Respondent Solarczyk, individually and d/b/a Active Contract Carriers, is not an employer operating under and subject to the Illinois Workers' Compensation Act.

The Arbitrator found that Respondent Robak was not operating under and subject to any automatic coverage provision of Section 3 of the Act. The Arbitrator found that while Respondent Robak was a carriage operator under Section 3(3), the evidence does not establish that he had more than two employees. The Arbitrator found and the Commission affirms that Robak was not operating under and subject to the Act. Without any remaining Respondents to the claim, the Commission affirms the Arbitrator's dismissal of Respondent Illinois Injured Workers' Benefit Fund.

As no Respondent was operating under and subject to the Illinois Workers' Compensation Act, the Commission lacks jurisdiction under the Act to make any further findings. The Commission strikes the Arbitrator's findings regarding whether there was an employer/employee relationship between the Petitioner and Respondents, whether the Petitioner's accident arose out of and in the course of his employment with Respondents, whether timely notice was given to the Respondents, the amount of wages and whether concurrent wages were proven, whether the medical services provided to Petitioner were reasonable and necessary, whether the Petitioner's present condition of ill-being is causally related to the injury and the amount of compensation due for temporary total disability.

All else is otherwise affirmed and adopted.

14IWCC0171

IT IS THEREFORE ORDERED BY THE COMMISSION that the February 20, 2013 Decision of the Arbitrator is hereby modified. The Commission lacks jurisdiction under the Act and the claim is dismissed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 07 2014

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

drd/adc
o-1/14/14
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZOCHOWSKI, KONRAD
Employee/Petitioner

Case# **08WC010483**

ACTIVE CONTRACT CARRIERS INC CHRISTOPHER SOLARCZYK INDV & D/B/A ACTIVE CONTRACT CARRIERS INC ARTUR ROBAK, PIOTR MUSILAK & IL STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

14IWCC0171

On 2/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
DAVID M BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

5048 ASSISTANT ATTORNEY GENERAL
MEGAN JANICKI
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

CHRISTOPHER SOLARCZYK D/B/A
ACTIVE CONTRACT CARRIER INC
714 N POINT DR
SCHAUMBURG, IL 60193

1739 STONE & JOHNSON CHARTERED
200 E RANDOLPH ST
24TH FLOOR
CHICAGO, IL 60601

PIOTR MUSIALIK
#2
960 BRANDY CT
DES PLAINES, IL 60016

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

KONRAD ZOCHOWSKI
Employee/Petitioner

Case #08 WC 10483

14IWCC0171

v.

ACTIVE CONTRACT CARRIERS. INC.,
CHRISTOPHER SOLARCZYK INDIVIDUALLY
& D/B/A ACTIVE CONTRACT CARRIERS. INC.,
ARTUR ROBAK. PIOTR MUSILAK AND
ILLINOIS STATE TREASURER AS *EX-OFFICIO*
CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Gerald Jutila, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on September 16, 2009, December 7, 2009, and January 11, 2010, and by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 1, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☒ Was there an employee-employer relationship?

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

D. ☒ What was the date of the accident?

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

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

G. ☒ What were the petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- This claim was filed on March 7, 2008, against respondents Active Contact Carrier, Inc., and Kintetsu World Express. The claim was amended March 21, 2008, to include respondents Piotr Musialik and Artur Robak, amended a second time May 15, 2008, to include respondent Christopher Solarczyk, individually and d/b/a as Active Contract Carriers, Inc., and a third time March 19, 2009, to include the State Treasurer, Ex-Officio Custodian for the Injured Workers' Benefit Fund.

- At the initial hearing on September 16, 2009, respondents Piotr Musialik and Artur Robak failed to appear by its officers or a representative and the matter proceeded *ex parte* against them.

- There was no evidence in the Commission's case file, its data base or the transcript of proceedings of a motion requesting a trial date for Arbitrator Jutila's September 2009 status call in compliance with §7030.20 of the Rules Governing Practices before the Illinois Workers' Compensation Commission. Nor was there evidence that timely notice was sent to respondents Piotr Musialik and Artur Robak to their last known address via regular U.S. mail or delivered to them or that they received actual notice of the petitioner's motion in accordance with §7030.20.

- There is no evidence that the hearing date, time and location was sent to respondents Piotr Musialik and Artur Robak to their last known address via regular U.S. mail or delivered to them or that respondents Piotr Musialik and Artur Robak received actual notice of the hearing date, time and location or that is has otherwise complied with §7030.20 of the Rules Governing Practices before the Illinois Workers' Compensation Commission.

- The petitioner did not present evidence that respondents Piotr Musialik and Artur Robak agreed to a hearing on September 16, 2009, or waived the requirements of

§7030.20 of the Rules Governing Practices before the Illinois Workers' Compensation Commission.

- The respondent Injured Workers' Benefit Fund Illinois through the State Treasurer, the *ex-officio* custodian of the Injured Workers' Benefit Fund, was represented by the Illinois Attorney General's office.

- After the start of the hearing on September 16, 2009, pursuant to the motion of the petitioner, respondent Kintetsu World Express was dismissed.

- On September 16, 2009, the matter was continued to December 7, 2009, at which time respondent Autur Robak appeared and testified without any objections regarding the proceedings or regarding the earlier *ex parte* hearing thereby implicitly waiving as to him any errors regarding the *ex parte* hearing.

- At the time of injury, the petitioner was 28 years of age, single with no children under 18.

ORDER:

- The petitioner's request for compensation under the Act is denied and the claim is dismissed.

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

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

Robert E Williams
Robert Williams

2/19/13
Date

FEB 20 2013

FINDINGS OF FACTS:

On December 5, 2007, the petitioner, a truck driver, received emergency medical care for lower back pain at Jasper County Hospital after sliding off a road and turning his vehicle over. CT scans of his lumbar spine revealed a 75% compression fracture with retropulsion of the fracture fragments at T12. After a transfer to ST. James Hospital the same day, a T12 corpectomy and anterior fusion of T11 through L1 was performed on December 12th. The petitioner was discharged on the 15th and followed up with Dr. Gregory McComis on the 19th. The doctor started the petitioner on a TLSO brace, which was discontinued for a lumbar corset on February 1, 2008. At his last follow-up with Dr. McComis on April 9, 2008, the petitioner reported no pain and normal activities. The doctor noted 5/5 strength in his upper and lower extremities, full flexion and extension and normal toe and heel walking. He was released without any work restrictions.

FINDING REGARDING WHETHER RESPONDENTS WERE OPERATING UNDER AND SUBJECT TO THE WORKERS' COMPENSATION ACT:

Based upon the evidence presented, the respondents Active Contact Carrier, Inc., Piotr Musialik, Artur Robak and Christopher Solarczyk, individually and d/b/a Active Contract Carriers, Inc., were not operating under and subject to the automatic coverage provision of §3 of the Workers' Compensation Act or any other provisions of the Act in regards to the petitioner's employment on December 5, 2007.

Although the respondent Artur Robak was a carriage operation involved in the loading, unloading and distribution of commodities, the evidence does not establish that he had more than two employees on December 5, 2007. Respondent Piotr Musialik was not subject to the Act by the lease of his truck to respondent Artur Robak. The evidence is that respondent Christopher Solarczyk was a State of Illinois corporation in good

standing on December 5, 2007, and not a sole proprietorship d/b/a Active Contract Carriers, Inc. The respondent Active Contact Carrier, Inc., was not a trucking business but a freight moving operation using independent truck drivers for moving the freight. The corporation was a one-man business and did not own any trucks or make deliveries.

FINDING REGARDING WHETHER THERE WAS AN EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE PETITIONER AND RESPONDENTS:

An employer/employee relationship existed between the petitioner and the respondent Artur Robak on December 5, 2007. Respondent Artur Robak control the petitioner's work, paid his salary and leased the vehicle driven by the petitioner.

The petitioner failed to prove that an employer/employee relationship existed between him and respondents Active Contact Carrier, Inc., Piotr Musialik and Christopher Solarczyk, individually and d/b/a as Active Contract Carriers, Inc., on December 5, 2007. The petitioner failed to prove that an employer/employee relationship existed between him and respondent Christopher Solarczyk. He did not operate his business as a sole proprietorship d/b/a Active Contract Carriers, Inc., but as a State of Illinois corporation. Respondent Active Contract Carrier, Inc., was not a carriage enterprise or a business of loading and unloading of commodities. Their business was a freight transportation supplier that utilized the services of owners of small and medium trucks. Respondent Active Contract Carrier, Inc., did not hire the petitioner or supply the truck driven by the petitioner and did not pay the petitioner for his work. The petitioner was not subject to any control, scheduling or termination by respondent Active Contract Carrier, Inc., and did not move freight exclusively for them.

The petitioner failed to prove that a joint employment or a loaning and borrowing relationship existed between him and respondents Active Contact Carrier, Inc., Piotr

Musialik and Christopher Solarczyk, individually and d/b/a as Active Contract Carriers, Inc., on December 5, 2007. The petitioner's request for compensation under the Act is denied and the claim is dismissed.

FINDING REGARDING WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENTS:

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an accident on December 5, 2007, arising out of and in the course of his employment with the respondent Artur Robak.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENTS:

Based upon the testimony and the evidence submitted, the respondent Artur Robak received timely notice of the petitioner's injury.

FINDING REGARDING THE AMOUNT OF WAGES AND WHETHER CONCURRENT WAGES WERE PROVEN:

Based upon the petitioner's testimony, in the year preceding the injury, his average weekly wage from respondent Artur Robak was $400.00.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner was reasonable and necessary.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his lumbar and thoracic spine is causally related to the work injury on December 5, 2007.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The petitioner was temporarily totally disabled from December 5, 2007, through April 9, 2008.

FINDING REGARDING THE ILLINOIS WORKERS' BENEFIT FUND:

An award against the Fund under §4(d) of the Act is only permitted to pay workers' compensation benefits when an employer has failed to provide coverage as determined under §4(d) and has failed to pay the benefits due. The respondent Artur Robak was not subject to the Act or required to provide coverage under §4(d) of the Act on December 5, 2007. The respondent Injured Workers' Benefit Fund Illinois is dismissed.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JANET BLANEY-PEELER,

Petitioner,

vs.

14IWCC0172

NO: 10 WC 15902

HARRAH'S METROPOLIS CASINO,

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

The Commission modifies the Decision of the Arbitrator with respect to permanent partial disability only. The Commission finds that the Petitioner is entitled to twenty-five percent loss of use of the person-as-a-whole as the result of her January 26, 2009 work-related injury.

IT IS THEREFORE OREDERE BY THE COMMISSION that the Decision of the Arbitrator filed on December 11, 2012, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $348.35 per week for a period of 125 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use of twenty-five percent of the person-as-a-whole.

14IWCC0172

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $759.78 for medical expenses under §8(a) of the Act and pursuant to the 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 $43,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 10 2014

Daniel R. Donohoo

Thomas J. Tyrrell

Kevin W. Lamborn

DRD/tdm
O: 2-25-14
068

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0172

BLANEY-PEELER, JANET
Employee/Petitioner

Case# 10WC015902

HARRAH'S METROPOLIS CASINO
Employer/Respondent

On 12/11/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0355 WINTERS BREWSTER CROSBY ET AL
LINDA J BRAME
111 W MAIN ST
MARION, IL 62959

1892 ROBERTS PERRYMAN PC
J BRADLEY YOUNG
1034 S BRENTWOOD SUITE 2100
ST LOUIS, MO 63117

14IWCC0172

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Janet Blaney-Peeler
Employee/Petitioner

v.

Harrah's Metropolis Casino
Employer/Respondent

Case # 10 WC 15902

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 **William R. Gallagher**, Arbitrator of the Commission, in the city of **Collinsville**, on **October 22, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On January 26, 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 respect to the right shoulder.

In the year preceding the injury, Petitioner earned $30,190.42; the average weekly wage was $580.59.

On the date of accident, Petitioner was 47 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 $$709.00 for other benefits, for a total credit of $709.00. The parties stipulated all TTD benefits have been paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical bills as identified in Petitioner's Exhibit 1 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall receive a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Based upon the Arbitrator's Conclusions of Law attached hereto, all other medical and chiropractic bills are denied.

Respondent shall pay Petitioner the sum of $348.35 per week for 100 weeks as provided in Section 8(d)2 of the Act because injury sustained caused the permanent partial disability of 20% loss of use of the body as a whole.

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

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

William R. Gallagher, Arbitrator

December 7, 2012
Date

DEC 11 2012

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of January 26, 2009, and that Petitioner sustained repetitive trauma and that the part of the body affected was right shoulder/arm, exhaustion, lumbar spine and cervical spine. Petitioner subsequently filed an Amended Application for Adjustment of Claim which was identical to the initial application filed with the singular exception being that the date of accident (manifestation) was alleged to be November 11, 2009. At trial, the parties stipulated that the appropriate date of accident (manifestation) was January 26, 2009, that all temporary total disability benefits had been paid and that Respondent had paid Petitioner a permanent partial disability advanced of $709.00 for which it was entitled to a credit. The disputed issues were causal relationship, liability for various medical/chiropractic bills and the nature and extent of disability.

This case was previously tried on October 14, 2010, before Arbitrator John Dibble on a 19(b) Petition. Arbitrator Dibble's decision was entered on November 10, 2010, and he ruled in favor of the Petitioner on virtually all of the disputed issues finding accident, notice, awarding both temporary total disability benefits and medical bills. In respect to causality, Arbitrator Dibble found that there was a causal relationship between the repetitive trauma accident and Petitioner's conditions in both the neck and right shoulder.

Petitioner's counsel filed another 19(b) Petition and the case was set before Arbitrator Deborah Simpson on January 20, 2012. A conference took place before Arbitrator Simpson at that time which resulted in an agreement being reached between Petitioner's counsel and Respondent's counsel. Following this conference, Respondent's counsel sent Petitioner's counsel an e-mail on January 27, 2012, which summarized the agreement that had been reached on January 20, 2012. This agreement stated, in relevant part, the following:

> "In exchange for paying the TTD benefits going back to June 8, 2011, and in exchange for the reinstatement of TTD benefits currently (as described in the prior paragraph), Petitioner agrees to the following:
>
> 'in light of the medical evidence from Dr. Hoffman, Dr. Davis, Dr. Wood, and Dr. Emanuel, Petitioner's work–related injury is limited to the right shoulder (Right Upper Extremity).'"

In a responsive e-mail from Petitioner's counsel to Respondent's counsel it stated:

> "I agree. Please issue the TTD check today. Thanks."

The initial e-mail also contained a statement that it was agreed that if the case proceeded to trial at a later time, that the agreement would be admissible as evidence. These e-mails were so received into evidence at the time of the trial.

Petitioner worked as a blackjack dealer at Respondent's casino in Metropolis, Illinois. Petitioner worked 10 hours a day, four days a week and frequently worked overtime. Petitioner experienced a gradual onset of pain in her right shoulder and cervical area. Subsequent to the 19(b) award of November 10, 2010, Petitioner did not contact Dr. Sonjay Fonn until February 7, 2011, to request an off work slip. There was no examination and Dr. Fonn simply provided the slip without seeing or examining the Petitioner.

Dr. Fonn was deposed on November 10, 2011, and both his deposition testimony and medical records were received into evidence at trial. Dr. Fonn examined Petitioner on March 23 and April 6, 2011, and renewed his recommendation that Petitioner have neck surgery which she again refused. When Dr. Fonn saw Petitioner again on December 21, 2011, she informed him that she had been treated by a chiropractor and Dr. Fonn recommended she continue doing so. He did authorize her to be off work at that time. When Dr. Fonn saw Petitioner on April 25, 2012, he reviewed the physical therapy notes and examined Petitioner and then opined that she had made "excellent progress" and he authorized her to return to work without restrictions.

At Respondent's direction, Petitioner was examined by Dr. James Emanuel on August 30, 2011. Dr. Emanuel was deposed on September 18, 2012, and his deposition was received into evidence at trial. In regard to the cervical spine, Dr. Emanuel diagnosed Petitioner with degenerative disc disease at C4–C5 and C5–C6 which he opined was not related to her work for Respondent. In regard to Petitioner's right shoulder, Dr. Emanuel diagnosed Petitioner with subscapular bursitis of the scapula and subacromial bursitis of the acromioclavicular joint. Dr. Emanuel opined that the shoulder condition was related to Petitioner's work activities for Respondent. He recommended surgery consisting of a decompression and distal clavicle resection. In respect to chiropractic care, Dr. Emanuel opined that it was prolonged and ineffective.

Petitioner was examined by Dr. William Hoffman, a neurosurgeon, on May 18, 2011. Dr. Hoffman was selected by Petitioner. When Petitioner saw Dr. Hoffman she complained of low back, in addition to neck and right shoulder, symptoms. Dr. Hoffman later treated Petitioner for a cyst in the low back on June 24, 2011, and in a report dated July 27, 2011, he noted Petitioner had been treated for a work-related injury involving her neck and right shoulder. In a supplemental report dated June 13, 2011, Dr. Hoffman stated that Petitioner's neck and shoulder problems are "...purely shoulder" and that an orthopedic consultation was indicated.

Petitioner was examined by Dr. J. Michael Davis, an orthopedic surgeon, on October 17, 2011. Dr. Davis was a physician Petitioner selected on her own. At the time of this visit, Petitioner's primary complaints were to the right shoulder and arm. On examination, Petitioner exhibited exquisite tenderness over the levator scapular area of the right shoulder. Dr. Davis opined Petitioner had chronic right upper extremity pain with a history of C6 radiculitis from old medical records, levator scapular syndrome and mild right shoulder bursitis without evidence of a rotator cuff tear. Dr. Davis recommended steroid injections which Petitioner received that same day. Dr. Davis later saw Petitioner at which time she stated her right shoulder complaints were much worse. Dr. Davis then recommended a cortisone injection which Petitioner declined to undergo. Dr. Davis also recommended that an MRI scan be performed so as to further evaluate the shoulder.

Petitioner sought treatment from three chiropractors subsequent to the prior decision, John Dinkelmann, Charles Koester and Jason Ozbourn. Petitioner testified Dinkelmann did not provide any treatment for her work injuries but that Koester and Ozbourn did treat her for her work injuries. Petitioner sought these chiropractors on her own. Koester saw Petitioner 10 times during 2011 and provided treatment to various areas of the spine. Ozbourn saw Petitioner for numerous treatments during 2011 and 2012. In both instances, Petitioner testified that the chiropractic treatment would give her subjective relief for just a few hours but nothing beyond that.

Dr. Davis provided a light duty release in late October, 2011, and Petitioner attempted to return to work on December 2, 2011, in the parking lot of Respondent's place of business. This was a light duty assignment and Petitioner was required to record the license plate numbers of cars entering the premises. Petitioner testified that after two hours of work her complaints increased and she ceased work after just four hours. Petitioner has not worked in any capacity since that time up to and including the date of trial in this case.

Conclusions of Law

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

The Arbitrator finds Petitioner's current condition of ill-being in respect to the right shoulder is causally related to the repetitive trauma injury of January 26, 2009.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator takes judicial notice of the decision of Arbitrator Dibble entered on November 10, 2010, which found both the neck and right shoulder conditions to be related to the repetitive trauma accident. While this finding is the law of the case, the subsequent hearing of October 22, 2012, involved different legal and factual issues than those presented at the prior hearing. The Arbitrator finds the holding of the case of Wever v. Illinois Workers' Compensation Commission, 900 N.E.2d 360, 369 (Ill. App. 1st Dist. 2008) to be dispositive.

The Arbitrator notes the medical opinions of Dr. Emanuel, Dr. Hoffman and Dr. Davis all focused on the right shoulder as being the Petitioner's primary area of complaint.

Finally, the Arbitrator notes the exchange of e-mails between Respondent's and Petitioner's counsel that occurred on January 27, 2012, in which the parties agreed that the injuries were limited to the right shoulder to amount to a pretrial stipulation of the parties.

In regard to disputed issue (J) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that the chiropractic care sought by Petitioner was not reasonable and necessary and Respondent is thereby not liable for payment of the bills associated therewith.

In support of this conclusion the Arbitrator notes the following:

Dr. Emanuel specifically opined that the chiropractic care was both prolonged and ineffective. Further, the Petitioner testified that she did not have any lasting relief from the chiropractic treatment.

The Arbitrator concludes the care provided by Dr. William Hoffman and Dr. J. Michael Davis to fall outside the two physician rule and Respondent is thereby not liable for the medical bills incurred therewith.

The Arbitrator finds Respondent is liable for the medical bills incurred in connection with the medical treatment provided by Dr. Fonn identified in Petitioner's Exhibit 1. The Respondent shall pay reasonable and necessary medical bills as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator finds Petitioner has sustained permanent partial disability to the extent of 20% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner has had ongoing symptoms in respect to the right shoulder and has declined to undergo the recommended surgery. Petitioner currently alleges that she is unable to return to work.

William R. Gallagher, Arbitrator

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

Rafael Vazquez,

Petitioner,

14IWCC0173

vs.

NO: 11 WC 34703

The Turf Team,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 18, 2013 is hereby affirmed and adopted.

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

14IWCC0173

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: MAR 10 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 3/6/14
45

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

VAZQUEZ, RAFAEL
Employee/Petitioner

Case# **11WC034703**

14IWCC0173

THE TURF TEAM
Employer/Respondent

On 7/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0766 HENNESSY & ROACH PC
MICHAEL GEARY
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0173

Rafael Vazquez
Employee/Petitioner

v.

The Turf Team
Employer/Respondent

Case # 11 WC 34703

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **3-13-13**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS 14IWCC0173

On the date of accident, **8-27-11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$22,880.00**; the average weekly wage was **$440.00**.

On the date of accident, Petitioner was **35** years of age, *married* with **2** dependent children.

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

Respondent shall be given a credit of **$2,404.95** for TTD, **$0** for TPD, **$0** for maintenance, and $ for other benefits, for a total credit of **$2,404.95**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $319.00/week for 80-5/7 weeks, commencing August 27, 2011 through March 13, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services in the amount of $175,538.83 as provided in Sections 8(a) and 8.2 of the Act. Said amount may decrease consistent with the medical fee schedule.

Respondent shall authorize prospective medical treatment proposed by Dr. DePhillips, including a second opinion from a spinal surgeon and possible surgical intervention.is liable for Petitioner's prospective medical treatment as recommended by Dr. DePhillips as a result of Petitioner's August 27, 2011 work accident.

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

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

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

Signature of Arbitrator

7/17/13
Date

ICArbDec19(b)

JUL 18 2013

FINDINGS OF FACT:

Petitioner, Rafael Vazquez, first began working for Respondent, Turf Team, in approximately August, 2010. Petitioner testified that he was hired as a landscaper and worked that position throughout his tenure with Respondent. Petitioner provided that as a landscaper, he was responsible for a number of tasks including installing patios, planting trees, breaking concrete, laying mulch and planting and maintaining gardens. He indicated this was heavy manual labor that including significant lifting and carrying. Prior to working for Respondent, Petitioner indicated, he had never had a back condition of any kind and had always worked full duty without missing work days.

Petitioner testified that on August 27, 2011, he reported for work and was working at full capacity carrying out his usual job duties. While at the work site, he was injured when his boss struck him while operating a Bobcat. Petitioner described the Bobcat as a four wheeled machine with forks used to lift materials that could rotate 360°. Petitioner indicated that he was injured when he and his boss were attempting to unload a trailer. He was on the ground while his boss was operating the Bobcat. As Petitioner reached to grab material out of the trailer, his boss spun the Bobcat and the left fork struck Petitioner in the right thigh. Due to the impact, Petitioner indicated that he fell over the forks before falling to the ground. Petitioner provided that after he was struck, he felt like he was dreaming and remembered being helped up by another worker while his boss was asking if he was okay. Petitioner testified that he noticed immediate pain in his right thigh and left ribs area. Post accident, Petitioner's boss had another employee drove him home. While on the way home, Petitioner noticed right thigh and left sided rib pain. He also noticed lower back pain. Petitioner stated that after arriving home, he felt terrible and called his boss to see what he should do. He was told to go to the hospital.

Petitioner proceeded to the Silver Cross Hospital emergency room. Petitioner gave a history of being struck by a forklift while working and reported pain in his left ribs, right thigh, right foot and lower back. The emergency room physician ordered CT scans for Petitioner's abdomen and pelvis, brain, chest, cervical and lumbar spine. The CT of his brain was normal; the CT of his cervical spine was normal; the CT of his abdomen and pelvis was normal; the CT of his chest was essentially normal; and the CT of his lumbar spine revealed mild degenerative endplate changes. Petitioner was taken off work and diagnosed with a chest contusion, abdominal wall contusion, back contusion and thigh contusion. Upon his discharge, Petitioner was instructed to follow up with a physician. (PX 8)

Petitioner followed up with Alivio Physical Therapy and Chiropractic on August 31, 2011. (PX 3) At that time, he reported being struck by the forklift and that he had ongoing pain in his neck, back, left rib cage, right thigh and right toes. Dr. Barnabas did an examination that revealed several findings including limited range of motion in Petitioner's neck with a positive compression test, swelling in the SI joint, positive sitting straight leg testing with radiculopathy on the left and positive straight leg on the right, tenderness in the right metatarsals and tenderness over the left 4th and 5th ribs. The doctor diagnosed Petitioner with a contusion to his chest, lumbosacral strain/sprain, lumbar spine radiculitis, lumbar disc displacement, lumbago and a cervical strain/sprain with the possibility of a herniated disk. Petitioner then was ordered to undergo physical therapy and additional diagnostic testing for his symptoms. (PX 3)

Petitioner indicated that he began physical therapy, underwent the testing and continued to follow with Dr. Barnabas. At his next appointment, Petitioner's complaints centered on his left rib area and lower back. (P3) The doctor read the lumbar MRI and indicated that it revealed mild generalized disc bulges at L4-5, L5-S1 without associated neuroforaminal stenosis. The cervical spine MRI was normal. The right foot MRI revealed very minimal fluid surrounding the distal aspect of the peroneus brevis tendon near its insertion at the base of

the fifth metatarsal bone, and a mild degree of tenosynovitis was suspected. (PX 3) Petitioner testified that he was taken off work and received workers' compensation benefits. Petitioner continued physical therapy and during his September 16, 2011 appointment was referred for pain management treatment. (PX 3)

Petitioner followed up with Dr. Piska at Advanced Pain Specialists. (PX 2) In addition to continuing therapy at Alivio, Petitioner began receiving epidural lumbar injections. (PX 2) Although Petitioner testified that many of his symptoms improved, he continued to notice significant lower back pain. Because Dr. Piska was changing her office location, Petitioner's pain management was transferred to Dr. Abdellatif at Lakeshore Surgery Center. (PX 5)

Pursuant to Section 12 of the Act, Respondent sent Petitioner for an independent medical examination on October 21, 2011 with Dr. Lawrence Lieber. The history recorded by the doctor is that Petitioner was using a forklift and was then struck by another forklift. Petitioner reported increasing lower back pain that bothers him at night, with ambulation and while sitting or lying down. (RX 1) Following the examination, Dr. Lieber assessed 1.) low back syndrome; 2.) status post cervical sprain; and 3.) pes planovalgus deformity, inflammation, right foot. Dr. Lieber indicated that from a subjective standpoint, Petitioner's complaints were the result of the work injury. He also indicated that objectively there was no evidence of any abnormality within the neck, lower back, or right foot area related to the August 27, 2011 work injury. Dr. Lieber indicated objective findings do not correlate with his subjective complaints and he stated no further diagnostic studies are indicated. The doctor further stated that "MRI scans based upon the records in Petitioner's subjective complaints appear to be indicated." Dr. Lieber also felt no further physical therapy and no further chiropractic care was indicated in association with the August 27, 2011 work injury. According to Dr. Lieber, Petitioner reached maximum medical improvement and could return to full employment with no restrictions in relation to the August 27, 2011 work injury. Lastly, Dr. Lieber felt that Petitioner's medical care appeared to have been reasonable and necessary based upon the subjective complaints associated with the work injury. (RX 1) Petitioner indicated all of his benefits were then terminated.

Records submitted show Petitioner underwent a lumbar epidural steroid injection at L5-S1 on October 1, 2011, at Lakeside Surgery Center and October 17th. On October 26, 2011, Dr. Abdellatif performed trigger point injections and lumbar/sacral facet neurolysis at L3-4 and a radiofrequency. (PX 2, PX 5)

Petitioner continued to complain of significant symptoms. Petitioner indicated that the injections would help on a temporary basis but that his symptoms would return. On November 4, 2011, Dr. Barnabas noted Petitioner was a candidate for a surgical evaluation and recommended a consult with a spinal specialist. (PX 3)

Pursuant to the recommendation of Dr. Abdellitif, Petitioner underwent a lumbar discogram on November 21, 2011. Dr. Abdellitif noted pain was concordant with L4-L5, L5-S1 levels discogenic pain. The doctor recommended a percutaneous disc decompression at the L4-L5, L5-S1 levels. (PX 5) Following the discogram, Petitioner continued with Alivio for physical therapy.

A Utilization Review was performed by Rising Medical Solutions on November 30, 2011. The Utilization Review approved one lumbar epidural steroid injection at L5-S1 and non-certified the remaining injections performed on October 17th and October 26, 2011. Dr. Baljinder Bathia, the physician who conducted the review, provided that he could not certify the remaining injections because "there [was] no documentation provided as to provide a rationale for any of these procedures to be performed." The doctor further added "...given that number of interventional procdures done, it does not appear he would be a candidate for any further procedures. He did have his IME prior to his Radiofrequency ablations and no documentation was provided to whether any relief occurred from the ablations. Given that, I tend to agree with the IME that the patient likely has reached MMI..." (RX 3)

Petitioner's therapeutic exercises/chiropractic therapies were also submitted for Utilization Review Same was performed by Charles Bodem, D.C., of Rising Medical Solutions on November 30, 2011. The Utilization Review certified six therapeutic exercises/chiropractic therapies rendered and non-certified all physical therapy/chiropractic visits after September 12, 2011. Dr. Bodem indicated ODG guidelines recommend a trial of six visits over two weeks with demonstrated functional improvement. He noted that Petitioner received physical therapy/chiropractic care for a total of eight visits from 8/31/11 – 10/14/11. Dr. Boden stated the records provided did not show that Petitioner's low back functionally improved over this period and as a result all visits (6) after 9/12/12 were not medically necessary. (RX 4)

At the request of Dr. Barnabas, Petitioner was seen by Dr. Giannoulias, G & T Orthopaedics and Sports Medicine, on October 31, 2011. Petitioner's chief complaint was right ankle and leg pain. The doctor recorded a consistent history of accident. After performing an examination and reviewing an MRI scan, Dr. Giannoulias impression was leg pain and radiculopathy. He indicated that same was referred pain from a dermatone. The doctor felt this was more likely coming from Petitioner's back and his radiculopathy. (PX 12)

Petitioner provided that although his right foot pain decreased somewhat, he continued with complaints. Petitioner testified that, Dr. Barnabas referred him to an orthopedic surgeon. Petitioner saw Dr. Robert Fink on November 27, 2011 with complaints of pain in his right ankle and foot. Dr. Fink reviewed Petitioner's previous MRI and indicated he was suffering from tendonitis along the peroneus brevis tendon. The doctor gave Petitioner an injections and ordered an ankle and foot support. (PX 4)

Petitioner presented to Dr. George DePhillips on December 8, 2011. At that time, Petitioner reported his injury on August 27 when he was struck by the Bobcat. Petitioner indicated that he was injured when the Bobcat turned suddenly and struck him, threw him forward and then he twisted his lower back and landed on his left side. The doctor recorded that Petitioner was suffering from "lower back pain radiating into the buttocks and posterior thighs and calves to the ankles." Dr. DePhillips reviewed Petitioner's lumbar MRI and indicated he was suffering from disk bulging at the L4-L5 and L5-S1 levels. The doctor also read the discogram which he felt was unreliable and referred Petitioner to Pain and Spine Institute for a repeat discogram. Petitioner was held off work until he underwent the discogram and returned to the doctor. (PX 9)

On January 9, 2012, Petitioner presented to Dr. Samir Sharma at Pain & Spine Institute. Upon presenting to Dr. Sharma, Petitioner complained of radicular bilateral leg pain, numbness in the buttock, thigh and lower leg and weakness of the upper leg and lower leg. Dr. Sharma indicated Petitioner was suffering from lumbar radiculopathy and lower back pain. The doctor prescribed oral medication and instructed to return for the prescribed discogram. (PX 17) Petitioner testified that Respondent would not authorize the discogram.

Throughout the spring and summer of 2012, Petitioner continued with Dr. Sharma and received additional conservative treatment including injections. (PX 17) Petitioner testified that, although the injections helped temporarily, his lower back symptoms would return.

Petitioner eventually underwent an additional discogram on August 23, 2012. Dr. Sharma noted on August 29, 2012, the discogram was positive for discogenic pain at the L5-S1 levels. (PX 17)

Petitioner returned to Dr. DePhillips on September 13, 2012 with progressively worsening lower back complaints. Upon reviewing the discogram, the doctor indicated that it confirmed condordant/discogenic pain at L5-S1 based on a concordant pain response during the provocative portion of the discogram. In his deposition testimony, Dr. DePhillips indicated that the discogram confirmed that the L5-S1 disc was contributing to Petitioner's pain and that this was consistent with his pain distribution. Following his examination, Dr. DePhillips indicated that lumbar surgery was reasonable for Petitioner's condition but that prior to recommending the surgery, he wanted Petitioner to get a 2nd opinion. (PX 18, pgs 10-14)

Respondent again sent Petitioner to an IME with Dr. Lieber on December 12, 2012. At that time, Dr. Lieber indicated that Petitioner reported, "consistent low back and right leg pain. He states that his leg discomfort is consistent with his back discomfort..." Dr. Lieber assessed low back syndrome. Dr. Lieber opined that Petitioner's current condition was not related to the August 27, 2011 work accident. Dr. Lieber reasoned that there is no objective evidence of any abnormality within the lumbar spine or right lower extremity that can be related to the August 20 11 work event. Dr. Lieber stated that the treatment Petitioner received since his last evaluation on October 19, 2011 was not related to the August 27, 2011 work accident, nor was it reasonable or necessary. Dr. Lieber indicated Petitioner's subjective complaints are out of proportion to the objective findings, that Petitioner does not require work restrictions in association with the work injury, and that he is able to return to all activities with no restriction based upon objective evaluation. (RX 2)

Petitioner last saw Dr. DePhillips on January 9, 2013. At that time, he had complaints of back pain radiating into the right lower extremity posterior thigh and calf. At that time, the doctor refilled Petitioner's prescriptions and, again, recommended a second opinion. (PX 19, pg. 14) Petitioner testified that in between his appointments with the doctor, his prescriptions would be refilled.

Petitioner testified that he continues to have strong lower back pain going into his right leg. He notices that his condition is worse when it is cold and that he notices cramping due to the pain. When asked if his symptoms interfered with his daily routine, Petitioner indicated that has constant problems sleeping, that he cannot go down stairs, that he cannot bend over and that he tries to not lift anything because of the pain. He further testified that it is his intention to follow up with Dr. DePhillips and to proceed with the 2nd opinion. To date, he indicated that he did not seek the 2nd opinion because he has no money.

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

Petitioner has submitted the evidence deposition testimony of Dr. George DePhillips taken on January 14, 2013. The doctor diagnosed Petitioner's condition as discogenic low back pain and lumbosacral radiculitis secondary to his work injury suffered on August 27, 2011. (PX 18 at 16) Dr. DePhillips testified that his casual connection is based in part on the fact that Petitioner did not have a history of treatment for his lower back pain prior to the work accident and that the description of the injury is consistent with aggravating a dehydrated and bulging disc. (PX 18 at 17) The doctor indicated that the distribution of Petititioner's radiculitis is consistent with the S1 nerve root which correlates with the condordant pain response at the L5-S1 level during the discography. (Id.) Dr. DePhillips also discussed his conclusions in his August 14, 2012 report wherein he indicated that he believes the work accident caused Petitioner's condition noting Petitioner had no clinical symptoms of discogenic low back pain or lumbosacral radiculopathy prior to the work injury. (PX 13)

During his testimony, Dr. DePhillips gave extensive explanation regarding the basis of his diagnosis of discogenic low back pain with radiculitis. He indicated that radicular symptoms are based on two pathological processes; neurologic compression and chemical irritation. (PX 18 at 9) Presently, Dr. DePhillips indicates that Petitioner is suffering from radiculopathy caused by inflammatory cytokines or chemicals which are toxic to nerves. (Id.) He further explained, "So in any patent who has low back pain with bulging who has been symptomatic for six months or longer may be suffering discogenic low back pain from an annular tear resulting in chemical radiculitis in addition to other potential sources of pain, facet injury, myofascial injury." (Id. at 7) When asked if annular tears can be caused by traumatic accidents, Dr. DePhillips testified they could. (Id.)

At hearing, Petitioner testified credibly that he had never had any problems of any kind with his lower back prior to his August 27, 2011 accident. He testified that he had never had treatment of any kind for his

back; he had always carried out his heavy job duties for Respondent without any problems, and that he had never missed work. Respondent provided no evidence to the contrary.

To dispute causation, Respondent offered the opinions of their independent medical examiner, Dr. Lawrence Lieber who initially examined Petitioner on October 21, 2011. Dr. Lieber assessed Petitioner's condition as low back syndrome, status post cervical strain and Pes planovalgus deformity, inflammation of the right foot. He further indicated that Petitioner's subjective complaints were related to the work accident but that there was no objective evidence of any abnormality of the neck, lower back or right foot that can be related to the work accident. The doctor then went on to opine that Petitioner's objective findings do not correlate with his subjective complaints and that CT scans did not appear to have been performed. The doctor further stated that MRI scans based upon the records in the Petitioner's subjective complaints appear to be indicated. According to Dr. Lieber, Petitioner reached maximum medical improvement and may return to full employment with no restrictions in relation to the August 27, 2011 work injury. (RX 1)

Dr. Lieber again examined Petitioner on December 12, 2012. At that time, Petitioner again reported consistent low back and right leg pain. Again, Dr. Lieber indicated that Petitioner's current condition is not related to the August 27, 2011 work accident because there is no objective evidence of abnormality in the lumbar spine. He further indicated that Petitioner's subjective complaints are out of proportion to the objective findings. (RX 2)

The Arbitrator is not persuaded by the opinions of Dr. Lieber. At first blush the history recorded by the doctor is that Petitioner was using a forklift and was then struck by another forklift. In his first report, Dr. Lieber falsely asserts that CT scans have not been done. Upon reporting the emergency room, Petitioner underwent a series of CT scans. Petitioner underwent no less than five CT scans to address his complaints to his abdomen/pelvis, brain, chest, cervical and lumbar spine. Further, Dr. Lieber indicated that Petitioner gave a history of, "while using a forklift stacking some pallets, turned and was struck by the forklift onto his right leg. He subsequently tripped and fell up against another forklift landing on his right side in rib area." This in unlike any history Petitioner gave during hearing or to any other physician noted in the record. Additionally, even though Dr. Lieber indicated an MRI was indicated, he then opined that no further testing was necessary. This is a clear contradiction.

Furthermore, Dr. Lieber indicated that Petitioner's subjective complaints did not correlate with objective testing. However, in his own examination of the back on December 12, 2012, the doctor recorded that Petitioner's range of motion was restricted, that bending and lateral rotation were restricted and that supine straight leg raising was positive on the left at 40 degrees and on the right at 20 degrees. Even if the doctor indicated that the range of motion and lateral bending were self restricting, which he did not, straight leg raising is well known to be an objective test. Additionally, the doctor did not discuss the August 31, 2011 MRI that showed disc bulges at the L4-5 and L5-S1 levels or the fact that the discogram ordered by Dr. DePhillips showed concordant pain response at the L5-S1 level. Dr. Lieber relying on the November 2011 discogram indicated that Petitioner did not suffer from an annular tear. As noted above, he did not discuss the August 2012 discogram showing concordant responses at L5-S1. Dr. DePhillips indicated that he saw an annular in the August 2012 discogram and explained, "I didn't spefic (sic) say annular tear, but I did say leakage of contrast into the annulus on September 13, 2012, which would imply an annular tear. (PX 18 pg. 39)

Finally, Dr. DePhillips discussed Dr. Lieber's opinions. Dr. DePhillips candidly indicated that Petitioner did not have any objective neurologic deficits. (PX18 pg. 24) However, the doctor indicated that Dr. Lieber implies that an individual cannot have radiculitis or radiculopathy or herniated disc or nerve root compression who is neurologically intact. (PX18 pg. 24) To this, Dr. DePhillips disagrees and explained that an individual can have radiculopathy due to chemical nerve irritation (Id.) Dr. DePhillips further states that when considering causation with Petitioner, it was important that Petitioner reported his symptoms immediately after

the accident. (Id. at 25) There is no dispute that Petitioner reported his injury immediately, sought medical treatment immediately and had an ongoing and consistent history of complaints.

For the reasons discussed above and based on the greater weight of the evidence, the Arbitrator finds that Petitioner's current condition of ill-being regarding his lumbar spine is causally related to the accident suffered on August 27, 2012. The Arbitrator specifically finds that the testimony of Dr. DePhillips is more persuasive than that of Dr. Lieber.

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

Given the Arbitrator's finding on causation, Respondent is liable for reasonable and necessary medical charges related to Petitioner's treatment. Petitioner submitted medical bills that remain unpaid by Respondent . (PX 1) During his deposition testimony, Dr. DePhillips was asked if he believed that Petitioner's treatment was reasonable and necessary. (PX 18 at27) To this, the doctor indicated it was reasonable and necessary and explained that he holds this opinion because, "my treatment and recommendations thus far have complied with the standard of care for spine surgery." (Id.) The doctor was further asked if the other conservative measures offered were reasonable and necessary. (Id.) Again, Dr. DePhillips indicated yes and offered, "Definitely I think that the physical therapy was reasonable and necessary and I agree that spinal injections, both diagnostic and therapeutic are reasonable and necessary." (Id.) He continued, "in general, I think that injections played a role in a condition such as his and that they would be reasonable and necessary and causally related to the work injury." (Id.)

Respondent again relies on Dr. Lieber regarding this dispute. The doctor opines in his first report of October 21, 2011 that Petitioner's subjective complaints were related to the work accident but that there was no objective evidence of any abnormality of the neck, lower back or right foot that could be related to the work accident. The doctor goes on state that the medical care appears to have been reasonable and necessary based upon the subjective complaints associated with the work injury. In his subsequent report, he opines that Petitioner's condition of ill-being was not related to the injury in August 2011. As noted above, the Arbitrator is not persuaded by the opinions of Dr. Lieber.

The Arbitrator notes a Utilization Review was performed by Rising Medical Solutions on November 30, 2011. The Utilization Review approved one lumbar epidural steroid injection at L5-S1 and non-certified the remaining injections performed on October 17th and October 26, 2011. Petitioner's therapeutic exercises/chiropractic therapies were also submitted for Utilization Review. Same certified six therapeutic exercises/chiropractic therapies rendered and non-certified all physical therapy/chiropractic visits after September 12, 2011. As noted above, the Arbitrator relies on the opinions of Dr. DePhillips and is not persuaded by the findings of the Utilization Review. The Arbitrator notes that even Dr. Lieber opined in his October 21, 2011 report that the medical care appears to have been reasonable and necessary based upon the subjective complaints associated with the work injury.

Given the above and based on the greater weight of the evidence, the Arbitrator finds that the treatment received by Petitioner was reasonable and necessary and related to the August 27, 2012 work accident. The Arbitrator awards Petitioner's the unpaid balances related to his treatment pursuant to the medical fee schedule.

With respect to (L) Whether Petitioner is entitled to any temporary total disability benefits, the Arbitrator finds as follows:

Given the Arbitrator's finding regarding causation, Respondent is liable for Petitioner's temporary total disability benefits. Although disputing liability, Respondent agreed that Petitioner's temporary total disability period is from October 27, 2011 through the date of hearing on March 13, 2013, or a period of 80-5/7th weeks.

With respect to (K) Is Petitioner entitled to any prospective medical services, the Arbitrator finds as follows:

Given the Arbitrator's finding regarding causation, Respondent is liable for Petitioner's prospective medical treatment. Petitioner returned to Dr. DePhillips on September 13, 2012 with progressively worsening lower back complaints. Upon reviewing the discogram, the doctor indicated that it confirmed condordant/discogenic pain at L5-S1 based on a concordant pain response during the provocative portion of the discogram. In his deposition testimony, Dr. DePhillips indicated that the discogram confirmed that the L5-S1 disc was contributing to Petitioner's pain and that this was consistent with his pain distribution. Following his examination, Dr. DePhillips indicated that lumbar surgery was reasonable for Petitioner's condition but that prior to recommending the surgery, he wanted Petitioner to get a 2nd opinion. (PX 18, pgs 10-14) The doctor reiterated his recommendation on January 9, 2013.

Considering the above and based on the greater weight of the evidence, the Arbitrator finds Respondent liable for Petitioner's prospective medical treatment including a second opinion from a spinal surgeon and possible surgical intervention.

With respect to (M), Should penalties or fees be imposed on Respondent, the Arbitrator finds as follows:

The Arbitrator finds that legitimate disputes exist in this matter. As such, Petitioner's request for penalties and attorneys' fees is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lance Williams,
Petitioner,

vs. NO. 12 WC 25841

14IWCC0174

Terminix International
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 3, 2013 is hereby affirmed and adopted.

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

DATED: MAR 11 2014

Daniel R. Donohoo

o-01/14/14
drd/wj
68

Kevin W. Lamborn

14IWCC0174

DISSENT

The Arbitrator found that Petitioner failed to prove accident, causal connection, and notice. He denied all benefits. The majority affirmed and adopted the Arbitrator's decision. I view the evidence in a different light, therefore, I respectfully dissent.

Petitioner, a 54 year old pest control technician, had been employed by Respondent in the same capacity for the past nine years. The very nature of the job required Petitioner to work in tight spaces both standing and on his hands and knees. He also climbed a ladder. On the day in question, March 23, 2012, Petitioner was servicing Bloomingdale's in their kitchen area. He had to place a "glue board under a cooler". Spraying was out of the question as this area contained food. Petitioner testified that he was on his hands and knees placing this "glue board" as it could not be slid into place. He stated, "I had to kind of lean forward and shift my weight. I had this sharp pain in my left knee."

Petitioner testified that he finished his job and continued working hoping the knee would feel better. It did not. Petitioner told his supervisor, Andrew Callahan, nine days later that he needed some time off to get his knee checked out. Petitioner had no prior knee problems. On April 2, 2012, Petitioner was discharged from the emergency room and given pain medication. Petitioner was told to give it a couple of weeks and if there was no improvement he would need further treatment. Petitioner continued working after being discharged from the emergency room, all the while taking prescribed medication and following emergency discharge instructions. There was no significant improvement. As such, a follow-up treatment was sought on May 4, 2012 with Dr. Dillella. After the examination, the doctor recommended an MRI. However, it did not occur at that time because it was not approved by the insurance carrier.

On July 10, 2012, Petitioner sought a second opinion from Dr. Michael Foreman who along with prescribing pain medication ordered Petitioner off-work, to begin physical therapy, and have an MRI which was finally approved and performed. The MRI revealed a tear of the posterior horn of the medial meniscus. In August of that year following the review of the findings from the MRI, Dr. Foreman referred Petitioner to Dr. Labanuskas. After examination and review of the medical records, Dr. Labanuskas recommended that Petitioner have surgery immediately to repair the torn meniscus in the left knee.

On November 5, 2012, the Petitioner was sent by the Respondent to see Dr. Bryan Neal for an IME. Dr. Neal noted the date of the accident and the history of injury consistent with all others contained in the Petitioner's medical records. Dr. Neal opined that Petitioner's left knee condition was related to arthritis and not any specific meniscal tear or work injury. However, Dr. Neal further stated that the Petitioner's meniscal tear could possibly occur from someone working on their knees.

The Respondent called Andrew Callahan to testify at trial. Mr. Callahan verified that he was Petitioner's supervisor. He also verified that Petitioner had reported having knee pain to him and requested time off work to consult with a physician.

14IWCC0174

The preponderance of evidence clearly establishes that the Petitioner sustained an accident that arose out of and in the course of his employment. It is unrebutted that this injury occurred while on his knees performing a function of his job. Notice was provided to his supervisor, Mr. Callahan. There was no prior knee injury history. Petitioner's efforts to get proper medical treatment to his injury were reasonable. Petitioner should receive the unquestionably needed arthroscopic surgery along with all needed and necessary post-operative care. The Petitioner is entitled to TTD benefits from July 10, 2012 to April 30, 2013, a period of 41 5/7 weeks and payment of all related unpaid medical bills.

It is for these reasons that I disagree with the Arbitrator and the majority. Respectfully, I Dissent.

Thomas J. Tyrrell

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

WILLIAMS, LANCE
Employee/Petitioner

Case# **12WC025841**

TERMINX
Employer/Respondent

14IWCC0174

On 6/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
ELLEN M KEEFE-GARNER
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

LANCE WILLIAMS
Employee/Petitioner

Case #12 WC 25841

v.

14IWCC0174

TERMINX
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on April 30, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☐ Prospective medical care?

FINDINGS

- On March 23, 2012, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- In the year preceding the injury, the petitioner earned $57,200.00; the average weekly wage was $1,100.00.
- At the time of injury, the petitioner was 54 years of age, *married* with two children under 18.
- The parties agreed that the respondent paid $2,000.00 in benefits to the petitioner.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

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

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

Robert E. Williams

Robert Williams

6/3/13

Date

JUN -3 2013

FINDINGS OF FACTS:

On April 2, 2012, the petitioner, a pest control technician, sought urgent care for his left knee at Ingalls Calumet City and reported a gradual onset of left knee pain for a week. He did not know the cause of his knee pain or the mechanism of injury and denied that it was related to his job. The doctor noted a positive McMurray's test for a medial meniscus injury and tenderness on palpation of the medial aspect of the anterior knee. X-rays were negative except for mild degenerative changes. On May 4th, the petitioner saw Dr. Carl DiLella at Ridge Orthopedics and reported feeling a significant twinge of left knee pain on April 2, 2012, that occurred after standing from a kneeling position during an inspection at a work site. The petitioner also reported that he initially placed ice on his knee and used oral anti-inflammatories after work and then sought care at Ingalls. Dr. DiLella recommended sedentary work and an MRI. The petitioner prepared a Proof of Claim form on May 10th and reported sustaining a left knee injury when he bent down on his knees to inspect and apply a treatment to an area under a dishwasher and the inability to get up smoothly when attempting to stand. He reported that the next morning his knee was stiff and that he sought care at Ingalls on Monday after two days of discomfort.

On July 10th, the petitioner sought care with Dr. Michael Foreman at South Holland Medical Center and reported a work-related left knee injury on March 30, 2012, with increased pain the next day. Dr. Foreman provided pain medication, recommended physical therapy and no work. The petitioner had physical therapy from July 11th through September 20th. An MRI on July 18th revealed a tear of the posterior horn of the medial meniscus. On August 15th, the petitioner saw Dr. Igor Laubanauskus, who recommended an arthroscopic medial meniscectomy.

On November 5th, pursuant to Section 12, the petitioner was evaluated by Dr. Bryan Neal, who noted that the petitioner was uncertain regarding his injury date and believed it could have been on March 23, 2012, but he didn't have a traumatic event. Dr. Neal opined that the petitioner's left knee condition was related to arthritis and not any specific meniscal tear or work injury.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he sustained an accident on March 23, 2012, arising out of and in the course of his employment with the respondent. The medical evidence does not support the petitioner's claim of a left knee injury on March 23, 2012, or an injury arising out of his employment duties. The varying accounts given by the petitioner of the cause of his left knee symptoms is most troublesome, especially in light of his initial report of an unknown cause for his left knee symptoms, his denial of a work injury and his report of gradual symptoms for a week. Coupled with the specific and detail description as to the date of injury he prepared for his Proof of Claim on May 10, 2012, and the history to Dr. Foreman on July 10, 2012, it is clear that March 23, 2012, was not the date the petitioner's left knee symptoms began and that he is unable to prove that his left knee condition arose out of his work duties. The petitioner's request for benefits is denied and the claim is dismissed.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The petitioner's supervisor, Andrew Callaghan, denied being notified of a work injury. The petitioner failed to prove that the respondent received timely notice of a work injury on March 23, 2012.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracy Riley,

Petitioner,

vs.

14IWCC0175

NO: 11 WC 45328

Kraft Foods,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2013 is hereby affirmed and adopted.

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

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: MAR 13 2014

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

DRD:bjg
0-2/25/2014
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0175

RILEY, TRACY
Employee/Petitioner

Case# **11WC045328**

KRAFT FOODS
Employer/Respondent

On 7/24/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4463 GALANTI LAW OFFICES PC
LESLIE COLLINS
PO BOX 99
EAST ALTON, IL 62024

0560 WIEDNER & MCAULIFFE LTD
MARY C SABATINO
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC0175

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tracy Riley
Employee/Petitioner

v.

Kraft Foods
Employer/Respondent

Case # 11 WC 45328

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 28th, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 15, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of the asserted accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$42,848.00**; the average weekly wage was **$824.00**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

Respondent ***is not liable for*** reasonable and necessary medical services.

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

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

ORDER

For reasons set forth in the attached decision, benefits under the Act are denied.

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

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

Signature of Arbitrator

July 24, 2013
Date

JUL 24 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

14IWCC0175

TRACY RILEY, Petitioner,	)	
vs.	)	No. 11 WC 45328
KRAFT FOODS, Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner is a woman, 43 years old on the asserted date of loss of November 15, 2011. She works for Kraft Foods, beginning employment with them in 2000. For the last two years she worked as a pouch machine operator, and worked in other positions before that time. She presently works an 8-hour shift without overtime. She asserts repetitive trauma causing bilateral cubital tunnel syndrome. The petitioner acknowledged a prior history of carpal tunnel syndrome approximately ten years before this claim, which resulted in bilateral carpal tunnel release surgery. The petitioner testified she began having elbow symptoms in approximately February 2011.

The petitioner testified as a pouch machine operator, she is responsible for two machines. She checks and scoops out empty Capri-Sun pouches to ensure they are sealed. She scoops out eight pouches per hour (four per machine), which takes 1-2 seconds per pouch which involves a swiping motion with a spoon. She also stretches out empty boxes to put into the machine, up to twelve boxes per machine per hour. She testified it takes "5 seconds maybe" to stretch a box. She noted that some of the boxes are previously stretched, which reduces the number of stretching boxes. In addition to these tasks, she is responsible for keeping track of the machines' efficiency and production levels on a clipboard. She acknowledged that in between the stretching and spooning activities, she performed other tasks or waited for the machine to process. Her supervisor, Jason Myer, confirmed the job duties. He testified that the boxes that had been recycled did not require stretching, and only the new boxes did. He also noted that most of the boxes are previously used. He testified that approximately forty minutes per hour was spent not stretching or spooning, but rather monitoring the machinery and visually inspecting the product.

The medical records submitted show that the petitioner initially saw Dr. Knapp at Gateway Occupational Health Services on July 6, 2011. She reported bilateral hand and finger complaints of pain and numbness over approximately nine months, left worse than right. She denied any direct trauma and noted a prior history of carpal tunnel syndrome

approximately nine years prior, for which she had undergone surgery. Dr. Knapp instructed her to use over the counter medication and gave her night splints, and discharged her to seek care with an orthopedist, Dr. Rotman. RX5.

On July 14, 2011, the petitioner saw Dr. Rotman. She described right thumb and index finger pain and triggering, with substantial tingling in the left hand but less pain. He noted her job description and discussed it with her. He noted "it is difficult to say if there is any evidence of a work-related injury, considering the light nature of her work activities." He noted her symptoms were not classic for ulnar nerve compression but that it was unusual for recurrence of carpal tunnel syndrome. He recommended EMG studies, and noted that the original EMG studies from her treatment with Dr. Beatty could not be secured. See RX3.

The petitioner underwent a nerve conduction study with Dr. Khariton on July 20, 2011. It revealed mild bilateral neuropathy at each wrist, but normal bilateral ulnar motor-sensory and radial sensory nerve conduction. A left median to ulnar anastomosis was noted. RX3.

On July 28, 2011, Dr. Rotman reviewed the EMG study and diagnosed "very minor borderline carpal tunnel" with "no evidence of cubital tunnel or any abnormal values in the ulnar nerve distribution." He noted the median nerve findings "may be residual from a much more severe carpal tunnel condition preoperatively after already previous releases." RX3. He assessed her as having residual symptoms stemming from her prior carpal tunnel release surgery. He provided the petitioner with a steroidal injection into the right wrist and instructed her to return in six weeks. RX3. The petitioner did not return to Dr. Rotman.

She sought treatment with Dr. Mark Eavenson, a chiropractor. Dr. Eavenson's reports were introduced as PX1. The Arbitrator notes these reports are incomplete; they cover a period from November 15, 2011, through March 29, 2012. However, the petitioner treated with Dr. Eavenson prior to November 15, 2011, and he prescribed x-rays and an EMG. The x-rays were apparently done on November 2 and apparently demonstrated arthritis (see the intake questionnaire for Dr. Paletta, PX2 p.12). The EMG study was performed by Dr. Phillips on November 14, 2011 at Dr. Eavenson's referral. See PX3-4. It does not appear Dr. Phillips was advised of the July 2011 EMG, or that the results were compared. Dr. Phillips interpreted the results as "relatively mild bilateral demyelinative ulnar neuropathies" and noted "the observations vis-à-vis the median nerves across the wrists are most consistent with residual from previously severe carpal tunnel." PX3.

Dr. Eavenson thereafter referred the petitioner to Dr. Paletta. She presented on November 30, 2011. She did not report Dr. Rotman's treatment, but did report the injection into the carpal tunnel. She reported intermittent pain in both elbows with numbness and tingling into the fingers. Dr. Paletta assessed bilateral cubital tunnel syndrome and recommended surgery or night splints and observation. PX2. The petitioner elected to proceed with surgical intervention.

The petitioner underwent ulnar transposition surgery on the right elbow on February 14, 2012, and on the left elbow on March 1, 2012. PX5-6. She saw Dr. Paletta postoperatively. On April 25, 2012, she reported feeling "dramatically better" and he released her to full duty and MMI at that time. PX2.

The respondent commissioned a Section 12 records review with Dr. Craig Beyer on November 5, 2012. See RX1-2. Dr. Beyer noted that the job activities depicted (RX4) did not appear particularly rigorous or repetitive, given the spacing of the tasks in any given hour. He further noted that the tasks involved much more finger work than elbow movement, which would not be consistent with cubital tunnel syndrome. He also noted non-work-related factors including age, body habitus, gender and smoking history. He concluded that her work activities had not accelerated or caused any condition of cubital tunnel syndrome. He also noted that chiropractic care was an unusual choice to have pursued, as it had no impact on elbow neuropathy. Dr. Beyer maintained those positions in deposition (RX2).

Dr. Paletta testified in deposition (PX7), opining that the petitioner's work activities had caused her condition. He admitted in deposition that he had not been aware of Dr. Rotman's evaluation or treatment and had not been aware of the negative EMG from July 2011. He was not asked to compare the EMG results. He admitted further that he had not reviewed the job description which Dr. Rotman and Dr. Beyer had reviewed. On cross-examination, he admitted he did not know how many boxes the petitioner stretched, or the weight of the boxes. He admitted that regarding the spooning out of the pouches, he did not know the weight or size of the probe, or how often she was required to do that activity.

The petitioner has continued to work in her usual capacity for the respondent. She reported feeling "great" since her medical release.

OPINION AND ORDER

Accident and Causal Relationship

A review of the exhibits and depositions submitted shows that the petitioner is relying on a repetitive trauma theory, as opposed to an acute injury. In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show that the claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987).

Examining Dr. Paletta's deposition testimony in this case, he admitted that he was effectively unaware of any of the pertinent specifics of the petitioner's job duties. He could not detail what precise motions the petitioner engaged in, the frequency or spacing of the motions, or the force required. In contrast, both Dr. Rotman and Dr. Beyer were provided with a detailed job analysis which appears to be more accurate than the history Dr. Paletta notes in his original appointment with the claimant. Dr. Rotman also spoke with the petitioner at length specifically regarding the petitioner's job duties. The job analysis appears more coherent with the numbers provided by the claimant at trial and the credible testimony of Jason Myer. Dr. Paletta's analysis of the kinds of stressors the petitioner was exposed to appears to be based on flawed information. Moreover, Dr. Paletta was also given an incomplete history of the petitioner's medical treatment to that point. This incomplete and inaccurate history provides a faulty foundation for his opinions. Furthermore, all the physicians noted additional risk factors that could explain the conditions arising, such as smoking.

Treating physicians are traditionally provided a degree of deference against Section 12 examiners in assessing causal connection. However, in the present case, the disagreement is not simply between a treating physician and a Section 12 examiner, but rather between two treating physicians (Drs. Rotman and Paletta), with whom one is joined in his conclusions by a Section 12 reviewer. Moreover, not merely was Dr. Paletta given an inaccurate foundation on which to base his opinion, but Dr. Rotman and Dr. Beyer based their opinion on a far more accurate and complete description of the petitioner's work and medical history.

The Arbitrator finds the conclusions of petitioner's first treating physician, Dr. Rotman, and respondent's Section 12 examiner, Dr. Beyer, more persuasive than that of Dr. Paletta. Given the stronger foundation they possessed as the basis for their conclusions, it would be unreasonable, and against the manifest weight of the evidence, to accept Dr. Paletta's opinion as being more reliable than their opinions. The claimant has failed to prove to a medical and surgical certainty via expert testimony that the condition regarding her elbows is causally linked.

Notice

This issue is moot given the above analysis.

Medical Services Provided

As these are not causally related, they are denied. The Arbitrator further notes that Dr. Paletta acknowledged that chiropractic care would be of no benefit in this case, and accordingly any bills from Dr. Eavenson would be disallowed even if the cubital tunnel syndrome was in fact related.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Pat Bacheldor,

Petitioner,

14IWCC0176

vs. NO: 12 WC 18644

Wal-Mart,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 24, 2014 is hereby affirmed and adopted.

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

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 13 2014

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

DRD:bjg
0-2/25/2014
052

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

14IWCC0176

BACHELDOR, MARY PAT Case# **12WC018644**
Employee/Petitioner

WAL-MART
Employer/Respondent

On 5/24/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4463 GALANTI LAW OFFICES
LESLIE N COLLINS
PO BOX 99
EAST ALTON, IL 62024

2593 GANAN & SHAPIRO PC
AMANDA WATSON
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0176

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mary Pat Bacheldor
Employee/Petitioner

v.

Wal-Mart
Employer/Respondent

Case # 12 WC 18644

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 William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 18, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $16,707.38; the average weekly wage was $321.30.

On the date of accident, Petitioner was 46 years of age, single with 1 dependent child(ren).

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

Respondent shall be given a credit of $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 amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay for reasonable and necessary medical services as identified in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

Respondent shall authorize and make payment for prospective medical treatment as recommended by Dr. Lehman, including, but not limited to, right shoulder surgery.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

May 17, 2013
Date

MAY 24 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on May 15, 2012. According to the Application, Petitioner fell while getting into a rolling chair and sustained injuries to her right shoulder. This case was tried as a 19(b) proceeding and Petitioner sought an order for payment of medical bills and prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner worked for Respondent in the optical department as an Optician Technician and her job duties required her to assist patients with pre-testing procedures, provide customer service, etc. On May 15, 2012, Petitioner had just recently returned to work following a right foot injury she previously sustained and she was on light duty. Because Petitioner had sustained a foot injury, she was wearing tennis shoes and ambulating with the use of a cane.

On May 15, 2012, one of the machines that is used to test eyesight was out of paper and Petitioner was attempting to observe her supervisor, Patricia Sinks, refill the machine with paper. The machine was on a table and Petitioner put her came down and proceeded to walk around the table to observe how the paper was placed into the machine. Petitioner then attempted to sit on a chair which was adjacent to the table and customarily used by patients. This chair had no arms and was on rollers and when Petitioner put her right hand on it, the chair gave way causing Petitioner to fall injuring her right shoulder. Petitioner described the surface of the floor as being wooden/shiny and that there were neither chair mats nor carpeting or any other floor coverings.

Petitioner completed and signed a document entitled "Associate Incident Report" (Respondent Exhibit 2) which indicated that Petitioner was watching the manager install tape (paper) in the field testing machine, and that she reached behind with her left hand to hold the chair which was on wheels, that she started to sit and the chair went out from under her causing her to fall and injure her right shoulder.

Patricia Sinks appeared and testified on behalf of the Respondent. She confirmed that she was Petitioner's supervisor and, on May 15, 2012, was in the process of changing paper in a machine used to test eyesight. Sinks testified that Petitioner was standing on the side of the table where the patient would customarily be and was observing her put paper in the machine. Sinks testified that the chair was on wheels but had no defects and that the floor was concrete covered with a vinyl floor covering that looked like wood. Sinks testified that the Petitioner attempted to sit down and missed the chair and fell sustaining injuries as a result thereof.

Prior to the accident, Petitioner was treated by Dr. Anne Christopher for the work-related right foot injury. While being treated for this injury Petitioner did have some right shoulder complaints.

Following the accident of May 15, 2012, Petitioner was seen by both Mark Eavenson, a chiropractor, and Dr. Richard Lehman, an orthopedic surgeon. Dr. Lehman previously treated Petitioner for her right foot injury as well. On June 22, 2012, an MRI was performed at Dr. Eavenson's direction which revealed a right rotator cuff tear. When Dr. Lehman saw Petitioner

on June 26, 2012, he examined her and reviewed the MRI scan opining that Petitioner had sustained a right rotator cuff tear as a result of the work-related accident of May 15, 2012. Dr. Lehman recommended arthroscopy and right rotator cuff repair.

Dr. Lehman was deposed on February 5, 2013, in regard to both the right foot and right shoulder cases. In regard to the right shoulder case, Dr. Lehman testified that Petitioner may have had a pre-existing right rotator cuff tear; however, he stated that the mechanics of the injury sustained by Petitioner on May 15, 2012, could aggravate a pre-existing tear.

Petitioner has continued to work light duty for Respondent and has continued to receive physical therapy for her right shoulder condition. She does want to proceed forward with the surgery as recommended by Dr. Lehman.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on May 15, 2012, to her right shoulder.

In support of this conclusion, the Arbitrator notes the following:

There is no significant dispute as to the circumstances of the accident of May 15, 2012. The testimony of both the Petitioner and Respondent's witness, Patricia Sinks, are consistent with one another in their description of the circumstances of this accident.

The Arbitrator acknowledges that for an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk in which the employee is exposed a risk of a greater degree than what the general public is exposed to by reason of his/her employment. Orsini v. Industrial Commission, 509 N.E.2d 1005 (Ill. 1987).

The Arbitrator finds the case of Poole v. Cook County Medical Examiner, 12 IWCC 0866, to be analogous to the instant case. In the Poole case, the Petitioner was seated in an office chair with rollers, he attempted to reach over to get a file from a file cabinet, and the rolling chair slid out from under him of causing him to sustaining injuries. In affirming the Arbitrator's decision, the Commission found that wheeled, swiveling office chairs are less stable than most chairs and that one who sits at work in such a chair on a linoleum surface is exposed to risks greater than that to which a member of the general public is exposed. In the instant case, the Petitioner sustained injuries when she attempted to sit in an armless chair on rollers on a concrete floor with a vinyl floor covering while she was in the process of observing how to load paper into the machine.

The Arbitrator finds the case of Bailey v. Cook County Department of Corrections, 12 IWCC 0399, to be distinguishable from the instant case. The Bailey case involved a Correctional Officer who was sitting on a roller chair without arms, reached across the desk to retrieve some papers and the chair flew out from under her. In the Bailey case, Petitioner alleged that it was her

act of reaching across the desk that imposed a greater risk of injury, not the fact that the chair rolled out from under her.

Accordingly, the Arbitrator concludes that Petitioner was exposed to a risk greater than that to which a member of the general public is exposed.

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of May 15, 2012.

In support of this conclusion the Arbitrator notes the following:

Dr. Lehman opined that there was a causal relationship between the accident of May 15, 2012, and the right rotator cuff tear and there is no medical opinion to the contrary.

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

The Arbitrator concludes that all of the medical services provided to Petitioner were reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator concludes that Petitioner is entitled to prospective medical treatment including, but not limited to, the right shoulder surgery recommended by Dr. Lehman.

In support of this conclusion the Arbitrator notes the following:

Dr. Lehman has recommended that Petitioner undergo right rotator cuff surgery and there is no medical opinion to the contrary.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paul Outlaw,

Petitioner,

vs. NO: 08 WC 24104

University of Illinois at 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 March 14, 2014, having been filed by Petitioner 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 March 14, 2014 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error 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: APR 0 2 2014
TJT:yl
51

Thomas J. Tyrrell

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

PAUL B. OUTLAW,

Petitioner,

vs.

NO: 08 WC 24104
14 IWCC 177

UNIVERSITY OF ILLINOIS AT CHICAGO,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW
UNDER SECTIONS 8(A), 16, 19(K) AND 19(L)

This cause comes before the Commission on Petitioner's Sections 8(a), 16, 19(k) and 19(*l*) petition, filed on January 16, 2013. A hearing on Petitioner's petition was held by Commissioner Tyrrell on February 20, 2013. The issues under Petitioner's petition were whether Petitioner is entitled to prospective medical care and whether Petitioner is entitled to penalties and attorneys' fees. The Commission, after having considered the record, hereby finds that Petitioner is entitled to prospective medical care, penalties and attorneys' fees. Petitioner's Sections 8(a), 16, 19(k) and 19(*l*) petition is granted.

FINDINGS OF FACT

Petitioner worked as an electrician for Respondent. On May 8, 2008, it was stipulated that he sustained an accident when he was struck by a bus and suffered a right rotator cuff tear injury, which was operated on two months later. Petitioner eventually returned to work with an irreparable massive rotator cuff tear and with significant restrictions. On March 2, 2009, Dr. Goldberg gave Petitioner permanent restrictions of no lifting, pushing or pulling over 30 pounds and no overhead work, specifying that Petitioner's work should be performed at the shoulder level or below.

The Arbitrator heard Petitioner's case on March 1, 2010. The Arbitrator found Petitioner's condition of ill being was causally connected to the work accident and awarded Petitioner a wage differential beginning on March 1, 2010, because the injuries sustained caused a loss of earnings, and medical bills per the fee schedule as submitted by Petitioner at the hearing. The Arbitrator's decision was not appealed. Petitioner returned to work for Respondent after the hearing and worked until he retired on May 1, 2010.

Petitioner testified about his worsening right shoulder condition on February 20, 2013. Since Petitioner last testified, he said he always has right shoulder pain. Moreover, Petitioner testified that his right shoulder has deteriorated since he last saw Dr. Goldberg. Petitioner testified he feels pressure on the area where his doctors previously attempted to surgically repair his shoulder and added the pressure is getting worse. He explained that it feels like something in the shoulder is pushing down on the nerve or tissue on the top of his right shoulder. Petitioner also began experiencing pains he described as "electrical shocks" around March 2012. He was not working at that time. Petitioner explained it feels like he gets electric shocks that go from his shoulder down to his wrist and fingers. Petitioner explained he did not pay attention to the shock sensations until he realized they were not going away. These shocks are intermittent but became more prevalent in the months before the February 2013 hearing. Petitioner testified that he experiences the shocks depending on how he moves his arm. Petitioner explained that when he tries to lift his right arm away from his body up to 90 degrees, he cannot hold his arm there long, he has to bring it down and then he experiences a tingling sensation. Petitioner described the tingling sensation as going down his right arm to his wrist and occurs immediately.

Petitioner last saw Dr. Goldberg in March 2009 and did not seek treatment for his right shoulder from March 2009 through November 2012. Dr. Goldberg initially treated Petitioner for his injury in 2008. He had previously diagnosed Petitioner with an irreparable chronic rotator cuff injury. Petitioner testified that in November 2012 he made an appointment with Dr. Goldberg for the electric shocks he was experiencing. Respondent authorized that appointment. Petitioner saw Dr. Goldberg on November 9, 2012. Dr. Goldberg again diagnosed Petitioner with an irreparable chronic rotator cuff injury, gave Petitioner the same work restrictions, and ordered an MRI. Respondent approved the MRI, which Petitioner had on November 21, 2012. The MRI findings included new thickening of the inferior glenohumeral ligament that can be seen with adhesive capsulitis. Petitioner returned for a second appointment with Dr. Goldberg on November 26, 2012, to review the MRI. Dr. Goldberg noted that he was worried about a possible outbreak of plexus compression and prescribed an EMG of the right upper extremity. Petitioner had the EMG on December 21, 2012, which Respondent authorized. Petitioner testified that he scheduled a third appointment to see Dr. Goldberg for January 2013.

Petitioner went to the appointment; however, he was told he could not see Dr. Goldberg because Respondent had not approved it. Respondent authored a letter on January 29, 2013, stating that it was denying further medical treatment as there was no medical evidence that Petitioner's continued shoulder complaints were causally connected to the May 2008 accident.

Petitioner testified that he would like to continue to treat with Dr. Goldberg.

CONCLUSIONS OF LAW

The Commission concludes that Petitioner's current condition in his right shoulder and his need for additional treatment as recommended by Dr. Goldberg is causally related to the work accident he sustained on May 8, 2008. We find that Petitioner sustained his burden of proof under Section 8(a) that his right shoulder symptoms worsened. The Commission further awards Petitioner penalties and attorneys' fees under Sections 19(k), 19(*l*) and 16.

The Commission holds that Petitioner is entitled to prospective medical treatment for his right shoulder condition. Petitioner credibly testified that he continues to experience pain in his right shoulder from his irreparable rotator cuff tear since the injury. Petitioner testified that he is still restricted in how he can move his shoulder and how much weight he can lift. Petitioner's condition then deteriorated further. He now feels a pressure on the top of his right shoulder, the area previously operated on. Petitioner explained it feels like something is pushing down on his nerve or tissue. Additionally, his pain increased around March 2012 when he began experiencing electrical shock sensations that travelled from his shoulder, down his arm to his hand. The shocks became more prevalent and did not abate, so Petitioner sought additional medical treatment from the same physician, Dr. Goldberg, for his worsened condition. Petitioner did not suffer an intervening injury and his right shoulder condition was previously found to be causally connected to the work related injury on May 8, 2008.

Further, when Petitioner sought additional medical treatment for these new right shoulder issues, Respondent initially authorized follow up treatment with Dr. Goldberg. Petitioner underwent the testing procedures prescribed and is waiting for further approval to follow up with Dr. Goldberg. Respondent cannot initially authorize treatment, and then later refuse to pay for the previously authorized treatment provided and necessary follow up. Petitioner proved that his condition has worsened and he is entitled to additional medical treatment as prescribed by Dr. Goldberg for his right shoulder irreparable rotator cuff tear.

We also award Petitioner penalties and attorneys' fees. It is well established that the imposition of Section 19(k) penalties and Section 16 attorney's fees is discretionary, and that they are assessed when the delay of payment is deliberate or results from bad faith or improper purpose. McMahan v. Industrial Comm'n, 183 Ill. 2d 499, 515, 703 N.E.2d 545, 553 (1998); Mechanical Devices v. Industrial Comm'n, 344 Ill.App.3d 752, 766, 800 N.E.2d 819, 829 (2003). Section 19(*l*) penalties are in the nature of a late fee, and "the statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.'" McMahan, 183 Ill. 2d at 515, 702 N.E.2d at 552. See also Mechanical Devices, 344 Ill.App.3d at 763, 800 N.E.2d at 829. If the employer or its insurance carrier cannot show an adequate justification for its delay, additional compensation under Section 19(*l*) is mandatory. McMahan, 183 Ill. 2d at 515, 702 N.E.2d at 552; Mechanical

Devices, 344 Ill.App.3d at 763, 800 N.E.2d at 829.

The Commission finds that Respondent's actions were unreasonable and vexatious in this case. Respondent initially authorized Petitioner to seek additional medical treatment with Dr. Goldberg. Petitioner had two appointments with Dr. Goldberg in November 2012. Dr. Goldberg's note states that he is seeing Petitioner for his ongoing complaints for his right shoulder from the May 8, 2008, work injury. Respondent also authorized the MRI and EMG tests ordered by Dr. Goldberg. However, Respondent later refused to pay for the testing it had previously authorized. Respondent then refused to authorize and pay for additional medical treatment for Petitioner.

Before undergoing additional tests, Petitioner sent Respondent a letter on November 28, 2012, requesting authorization and payment for the MRI and EMG. Petitioner asked Respondent to provide a written reason if treatment was being denied. However, Respondent did not respond until January 29, 2013, after the services were authorized, changes incurred and then payment for the same summarily denied by Respondent. Respondent's actions put Petitioner in the position of being potentially liable for expensive medical treatment that Respondent previously authorized and then months later decided to not pay for. We hold that Respondent acted in an unreasonable and vexatious manner, and Petitioner is entitled to penalties and attorneys' fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Section 8(a) petition for prospective medical treatment for his right shoulder as recommended by Dr. Goldberg is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all medical expenses incurred by Petitioner for treatment for his work related injury under Section 8(a) and pursuant to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for penalties under Section 19(k) and Section 19(*l*) and attorneys' fees under Section 16 is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $2,216.50 pursuant to Section 19(k) without further delay.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $4,590.00 pursuant to Section 19(*l*) without further delay.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $1,361.30 in attorney's fees pursuant to Section 16 without further delay.

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.

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: APR 0 2 2014
TJT: kg
R: 2/20/13
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF MCCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nancy Grubel,
Petitioner,

vs.
Learning Care Group Inc. d/b/a LaPetite Academy,
Respondent,

NO: 11 WC 38637
14IWCC0178

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014

Mario Basurto

David L. Gore

Daniel R. Donohoo

MB/mam
O:2/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRUBEL, NANCY
Employee/Petitioner

Case# 11WC038637

14IWCC0178

LEARNING CARE GROUP INC D/B/A LaPETITE ACADEMY
Employer/Respondent

On 7/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0564 WILLIAMS & SWEE LTD
STEVEN R WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2593 GANAN & SHAPIRO PC
JESSICA M BELL
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0178

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nancy Grubel
Employee/Petitioner

v.

Learning Care Group Inc d/b/a LaPetite Academy
Employer/Respondent

Case # 11 WC 38637

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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **5/15/13**. 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 _____

FINDINGS

On **4/26/11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,960.00**; the average weekly wage was $**480.00**.

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

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

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

Respondent shall be given a credit of $**3,665.00** 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 $ under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**316.86**/week for **11 3/7** weeks, commencing **9/21/11** through **12/9/11**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **9/21/11** through **present**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $**3,665.00** for temporary total disability benefits that have been paid.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $**288.00**/week for 37.625 weeks, because the injuries sustained caused the 17.5% loss of the **right leg**, as provided in Section 8(e) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $**230.00** to **OSF Medical Group**, $**768.00** to **Central Illinois Orthopedic Surgery**, $**99.00** to **Neuro Ortho Rehab**, and $**8,258.00** to **Bloomington Normal Healthcare Surgicenter** as provided in Sections 8(a) and 8.2 of the Act. The Respondent shall pay these charges pursuant to the Fee Schedule.

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 J Mathis

Signature of Arbitrator

7-15-13

Date

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

The Petitioner testified that on April 26, 2011 she was working for La Petite. On this date, the Petitioner leaned against a fence to let a child go through on his tricycle. As she leaned on the fence, the fence gave way and she fell twisting her knee.

On April 28, 2011 the Petitioner sought medical treatment. Dr. Cash examined the Petitioner. He noted the Petitioner was injured at work and he noted a twist. During his examination he noted range of motion and swelling of the right leg. There is also tenderness. (px2)

The Petitioner underwent a MRI on June 24, 2011. The MRI showed a radial tear at posterior horn of the lateral meniscus. There is a degenerative tear in the posterior horn of the medial meniscus. (px3)

On July 14, 2011 the Petitioner saw Dr. Keller. Dr. Keller noted a work related injury at La Petite Academy when the Petitioner was leaning against a fence and fell and twisted her right knee. During the examination he noted tenderness at the lateral joint line, effusion, patellofemoral crepitus and decreased range of motion of the right knee. (px4)

On September 28, 2011 the Petitioner underwent a surgical procedure. Dr. Keller performed a right knee arthroscopy medial and lateral meniscectomy, debridement of patella/trochlea, and debridement/chondroplasty of lateral femoral condyle. He diagnosed right knee medial and lateral meniscus tears, Grade 3 chondromalacia trochlea, and Grade 3 out of 4 chondromalacia lateral femoral condyle. (px5)

On October 26, 2011 the Petitioner underwent a strength test. The right knee had decreased strength and extension and flexion when compared to the left knee. (px6)

On November 8, 2011 the Petitioner was seen by Dr. Keller. He noted discomfort. There is slightly decreased strength at 4+ out of 5. (px8)

During a physical therapy note on December 7, 2011 the Petitioner complained of stiffness. She had discomfort at the end range of passive flexion. (px9)

In a physical therapy update dated December 9, 2011 the right knee still had occasional pain. There was some catching in the knee. (px10)

Dr. Keller authored a report dated May 1, 2013. He stated that the Petitioner was leaning against a fence, fell and twisted her right knee. A MRI showed a medial and lateral meniscus tear. He performed a surgical procedure on September 28, 2011. This included a right knee arthroscopy medial and lateral meniscectomy and debridement of the patella trochlea and debridement of the lateral femoral condyle. Dr. Keller stated that there is a causal relationship between the Petitioner's injury and her condition of ill-being.

The Petitioner continued to have difficulty with stairs, squatting, kneeling and getting up and down off the floor.

Based on the above the Arbitrator awards 17.5% loss of use to the Petitioner's leg.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas K. Mayer,
Petitioner,

vs.

NO: 07 WC 42456

14IWCC0179

Cintas Corporation,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability and additional compensation/attorneys' fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds in addition to the temporary total disability periods the Arbitrator found Petitioner was entitled to Petitioner is entitled to additional temporary total disability from September 27, 2007 through October 21, 2007 and from February 6, 2008 through March 9, 2008 for an additional total of 8-1/7 weeks. While the off work notes from the various doctors were less than clear, the Commission finds during these periods that Petitioner's condition had not yet stabilized and Petitioner had not yet reached a state of maximum medical improvement and as such he is entitled to additional temporary total disability benefits.

The Commission further finds that Respondent's behavior was not unreasonable or vexatious and as such Petitioner is not entitled to additional compensation/attorneys' fees under Sections 19(l), (k) & 16 of the Act. The Commission finds that when any delays were pointed out they were rectified in short order and there was no unreasonable behavior on the part of the Respondent or its representatives.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $554.69 per week for a period of 117 weeks, that being the period of

14IWCC0179

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 $554.69 per week for a period of 39-3/7 weeks for maintenance, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is owed $1,352.43 in wage differential and commencing on May 23, 2012 Respondent pay to Petitioner the sum of $529.20 per week for the duration of his disability, as provided in §8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursing the duties of his usual and customary line of employment.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit of $85,586.16 for temporary total disability and maintenance payments and $16,179.61 for temporary partial disability payments for a total credit of $101,765.77 paid to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAR 17 2014

Mario Basurto

David L. Gore

Daniel Donohoo

MB/jm

O: 1/23/14

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAYER, THOMAS K
Employee/Petitioner

Case# **07WC042456**

14IWCC0179

CINTAS CORPORATION
Employer/Respondent

On 7/5/2012, 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 0.15% 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:

4599 SCHUCHAT, COOK, & WERNER
CLARE R BEHRLE
1221 LOCUST ST 2ND FLR
ST LOUIS, MO 63119

2593 GANAN & SHAPIRO PC
AMANDA WATSON
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0179

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Thomas K. Mayer
Employee/Petitioner

v.

Cintas Corporation
Employer/Respondent

Case # 07 WC 42456

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 Joshua Luskin, Arbitrator of the Commission, in the city of Collinsville, on May 23, 2012. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 17, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

Petitioner's average weekly wage was $832.04. The parties agree that if the claimant was still employed by the respondent in his pre-injury position, the petitioner's current average weekly wage would be $971.00.

On the date of accident, the petitioner was 43 years of age, ***single*** with **2** dependent children under 18.

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

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services and agreed to be responsible for causally related medical bills pursuant to the fee schedule.

Respondent shall be given a credit of $85,586.16 for TTD and Maintenance, and $16,179.61for TPD, for a total credit of $101,765.77.

Respondent may take credit under Section 8(j) of the Act for any amounts paid pursuant to a qualified group insurance plan. The parties agreed that Section 8(j) rights were not waived by the respondent.

ORDER

SEE ATTACHED DECISION

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

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

Signature of Arbitrator

July 3, 2012
Date

JUL -5 2012

14IWCC0179

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

THOMAS K. MAYER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 07 WC 42456
	)	
CINTAS CORPORATION,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The claimant began working for the respondent in April 2006 as a sales service representative, providing customers with supplies, uniforms and floor mats. On April 17, 2007, the petitioner was bending over to lift a floor mat and felt pain in his abdomen below his sternum, which worsened throughout the day. He reported the injury to his supervisor and sought medical care the following day. Dr. Terschluse diagnosed a hernia and performed surgical repair on April 20, 2007. Dr. Terschluse released the petitioner to light duty as of Monday, May 14. The petitioner did return to light duty at that time and was thereafter released to full duty on June 18. See PX1, PX2.

The claimant returned to Dr. Terschluse on August 1, 2007, complaining of recurrent pain. Dr. Terschluse prescribed him off work until August 5. On August 22, the petitioner noted ongoing discomfort, but there was no evidence of recurrent hernia. He was discharged from care at that time. On September 5, the petitioner returned noting pain that was continuing despite medication. Dr. Terschluse prescribed medication and physical therapy but reassured the petitioner "that nothing serious is going on." PX2.

The claimant saw Dr. Pruett on September 12, 2007. Dr. Pruett diagnosed a recurrent hernia and recommended surgery and light duty. See PX3.

On September 19, 2007, the claimant saw Dr. Ahmed. Dr. Ahmed diagnosed a possible recurrent hernia and recommended a CT scan to confirm. The CT scan was done that day and demonstrated no evidence of a recurrent hernia. See PX4. The medical records of Dr. Ahmed contain two different work restriction notes dated September 26, 2007; one prescribed the petitioner a return to work on September 27, and the other prescribed him off work until October 22. See PX4.

On October 15, the claimant saw Dr. Terschluse and noted he had seen Dr. Pruett and Dr. Ahmed for second opinions, and Dr. Terschluse referred the claimant to Dr. Velling for a pain evaluation. A letter dated October 16, 2007 indicated the claimant could "continue" to work full duty. PX2.

The claimant then saw Dr. Ramshaw on December 5, 2007. Dr. Ramshaw diagnosed a failure of the mesh and thereafter performed surgical repair with mesh placement on January 10, 2008. On February 6, 2008, Dr. Pruett saw the claimant in follow-up from the surgery. The claimant noted dramatic improvement in the symptoms following surgery. Following examination, Dr. Pruett discharged the claimant from care, noting he may resume normal activity, including work activity, as tolerated. See PX6.

The petitioner returned to work in March 2008. On April 14, 2008, he saw Dr. Houser describing recurrent pain, but no substantial care was recommended at that point. PX6. The petitioner testified he did not have problems until approximately September 2008, and on October 29, 2008, he returned to see Dr. Ramshaw, noting pain had begun approximately two months before that date and had progressed. Dr. Ramshaw recommended a CT scan to determine if a mesh failure had occurred and to work light duty pending a follow-up examination. Light duty was accommodated by the respondent at that time. On December 9, 2008, Dr. Ramshaw recommended a pain management referral. See PX6. On December 18, 2008, the claimant ceased working light duty.

The respondent secured a utilization review which recommended the CT scan but disputed the pain specialist referral at that juncture (see RX3). After the CT scan demonstrated another mesh failure or recurrent hernia, the petitioner treated with Dr. Shelby Kopp and Dr. Mathews and subsequently underwent a third hernia surgery by Dr. Ramshaw on September 8, 2009 to again repair the surgical site and the mesh. The petitioner was never released to full duty during this time period. (PX6, 7 & 8)

Following the surgery, Dr. Ramshaw moved his practice and the petitioner followed up with his colleague, Dr. Bachman. On January 6, 2010, the petitioner was assessed at MMI regarding the hernia issue, and relative to it he was given permanent lifting restrictions of twenty pounds and told to move around, as time limits of prolonged standing, walking, sitting and driving were noted. It does not suggest that the claimant cannot work an eight-hour day so long as the claimant does not extend past the time limit for each one of these tasks. PX18. It is not disputed that these restrictions are inconsistent with his preinjury job duties.

Following the September 2009 surgery the claimant had radiating pain into his legs and was subsequently diagnosed with meralgia paresthetica, a neurological condition which was assessed as a complication of the surgical positioning. See PX10. Petitioner came under the care of Dr. Hagan, who performed surgical decompression of his left lateral femoral cutaneous nerve on July 21, 2010. Following surgery he had nerve block injections and physical therapy. He achieved MMI on November 18, 2010. No medical restrictions were assessed relative to this issue, but his prior restrictions regarding the hernia surgeries were not amended. See PX11.

On March 30, 2011, Dr. Cantrell evaluated the petitioner pursuant to Section 12 of the Act. Dr. Cantrell believed the petitioner would eventually be able to lift fifty

pounds without risk. However, Dr. Cantrell did not believe the petitioner would be capable of resuming work at Cintas because of the heavy lifting requirements. PX12.

The respondent could not provide a job within the permanent restrictions and on April 12, 2010, the claimant was referred for vocational assistance. See PX15, RX4. On August 22, 2011, the petitioner began working at his brother's grocery/convenience store making $7.25 per hour approximately twenty-five hours a week.

The petitioner testified that if he sits too long he gets tingling and pain in his left leg, and that a couple times per week he gets abdominal pain, often precipitated by physical activities or by actions such as sneezing. He avoids sports and will take over the counter medication and use a heating pad.

OPINION AND ORDER

Temporary Total Disability and Maintenance

The petitioner seeks temporary total disability or maintenance benefits for 156 & 4/7 weeks covering various periods between April 18, 2007 and August 21, 2011. The Arbitrator will address these individually, noting temporary total disability would extend through the date of maximum medical improvement. Thereafter, benefits would be characterized as maintenance. His hernia condition achieved MMI on January 6, 2010 and his leg complaints did so on November 18, 2010.

The Arbitrator's review of the evidence supports a finding that eligibility for temporary total disability has been established for the following periods:

1) April 18, 2007 through May 13, 2007 (following the injury until Dr. Terschulse released the claimant to light duty; see PX2);
2) August 1 through 5, 2007 (Dr. Terschluse, see PX2);
3) January 10, 2008 through February 6, 2008 (Dr. Ramshaw/Dr. Pruett, PX6)
4) April 14-16, 2008 (Dr. Houser; PX6)
5) December 19, 2008 through MMI on November 18, 2010 (PX6-8, PX11-12)

While Dr. Ahmed may have taken the petitioner off of work from September 26 through October 21, 2007, this note is both contradicted by Dr. Ahmed's own internal notes and stands in opposition to Dr. Terschluse's full duty release and Dr. Pruett's light duty release during that time frame, as well as the negative CT scan. TTD during that period is denied. While the petitioner did not return to work immediately following the February 6, 2008, release, there is no medical evidence indicating inability to work during that period, and TTD is not supported.

As of November 2010, vocational services had already been discussed and these continued until he began employment on August 22, 2011. Maintenance benefits would thus apply from November 19, 2010 through August 21, 2011.

Accordingly, the claimant has demonstrated eligibility for 108 & 6/7 weeks of temporary total disability and 39 & 3/7 weeks of maintenance, for a total of 148 & 2/7 weeks of benefits at the TTD/maintenance rate of $554.69 per week, a total liability of $82,252.60. The respondent has paid $85,586.16 for this time span and shall be credited $3,333.56 for the overpayment against weekly benefits as discussed below.

Nature and Extent of the Injury

It is unrefuted that the petitioner is unable to return to his pre-injury employment due to the physical limitations caused by this injury. The claimant procured employment beginning on August 22, 2011. The claimant requests an award pursuant to Section 8(d)1 of the Act (wage differential).

PX19 is a group exhibit of the petitioner's pay records in his new employment. It demonstrates he became employed at $7.25 per hour and remained so at the time of trial, working an irregular schedule of approximately 25 hours per week over the 34 weeks from August 28, 2011 through May 5, 2012 represented by these documents. The claimant earned $6,024.78 during that span, or $177.20 per week.

Section 8(d)1 notes the appropriate calculation is based on the difference between what the claimant would be earning in his pre-injury employment and the amount he can earn in suitable employment after the accident as a result of the limitations. The parties stipulated that absent the injury, the claimant would be earning $971.00 per week in his pre-injury employment. The petitioner's work restrictions do not compel part-time employment, but the respondent did not claim inadequate earnings or request additional vocational efforts be undertaken. The Arbitrator thus accepts the above part-time employment earnings as the amount he could earn, rather than a conventional 40-hour week at $7.25 per hour. The differential is therefore $971.00 - $177.20 = $793.80 per week. Section 8(d)(1) benefits are two-thirds the difference, or $529.20 per week.

It is ordered the respondent shall pay the petitioner, pursuant to 8(d)1 of the Act, $529.20 per week beginning August 22, 2011 and for as long as the disability lasts. As of the May 23, 2012 trial date, 39 & 3/7 weeks of benefits had accrued, resulting in liability of $20,865.60. Against this amount, the respondent is credited $3,333.56 as noted in the TTD/maintenance section above and $16,179.61 in benefits paid following August 22, 2011, for a total credit of $19,513.17. The respondent is thus liable to the petitioner for $1,352.43 in benefits owed as of May 23, 2012, and for weekly benefits thereafter at the rate of $529.20 per week, for such time as the disability lasts.

Penalties and Fees

The claimant requests penalties and fees be imposed upon the respondent for vexatiously and unreasonably failing to timely pay benefits including TTD, TPD, mileage

and wage differential benefits during the course of the litigation. The Arbitrator finds that the evidence adduced does not support these remedies.

The compelling evidence introduced involves the stipulations of the parties, the composite exhibit PX17, being the correspondence between counsel, and RX1, the respondent's payment ledger. The correspondence in particular undermines the claim of unreasonable and vexatious conduct. When inquiries were made as to the status of checks, responses were timely and rectification, if needed, was made immediately. No hostility or ill-feeling was demonstrated, and there does not appear to be any assertion by the respondent of bad faith or prejudice. This does not support a finding of vexatiousness of the respondent against the claimant in either behavior or attitude.

Moreover, substantial sums were paid throughout the course of the case. The parties stipulated that all the medical bills were paid by the respondent prior to hearing, a sum in excess of $100,000.00. In addition, the respondent paid the claimant's mileage and vocational services, which were offered in a timely manner following the claimant's permanent restrictions being authored. As noted above, substantial disability payments were made throughout the course of the claim as well.

The Arbitrator does not view the history or handling of the case to be motivated by ill feeling or in bad faith, or done in a deliberate, vexatious, or negligent manner. Penalties and fees are therefore denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clifford Johnson,
Petitioner,

vs.

NO: 08 WC 18028

14IWCC0180

Steve Golightly d/b/a Mini Max Storage and U Haul,
Respondent,

DECISION AND OPINION ON REMAND

On March 1, 2010 Arbitrator Nalefski found Petitioner sustained an accidental injury arising out of and in the course of his employment on October 24, 2007. As a result of the October 24, 2007 work accident he found Petitioner was temporarily totally disabled from October 24, 2007 through November 12, 2009 for 106-5/7 weeks. The Arbitrator further found, "Petitioner will need a total knee replacement as a consequence of this work accident. Respondent shall pay for that procedure, subject to the medical fee schedule, when the time comes", Petitioner lost 40% of the use of his right leg. Petitioner's shoulder condition is not causally connected. Respondent is entitled to a credit of $13,032.68 for temporary total disability/maintenance payments.

On April 5, 2010 Respondent filed a Petition for Review marking the issues of causation and prospective medical care. On October 20, 2010 the Commission issued a decision in which struck the phrase "when the time comes", but otherwise affirmed the Arbitrator's decision. On November 15, 2010 Respondent filed a Section 19(f) Motion indicating that the following sentence be deleted from the decision "Petitioner will need a total knee replacement as a consequence of this work accident. Respondent shall pay for that procedure, subject to the medical fee schedule, when the time comes". The Motion was granted on November 22, 2010. The original Decision was recalled and a Corrected Decision was issued. On December 20, 2010 a Corrected Decision and Opinion on Review was issued. Unfortunately, this decision mirrored the first decision and only struck the language "when the time comes". On March 3, 2011

14IWCC0180

Respondent issued a check to Petitioner for permanent partial disability benefits and interest. On March 10, 2011the Commission, sua sponte, recalled the Corrected decision and issued a second Corrected Decision which struck the following sentence from the decision "Petitioner will need a total knee replacement as a consequence of this work accident. Respondent shall pay for that procedure, subject to the medical fee schedule, when the time comes." The Commission's Mainframe shows Petitioner filed a Section 19(k) Petition on February 23, 2011, filed a Section 16 Petition on March 8, 2011 and filed Section 19(k) and Section 16 Petition on March 16, 2011. On March 22, 2011 Petitioner filed an Amended Petition for Penalties under Sections 19(k) and 16 of the Act. A Review Hearing on this Petition was held on May 9, 2011. On July 11, 2011 the Commission issued an Order denying Petitioner's Petition for Penalties/Attorneys' Fees holding Respondent was not obligated to tender payment until the award was final. The decision didn't become final until April 7, 2011. Respondent had made payment of permanent partial disability award and interest on March 3, 2011.

Petitioner filed an appeal to the Circuit Court. On June 25, 2012, the Circuit Court found that any portion of the claimant's benefits that are undisputed must be promptly paid or the employer will be subjected to penalties and attorneys' fees. The Circuit Court reversed the decision of the Commission in denying Section 19(k) penalties and Section 16 attorneys' fees and remanded the case to the Commission for further proceedings.

On October 30, 2012 after both parties had filed a joint motion to determine jurisdiction in the Appellate Court, the Appellate Court dismissed the appeal for lack of jurisdiction finding that the Circuit Court's Order was not a final and appealable order.

Currently, this case is before the Commission is on remand from the Circuit Court. The Commission has reviewed the record and file and finds that Petitioner is entitled to $10,221.00 under Section 19(k) of the Act and $4,088.40 in attorneys' fees under Section 16 of the Act. Lastly, the Commission finds that the legal costs are separate and apart from this decision and are a contractual issue between the Petitioner and his attorney.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was entitled to his permanent partial disability award as of November 13, 2009 after his temporary total disability award had ended. Although Respondent raised the issues of causation and prospective medical care on Review of the Arbitrator's decision, Respondent did not raise the issue of permanency. Thus, permanency payments would have accrued from November 13, 2009 through July 9, 2011.

2. On March 3, 2011Respondent paid the permanent partial disability award and interest.

3. On May 9, 2011 a Review Hearing was held before Commissioner Donahoo on Petitioner's Petition for Additional Compensation under Section 19(k) and Attorneys' Fees under Section 16 of the Act. More specifically, Petitioner contends that Respondent

should have paid the permanent partial disability award when it was due and owing since it was not an issue on Review.

4. The Appellate Court found in Zitka v. Industrial Commission, 328 Ill.App.3d 844 (2002) that Respondent only raised a medical issue and was not contesting the temporary total disability or permanent partial disability awards. Moreover, having not contested that portion of the award, the Appellate Court found that the awards for temporary total disability and permanent partial disability were due and payable prior to a final award being issued by the Commission. Furthermore, having not paid the award the Appellate Court found that Respondent 's actions warranted additional compensation under Section 19(k) and attorneys' fees under Section 16 of the Act to be assessed against the Respondent.

5. The Appellate Court in Jacobo v. Illinois Workers' Compensation Commission, 959 N.E.2d 772 (2011) also found like the Appellate Court in Zitka, Id. that the claimant's appeal on an issue unrelated to the substantive award is not a legitimate reason to withhold payment of the undisputed award. The Court held that the employer's delay in paying the uncontested award served no purpose except to delay compensation to an injured worker; a result that the penalties are designed to prevent. The Court specifically held that any portion of the claimant's benefits which are undisputed must be promptly paid or the employer will be subject to penalties and attorney fees under the Act.

Based on the above, the Commission finds that Respondent should have paid the uncontested permanent partial disability award that was due as of November 13, 2009 through the date of the May 9, 2011 Review Hearing dealing with Petitioner's Section 19(k) and Section 16 penalties/fees Petition. The total of the permanent partial disability award is 86 weeks and the payment period spanned from November 30, 2009 through July 8, 2011 at a rate of $264.00 x 86 weeks totaling $22,704.00. The Commission finds that from November 13, 2009 through the May 9, 2011 Review Hearing 77-3/7 weeks of the permanent partial disability award had accrued leaving un-accrued amount of 8-4/7 weeks, which is $264.00 x 8-4/7 weeks and totals $2,262.00. Using the $22,704.00 total of accrued permanent partial disability-$2,262.00 which had not accrued the total=$20,442.00 and divided by 50% the total=$10,221.00. Based on the holding of the Appellate Court in Zitka, id. the end period should be the date of the Review Hearing for Petitioner's Penalties/Fees Petition and not the Remand Hearing date. Furthermore, Section 16 should be related to Section 19(k). Any cost due to Petitioner's attorney should be part and parcel of the Attorney Representation Agreement, which is a contract entered into between Petitioner and his attorney and not part of Section 16 calculation. As such, Petitioner's attorney should be due $4,088.40 in attorneys' fees, which is 20% of the amount of the accrued permanent partial disability award.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $10,221.00 as provided in §19(K) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that of the sum of $4,088.40

14IWCC0180

Respondent pay to the attorney for the Petitioner legal fees in the amount as provided in §16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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 $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014

MB/jm

O: 1/23/14

43

Mario Basurto

David L. Gore

Daniel Donohoo

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Bahrey, Jr.,
Petitioner,

vs.

NO: 10 WC 11460

14IWCC0181

ATMI Precast Company,
Respondent,

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's conclusion that Petitioner's current condition is causally related to the March 1, 2010 accident. However, the Commission bases it causation opinion on the chain of events rather than the causation opinions of Drs. Kim and Gleason. The Commission finds that the medical opinions of Drs. Kim and Gleason are insufficient to support a causation opinion as they both lack a sufficient understanding of Petitioner's work duties as well as an understanding of the time period the conditions manifested themselves. The Commission finds that the chain of events supports Petitioner's position that his condition arose from his employment on March 1, 2010. Therefore, the Commission affirms the Arbitrator's conclusion regarding causation but provided a different basis in which to support the same.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 21, 2013 is hereby affirmed and adopted with the exception of the comments noted above.

14IWCC0181

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit in the amount of $1,127.90 under Section 8(j); provided that Respondent shall hold Petitioner harmless from any claims or demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

DATED: MAR 17 2014

MB/jm

O: 1/16/14

43

Mario Basurto

David L. Gore

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BAHREY, JOHN S JR
Employee/Petitioner

Case# **10WC011460**

14IWCC0181

ATMI PRECAST CO
Employer/Respondent

On 2/21/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0190 LAW OFFICES OF PETER F FERRACUTI
JENNIFER KIESEWETTER
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

0075 POWER & CRONIN LTD
DANIEL ARTMAN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS. 14IWCC018
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
CORRECTED

JOHN S. BAHREY, JR.
Employee/Petitioner

v.

ATMI PRECAST CO.
Employer/Respondent

Case # 10 WC 11460

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **11/8/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 14IWCC0181

On the date of accident, **3/10/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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 **$78,705.12**; the average weekly wage was **$1,513.56**.

On the date of accident, Petitioner was **62** years of age, *married* with **0** dependent children.

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

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

Respondent is entitled to a credit of **$1,127.90** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1009.04/week for 47 weeks, commencing 5/27/10 through 4/20/11, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $151,829.30, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 225 weeks, because the injuries sustained caused the 45% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator — Date: 2/18/13

FEB 21 2013

ICArbDec p. 2

STATEMENT OF FACTS

Petitioner began working for ATMI Precast in 1972, but at that time the company was known by a different name. Petitioner testified that he worked various jobs during his time with ATMI, including laborer, brick layer, and erecting precast. Petitioner started erecting precast in 1978. Precast slabs are made of concrete about 12 feet wide and 40 feet tall and must be welded together to make a building. Petitioner testified that a four man crew would work together to assemble these panels. Petitioner had to climb up on a truck, put lifters on a concrete slab, and then jump off the truck repeatedly during the work day. Petitioner testified that in order to get on the truck, he would climb the wheels of the truck to get in the trailer and then would jump down about a distance of four feet. He would also have to get in and out of the footing four foot deep in the ground. Petitioner testified that he would climb up the truck and jump off approximately 25 times a day, as well as jumping down into the footing and climbing back out around 25 times a day. Petitioner was involved in welding the bottom of the concrete to the footing. He would have to climb up the wall in order to install the pole braces, which each weighed over 100 pounds. Petitioner testified that he would set up on average 25 panels a day.

Petitioner testified that in 2000, he began working on repairs rather than erecting precast. This involved climbing the ladders, sticking concrete under the panels, cutting holes in the panels, and jumping in the footing four feet deep in the ground.

Petitioner testified that he never had any problems with his hips prior to beginning work for ATMI Precast. He further stated that he has had pain in his hips the last 12 years, which became progressively worse.

Petitioner saw his primary care physician Dr. Sifatur Sayeed on January 10, 2007, and complained of left hip pain. (PX4 at 1). Petitioner had started physical therapy for his left hip pain. (PX4 at 1). On May 23, 2007, Petitioner saw Dr. Sayeed for his hip pain and indicated he was unable to do regular exercise because of it. (PX4 at 9). Dr. Sayeed assessed him as having left hip pain, secondary to severe degenerative joint disease in both hips. (PX4 at 10). On April 23, 2008, Petitioner was again assessed as having degenerative joint disease of his left hip. (PX4 at 12). An examination on February 2, 2010, revealed Petitioner had bilateral hip joint pain. (PX4 at 16).

Petitioner testified that the last day he worked with ATMI was November 24, 2009 as a result of a layoff. Petitioner testified that he officially retired with ATMI Precast on March 1, 2010 because he could no longer do the job. He could not bend over to put the pole braces in and he had difficulty climbing the ladder.

Petitioner testified that he told supervisors Jim Armbruster and Bob Hayden about his hip pain.

Dr. Andrew Kim, board-certified orthopedic surgeon of M&M Orthopaedics of Naperville, Illinois, testified via evidence deposition on August 4, 2011. (PX3). Petitioner first saw Dr. Andrew Kim on March 10, 2010. At that time, Petitioner was complaining of pain in both hips, the left hip worse than the right at that time. (PX3 at 4). X-rays showed decreasing joint space of both hips and signs of moderate to severe arthritis of both hips. Dr. Kim recommended a total hip replacement for his left side. (PX3 at 5).

On March 24, 2010, Petitioner again saw Dr. Sayeed for right hip pain and reported the severity to be at a 5 to 8 on the pain scale. (PX4 at 24). Petitioner described the pain as sharp, radiating to his right leg, and getting worse with moving. (PX4 at 24).

On his next visit with Dr. Kim on May 19, 2010, Petitioner was having more pain in his right hip and wanted to switch sides and have his right hip replaced. (PX3 at 5). Dr. Kim testified that in his opinion both hips needed to be replaced. (PX3 at 5).

On May 21, 2010, Dr. Sayeed cleared Petitioner for the right hip replacement, indicating that he was medically stable for the procedure. (PX4 at 32).

On May 27, 2010, an anterior total right hip replacement was performed by Dr. Kim at Rush-Copley Hospital. (PX3 at 6). Dr. Kim described the surgery as one in which they cut almost no muscles. (PX3 at 6). In his post-surgical visits, Petitioner was doing very well. He complained mostly of left hip pain, but the right hip that had been operated on was doing quite well. (PX3 at 8).

On December 28, 2010, Petitioner was evaluated for an Independent Medical Evaluation by Dr. Thomas Gleason, a board certified orthopedic surgeon, who testified via evidence deposition on October 11, 2011. Petitioner complained of left hip and groin pain when he met with Dr. Gleason. Dr. Gleason described Petitioner as having a painful limp, favoring the left lower extremity. (RX1 at10). Dr. Gleason took x-rays which revealed a right total hip arthoplasty in satisfactory position and degenerative joint disease of the left hip, severe, with joint space narrowing, sclerosis, subchondral spur formation, and articular irregularity. (RX1 at12). Dr. Gleason further testified that Petitioner has a diminished range of motion with his left hip and an antalgic gait. (RX1 at13). Dr. Gleason found no causal relationship between Petitioner's hip conditions and his work. (RX1 at14). He further testified that a hip replacement is always related to the natural aging process and never because of a person's certain activity level. (RX1 at19). Dr. Gleason also testified that for patients who have bilateral hip arthroplasty, he would not recommend that they return to heavy work. (18).

On January 12, 2011, Dr. Sayeed cleared Petitioner for the left hip replacement, indicating that he was medically stable for the procedure. (PX4 at 51). On January 20, 2011, Dr. Kim performed an anterior total left hip replacement on Petitioner. (PX3 at 8). On his last visit with Dr. Kim on April 20, 2011, Dr. Kim discussed activity restrictions with Petitioner. Dr. Kim instructed Petitioner to avoid repetitive high impact exercises in order to prolong the life span of his implants. (PX3 at 9). Dr. Kim testified that running, jumping, and most sports activities would be discouraged on a permanent basis after a total hip replacement. (PX3 at 10). He indicated he would see Petitioner in two years, and that patients should follow-up after a total hip replacement every several years for an X-ray check. Dr. Kim testified that a hip replacement may last someone 20 years. (PX3 at 10).

Dr. Kim testified that heavy lifting and certainly jumping from three to four feet high 30 to 60 times a day is probably an aggravating factor in the progression of Petitioner's degenerative hip disease. (PX3 at 12). He elaborated that this is a repetitive trauma to the hip that could be and probably is a contributing factor to progression of arthritis. (PX3 at 12-13). Dr. Kim also testified that despite the Petitioner's work activities it was possible that Petitioner would have required hip replacement anyway. (PX3 at 18-19).

Petitioner testified that he currently has limitations walking and bending over as a result of his bilateral hip replacements. He also stated he cannot lift his legs up, but must pick up his legs in order to put socks on.

In support of the Arbitrator's Decision as to C. WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURE OF PETITIONER'S EMPLOYMENT, the Arbitrator finds the following:

The Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of employment. Petitioner testified that he retired from ATMI on March 1, 2010, because he could no longer perform his regular job duties.

Petitioner testified that he had symptoms prior to March 1, 2010, for approximately twelve years, but that the pain in his hips became increasingly worse over time. Petitioner continued to work for Respondent, but he did discuss his hip pain with his primary care physician Dr. Sayeed.

Mr. Bahrey described working for Respondent for 37 years prior to his retirement on March 1, 2010. From 1978 to 2000, Petitioner described his position involving the erection of precast concrete slabs about 12 feet wide and 40 feet tall. Petitioner had to climb up on a truck, put lifters on a concrete slab, and then jump off the truck repeatedly throughout the day. Petitioner testified that in order to get on the truck, he would climb the wheels of the truck to get in the trailer and to get off he would jump down about a distance of four feet. He would also have to get in and out of the footing four foot deep in the ground. Petitioner testified that he would climb up the truck and jump off approximately 25 times a day, as well as jumping down into the footing and climbing back out around 25 times a day. Petitioner was involved in welding the bottom of the concrete to the footing. He would have to climb up the wall in order to install the pole braces, which each weighed over 100 pounds. Petitioner testified that he would set up on average 25 panels a day. Petitioner testified that in 2000, he began working on repairs rather than erecting precast. This job, although less physically demanding, still involved climbing the ladders, sticking concrete under the panels, cutting holes in the panels, and jumping in the footing four feet deep in the ground

Based upon the greater weight of the evidence, the Arbitrator finds that Petitioner suffered a repetitive trauma causing severe degeneration and arthritis in both hips arising out of his employment with Respondent which culminated and manifested itself on Petitioner's retirement date of March 1, 2010. It was that date upon which he determined that he could no longer handle performing his regular career and shortly thereafter he was referred for orthopedic care for the first time regarding his hip conditions.

In support of the Arbitrator's Decision as to E. WHETHER TIMELY NOTICE WAS GIVEN TO RESPONDENT, the Arbitrator finds the following:

Petitioner testified that he informed supervisors Jim Armbruster and Bob Hayden of his hip pain. Petitioner testified that Respondent knew of his bad hips. Petitioner testified that he retired on March 1, 2010, because he could no longer perform his job duties.

The notice requirement under the Act is liberally construed and does not require Petitioner to know medically exactly what his diagnosis is nor does it require Petitioner to have a specific incident described or fill out a specific incident report to constitute proper notice. Further, Respondent did not offer any evidence to rebut Mr. Bahrey's testimony that his supervisors knew of his hip problems and knew that he was having difficulty in the performance of certain aspects of the job due to his hip difficulties. Lastly, the Application for Adjustment of Claim was filed within 45 days of the accident date.

Based upon the greater weight of the evidence and the credible testimony of Petitioner, the Arbitrator finds that Respondent had proper notice under the Act.

In support of the Arbitrator's Decision as to F. WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to Petitioner's repetitive trauma at work.

Dr. Kim testified that heavy lifting and certainly jumping from three to four feet high 30 to 60 times a day is probably an aggravating factor in the progression of Petitioner's degenerative hip disease. (PX3 at 12). He elaborated that this is a repetitive trauma to the hip that could be and probably is a contributing factor to progression of arthritis. (PX3 at 12-13).

Respondent's IME, Dr. Gleason, on the other hand, testified that a hip replacement is always related to the natural aging process and never because of a person's certain activity level.

The Arbitrator finds the opinion of Dr. Kim to be credible. The Arbitrator finds that Petitioner provided sufficient evidence that his work activities over time contributed to and aggravated his condition, causing him to develop severe arthritis in both hips and requiring Petitioner to undergo bilateral total hip replacements. The Arbitrator finds Dr. Kim to be more credible than Dr. Gleason who appeared to be of the opinion that no type of activity would ever contribute to the need for a hip replacement but that rather it was always due to solely the age of the person.

In support of the Arbitrator's Decision as to J. WHAT AMOUNT SHOULD BE AWARDED FOR REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds the following:

Petitioner's Exhibit #1 is a compilation of itemized medical expenses related to Mr. Bahrey's hip care following his March 1, 2010 retirement. Included in the expenses are medical bills totaling $3,521.00 from Dr. Sayeed, with an outstanding balance of $2,467.95. A review of Dr. Sayeed's records and bills reflects the following:

3/02/10 - $100.00 charge – Petitioner seen for medication refill and blood work-up for diabetes.

9/27/10 - $175.00 charge – Petitioner seen for treatment of his diabetes, medication refill and for a flu vaccine.

10/25/10 - $410.00 charge - Petitioner seen for treatment of his diabetes and hypertension.

12/06/10 - $190.00 charge – Petitioner seen for flu and diabetes.

It is clear that at least $875.00 of Dr. Sayeed's charges are for treatment for Petitioner's personal medical condition and not related to this claim.

Thus, the Arbitrator finds that Petitioner shall be entitled to total medical expenses of $153,487.25 minus adjustments made by the workers' compensation carrier Gallagher Bassett Services, Inc. of $1,127.90 with Respondent to receive Section 8(j) credit for payments and adjustments of $530.05, leaving awarded to Petitioner $151,829.30 for his remaining reasonable, related, and necessary medical expenses subject to the limitations of the medical fee schedule of Section 8.2 of the Act.

In support of the Arbitrator's Decision as to K. WHAT AMOUNT OF TEMPORARY TOTAL DISABILITY BENEFITS SHOULD BE AWARDED, the Arbitrator finds the following:

Petitioner was released at maximum medical improvement by Dr. Kim on April 20, 2011. The Arbitrator finds that Petitioner is entitled to TTD from May 27, 2010 through April 20, 2011, representing 47 weeks. The Arbitrator notes that May 27, 2010 is the first day Petitioner was taken off work by any treating doctor.

Although Mr. Bahrey had retired from his employment, he would still be entitled to temporary total disability for the period that he would have been completely off work due to the surgical necessity. Petitioner is not alleging any temporary total disability beyond his release from Dr. Kim's medical care.

In support of the Arbitrator's Decision as to L. THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

Although Petitioner had already retired from his employment with Respondent on March 1, 2010, Dr. Kim testified that Petitioner would have to avoid any repetitive or high impact activity as a result of his bilateral hip replacements. Dr. Kim testified that running, jumping, and most sports activities would be discouraged on a permanent basis after a total hip replacement. Even Dr. Gleason, Respondent's IME, testified that he would not recommend that patients who have had bilateral hip replacements return to heavy work.

Based upon this, the Arbitrator concludes that Petitioner would not be able to return to his usual and customary employment. Petitioner's employment even in repairing and not erecting precast involved climbing and jumping – climbing up the truck and jumping off, jumping into the four foot deep footing, and climbing up and down ladders.

Petitioner has a 37 year history working for Respondent. Due to the repetitive trauma on his hips, Petitioner has lost his ability to perform his usual and customary occupation. Petitioner testified that he still has limitations in walking, bending over, and lifting his legs up.

Based upon the greater weight of the evidence, Petitioner's loss of ability to continue in his usual and customary occupation, and Petitioner's overall permanent restrictions, the Arbitrator finds that Petitioner is entitled to an award of 45% loss of use person as a whole pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LARRY HERMAN,

Petitioner,

vs. NO: 10 WC 6182

14IWCC0182

WENGER TRUCK LINES,

Respondent,

DECISION AND OPINION ON REVIEW

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

The Commission disagrees with the Arbitrator regarding the weight given to the surveillance videos as they reflect on the credibility, or lack thereof, of the Petitioner in this case and also regarding the weight given to the opinions of Respondent's Dr. VanFleet. Petitioner's credibility is vital to his claim and we find that the surveillance videos undermine his own credibility and support the credible opinion of Dr. VanFleet. For the reasons outlined below, we find that Petitioner is not credible regarding the extent of his injuries, his complaints to his medical providers, and his current alleged symptoms.

On May 3, 2010, Petitioner saw Dr. DePhillips with continuing complaints of low back pain that "can reach a 10 on a scale of 1-10," which radiated into the buttock and down the anteroloateral thighs to the knees. Petitioner also complained of continuing neck pain, headaches, and radiating pain into the left arm. (Px5). On May 5, 2010, Petitioner canceled his

physical therapy appointment "due to [increased] pain." (Px4). On May 7, 2010, Petitioner told his therapist that he "hurt all over" and had level "6/10" pain. (Px4).

However, having been made aware that surveillance videos had been taken of him during this time period, Petitioner testified at hearing that he "was making a patio." (T.16). On cross-examination, Petitioner admitted that he planted flowers, shoveled dirt, carried a bench that weighed about 20 pounds, used a posthole digger to dig holes, painted, and mowed the grass. (T.31-33).

On May 5, 2010, the same day that Petitioner canceled his physical therapy appointment, the Petitioner is seen unloading what appear to be large stones/pavers and bricks from the back of a trailer. The Arbitrator mentioned the "unloading" but neglected to note that Petitioner was actually building the patio and engaging in physical activities that undermine Petitioner's physical therapy record that he had to cancel the appointment due to increased pain. Petitioner was carrying four to six "bricks" at a time, walking approximately 15 to 20 feet back and forth from the trailer to the "patio" area in front of his home and carefully placing each brick by bending over for extended periods of time and returning to an upright position with no apparent difficulty. Petitioner is seen leaning into the trailer with his arms outstretched to get the bricks. We note that Petitioner testified that these were actually one to two pound pieces of wood that were the size of bricks. (T.17). Whether these were bricks or pieces of wood, the video suggests that there were also larger, heavier materials that Petitioner lifted, such as larger stone pavers. Regardless, our decision in this case does not rest on whether the items were brick or wood but, rather, on the Petitioner's activities as a whole.

On May 7, 2010, after telling his therapist that he "hurt all over" and had "6/10 pain," Petitioner is seen bending over for an extended period while appearing to cut something with a saw, walking briskly, bending effortlessly while apparently planting flowers, digging with a long shovel and walking the shovelfuls of dirt to a nearby tree, and sweeping with a large broom. The Arbitrator's decision does not mention that videos also show that Petitioner mowed his lawn by hand while walking very rapidly and jogging at times, pulling and pushing the lawnmower very aggressively and at times with only one hand, turning and rotating his body and head with no signs of distress or difficulty, and bending over for extended periods.

On May 10, 2010, Petitioner returned to Dr. DePhillips and again complained of low back pain that could reach 10-out-of-10 that radiated into the lower extremities. Petitioner told him that he had no relief with the epidural steroid injections and failed to improve with physical therapy. Petitioner also complained of neck and shoulder pain and he was awaiting cervical injections with Dr. Patel. Petitioner was to remain off work.

On May 11, 2010, Petitioner was filmed filling a garbage can with water for about 30 seconds and then lifting and carrying it. He also spread grass seed, carrying a bench, bending for extended periods, painting boards in his garage, getting into his vehicle, driving, and walking up and down stairs. All of these activities are performed without any apparent difficulty or signs of distress. Yet, on May 12, 2010, Petitioner reported "8/10" pain to his therapist.

Based on our viewing of the videos, we find that the Arbitrator's depiction of Petitioner's activities is not accurate. We also note that the surveillance videos only show portions of the construction of Petitioner's "patio," but over the course of the several days, the area in front of Petitioner's house transforms from having several large wooden posts sunk into the ground to a full enclosure with wood lattice fencing. As such, we find that it is more likely than not that

Petitioner engaged in significantly more substantial physical activity than even what is depicted in the videos.

Petitioner's claims of pain to his medical providers are not supported by the level of physical activity depicted in the surveillance videos. This, along with the fact that Petitioner canceled his therapy appointment claiming he had increased pain but instead was building his patio, serves to greatly undermine Petitioner's credibility and causes us to find Respondent's Dr. VanFleet's opinion to be the most credible medical opinion in this case.

Petitioner was examined by Dr. VanFleet on June 15, 2010. Dr. VanFleet testified that Petitioner was very uncooperative during the examination. Petitioner told him that he did not feel that he was capable of any kind of activity. Petitioner wore sunglasses during the entire examination, refused to change into a gown, and actually spit on the examination table. Dr. VanFleet noted several Waddell's signs including very deliberate and exaggerated movements with a great deal of gasping. Petitioner wouldn't move his back, extend, or flex. Petitioner had superficial tenderness to palpation, and pain with simulated truncal rotation. Petitioner had "give way" weakness in all motor groups making strength testing impossible. Dr. VanFleet reviewed the cervical and lumbar MRI films and testified that they were of good diagnostic quality. He diagnosed cervical and lumbar degenerative disc disease with symptom magnificent and nonorganic pain syndrome.

Dr. VanFleet testified that nonorganic pain syndrome is when somebody has a plethora of symptom magnification signs and there is a possibility that this is a fabricated situation with no truly organic pain problem. He opined that Petitioner's lack of cooperation, exaggerated responses during examination, and the Waddell's findings are indicative of nonorganic pain syndrome. He opined that the prognosis is poor with patients in this situation because they "have an incentive not to get better." (Rx1 at 17). Dr. VanFleet testified that Petitioner's diagnosis of degenerative disc disease was certainly a pre-existing condition that predated the injury that he described. He felt that Petitioner's continuing complaints of pain are all based upon his own description and are entirely subjective without objective corroboration, which is contradicted by the nonorganic pain manifestations.

Dr. VanFleet testified that he issued a second report on July 12, 2010, after he reviewed surveillance videos from May 5, May 7, and May 11, 2010, and that Petitioner's activities depicted in the videos were "not at all" consistent with his behavior and physical examination one month later. (Id. at 19-22).

We also note that Petitioner's Dr. DePhillips testified on cross-examination that he had not seen the video surveillance tapes and that, if he had, it could change his opinion as to Petitioner's level of function and restrictions. (Px11 at 34-35).

Petitioner's alleged need for additional medical treatment and work restrictions rests entirely on his credibility or, in this case, the lack thereof. Based on the above and a review of the record as a whole, we find Petitioner to be not credible regarding the extent of his injuries, his complaints to his medical providers, and his current alleged symptoms. Therefore, we find that Petitioner failed to prove that he is entitled to temporary total disability or medical expenses after the date of Dr. VanFleet's report on July 12, 2010, and hereby modify the Arbitrator's decision to reduce the award of temporary total disability to 25-3/7 weeks for the period from January 16, 2010 through July 12, 2010. In addition, we modify the medical award to only award those expenses incurred through July 12, 2010, as Petitioner has failed to prove that the medical expenses incurred after this date were causally related to his work injury on January 15,

2010. We note that some of the medical bills incurred by Petitioner are not at issue and Respondent had already paid them. Of the remaining bills that were in dispute at the hearing and introduced into evidence, as represented by Petitioner's Exhibits 13 through 25, we find that the following were reasonable, necessary, and causally related to his work injury:

Peru Ambulance (Px13)		$ 810.50
Hospital Radiology (Px14)		580.00
St. Mary's Hosp. (Px16)		9,805.00
2/18 – 6/30/10 PT (38 x $170) = $6460		
3/1/10 Blood work = $659.00		
3/13/10 Lumbar MRI = $2486.00		
7/5/10 PT = $200		
Dr. George DePhillips (Px17)		710.00
3/10/10	$250	
5/3/10	$160	
5/10/10	$150	
7/12/10	$150	
Pain & Spine Institute (Px18)		15,325.20
3/22/10	$ 560.20	
4/8/10	$5277.50	
4/22/10	$4492.50	
5/14/10	$4200.00	
6/29/10	$ 795.00	
Illinois Valley Orthopedics (Px19)		95.00
6/17/10	$95	
Associated St. James Radiology (Px24)		451.00
2/19/10	$175.00	
3/13/10	$276.00	
Prescription medication (Px25)		421.36
1/16/10 through 6/29/10		
	Total:	$ 28,198.06

This results in a medical award of $28,198.06, which shall be paid pursuant to the fee schedule in Section 8.2 of the Act, and for which Respondent shall receive credit for any amounts already paid toward these disputed bills.

Finally, we vacate the Arbitrator's award of prospective medical treatment with Dr. Salehi.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $236.12 per week for a period of 25-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $28,198.06 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014

Charles J. DeVriendt

Michael J. Brennan

Ruth W. White

SE/
O: 1/28/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HERMAN, LARRY
Employee/Petitioner

Case# **10WC006182**

WENGER TRUCK LINES
Employer/Respondent

14IWCC0182

On 1/24/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0400 DAVID W OLIVERO
1615 4TH ST
PERU, IL 61354

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
BRENT HALBLEIB
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

14IWCC0182

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

LARRY HERMAN,
Employee/Petitioner

v.

WENGER TRUCK LINES,
Employer/Respondent

Case # **10** WC **6182**

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 **George Andros**, Arbitrator of the Commission, in the city of **Ottawa, IL**, on **08/30/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0182

FINDINGS

On the date of accident, **01/15/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**2,480.36**; the average weekly wage was $**354.34**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $5,918.33 for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

THE RESPONDENT HEREIN IS ODERED TO PAY TO THE PETITIONER AND HIS ATTORNEY $40, 922.21 IN REASONABLE AND NECESSARY MEDICAL EXPENSES TO DATE OF HEARING UNDER SECTION 8(A) PER 8.2

THE RESPONDENT IS ORDERED TO PAY TO THE PETITIONER AND HIS ATTORNEY THE TEMPORARY TOTAL DISABILITY ACCRUED TO DATE FROM 1/16/10 THROUGH 8/30/12 OR 136&6/7TH WEEKS AT THE RATE OF $236.12 UNDER SECTION 8.

THE RESPONDENT IS ORDERED TO AUTHORIZE IN WRITING PROSPECTIVE MEDICAL TREATMENT UNDER SECTION 8(A) INCLUDING ALL MAINTENANCE PLUS PRE AND POST SURGICAL ANCILLARY CARE – TO PETITIONER AND DR. SEAN SALEHI OF NEUROSURGICAL SURGERY & SPINE SURGERY, S.C FOR THE HIS RECOMMENDED SURGERY IN HIS DEPOSITION , PX 1.

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

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

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

#01 George J. Andros
Signature of Arbitrator

JAN 22. 2013
Date

ICArbDec19(b)

JAN 24 2013

STATEMENT OF FACTS 10 WC 06187

Mr. Herman testified at his arbitration hearing that he was hired as a truck driver by employer, WENGER TRUCK LINES, on November 22, 2009. He further testified that prior to his work injury on January 15, 2010, he had never had any type of low back injury, nor had he ever received any medical care to his low back.

On January 15, 2010, Petitioner was refueling his truck at a truck stop in Peru, Illinois. When he attempted to climb into the cab, he reached up to grab onto the steering wheel when his feet slipped on the steps, causing him to fall down the side of the truck. He fell to the ground in such a way that it caused his lower back to hyper-extend. He testified that his low back arched inward. Then he immediately experienced severe pain all over his body and had to be transported by ambulance to a local hospital, IVCH, for medical attention.

Hisl complaints at IVCH were of neck pain, shoulder pain and upper right arm pain. The x-rays taken of all those injured areas showed degenerative changes without acute findings. The emergency room physician discharged employee HERMAN with a diagnosis of cervical strain, bilateral shoulder strains and contusions. He was prescribed Vicodin for pain, Flexeril for muscle spasms and his right arm placed in a sling. The emergency room physician restricted him from work from January 15, 2010 to January 18, 2010 and also instructed him to call Dr. Mitchell of Illinois Valley Orthopedics for a follow-up appointment. He further testified that within a few days following his work accident, he also began experiencing low back pain. The Arbitrator adopts this testimony as material findings of fact.

On February 9, 2010, Petitioner completed a medical history form for Illinois Valley Orthopedics indicating that he was experiencing neck and low back pain. He returned to on February 12, 2010, for an appointment with Dr. Jason Bergandi who was with Illinois Valley Orthopedics. There he completed a medical form wherein he described that he was experiencing neck, shoulder and lower back pain. Dr. Bergandi noted his chief complaints of pain were in his neck, bilateral shoulder and low back. The patient gave Dr. Bergandi a history that he fell out of a truck on January 15, 2010 and landed, twisting his abdomen and neck.

Dr. Bergandi's physical examination revealed that employee HERMAN had limited range of motion in the neck and weak grip strength. Dr. Bergandi noted a positive Waddell sign when he pressed on employee HERMAN's head as well as with thoracic bending.

Dr. Bergandi reviewed the MRI scan of employee HERMAN's neck, which showed disc bulging at C3-4, C4-5 and somewhat of C5-6. Dr. Bergandi diagnosed him with cervicalgia, possible upper extremity radiculopathy as well as right shoulder pain and prescribed Medrol Dosepak, Valium and anti-inflammatories. Doctor instructed him to continue with physical therapy for his neck and also gave have him an order for physical therapy for his low back. Dr. Bergandi found his patient to be totally disabled and scheduled a follow-up appointment on April 15, 2010.

He received six (6) sessions of physical therapy at St. Mary's Hospital from February 18, 2010 to March 5, 2010 and during each of these visits, he reported pain in his low back, neck and shoulders. The therapy records reflect that he cancelled physical therapy on February 26, 2010, due to having back pain. On March 3, 2010, employee HERMAN complained to the therapists of significant back pain and rated it 8 out of 10. He also complained of having neck pain, which he rated as 3 out of 10.

On March 8, 2010 the Petitioner saw Dr. George DePhillips, a neurosurgeon, and gave a history that he was involved in a work accident on January 15, 2010, when he slipped while entering his truck and since that time, has had neck pain, headaches, low back pain, bilateral buttock pain and pain radiating into his legs.

Dr. DePhillips reviewed the cervical MRI which revealed degenerative disc disease, cervical spondylosis and foraminal stenosis at various levels.

Dr. DePhillips believed that the work injury could or might have aggravated the degenerative disc disease in the cervical region as well as his cervical spondylosis. Dr. DePhillips also ordered a lumbar MRI and recommended that he receive diagnostic injections from Dr. Sharma to his lower back.

On March 13, 2010, he underwent a lumbar MRI which, according to the radiologist, showed at the L4-5 level, a moderate sized universal protruding disc with extrinsic pressure on the dural sac, marked narrowing of the left neural foramen and moderate narrowing of the right neural foramen.

On April 8, 2010, the Patient saw Dr. Samir Sharma with complaints of neck pain, upper back pain, shoulder pain and low back pain. He also told Dr. Sharma that his current episode of pain after his injury on January 15, 2010, when he fell from a seven foot height. Dr. Sharma reviewed the lumbar MRI, which he believed showed disc protrusion at L4-5. Dr. Sharma diagnosed him with shoulder pain, upper back pain, neck pain and low back pain. Dr. Sharma's records indicated that he previously treated employee HERMAN on September 11, 2009, for neck pain, upper back pain, knee pain and shoulder pain. Also, on November 6, 2009, Dr. Sharma performed a cervical diagnostic medical branch block of the C5, C6, C7 medial branch nerves. Dr. Sharma restricted his patient from work.

The Patient returned on April 15, 2010 to Dr. Bergandi for follow-up treatment for his neck pain. Dr. Bergandi found on physical examination that employee HERMAN had very little range of motion of the neck, secondary to pain. Dr. Bergandi diagnosed him with cervicalgia and restarted him on physical therapy. He also prescribed for Dr. Sharma to consider giving employee HERMAN trigger point injections in the cervical spine near the trapezius muscle. Dr. Bergandi restricted employee HERMAN from work until his next visit on June 15, 2010. On April 22, 2010, Dr. Samir Sharma performed transforaminal epidural steroid injections on patient at levels L4 and L5. Dr. Sharma also refilled his prescription of Vicodin ES, 120 tablets, which could be taken three times a day.

On May 3, 2010, he saw Dr. DePhillips complaining of low back pain which radiated into his buttock and down his thighs. He also complained of headache, neck pain and left arm pain. Dr. DePhillips requested the patient obtain the actual lumbar MRI films in order for Dr. DePhillips to determine whether to order a lumbar discography.

Petitioner was filmed on May 5, 2010, from 10:10 a.m. to 11:10 a.m., unloading small pieces of landscaping material from a trailer for a patio project. He testified that these small landscaping pieces did not weigh very much. On May 5, 2010, employee HERMAN cancelled his scheduled physical therapy session that day due to having an increase in pain. The Arbitrator did not observe any gross deviation in activity against medical orders in the medical testimony. Petitioner was filmed on May 7, 2010, at 8:34 a.m. walking into his home. The surveillance video from 10:07 a.m. to 10:09 a.m., showed him walking in his yard and picking up an empty cardboard box that ended up in his yard. He is not filmed again that day until 12:48 p.m. According to the St. Mary's Hospital records show he was in physical therapy from 11:30 a.m. to 12:00 p.m.

Additionally, he planted some flowers. On May 7, 2010 Petitioner attended aquatic therapy from 11:30 a.m. to 12:00 p.m. The physical therapy records indicate that he complained of having pain all over. After his therapy session, it was noted that the treatment plan was for him was to receive injections in the neck the next Thursday.

On May 7, 2010, at 8:52 a.m., the patient called Dr. Sharma's office to schedule a cervical injection. According to the office records, Dr. Sharma's office planned to schedule the injection on May 20, 2010, when employee HERMAN would be out of medication. He told the staff that he would be out of medication early, so they scheduled his appointment for May 13, 2010.

On May 10, 2010, Dr. DePhillips reviewed the lumbar MRI that had been taken on March 13, 2010 and he believed the MRI showed a disc bulge at L4-5 with a protrusion at L5-S1 with a tear of the posterior annulus. He also found moderate spinal stenosis at L4-5. (2)

Petitioner complained that he was having neck and shoulder pain, but that his low back pain was more bothersome than his neck pain. Dr. DePhillips recommended a lumbar discography and a cervical epidural steroid injection. Dr. DePhillips restricted employee HERMAN from work until his next follow-up visit. He was filmed on May 11, 2010 starting at 9:17 a.m. taking out garbage and also rinsing out a garbage can. He was filmed from 9:38 a.m. to 9:39 a.m., spreading grass seed then planting flowers, painting in his garage and walking in his yard.

On May 14, 2010, he complained to the treater at the Pain Institute of neck and shoulder pain and received an epidural steroid injection at C6-C7.

On June 15, 2010 Dr. Timothy VanFleet peformed a section 12 examination of the worker at the request of employer. He diagnosed symptom magnification, cervical and lumbar degenerative disc disease.
Dr. VanFleet believed that Petitioner was at maximum medical improvement and anticipated a full duty release based upon a valid functional capacity evaluation.

The Petitioner returned to Dr. Bergandi on 6/17/10 with ongoing neck pain which had worsened since the epidural steroid injections two weeks before. Dr. Bergandi believed that the cervical MRI did not show significant disc herniations, although possibly a far lateral disc herniation at C5-6. The Patient had very little range of motion in his neck, secondary to pain and stiffness. The diagnosis was mild cervicalgia, mild degenerative disc disease of the cervical spine and mild cervical spondylosis. He recommended trigger point injections and aquatic therapy two times a week for four weeks. On August 10, 2010, Dr. Bergandi referred employee HERMAN to Dr. DePhillips for a second opinion . October 6, 2010, Dr. DePhillips ordered a Functional Capacity Evaluation to be done at Newsome Physical Therapy Center. The results of the Functional Capacity Evaluation showed consistent effort .The evaluation was considered to be valid. All Waddell's signs were documented as being negative. The Patient was determined to be functioning between light (20#) and light/medium (35#) demand level. Based upon his job description as a truck driver, the evaluator found the patient fell below the medium physical demand level of his job. The evaluator also recommended work hardening.

On November 18, 2010, employee HERMAN had a lumbar discogram done by Dr. Sharma. On December 2, 2010, Dr. DePhillips interpreted the discogram results as showing concordant pain at L4-5 and L5-S1 levels. The post discogram CT scan showed annular tearing at L3-4, L4-5 and L5-S1 levels. Dr. DePhillips recommended a two level discectomy and fusion. He then referred employee HERMAN to Dr. Sean Salehi, for a second opinion. On May 5 he was examined by the neurosurgeon, former teacher at Northwestern Medical School, Dr. Salehi and complained of low back pain that radiated into his legs.
He gave a history of falling as he attempted to climb into his truck. Dr. Salehi reviewed the MRI of the lumbar spine dated 03/13/10, which showed L4-5 facet arthropathy resulting in significant left lateral recess stenosis. Dr. Salehi believed it would be wise to avoid a multi-level fusion due to the chances of not improving his lumbar symptoms. He did recommend a limited left L4-5 hemilaminectomy and facetectomy to resolve the left leg symptoms.

The patient teated with Dr. Sharma on twelve (12) different occasions from June 29, 2010 to January 13, 2012. Employee HERMAN consistently complained of neck pain, upper back pain, shoulder pain and low back pain. The treatment was trigger point injections, medication management consisting of Vicodin ES, which was then switched to Ultram after patient developed stomach problems. Hisl condition remained relatively stable, unchanged.
On November 18, 2010, Dr. Sharma recommended that employee HERMAN's work restrictions be at light duty with his lifting restrictions consistent with FCE testing.

On January 18, 2011he told Dr. Sharma that his leg symptoms had increased since the last visit. In regards to employee HERMAN's neck pain, Dr. Sharma diagnosed it as discogenic pain. At his last visit on January 13, 2012, Dr. Sharma ordered a lumbar MRI to rule out worsening stenosis. (p. 3)

On January 23, 2012, Petitioner underwent a lumbar MRI and gave a history at the hospital of having low back pain and bilateral leg pain. The radiologist found at the L4-5 level, encroachment on the descending nerve roots in the lateral recesses, bilaterally, greater on the left. The radiologist also found mild bilateral neural foraminal encroachment..

On January 20, 2011, Dr. George DePhillips testified the Petitioner became his patient on March 8, 2010 and gave a history of having neck pain, bilateral extremity pain, low back pain, bilateral buttock pain and pain radiating into thighs and calves following his work injury on January 15, 2010. Dr. DePhillips discussed with him the possible differential diagnosis of diskogenic pain, myofascial pain and facet medicated pain. Dr. DePhillips recommended that Dr. Sharma continue with the epidural steroid injection and also recommended a MRI scan of the lumbar spine.

Dr. DePhillips testified the patient returned on May 3, 2010, and reported that he received two lumbar epidural steroid injections. The first injection gave him temporary relief for a week, however the second injection did not provide any relief of his back pain and radicular symptoms. Employee HERMAN brought his lumbar MRI report to Dr. DePhillips, but did not have the films to show Dr. DePhillips. Dr. DePhillips requested the actual films to review, but based upon the reported lumbar MRI findings, Dr. DePhillips considered ordering a lumbar diskography to determine if the pain was diskogenic in origin.

Dr. DePhillips testified that on May 10, 2010, he reviewed the lumbar MRI films, which revealed a disc bulge at L4-5 and moderate spinal stenosis with a protrusion at L5-S1 along with a tear of the posterior annulus. Dr. DePhillips arrived at the diagnosis of pre-existing lumbar spondylosis including degenerative disc disease, facet hypertrophy, arthropathy and diskogenic pain.

Regarding causation, Dr. DePhillips testified that he believed that Mr. Herman's work accident on January 15, 2010, aggravated his degenerative disc disease and more likely than not, caused the annular tearing.

Dr. DePhillips further testified that on October 19, 2010, he reviewed the FCE report and found that it was a valid representation of his physical abilities at a light demand level and that there was no indication of malingering, secondary pain or inconsistencies during the evaluation.

Dr. DePhillips further testified that employee HERMAN could not safely return to work as a truck driver since he was at the light physical demand. Dr. DePhillips also testified that he last saw employee HERMAN on December 2, 2010, at which time he reviewed both the MRI can of his lumbar spine as well as the lumbar diskogram. The diskogram provoke concordant pain at the L4-5 and L5-S1 levels. Clinically, employee HERMAN's complaints of low back pain were consistent with the diskography results.

Most noteworthy to this Arbitrator, Dr. DePhillips believed that surgery was a treatment option, but he could not decide whether to recommend a two level or three level spinal fusion, so he recommended a second opinion from Dr. Sean Salehi. Per Px 12, dep exhibit 1a, the doctor is a board certified neurological surgeon and partner in Neurological Surgery and Spine Surgery, SC. in Westchester, Illinois. He had been an assistant professor of neurological surgery at Feinberg School of Medicine at Northwestern University after being a chief resident and instructor.

Importantly regarding the videos, Dr. DePhillips testified that he never restricted his patient from driving a vehicle, walking, standing, sitting, bending at the waist or carrying an object that weighed as much as a gallon of milk.

Dr. DePhillips testified on cross-examination that he primarily treated his patient for low back and had not narrowed the differential diagnosis for his neck condition.

On June 15, 2011, Dr. VanFleet , the employer's section 12 examiner testified that he is a board certified orthopedic surgeon, who a year earlier examined the employee at the request of his employer. He recorded a history that he fell out of a semi-truck and when he fell, he twisted and injured his neck and low back with pain radiating into his arms and legs. He also said that he was taking Vicodin every four to six hours for the pain. Dr. VanFleet testified that after examining employee HERMAN and reviewing the medical records, including the cervical and lumbar MRI studies, he diagnosed employee with cervical and lumbar degenerative disk disease with symptom magnification and a non-organic pain syndrome. He further testified that it was difficult to say that the condition was related to his injury because it was entirely subjective. Dr. VanFleet had no treatment recommendations and felt Petitioner needed a functional capacity evaluation in order to return him back to work.

Dr. VanFleet reviewed the surveillance video tape and commented that the activities the video tape were not consistent with his behavior during the medical evaluation. Dr. VanFleet also testified that he reviewed the FCE that recommended he function at the medium light level, which Dr. VanFleet believed was consistent with his job description as a truck driver. Dr. VanFleet further stated that a two level fusion, as recommended by Dr. DePhillips, was not reasonable medical care. Dr. VanFleet also believed he was at maximum medical improvement in June 2010 and could return to work.

On cross-examination, Dr. VanFleet stated that as far as he was aware, Petitioner never had any prior back injury, nor had he viewed any records suggesting prior back treatment. Dr. VanFleet testified that the radiologist's lumbar MRI report stated that at L4-5 level, there was a moderate sized protruding disk seen with extrinsic pressure on the dural sac. He described the L4-L5 level via MRI as showing facet hypertrophy with degenerative disk disease and stenosis.
Dr. VanFleet agreed on cross-examination, that the trauma the Petitioner sustained in his work accident could or might have aggravated, exacerbated a pre-existing disk problem at that level.

He further testified that the radiologist who interpreted the discogram at L4-5, stated that it showed a Grade 4 radial tear, while Dr. VanFleet testified that he described L4-5 as showing evidence of degenerative pattern. Dr. VanFleet agreed on cross-examination that trauma could worsen or exacerbate an annular tear.

Morever, he said that Petitioner's back pain could be from a multi-level degenerative pattern. He did admit that there was no evidence that Mr. Herman had any back pain prior to January 15, 2010. Although, he also agreed that it was possible that the MRIs', discograms and CT scans which indicate multiple tears in the low back, could or might generate pain. Dr. VanFleet confirmed a protruding disc can be a pain generator.

Dr. VanFleet testified that he believed the FCE results were consistent with his job as a truck driver. However, on cross-examination, it was pointed out to Dr. VanFleet that Petitioner fell below the medium physical demand characteristic of his work which required an occasional two handed floor to waist. Also, Dr. VanFleet acknowledged that the physical therapist recommended work hardening for their patient before he attempted to return back to work.

On August 2, 2012, Dr. Sean Salehi testified at his evidence deposition that is a board certified neurological surgeon, trained at Northwestern Medical School and was a faculty member at Northwestern Medical School before moving to private practice where the vast majority of his treatment is of the spine.
Dr. Salehi further testified that he performs 300 spine surgeries a year and commonly performs hemilaminectomies and facetectomies.

Dr. Salehi state that he saw employee HERMAN on May 2, 2011, as a second opinion referral from Dr. DePhillips. According to Dr. Salehi, his patient complained of pain in his neck and pain in his low back that radiated and gave a history of being injured at work on January 15, 2010, when he was climbing into his truck and fell backwards, landing directly on his feet.

Dr. Salehi testified that he performed a detailed neurologic examination which revealed tenderness in the lumbosacral spine, limitation of range of motion by 50% and a positive straight leg raise testing, but only in the back. Dr. Salehi stated that he reviewed the MRI film which showed significant bilateral L4-5 and L3-4 facet arthropathy, L4-5 facet arthropathy resulting in significant left lateral recess stenosis. Dr. Salehi testified that he reached a diagnosis of lumbar degenerative disc disease and lumbosacral spondylosis. *Dr. Salehi further testified that he would recommend avoiding a multi-level fusion, but rather concentrate on a smaller operation to treat his radicular symptoms in the left leg, which would consist of a left hemilaminectomy and facetectomy.(emphasis added)*

Dr. Salehi also stated that the mechanism of injury described by employee HERMAN is certainly there for causing aggravation of his back condition. Dr. Salehi testified that if employee HERMAN had no prior history of ongoing back issues, then it is reasonable to say that the accident did result in aggravation. He further testified that if employee HERMAN's left leg pain was a majority portion of his pain complex, then surgery would make sense and therefore is causally related to the accident of January 15, 2010.

On cross-examination, Dr. Salehi agreed that he only saw Herman for his lower back problems. He further stated that the conditions of lumbar degenerative disc disease and lumbosacral spondylosis were aggravated by his accident.

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

At the Arbitration hearing on August 30, 2012, Petitioner testified that he was in his usual state of health when he began working for employer, WENGER TRUCK LINES. He further testified that he had never before injured his low back or received medical care to his low back. There were no medical records presented at Arbitration to contradict his testimony concerning this issue.

Petitioner further testified that on January 15, 2010, while attempting to climb into his cab, he slipped and fell down the side of the truck. As per above, he was taken by ambulance to Illinois Valley Community Hospital emergency room where he was diagnosed with a cervical strain and bilateral shoulder strain. He then came under the care of Dr. Bergandi for his neck condition, which he diagnosed as cervicalgia. Petitioner was also seen by Dr. DePhillips for his neck condition, which he diagnosed as aggravation of the degenerative disc disease in the cervical region. In regards to the Patient's low back condition, Dr. DePhillips diagnosed it as an aggravation of a degenerative disc disease and an annular tearing.

Dr. Sean Salehi also treated employee HERMAN and diagnosed him with L4-5 facet arthropathy resulting in significant left lateral recess stenosis. Dr. Salehi believed his patient's work injury certainly could have aggravated his pre-existing conditions.

Based upon the totality of the evidence, the Arbitrator finds as a matter of fact and as a conclusion of law that there is a causal connection between employee HERMAN's current condition of ill-being requiring surgery as prescribed by Dr. Sean Salehi i and his work injury sustained to his neck and low back as alleged herein.

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

The Arbitrator adopts his previous findings for disputed issue (F). Employee HERMAN submitted into evidence the following outstanding medical bills:

1. Peru Ambulance (PX. 13) ..... $ 810.50

2. Hospital Radiology (PX. 14) ..... $ 580.00
(Date of service 01/15/10 and 01/23/10)

3. Ottawa Regional Hospital (PX. 15) ..... $ 2,790.00
(Date of service 01/23/12)

4. St. Mary's Hospital (PX. 16) ..... $ 7,766.75
(Dates of service 02/17/10 to 05/26/11)

5. Dr. George DePhillips (PX. 17) ..... $ 1,040.00

6. Pain & Spine Institute (PX. 18) ..... $ 21,703.81
(Dates of service 03/22/10 to 01/13/12)

7. Illinois Valley Orthopedics (PX. 19) ..... $ 403.00
(Dates of service 02/12/10 to 08/24/10)

8. Provena St. Joseph Medical Center (PX. 20) $3,495.00
(Date of service 11/18/10)

9. Joliet Radiological Service (PX. 21) ..... $ 198.00
(Date of service 11/18/10)

10. Neurological Surgery (PX. 22) ..... $ 225.00
(Date of service 05/02/11 - reimbursement to petitioner)

11. Central Illinois Radiological (PX. 23) ..... $ 478.00
(Date of service 01/23/12)

12. Associated St. James Radiology (PX. 24) $ 784.00
(Dates of service 02/19/10 to 05/26/11)

13. Prescription medication (PX. 25) ..... $ 648.15
(01/16/10 to 09/12/11 - reimbursement to petitioner)

TOTAL ..... $ 40,922.21

The Arbitrator finds based upon the totality of the evidence after reviewing the medical records introduced into evidence, as well as the evidence depositions, that the medical bills submitted by the Petitioner herein for payment/ reimbursement are as a matter of fact and law, reasonable and necessary under Section 8(a) of the Act.

The Arbitrator, therefore, orders employer, WENGER TRUCK LINES, to pay to the Petitioner and his lawyer $40,922.21 for medical services as provided in Section 8(a) of the Act. The bills for service rendered after 02/01/06 are awarded in conjunction with the fee schedule and are subject to the provisions and limitations of Section 8(a) and Section 8.2 of the Act.

K. **IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE ?**

Dr. Sean Salehi testified that employee HERMAN's lumbar MRI demonstrates L4-5 facet arthtropathy resulting in significant left lateral recess stenosis. It is Dr. Salehi's well-reasoned opinion adopted by the Arbitrator as the material finding of fact herein, that a multi-level lumbar fusion should be avoided and instead a left hemilaminectomy and facetectomy would better treat the radicular symptoms employee HERMAN experiences in his left leg. The Arbitrator adopts the opinion of Dr. Sean Salehi, including his recommendation on the type of surgical procedure to relieve Petitioner of his left leg pain. The Arbitrator further finds that Dr. George DePhillips' recommendation for a multi-level lumbar fusion is not as persuasive as Dr. Salehi's opinion against that surgical procedure. The Arbitrator also finds that Dr. VanFleet's opinion that there are no treatment options is not adopted based upon Dr. Salehi's more reasoned opinion. The Arbitrator, therefore, based upon the totality of the evidence finds as a matter of law Mr. Herman is entitled to prospective medical care as testified to by Dr. Sean Salehi.

L. **WHAT TEMPORARY BENEFITS ARE IN DISPUTE? TTD?**

Employee HERMAN claims that he has been temporarily totally disabled from January 16, 2010, through August 30, 2012, for a period of 136-6/7 weeks. Employer, WENGER TRUCK LINES, claims HERMAN has been temporarily totally disabled from January 16, 2010, through July 9, 2010, for a period of 25 weeks.

Petitioner was initially restricted from work by the Illinois Valley Community Hospital emergency room physician. He was then instructed to follow-up with Illinois Valley Orthopedics, where he came under the care of orthopedic surgeon, Dr. Jason Bergandi. The initial office visit with Dr. Bergandi was on February 12, 2010, at which time Dr. Bergandi ordered physical therapy and restricted employee HERMAN from work from February 12, 2010 to April 15, 2010. When the Patient returned on April 15, 2010, Dr. Bergandi ordered trigger point injections and continued employee HERMAN off work until further notice. He returned to Dr. Bergandi on June 17, 2010, who ordered additional physical therapy and took him off work until further notice. On August 10, 2010, Dr. Bergandi referred the patient to Dr. DePhillips for a second opinion and took him off work. He treated with neurosurgeon, Dr. George DePhillips, who on May 10, 2010 reviewed the lumbar MRI film and recommended a discography and restricted employee HERMAN from all work.

On June 15, 2010, Dr. Timothy VanFleet examined him for Respondent under section 12, who released him to work with a recommendation for a functional capacity evaluation, and if valid, then perhaps restrictions could be placed at that time. On October 6, 2010 he had a FCE which placed him functioning between light and light/medium duty. The physical therapist determined that employee HERMAN fell below the physical demands of his job. On November 8, 2010, when the Patient saw Dr. Samir Sharma, his pain management specialist, he was released to work at light duty with lifting restrictions consistent with FCE testing.

Dr. George DePhillips testified at his evidence deposition on January 20, 2011, that his patient could not return to work as a truck driver since he was at the light physical demand level. Employer, WENGER TRUCK LINES, did not demonstrate that it ever offered employee HERMAN light to light/medium work after terminating temporary total disability benefits on July 9, 2010.

Based upon the totality of the evidence, the Arbitrator finds that Larry Herman is entitled as a matter of law to received TTD payments in the amount of $236.22 per week from January 16, 2010 through August 30, 2012, for a period of 136-6/7 weeks. The Respondent is ordered to pay that accrued amount to the Petitioner and his lawyer.

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 WAGES	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Reed,

Petitioner,

14IWCC0183

vs.

NO: 05 WC 1756

TH Ryan Cartage Company, and L&D Driver Services, Inc.,

Respondent,

DECISION AND OPINION ON REMAND

This matter came before the Commission on Judge Patrick Sherlock's August 15, 2013, remand. The Judge affirmed the finding that the Petitioner's overtime earnings should be included in his average weekly wage. The Judge also affirmed the Commission regarding their findings on all other issues except for average weekly wage. The Judge remanded this award back to the Commission for a clarification as to how the Commission arrived at the calculation of an average weekly wage of $812.50.

The Commission, after reviewing the record, lowers the Petitioner's average weekly wage to $808.32, and modifies the Arbitrator's original award.

It is the Commission's opinion that the payroll records provided by the Respondent contain enough information regarding the Petitioner's regular and overtime hours in which to calculate his average weekly wage.

According to Respondent's Exhibit 11, Petitioner started working for Respondent on or about April 23, 2004. He made $15.00 an hour at straight time. From April 23, 2004 through August 12, 2004, Petitioner worked a total of 14 2/7 weeks. During the week of July 23, 2004, Petitioner worked 3 days and during the week of June 25, 2004, he worked 4 days. During that period, Petitioner worked 571.43 straight time hours and 198.42 in overtime hours or a grand total of 769.85. Multiplying that amount of hours (769.85) times Petitioner's straight time hourly

14IWCC0183

pay ($15.00) yields a sum of $11,547.52. By dividing that amount ($11,547.52) by the 14 2/7th weeks that Petitioner worked, it is then determined that Petitioner had an Average Weekly Wage of $808.32.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's average weekly wage is $808.32.

Per the remand order of Judge Sherlock, all else is affirmed.

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:

MAR 17 2014

Charles J. DeVriendt

Michael J. Brennan

Ruth W. White

HSF
O: 2/19/14
049

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

DENNIS FRETTS,

Petitioner,

14IWCC0184

vs.

NO: 09 WC 26492

ABF FREIGHT SYSTEMS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent of permanent disability, penalties and attorney fees, maintenance benefits, and vocational rehabilitation, and being advised of the facts and law, clarifies and corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On page 14 of Arbitrator's decision, the Commission corrects the Arbitrator's statements with regard to Petitioner's job search. On page 14, paragraph one, sentences seven and eight, the Commission strikes "Neither was there evidence presented of a self-directed search. The Arbitrator has not been presented with any evidence of a search, diligent or not;" To the contrary, a review of the record reveals Petitioner did submit a set of job search records, PX17. However, in so finding, the Commission affirms and adopts the Arbitrator's conclusion that Petitioner failed to present evidence of a diligent job search. The documents contained within PX17 fail to support Petitioner's testimony that he engaged in a diligent job search. A review of the documents within PX17 reveals that none of the job search records submitted by Petitioner pertained to any actual posted job openings, and instead it appears Petitioner merely called or walked into businesses without identifying opening, and merely inquired if the businesses were hiring. The records submitted fail to indicate that Petitioner completed any job applications, submitted any resumes, and little if any follow up on any of his alleged inquiries.

14IWCC0184

On page 15, paragraph one, sentence two of the Arbitrator's decision, the Commission strikes "25% of the right arm or," and finds that because Petitioner's undisputed work injury involves his shoulder, the permanency is properly awarded under Section 8(d)2 of the Act, and Petitioner has established permanent partial disability to the extent of 12.65% loss of use of the person as a whole. See Will County Forest Preserve District v. IWCC, 2012 Ill.App.3d 110077WC, 970 N.E. 2d 16, 361 Ill.Dec. 16, where Appellate Court held that the shoulder is distinct from the arm and that permanency awards in such cases should be made pursuant to Section 8(d)(2) of the Act rather than Section 8(e).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 8, 2012, as corrected and clarified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $693.98 per week for a period of 53-4/7 weeks, for the period of December 7, 2007 through December 15, 2008, and the sum of $841.77 per week for a period of 54-2/7 weeks, for the period of May 12, 2009 through May 25, 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 $624.58 per week for a period of 63.25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use to the person as a whole to the extent of 12.65%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $17,683.48 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and attorney's fees is denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid to or on behalf of Petitioner on account of said accidental injury, including Respondent's payment of $98,158.06 for temporary total disability benefits paid, $7,045.68 for temporary partial disability benefits paid, and $10,512.60 for a permanent partial disability advance.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/kmt
O- 12/17/13
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0184

FRETTS, DENNIS
Employee/Petitioner

Case# **09WC016718**

09WC026492

ABF FREIGHT SYSTEMS INC
Employer/Respondent

On 11/8/2012, 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 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MARK WEISSBURG
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2965 KEEFE CAMPBELL & ASSOC LLC
JOSEPH F D'AMATO
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
ARBITRATION DECISION

14IWCC0184

Dennis Fretts
Employee/Petitioner

Case # 09 WC 16718

v.

Consolidated Case: 09 WC 26492

ABF Freight Systems, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on August 27, 2012. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/8/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$28,991.22**; the average weekly wage was **$1,262.65**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $ 98,158.06 for TTD benefits paid, $7,045.68 for TPD benefits paid, $0.00 for maintenance benefits paid to date and $10,512.60 for a PPD advance for a total of $115,715.34.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $693.98 per week for 53 &4/7 weeks commencing December 7, 2007 through December 15, 2008, as provide in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $841.77/week for 54 & 2/7 weeks, commencing May 12, 2009 through May 25, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay to the medical service providers reasonable and necessary medical services up to $17,683.48 or the balance of the expenses, pursuant to this decision, as provided in Section 8(a) of the Act.

Respondent shall have credit for any and all medical services, temporary total disability and temporary permanent disability previously paid pursuant to sections 8(a) and 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $624.58 per week for 63.25 weeks because of injuries sustained caused 25% loss of the right arm as provided in Section 8(e) of the Act or 12.65% loss of the whole person, a provided by Section 8(d)(2) of the Act.

No penalties or attorney's fees are awarded.

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

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

payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

November 7, 2012

NOV - 8 2012

The disputed issues in the matter of 09 WC 16718 are: 1) causal connection; 2) temporary total disability; 3) temporary permanent disability; 4) medical bill payments; 5) penalties; 6) attorney's fees; 7) nature and extent; and 8) determination of workers' compensation fraud. *See,* AX1

The disputed issues in the matter of 09 WC 26492 are: 1) causal connection; 2) temporary total disability; 3) temporary permanent disability; 4) medical bill payments; 5) penalties; 6) attorney's fees; 7) nature and extent; 8) determination of workers' compensation fraud; 9) wage differential period; 10) maintenance; and 11) permanent partial advances. *See,* AX2.

In case number 09 WC 16718, the date of accident was December 1, 2007. Petitioner testified he was employed by ABF Freight Systems (hereinafter referred to as "Respondent") on December 1, 2007, and May 8, 2009, as a truck driver. Petitioner stated he drove semi-point double trailers loaded with freight from Chicago Heights to other terminals around the country. Petitioner also testified that the other physical aspects of the job included dropping, hooking and setting trailers. He noted that his job did not include loading or unloading the trailers. *See,* Tr. at 24-25. On December 1, 2007, Petitioner testified that it was an icy day and he slipped attempting to get into his truck. His right arm was forced into a forward flexed position as he fell. He testified that he felt a pulling sensation and pain in his right shoulder.

On December 10, 2007, he had x-rays taken at Concentra Medical Center which showed osteopenia and a degenerative spur formation. On December 28, 2007, Petitioner underwent an MRI study for the right shoulder at Provena Health Center which showed severe supraspinatus tendinosis with a superimposed low grade partial-thickness tear of the mid-fibers; moderately severe acromioclavicular osteoarthritis; and severe glenohumeral osteoarthrosis. There was an abnormal signal in the anterior labrum suspicious of a tear and the technician also suspected a degenerative condition.

On January 12, 2008, Dr. Corcoran diagnosed the petitioner as having right shoulder osteoarthritis, rotator cuff tendonitis and impingement syndrome. Petitioner was taken off work for four (4) weeks and prescribed physical therapy ("PT") three (3) times per week for four (4) weeks. Dr. Corcoran also prescribed 200 mgs of Celebrex and administered an injection of Kenalog and Marcaine.

On January 15, 2008, Petitioner started PT and continued PT until March 6, 2008, with the

doctor stating that Petitioner had an exacerbation of existing glenohumeral arthropathy and also had impingement syndrome. On March 31, 2008, Petitioner underwent a right shoulder arthroscopy; a chondroplasty of glenoid and humerous; an arthroscopic Bankart repair; debridement of an undersurface rotator cuff tear; a subacromial decompression consisting of CA ligament excision; and an acromioplasty with arthroscopic distal clavicle re-section. He was placed on PT and taken off of work until further notice.

On August 20, 2008, Petitioner started a work conditioning assessment at AthletiCo and on September 29, 2008, the therapist noted that he was reporting right shoulder pain. It was noted that scar tissue was limiting his range of motion ("ROM") and tissue massage was prescribed through September of 2008; and chiropractic treatment was prescribed through October 2, 2008.

On November 4, 2008, Petitioner completed a valid functional assessment at ATI Physical Therapy and demonstrated an ability to function at the medium to heavy physical demand level. It should be noted that Petitioner's truck driving occupation was described as requiring a medium physical demand level.

On November 11, 2008, Dr. Corcoran noted this demand level and stated that Petitioner had some concerns about whether he could work overhead and move dollies to pull dual trailers. Upon physical examination, the doctor observed that Petitioner lacked ten (10) degrees of forward flexion and external rotation. He continued Petitioner off of work for another four (4) weeks then on December 3, 2008, released him to work with the following restrictions: 1) no overhead lifting; 2) ground level work only; and 3) no lifting over thirty (30) pounds.

On December 15, 2008, Dr. Corcoran commented on Petitioner lack of ROM, i.e. twenty (20) degrees of forward flexion on the right and fifteen (15) degrees of external rotation on the right side compared to the left. Petitioner was released to return to work in a full duty capacity.

Petitioner continued treating with Dr. Corcoran, i.e. having a cortisone shot on January 26, 2009 and upon a March 6, 2009 examination, Dr. Corcoran observed that the petitioner lacked twenty (20) degrees of forward flexion and ninety (90) degrees of abduction and fifteen (15) degrees of external rotation. He stated that Petitioner had lost some ROM and was going to have some chronic disability and diffused degenerative changes, exacerbated by his work injury.

On May 8 2009, Petitioner had a second accident. He testified that he was at work, hooking up a double trailer, pulling a gear chain to connect to the trailer, when he jarred his right shoulder. His relevant duties as an over-the-road driver, at the time of this accident, consisted of (1) driving a semi-point double trailer; (2) being able to hook and unhook an approximately three hundred (300) pound converter gear; (3) being able to maneuver it which according to one of Respondent's witness, took approximately five to ten pounds of force for five seconds, and (4) being skilled in driving a double tractor-trailer rig.

On May 12, 2009, Petitioner went to Concentra Medical Centers and was seen by Dr. Knight who ordered an MRI; then released him to return to work with restrictions of no lifting, pulling or pushing; and limited use to the right arm. Respondent accommodated Petitioner's restrictions.

On May 22, 2009, Petitioner underwent an MRI of the right shoulder at Provena St. Mary's Hospital which showed severe, chronic-appearing degenerative changes of the glenohumeral joint with remodeling of the articular surface of the humeral head; and glenoid consistent with a chronic labrum tear. A full-thickness tear of the supraspinatus tendon was noted with a possible loose body in the anterior aspect of the joint space. The supraspinatus tendon finding appeared to be new when compared to diagnostic testing performed on December 28, 2007. The glenoid labrum changes appeared more advanced. On May 27, 2009, Dr. Knight released Petitioner to return to work in a full duty capacity, without restrictions.

On May 29, 2009, Petitioner was seen by Dr. Anthony Romeo at Midwest Orthopaedics. His

diagnosis was a possible acute right shoulder rotator cuff tear with an underlying diagnosis of glenohumeral osteoarthritis. Dr. Romeo noted Petitioner's original work injury to the right shoulder on December 1, 2007 and his recent work injury to his shoulder on May 8, 2009. He noted that the petitioner now had increased symptoms of pain and a new MRI that revealed obvious degenerative changes of the glenohumeral joint; and a full-thickness tear of the supraspinatus tendon; which was distinct from his previous MRI. He restricted Petitioner to sedentary duty and no work above shoulder level; maximum lifting of ten pounds at or below waist level; and he recommended surgery for rotator cuff repair.

On July 31, 2009, Petitioner underwent a second right shoulder surgery performed by Dr. Romeo at Rush Oak Park Hospital. The operation performed was a right shoulder arthroscopy debridement with a capsular release. Petitioner testified he attended PT and eventually underwent a functional capacity evaluation ("FCE") in April of 2010. *See,* Tr. at 30-33. After reviewing the results of the FCE, Dr. Romeo returned Petitioner to work with the following restrictions: medium duty capacity from floor to waist, light medium capacity from waist to shoulder and light duty above the shoulder level on the right; and he ordered a floor to waist lifting restriction of fifty (50) pounds; from waist to shoulder of thirty-five (35) pounds; and above the shoulder with no more than twenty (20) pounds. Dr. Romeo felt that the restrictions were permanent. *See,* RX14, pg 17.

On August 12, 2009, Dr. Romero prescribed aqua therapy for three months and in October, 2009 he ordered six (6) weeks of PT. In December of 2009, Dr. Romero prescribed PT to treat the capsular release and in January of 2010, ordered Petitioner to be off work for another six (6) weeks for more PT.

On April 8, 2010, Petitioner took an FCE at ATI which was deemed valid however; the petitioner consistently reported anterior and posterior shoulder pain with lifting. The therapist recommended a course of work hardening which the doctor ordered. From April 19, 2010 through May 14, 2010, Petitioner attended a course of work hardening.

On May 26, 2010, Petitioner was released to return to work with the following restrictions:

1) light duty above the shoulder level and lifting a maximum of twenty (20) pounds occasionally and not more than ten (10) pounds frequently; 2) medium to light work from waist to shoulder, lifting a maximum of thirty-five (35) pounds occasionally and not more than twenty (20) pounds frequently; and 3) medium work from floor to waist, lifting no more than a maximum fifty (50) pounds occasionally and not more than twenty-five (25) pounds frequently. Dr. Romero considered petitioner to be at maximum medical improvement ("MMI") and discharged him from his care.

On July 26, 2010, Petitioner presented to Dr. William Vitello, at Respondent's request, for an independent medical examination ("IME"). A report was generated by the doctor, dated July 28, 2010, in which he noted that at the time of examination, Petitioner's complaints were right shoulder pain, lack of ROM and difficulty lifting. There was no symptom magnification and based on the doctor's view of the medical records, his diagnosis of Petitioner's condition was moderate to severe right shoulder glenohumeral arthritis. Dr. Vitello did not believe that the petitioner could work in a full duty capacity, at that time, and he concurred with the permanent work restrictions imposed by Dr. Romero. He went on to state that he agreed with Petitioner's medical treatment and thought that it was reasonable and necessary and that Petitioner's current condition of ill-being was causally related to both the December 1, 2007 and May 8, 2009 accidents, based on a reasonable degree of medical and surgical certainty. And that Petitioner had some degree of pre-existing glenohumeral arthritis, prior to the first accident. *See*, RX28.

On August 13, 2010, Petitioner met with David Patsavas, a certified vocational rehabilitation consultant, at the request of his counsel. A summary of his report is as follows:

> Based on Mr. Fretts' overall transferable skills, prior work history, completion of a high school diploma, and being released to return to work by his treating physician, it is this consultant's professional opinion as a certified rehabilitation consultant that he is a candidate for Vocational Rehabilitation Services. Mr. Fretts could benefit from job readiness and job seeking skills coordination through a certified rehabilitation consultant.

> Additional exploration such as educational training and/or on-the-job training, as well as direct job placement services would be beneficial for Mr. Fretts' return back to gainful employment. It is this consultant's professional opinion that Mr. Fretts' potential earning at this time would be between $10.00 to $15.00 an hour.

On February 2, 2012, Dr. Mash testified, at Respondent's request, that he had performed a records review and had also reviewed surveillance video of the petitioner and he opined that Mr. Fretts is capable of exceeding the restrictions placed upon him by Dr. Romeo. On cross examination, Dr. Mash admitted he did not know what type of truck Mr. Fretts drove for Respondent. He admitted that lifting weights and staying active is helpful after suffering a shoulder injury. He agreed that Dr. Romeo is well respected in the field of shoulder surgery. *See,* RX14 pgs. 25-29.

On February 27, 2012, the parties took the deposition of Ms. Mary Szczepanski, a certified case manager, over Petitioner's attorney's objection that Ms. Szczepanski is not a certified vocational rehabilitation counselor and is not qualified pursuant to section 8(a) of the Workers' Compensation Act, (the "Act"). The case manager rendered a vocational opinion and produced a report regarding the petitioner.

At trial, Petitioner testified that while working, he had stayed within his prescribed restrictions and that he had attempted to return to work with Respondent but that even driving a straight truck and a pick-up truck proved difficult. He testified that he had only worked a few days for Mr. Havner and denied requesting more jobs from Havner Enterprises. He testified that agents of Respondent told him, after his release from Dr. Romeo, that Respondent would not take him back. *See,* Tr. Pgs. 37-40, 162.

Respondent called four witnesses, Christopher Havner, Keith Coffel, Dean Gluth and Stephen Evener.

Christopher Havner's testimony

Mr. Havner testified that he is the owner of Havner Enterprises ("Havner") and that he paid Mr. Fretts $500.00 to drive a flat-bed truck of products to Louisiana and $700.00 to drive a pick-up truck to the East Coast. *See,* Tr. Pg. 182. The petitioner testified that to test whether his shoulder was in condition to return to work, he drove a trip for Havner on August 11, 2011; and it took him twenty (20) hours to drive from Illinois to Louisiana. He further testified that he was under permanent restrictions imposed by Dr. Romeo when he made this trip; that the trip aggravated his shoulder condition; that he was paid $500.00 for making the trip; and that he was still collecting temporary total disability ("TTD") from Respondent at that time, i.e. $800.00 in TTD payments. The petitioner further testified that two months later he drove a second trip for Havner Enterprises in October of 2011, traveling from Illinois to several states on the East Coast in a pick-up truck to deliver lawn mowers; and that he was paid $700.00 for this trip. Mr. Havner's testimony confirmed these trips and the payments.

Keith Coffel testimony

Mr. Coffel testified that he has known Mr. Fretts for twenty (20) years and met him at the gym and that Mr. Fretts told him about the two trips he took for Mr. Havner. Mr. Coffel testified that he warned Petitioner that he might get in trouble for working while receiving TTD benefits. Mr. Fretts told Mr. Coffel that he didn't know if he was going to be able to return to work for Respondent as it depended on the mobility of his shoulder after rehabilitation and his doctor's restrictions. Mr. Coffel testified that he never saw Petitioner lifting weights with his shoulders. *See,* Tr. Pgs. 204-214.

Dean Gluth's testimony

On January 5, 2011, Dean Gluth from Infomax Investigations entered Riverside Health Facility, a private gym in Bourbonnais, Illinois with a video camera and captured video footage of Petitioner exercising and lifting weights. *See,* Tr. Pgs. 249-253. Petitioner was not aware that he was being videotaped. *Id.* pg. 99. Mr. Gluth testified he stood approximately twenty (20) feet from Petitioner while Petitioner was lifting weights and pretended to exercise while conducting surveillance on Petitioner. *See,* Tr. pg. 256. Mr.

Mr. Gluth stated he captured video surveillance using what he termed a "covert camera encased in an ID badge lanyard." *Id.* at 254. This video footage, labeled as Respondent's Exhibit 6, was shown several times during trial and claimant admitted on cross-examination, that the video accurately depicted him exercising at that location on January 5, 2011. *Id.* pgs. 87-88. The parties essentially agreed Petitioner was lifting weights at the gym on January 5, 2011; and they agreed that he was engaged in the following exercises: dumbbell bench presses, push-ups and incline dumbbell bench presses. *See,* Tr. pgs. 83-107. The Arbitrator viewed the video and makes the following factual determinations regarding the movements captured:

- dumbbell bench press: Petitioner was laying on a flat bench pressing dumbbells from his chest outward, using his arms, shoulder and chest for at least eleven (11) repetitions at a time;
- push-ups: Petitioner was in a prone position, face down to the floor, pushing his body weight up and lowering it, using his arms, shoulders and chest for at least 10 repetitions at a time; and
- incline dumbbell bench press: Petitioner was seated on an inclined bench pushing dumbbells from chest movement straight out from his chest using his chest, arms and shoulders for at least eleven (11) repetitions at a time.

The Arbitrator did not discern any evidence of claimant being in discomfort while engaging in the aforementioned activities. The Arbitrator further witnessed Petitioner changing dumbbells frequently, opting for larger and presumably heavier weights during each new set of repetitions.

Petitioner testified none of the weights he lifted on January 5, 2011, were greater than twenty (20) pounds. *See,* Tr. pg. 86. Claimant also testified that at times, he could not recall how much weight he was lifting. *Id.* at 113.

Mr. Gluth testified that the dumbbells Petitioner lifted while doing dumbbell bench presses ranged from forty (40) to fifty-five (55) pounds. *Id.* pgs. 261-272. He testified that he wrote down the weights of the dumbbells lifted by claimant in a spiral notebook while conducting

surveillance. *Id.* at 256-257. At times, Mr. Gluth is visible on the video, examining the dumbbells used by Petitioner at the conclusion of various exercises. *Id.* pgs. 266-267.

On the particular issue of how much weight petitioner was lifting, the Arbitrator finds the testimony of Mr. Gluth to be more reliable than the testimony of claimant. Mr. Gluth's sole purpose for being in the gym was to record Petitioner's activities, while Petitioner's sole focus, presumably, was exercising and lifting weights. Additionally, Mr. Gluth can be seen in Respondent's Exhibit 6, recording the weight of the dumbbells used by claimant. The Arbitrator finds Mr. Gluth's testimony to be more credible and accurate and further finds claimant lifted weights ranging from 40 to 55 pounds in the gym on January 5, 2011. The Arbitrator notes the evidence of claimant lifting dumbbells weighing between 40 and 55 pounds is relevant to the nature and extent of his injuries however it is also noted that the petitioner did not lift the weights overhead but in a lateral motion; pushing out from his chest.

On cross-examination, Mr. Gluth testified that he was not concerned about whether he was violating the rules of the gym by taking covert video on the premises. He could not see the weight printed on the dumbbells while Mr. Fretts was working out, rather, he had to get up and go to the rack where the weights were placed after Mr. Fretts finished exercising; which was some distance away. He admitted it would have been a problem if the people running the gym had seen him videotaping. And he testified that as a private investigator, he is not allowed to obtain video of a person in a tanning salon, hotel room, bathroom, or locker room which the Arbitrator notes that the gym is none of these. *See,* Tr. pgs. 290-309.

Stephen Evener's testimony

Mr. Evener testified that he is currently a supervisor for Respondent, but was a dispatcher at the time of Petitioner's accidents. On direct examination he testified that the job of an over-the-road truck driver required "minute positioning of equipment" that entailed pushing a three hundred pound object. It also requires over-the-head lifting. He later testified that a driver might have to push the converter gear for five to seven (5-7) seconds, and that the gearbox weighs three hundred (300) pounds. He testified that a driver might

need to exert a brief hundred pound pull to pull down an empty trailer door and that this action would require reaching up to grab a fabric strip and pulling down. *See,* Tr.pgs. 323-330.

On cross-examination, Mr. Evener testified he had never driven a double trailer truck and that pushing the converter gear was the hardest part of the job; and that that maneuver is not depicted in the job description video submitted into evidence by the respondent. He testified that moving the converter gear could put the worker at risk of injury and that getting into and out of the truck requires having the right hand extended over one's head; and holding onto a bar on the right side of the driver's door. He stated that the job requires hooking and unhooking overhead cables, which requires some force. He further testified that if someone can't get their hands above shoulder level, that would be a problem in terms of performing the job. He testified that the converter gear weighed approximately five hundred pounds and that it might actually be three thousand pounds or greater. He admitted it would take one to two hundred pounds of exertion to push the converter gear and that climbing in and out of a tractor could occur up to twenty (20) or thirty (30) times on an average work shift. *See,* Tr. Pgs. 349-371.

On rebuttal, Mr. Fretts testified that the job performance video, shown during the trial, depicted "ideal circumstances, a perfectly leveled blacktop driveway, during the daylight." He stated that his job consisted of working in the middle of the night in dark lots with gravel and uneven potholes. He testified that in a lot that was uneven, one had very little room to maneuver and one would have to position the conversion gear manually. He further testified that he would have difficulty pulling himself up into the truck using his right hand, as depicted in the video. He testified that he was told specifically by Jim Keller, an agent of Respondent's, that they would not hire him back after he received permanent restrictions from Dr. Romeo; as he is not physically able to perform the job as he had performed it in 2007 and 2009. *See,* Tr. Pgs. 384-409 & RX5.

CONCLUSIONS OF LAW

F. Was Petitioner's condition resulting from the first accident causally related to the injury?

Doctor Corcoran's notes confirm a causal connection for the 2007 accident, and there is no medical evidence disputing that conclusion. Based upon the testimony and evidence of record, the Arbitrator finds that Petitioner sustained a work related injury on December 1, 2007, and that his condition of ill being and all treatment recited above, was a result of that work accident.

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

Although Respondent disputes causation, Respondent has presented no evidence calling causation into question. There is a clear causal connection based not only on the facts of the case but Respondent's own IME examiner, Dr. Vitello. The opinion of Dr. Mash related to petitioner's current abilities, not causation. Dr. Romeo noted that the new MRI that was performed on May 22, 2009, revealed a full-thickness tear of the supraspinatus tendon, which was different from his previous MRI. Based upon the petitioner's release to work before the 2009 accident with permanent restrictions, the traumatic accident he suffered at work on May 8, 2009; and the subsequent new findings on diagnostic testing, the Arbitrator finds a causal connection between his subsequent condition of ill being, need for treatment and the new work accident.

In regards to Petitioner's current condition of ill-being, the Arbitrator finds that the petitioner's testimony, that he aggravated his shoulder condition on the over-the-road trip he took to Louisiana on behalf of Havner Enterprises, in August of 2011, should be noted; and that he took an additional over-the road-trip in October. While there apparently was no intervening accident, obviously, neither trip was helpful in the recovery of Petitioner right shoulder condition and should be taken into account when determining the nature and extent of Petitioner's injuries. The Arbitrator finds that the petitioner's current condition of ill-being is causally related to the May 8, 2009 accident.

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

The Arbitrator finds that the respondent is liable under Section 8(a) for all medical bills incurred as a result of the accident of December 1, 2007, based upon the evidence in the record. According to evidence presented by Respondent, these bills have been paid and Respondent shall receive credit for said payments. The Arbitrator also finds that the respondent is liable under Section 8(a) for the medical bills incurred for the accident of May 8, 2009; as stated in Petitioner's exhibit 14, which is attached to AX2; i.e. Midwest Orthopedic at Rush, with a balance in the amount of $1,903.65 and Rush Oak Park Hospital, with a balance in the amount of $15,779.83. The Arbitrator adopts Drs. Romeo and Vitello's opinions and further finds, based upon the treatment records, that all treatment was reasonable and necessary to cure petitioner of his condition of ill being. The Arbitrator notes that all of the medical services for this second accident were tendered prior to the petitioner's two trips for Havner. The respondent confirms payment to Midwest Orthopedics, leaving a $1,903.65 balance and a payment to Rush Oak Park Hospital in the amount of $13,771.89. The respondent shall receive a credit for all medical expenses paid and shall pay the remaining balance of these expenses, if any.

K. What temporary total benefits are in dispute?

The parties disagree on the dates for which TTD was payable for the December 1, 2007 accident. Having heard the testimony and reviewed the evidence, the Arbitrator finds Petitioner's request of TTD is consistent with the record of the periods of time he was kept off work, in this matter. *See,* PXs 2-12. The petitioner testified specifically to those dates he was off work and the two dates on which he returned to work in a light duty capacity for Respondent. *See*, Tr. Pg. 57. Respondent shall pay Petitioner temporary total disability benefits of $693.98/week for 53 4/7 weeks, commencing December 7, 2007 through December 15, 2008, as provided in Section 8(b) of the Act.

A review of the medical records of the second accident indicates that Petitioner was kept off work or given restrictions that would prevent the full performance of his job from May 12,

2009 through May 25, 2010; when he was found to have reached MMI and given permanent restrictions by Dr. Romeo. During that time, he testified to working light duty for Respondent on May 27, 2009 and July 4, 2009. *See,* Tr.58.

Petitioner testified that the two trips previously discussed, were the only trips made for Havner Enterprises between his dates of accident and the time of trial. *See, Tr.* at 75-76; 187. Petitioner testified he never contacted Mr. Havner in order to request additional employment opportunities. However, Mr. Havner testified Petitioner called him on more than one occasion, subsequent to the trips to Louisiana and the East Coast, requesting additional work from Havner Enterprises. *Id.* at 197. Mr. Havner testified he could not offer claimant additional trips because none were available. *Id.* at 197. Petitioner testified that after he was released to return to work with restrictions, he advised the respondent of his release and was asked what his restrictions were and upon relaying them to a Mr. Jim Keller, on or about May 25, 2010, he was told that the company could not take him back because his physical condition did not meet the job description. *See,* Tr. pgs. 407-8. Petitioner testified that the respondent did not offer him assistance in finding other work. *Id.* at 59, therefore he performed a job search on his own. Based upon the medical records and testimony in this matter, the Arbitrator orders that Respondent shall pay Petitioner temporary total disability benefits of $841.77/week for 54 2/7 weeks, commencing May 12, 2009 through May 25, 2010, as provided in Section 8(b) of the Act.

Maintenance

Pursuant to 50 Illinois Administrative Code, Chapter II Section 7110.10, (the "Code") the employer, or its representative has the burden to consult with the injured worker and his representative; and craft a written assessment of the course of medical care and if appropriate, rehabilitation required to return the injured worker to employment when 1) (s)he is unable to resume the regular duties in which (s)he was engage in at the time of the injury or 2) when the period of total incapacitation for work exceeds 120 continuous days; which ever comes first. The injured worker may also initiate and complete this process. There has not been presented, by a preponderance of the evidence that neither party pursued this process. Petitioner testified that he met with David Patsavas, a certified

vocational rehabilitation consultant, on August 13, 2010, at the request of his counsel. Petitioner was declared to have reached MMI on May 26, 2010 and from that time to the date of trial, on August 27, 2012, Petitioner has claimed to be unable to find work that exists in a stable labor market, despite a diligent search. Although a vocational expert, David Patsavas, was hired by Petitioner and testified that Mr. Fretts is currently capable of earning from $10 to $15 per hour, if he were able to find stable work; and he further opined that Mr. Fretts is a candidate for vocational rehabilitation services; no such services were established pursuant to the Code. *See,* PX16. There was no testimony or evidence presented that Petitioner worked with this counselor in instituting the process of vocational rehabilitation and that there was the authorization and implementation of a plan to return the petitioner to gainful employment, pursuant to the Code. Neither was there evidence presented of a self-directed search. The Arbitrator has not been presented with any evidence of a search, diligent or not; and as Petitioner is claiming a period of maintenance for 117 6/7 weeks, the importance of presenting evidence of such a search is paramount. Therefore, Petitioner has not been proven, by a preponderance of the evidence, that he participated in a diligent job search and no maintenance benefits or wage differential benefits, are awarded, pursuant to the Act.

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

The Arbitrator takes notice that the petitioner testified that the twenty (20) hour trip to Louisiana, and that is presumably one-way, aggravated his right shoulder condition. Then the petitioner took a second trip to the East Coast, delivering lawn mowers at various locations. As the petitioner claims that he cannot return to work for the respondent because of the condition of his shoulder, one can only surmise that the second trip, while putting funds in his pocket, also did not help to improve the condition of his shoulder and in fact may have exacerbated it. Prior to these trips, Petitioner sustained an injury to his right shoulder; and his medical examinations noted a right shoulder Bankart lesion; and grades 3 and 4 chondromalacia throughout both the humerus and glenoid; as well as undersurface tearing of the rotator cuff; dense thickened hypertrophic bursal tissue; as well as acromioclavicular arthropathy which was end-stage. He underwent surgery by Dr. Corcoran, who performed a right shoulder arthroscopy, chondroplasty of glenoid,

chondroplasty of humerus, arthroscopic Bankart repair, debridement of undersurface rotator cuff tear, subacromial decompression consistent of CA ligament excision, and an acromioplasty with arthroscopic distal clavicle re-section. Therefore, the Arbitrator finds that the nature and extent of petitioner's injuries, resulting from these two accidents to be 25% of the right arm or 12.65% loss of the person as a whole and awards 63.25 weeks of permanent partial disability.

M. Should penalties or fees be imposed upon Respondent?

Petitioner has filed a petition for penalties and attorneys' fees under §19(k), §19(l) and §16 of the Act. The Arbitrator declines to award penalties or fees in this matter. Respondent's conduct does not rise to the level of vexatious and unreasonable or actions taken in bad faith.

N. Is Respondent due a credit?

Respondent alleges a credit of $98,158.08 in temporary total disability and $7,045.68 for temporary partial disability, as well as $10,512.60 in permanent partial disability advances; for a total of $115, 716.36. Respondent's exhibit 3 shows payments from May 21, 2009 through December 28, 2011 totaling this amount paid as temporary total disability, temporary partial disability, and permanent partial disability advances. The Arbitrator awards this total amount of $115,716.36, as delineated by Respondent.

O. In regards to the issue of workers' compensation fraud

Two questions arise concerning the work Petitioner performed for Mr. Havner. First, would it affect Petitioner's right to temporary total disability for those days he work for Mr. Havner and second, Respondent alleges that the trip in October of 2011 constitutes workers' compensation fraud in that Petitioner received temporary total disability while also collecting a salary from a different employer. The resolution of both issues turns on an examination of the case law.

In keeping with the remedial nature of the Workers' Compensation Act and relevant case law, a claimant's earning of occasional wages does not preclude a payment of TTD. This is consistent with the law in several cases indicating that an employee does not have to be reduced to a state of total physical and mental incapacity before TTD can be awarded.

In *J. M. Jones Co. v. Industrial Commission*, 71 Ill.2d 368, 375 N.E.2d 1306, 17 Ill. Dec. 22 (1978), the Supreme Court held that the fact that the claimant was capable of driving as a school bus operator for approximately one hour in the morning and one hour in the afternoon did not preclude awarding TTD. "For the purposes of section 8(f) [section 19(b)], a person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists." 71 Ill. 2d 353, 361-62, quoted with approval in *Zenith v. Industrial Commission*, 91 Ill.2d 278 (1982). In *Zenith*, the Supreme Court noted that the fact that the claimant occasionally sold hot dogs from a truck for a few hours per day did not bar him from TTD entitlement. The *Zenith* court also addressed whether this activity amounted to self-employment, finding that it did not.

In *Mechanical Devices v. Industrial Commission*, 344 Ill.App.3d 752, 800 N.E.2d 819, 279 Il 1. Dec. 531 (4th Dist. 2003), the appellate court again found TTD entitlement when the claimant earned occasional wages. Consistent with the court's findings in *J. M. Jones* and *Zenith*, the *Mechanical Devices* court found that a machinist who suffered an arm and back injury and returned to work as a bus driver, averaging 10 to 15 hours per week, was still disabled. The claimant's treatment was ongoing and his condition had not stabilized; therefore, the claimant was entitled to TTD benefits.

In the subject case, the entirety of Petitioner's work for Mr. Havner, during the period of time he was also receiving TTD benefits, was a few days. It is debatable whether or not this work constituted a reasonably stable labor market in that Petitioner testified that he was unable to obtain other work. Because the few days of work driving a flat-bed and pick-up truck did not establish a stable labor market and because Petitioner continued to have restrictions from his doctor, his entitlement to TTD for that period was not interrupted by the work he did for Mr. Havner in August of 2011. Likewise, the days worked light duty for Respondent did not constitute a light duty accommodation.

SECTION 25.5 OF THE ACT STATES IN PERTINENT PART:

(a) It is unlawful for any person....or entity to:
(1) Intentionally present or cause to be presented any false or fraudulent claim for

the payment of any workers' compensation benefit.
(2) Intentionally make or caused to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any worker's compensation benefit.
(3) Intentionally make or caused to be made any false or fraudulent statements with regard to entitlement to workers' compensation benefits with the intent to prevent an injures worker from making a legitimate claim for workers' compensation benefits.

For the purposes of paragraphs (2), (3), (5), (6), (7), and (9), the term "statement" includes any writing, notice, proof of injury, bill for services, hospital or doctor records and reports, or X-ray and test results.

Respondent failed to show any statement by Petitioner that was both intentional and fraudulent regarding his working for Havner Enterprises while collecting TTD. If there was a question of Petitioner's entitlement to TTD during the days that he worked for Mr. Havner; there is a lack of evidence that he lied about this work. According to case law, Petitioner could collect TTD during the limited time that he worked for Mr. Havner. In addition, the Arbitrator notes the distinction between the trucks Petitioner drove for Havner and the trucks driven for Respondent, i.e. a flat-bed and pick-up truck versus double trailers which have to be hooked to a cab. Respondent has not proven by a preponderance of the evidence, that the petitioner committed a fraudulent act.

Lastly, Respondent attempted to admit, over Petitioner's objection, a report and deposition testimony of Ms. Mary Szczepanski. She is not a certified rehabilitation counselor. She testified that she is a certified case manager. She does not possess an appropriate certification, pursuant to the Act, that designates her as qualified to render opinions relating to vocational rehabilitation. Therefore, the Arbitrator did not admit Respondent's exhibits 11 and 12.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☒ 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

DEBRA LOUGHRIDGE,

Petitioner,

vs.

14IWCC0185

NO: 07 WC 45723

PETSMART, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability benefits, medical expenses, nature and extent of injuries, and permanent total disability, and being advised of the facts and law, affirms and adopts the July 22, 2013 Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the following clerical errors found within the Arbitrator's Decision:

1) On page two, section two, under "Order," the Arbitrator awarded temporary total disability benefits from February 29, 2008 through June 8, 2009. The Commission corrects this award to reflect that temporary total disability benefits are awarded from "July 25, 2007 through June 8, 2009," as indicated in body of decision, and as supported in the medical records;
2) The Commission strikes the entire blank 4th page of the Arbitrator's Decision;
3) On page one, paragraph two, sentence one, of the Arbitrator's Decision under the "Statement of Facts," the Commission corrects "July 24, 2007," to actual date of accident of "July 23, 2007;"

14IWCC0185

4) On page tone, paragraph six, sentence one, of the Arbitrator's Decision under the "Statement of Facts," the Commission corrects "with any of the adaptive annuity she stated in the office" to "without any of the adaptive annuity she stated in the office;"
5) On page two, paragraph nine, sentence one, of the Arbitrator's Decision, under the "Statement of Facts," the Commission corrects "Dr. Debra Loughridge" to "Ms. Debra Loughridge;"
6) On page three, paragraph two, sentence one, of the Arbitrator's Decision, under "Conclusions of Law," the Commission corrects "July 24, 2007" to actual date of accident of "July 23, 2007;"
7) On page four, paragraph one, sentence two, of the Arbitrator's Decision, under "Conclusions of Law," the Commission corrects "July 24, 2007" to actual date of accident of "July 23, 2007;" and,
8) On page five, paragraph one, sentences three and four, of the Arbitrator's Decision, under "Conclusions of Law," the Commission corrects "July 24, 2007" to actual date of accident of "July 23, 2007."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $68,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/kmt
02/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

14IWCC0185

LOUGHRIDGE, DEBRA
Employee/Petitioner

Case# 07WC045723

PETSMART INC
Employer/Respondent

On 7/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

3227 HOLECEK & ASSOCIATES
ANTHONY ENRIETTI
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

14IWCC0185

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

CORRECTED ARBITRATION DECISION

Debra Loughridge,
Employee/Petitioner

v.

Petsmart, Inc.,
Employer/Respondent

Case # 07 WC 45723

Consolidated cases: NONE

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **Ottawa**, on September 17, 2012 and March 15, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document. **This is a corrected Award only on the nature and extent of the injury.**

DISPUTED ISSUES

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

14IWCC0185

FINDINGS

On **July 23, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being *is not after June 8th, 2009* causally related to the accident. Any condition of ill being after the commencement of treatment by Dr. George De Phillips is unrelated to To the accident in the case at bar.

In the year preceding the injury, Petitioner earned **$26,311.48**; the average weekly wage was **$505.99**.

On the date of accident, Petitioner was **51** years of age, *single* with **no** dependent children.

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

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

Respondent shall be given a credit of **$22,393.87** for TTD, **$0** for TPD, **$0** for maintenance, and **$17,731.00** for other benefits, for a total credit of **$40,124.87**.

Respondent is entitled to a credit of **$27,820.89** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $377.32/week for 000 weeks, commencing February 29th, 2008 through June 8th, 2009 , as provided in Section 8(b) of the Act. On June 8th, 2009 Dr. Kuo released the Petitioner to work. The Arbitrator makes the special finding of fact that the opinions of Dr. De Phillips are not credible and not at all persuasive on any issue at bar.

Respondent shall be given a credit of $40,124.87 for compensation benefits that have been paid. No penalties are awarded under section 19 of the Act plus no legal fees are awarded.

Respondent shall pay reasonable and necessary medical services of $ 00,000.00, as provided in Sections 8(a) and 8.2 of the Act. The Respondent is liable for reasonable and necessary care only up to dates of service through June 8th, 2009, the last visit to Dr. Kuo. None of the bills of Dr. DePhillips or the bills of ancillary providers after that date including any facilities charges are the responsibility of the Respondent herein under the Workers Compensation Act.

Respondent shall be given a credit for Petitioner's group insurance and Medicare benefits paid for related bills of $27,820.89 and $92,239.74 in reductions taken, 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.

CORRECTION :Respondent shall pay Petitioner permanent partial disability for 250 weeks of compensation at the rate of $303.59 representing disability to the extent of fifty per cent (50 %) under section 8(d)2 .

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

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

Signature of Arbitrator

CORRECTED 7/17/13
Date

JUL 22 2013

INTRODUCTION

The parties stipulate that on July 23, 2007, Petitioner was involved in a compensable work-related incident in which he sustained injury to her lower back. Temporary total disability benefits were paid, as was medical care. The dispute in this matter arose following Respondent's termination of benefits on or about June 8, 2009. The issues in this hearing include first, whether Petitioner's current condition of ill-being (or current condition of ill-being after May, 2009) is causally related to the work incident. Secondly, Respondent denies liability for any medical care after June 8, 2009. Petitioner's permanent partial disability is also at issue. Finally, Petitioner has filed a Petition for Penalties pursuant to Section 19(k), Section 19(l) and Section 16.

STATEMENT OF FACTS

It is undisputed between the parties that on July 24, 2007, Petitioner was employed by Pet Smart and working in the Ottawa Distribution Center when she sustained work-related injuries to the lower back. Petitioner was initially seen at Ottawa Community Hospital and referred out to Rezin Orthopedics. At Rezin Orthopedics, Petitioner was seen by multiple doctors, including Dr. Pulluru, Dr. Rezin, Dr. Franklin, and ultimately by Dr. Eugene Kuo. Dr. Kuo is an orthopedic surgeon and provided medical care for the Petitioner's lower back problems. Following a course of conservative medical treatment, on December 6, 2007, Dr. Kuo performed a L4-L5 hemilaminectomy on the left side, discectomy and decompression.

Following surgery, Petitioner continued to treat with Dr. Kuo. Petitioner continued to complain of pain to the lumbar spine at L4-L5 and L5-S1 level.

Dr. Kuo referred Petitioner out for a consultation with Dr. Gary Koehn who recommended continued conservative treatment at the L5-S1 level. Petitioner also began complaining to Dr. Kuo of right-sided/right leg pain.

On February 28, 2008, Dr. Kuo performed a second surgical procedure. Dr. Kuo performed an L5-S1 left revision hemilaminectomy, foraminotomy, lateral recess and decompression. Dr. Kuo's diagnosis was re-herniation at L5-S1.

On June 2, 2008, Petitioner was examined by Dr. Kuo complaining of left leg pain. Dr. Kuo could not provide a clear explanation for these problems and recommended an MRI.

On June 20, 2008, Petitioner was seen by Dr. Jerome Kolavo for an Independent Medical Examination. Dr. Kolavo diagnosed the Petitioner with lumbago, lumbar degenerative disc disease and post-laminectomy lumbar pain. In an addendum report on July 14, 2008, Dr. Kolavo opined there was a causal relationship between the Petitioner's current condition of ill-being and the work-related injury.

Petitioner continued to treat with Dr. Kuo at Rezin Orthopedics. On August 8, 2008, Dr. Kuo referred Petitioner to Dr. Carey Templin at Hinsdale Orthopaedics for a second opinion. Dr. Templin recommended an EMG followed by an isolative nerve root block at the L5 nerve root. Petitioner received the L5 selective nerve root block from Dr. Franklin at Rezin Orthopedics. Petitioner also underwent the EMG/NCV.

The study resulted in normal findings and no evidence of peripheral neuropathy, lumbar radiculopathy or plexopathy. There was no evidence of neuromuscular disease.

As of February 2, 2009, Petitioner's complaints had not changed, and the negative EMG was noted in Dr. Kuo's records. Dr. Kuo found no stenosis at L4-L5, and he had no explanation for Petitioner's ongoing complaints. Dr. Kuo recommended a functional capacity evaluation at Vital Care and for Petitioner to remain off work.

On February 16, 2009, the Petitioner underwent the functional capacity evaluation at Vital Care. The overall functional capacity evaluation test findings, in combination with the clinical observations, suggested the presence of sub-maximal effort and there was a considerable question to be drawn as to the reliability/accuracy of the Petitioner's subjective reports of pain/limitation. In conclusion, this patient/Petitioner would not be a good candidate for work hardening due to her sub-maximal effort concluding the unreliable reports of pain and presence of symptom magnification during the course of the evaluation.

On February 27, 2009, the Petitioner was again examined by Dr. Kuo, who reviewed the functional capacity evaluation reports. Dr. Kuo noted Petitioner failed at least half to two-thirds of the test questionnaires. Dr. Kuo found Petitioner to be at maximum medical improvement and released her to return to work with restrictions of no lifting more than 10 pounds, no repetitive bending, squatting, twisting or climbing, and no continuous standing and/or sitting.

On April 17, 2009, Petitioner was seen again by Dr. Jerome Kolavo for an Independent Medical Examination. Dr. Kolavo reviewed the updated medical reporting, including the functional capacity evaluation. Based on his examination and review of the medical records, Dr. Kolavo reported that Petitioner was capable of an independent exercise program with over-the-counter anti-inflammatories if needed, that she was capable of returning to full-duty work with no restrictions.

On June 8, 2009, Petitioner was again seen by Dr. Kuo at Rezin Orthopedics. During the examination, Petitioner complained of pain to the back, knee and feet. She indicated her feet felt as if they were on fire. Petitioner complained of severe knee and ankle pain when rising.

On June 8, 2009, Dr. Kuo observed the Petitioner leaving the building and demonstrating an essentially normal stride and sitting in her car with any of the adaptive annuity she stated in the office. Dr. Kuo observed as the Petitioner reached back and turned around to back her car out without any hesitation. At this point, Dr. Kuo reports, "At this point, I think that the patient should be discharged at MMI. She has no restrictions. She can follow up on an as-needed basis. All of her questions were otherwise answered." The Arbitrator adopts the opinions of Dr. Kuo as material fact in the case at bar.

After June8, 2009 Petitioner did not return to DR Kuo and later came under the care of Dr. George DePhillips. On Jan 12, 2010 Dr DePhillips performed left-sided discectomy and interbody fusion surgery with pedicle screw fixation

Petitioner continues to treat with Dr. DePhillips, receiving post-surgical therapy. Petitioner also started treating with Dr. Samir Sharma for pain management. Petitioner continues to treat sporadically with those doctors to the present time. The Arbitrator totally rejects the opinions of Drs. De Phillips and Sharma in the case at bar.

In regards to the medical treatment, Dr. Debra Loughridge testified consistent with the above summary. Petitioner testified her complaints of pain prior to the initial surgery performed by Dr. Kuo included pain to the lower back and left side, left knee and left hip. As of the date of Arbitration, Petitioner complained of center-based left-sided pain and pain down to both knees.

At Arbitration, Petitioner testified she cannot sit or stand for too long and is very limited with her work-at-home activities. At arbitration Petitioner testified to having no knowledge to the medic al reporting or testimony indicating symptom magnification and malingering as offered by Dr Kuo and Dr Kolavo. Petitioner testified to being on two narcotic pain medications
Petitioner testified that she has not attempted a return to work or job search since she was last taken off of work by Dr. DePhillips in 2009.

CONCLUSIONS OF LAW

In regards to issue (F), whether Petitioner's current condition of ill-being is caused or related to the injury; the Arbitrator finds as follows:

The Arbitrator finds the combination of four independent events beginning with the functional capacity evaluation report of February 16, 2009; medical reporting and testimony of Dr Jerome Kolavo; Dr. Kuo's examination note of June 8, 2009, and finally Petitioner's increased pain and reported disability after Dr DePhillips surgery, together are persuasive in finding as a matter of material fact and as a matter of law that Petitioner's current condition of ill-being is not related as a matter of fact and as a matter of law to the work incident of July 24, 2007.

First, the Arbitrator finds the evidence of symptom magnification and malingering was consistent through the functional capacity evaluation and Dr. Kolavo's examination. During Dr. Kolavo's second examination of the Petitioner on April 17, 2009, he could not identify objective findings consistent with the Petitioner's exaggerated complaints of pain and disability. Neurological exam resulted in normal findings, as well as the EMG and previous MRI testing. Additionally, a lumbar myelogram, which was taken on August 1, 2008 was reviewed and did not support continued herniation or nerve root impingement. While Dr Kolavo is a Respondent's section 12 examiner, following his first examination Kolavo affirmed causal connection between the work incident and her (then) condition. Dr Kolavo has demonstrated to this Arbitrator he is a credible and persuasive expert.

Additionally, the Arbitrator finds Dr. Eugene Kuo is credible and persuasive as he had been Petitioner's primary treating orthopedic for her lower back condition for a period of two years. His opinions are well written and follow her condition is a progressive fashion. Dr. Kuo had examined Petitioner on numerous occasions and performed two surgical procedures to her lumbar spine. Dr. Kuo is the medical expert who is in the best position to watch and observe Petitioner's action and determine if they were consistent with her complaints.
However, on June 8, 2009, Dr. Kuo included in his office note his objection observations of Petitioner after she left his examination room and drove away from the office. It is clear to this Arbitrator Dr. Kuo observed Petitioner demonstrating ability to walk, turn, bend and twist in a manner very inconsistent with what she had just exhibited during the examination. As a result, Dr. Kuo suddenly altered his prior restrictions, pronounced Petitioner at maximum medical improvement and returned her to work full-duty. This opinion is adopted for the IWCC Award.

This Arbitrator finds Dr. Kuo's observations and diagnoses are consistent with, and serve to support the functional capacity evaluation findings and Dr. Kolavo's opinions and testimony. Thus, the Arbitrator finds Dr Kolavo and Dr Kuo credible and more persuasive on all issues compared to the opinions expressed any other doctor involved in the workers care.

Thus, this Arbitrator finds that as a matter of fact and law, the Petitioner's condition of ill-being resulted in a medical finding of maximum medical improvement and full-duty work release as of June, 2009. Therefore, none of Petitioner's complaints, subsequent to June 8, 2009, are related to the work incident of July 24, 2007 as a matter of fact and conclusion of law.

In regards to issue (J), whether medical services that were provided to Petitioner were reasonable and necessary? Has Respondent paid all the appropriate charges for all reasonable and necessary medical services? The Arbitrator finds as follows:

As indicated above, this Arbitrator finds Petitioner's condition of ill-being ended as of June, 2009 when Petitioner's primary medical provider, Dr. Kuo, pronounced Petitioner at maximum medical improvement, i.e. stabilized and full-duty work release.

Furthermore, Petitioner's testimony serves to support the legal finding that medical care after June 8, 2010 not to be reasonable or necessary under the Act. Petitioner testified her complaints of pain after Kuo's second surgery to be across the back and down to the legs. Per the FCE and Dr Kou's initial opinion, Petitioner was release with light duty work restrictions. However, at arbitration Petitioner testified to increased pain and disability after Dr DePhillips performed a third procedure. Given the undisputed results of the third surgery it is difficult for Petitioner to argue that procedure was necessary or reasonable. The result is supportive of the opposite conclusion.

The records in evidence in the case confirm all reasonable and necessary medical treatment from July 24, 2007 through June 8, 2009 has been paid by the Respondent. Furthermore, by way of this Arbitrator's Decision on issue F, Respondent is not liable as a matter of law for payment of any medical services received by the Petitioner after June 8, 2009.

In regards to issue (K), the proper period of temporary total disability benefits paid; the Arbitrator finds as follows:

The parties have stipulated that Respondent paid temporary total disability benefits from July 25, 2007 through June 8, 2009. The Arbitrator finds as matter of fact and law that the Petitioner is entitled to temporary total disability benefits from July 25, 2007 to June 8, 2009. Respondent's liability for temporary total disability benefits ends on June 8, 2009, when the Petitioner was deemed at maximum medical improvement and received a full-duty work release. That finding is adopted herein.

In regards to issue (L), What is the nature and extent of this injury? The Arbitrator finds as follows:

Petitioner sustained a compensable work-related injury that resulted in two surgical procedures to the lumbar spine. Petitioner has not made any effort to return to work and perform a job search. First, the Arbitrator finds that as a matter of fact in law Petitioner has failed to establish that she is permanently and totally disabled as a result of the work-related injuries from July 24, 2007. Second, the Arbitrator finds Petitioner has failed to establish a claim for wage differential or loss of earnings as a result of the work-related injury of July 24, 2007. Based on the nature of the injuries sustained and the reasonable and related medical benefits received, the Arbitrator finds Petitioner has sustained permanent partial disability of 50% loss of use as the man as a whole at the rate in the Award.

In regards to issue (M), should penalties or fees be imposed upon Respondent? The Arbitrator finds as follows:

For all the reasons mentioned above, the Respondent acted in a reasonable manner at all times. Respondent made a good faith challenge to the payment of compensation. The Respondent paid all reasonable and necessary medical benefits and temporary total disability benefits. Respondent correctly and properly terminated temporary total disability benefits and medical benefits June, 2009 when Petitioner had achieved MMI status and received a full-duty work release. Penalties are denied as a matter of fact and law.

In regards to issue (N), is Respondent due any credit? The Arbitrator finds as follows:

The parties have stipulated Respondent provided advances of workers compensation payments totaling $7,235.20. Respondent deems them advancements against permanent partial disability. Respondent is to receive a credit for those payments reflected in the evidence.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ 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

14IWCC0186

Carl Levitt,
Petitioner,

vs.

NO: 10 WC 28771
10 WC 28772

Sun Chemical Corp,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013 is hereby affirmed and adopted.

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

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

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: MAR 17 2014
KWL/vf
O-2/25/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0186

LEVITT, CARL
Employee/Petitioner

Case# **10WC028771**

10WC028772

SUN CHEMICAL CORP
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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:

3123 ROBERTS PERRYMAN PC
JASON GUERRA
1034 S BRENTWOOD SUITE 2100
ST LOUIS, MO 63117

0581 LAW OFFICE OF NICHOLAS M BIGONESS
1010 JORIE BLVD
SUITE 134
OAK BROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0186

Carl Levitt
Employee/Petitioner

v.

Sun Chemical Corp.
Employer/Respondent

Case # 10 WC 28771

Consolidated cases: 28772

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Mount Vernon**, on **July 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0186

FINDINGS

On **4/7/08 and 4/8/08**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident *was not* given to Respondent.

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

In the year preceding the injury, Petitioner earned **$40,071.58**; the average weekly wage was **$770.61**.

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

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

ORDER

Having failed to prove that Petitioner sustained an accidental injury arising out of and in the course of his employment with the Respondent on April 7, 2008, and April 8, 2008, and that timely notice of either alleged accident was not given to Respondent, all claims for compensation are hereby denied.

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

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

Signature of Arbitrator

8/23/13
Date

AUG 29 2013

FINDINGS OF FACT

Petitioner testified that he works as a batchmaker for Sun Chemical, a producer of printing ink. He was assigned to 3Z Printing in Teutopolis where he would mix the inks for the customer in their processing plant. The Petitioner worked the third shift, and he reported to his supervisor, Vernon Ruholl, who worked the first shift.

Petitioner testified that he injured his neck on two consecutive days "around" April 7, 2008, and April 8, 2008, while changing a tote bin. He testified that on April 7, 2008, he "felt something pop" and on the next day, April 8, 2008, he again felt a pop in his right shoulder with pain going down his right arm.

Petitioner testified that he reported both injuries to his supervisor, Vernon Ruholl, on the dates they occurred.

Petitioner first saw medical attention more than 3 weeks after the alleged injuries when he saw his family physician, Dr. Sean Flynn, on May 1, 2008. During that first visit Dr. Flynn noted Petitioner's complaints of pain in his neck, right shoulder and right arm, and that Petitioner had recently golfed. There was no history of an injury at work reported to Dr. Flynn. (PX 3) Dr. Flynn referred the Petitioner to Dr. B. Heshmatpour, an orthopaedic, who first examined the Petitioner on May 9, 2008.

On May 8, 2008, the Petitioner filled out a Patient Information form, in which he listed his address, employer, date of birth and other preliminary information. (PX 4) One of the questions contained therein asked, "Is condition due to an accident?" and the Petitioner responded "No". A space for the "Date of Accident" was left blank. Another question asked "Where did accident occur?" and even though "Work" was a suggested answer on the form, the Petitioner responded with a question mark. The Petitioner acknowledged he filled out this form and signed it. There was no report of a work injury.

Another Patient Information form was prepared by one of Dr. Heshmatpour's assistants. (PX 5) The Petitioner testified that he was asked a series of questions by the assistant prior to seeing Dr. Heshmatpour, and these questions included his address, employer, referring physician, medications, and other preliminary information. He acknowledged that this information was important, especially the medical information, as this would assist the doctor in his diagnosis. These records indicate that Petitioner told the assistant his primary problem was with the right side of his neck, shoulder and arm, and when asked "How Injury Occurred" the records state: "golfing". There was no report of a work injury. Dr. Heshmatpour's records include an Initial Office Evaluation report of the May 9, 2008, visit, and in his first paragraph he states:

> This is a 56-year-old male patient of Dr. Flynn who presents to our office today. He has worked for a printing company for the past 30+ years on an offset machine and does a lot of bending and using his upper extremities. He states he injured his neck and right arm golfing three to four weeks ago. (PX 6)

Petitioner did not report any type of work injury to Dr. Heshmatpour. Dr. Heshmatpour ordered an MRI, which revealed multilevel broad-based spur/disc complexes and accompanying cervical spondylosis resulting in multilevel foraminal encroachment as well as mild to moderate central canal stenosis. Dr. Heshmatpour prescribed a cervical epidural block and referred the Petitioner to Dr. Neill Wright, a neurosurgeon.

Petitioner was examined by Dr. Wright on May 22, 2008, and stated to the doctor that he had neck and arm pain. The Petitioner told Dr. Wright that he had been having this problem for 10 years off and on. He told Dr. Wright that he had flare-ups of pain off and on ever since, and that approximately one month prior the pain began to extend more severely down his right arm to the elbow. Petitioner did not report any type of work injury to Dr. Wright. Petitioner was diagnosed with degenerative disc disease at C5-C6 with bilateral foraminal stenosis and subsequently underwent an anterior cervical discectomy and fusion on July 22, 2008. Following the surgery, Dr. Wright monitored the Petitioner's progress and on January 21, 2009, noted that the Petitioner had some minor neck stiffness, but no arm complaints. The Petitioner was back at work without restrictions. Dr. Wright noted that the Petitioner was doing very well and would follow up on an as-needed basis.

Tony Althoff was called to testify on behalf of Petitioner. Mr. Althoff, a 3Z Printing employee, testified that he worked third shift and was present on April 8, 2008, when Petitioner informed Respondent supervisor Vernon Ruholl that he had injured his shoulder and neck. Mr. Althoff testified that when Mr. Ruholl heard Petitioner's statement, Mr. Ruholl said nothing. Mr. Althoff testified that he was unaware that the Petitioner had injured his shoulder and neck the previous day.

Petitioner called Raymond Cohen, D.O. to testify via evidence deposition. Dr. Cohen did not treat Petitioner, but performed an examination on January 25, 2011. Dr. Cohen opined that Petitioner's "injuries were work-related based on the description that Mr. Levitt provided to me from what he was doing at work on those two days...".

Vernon Ruholl was called to testify on behalf of Respondent. Mr. Ruholl testified that he works for Sun Chemical on the first shift at the 3Z Printing facility, and that he is Petitioner's supervisor. Mr. Ruholl denied that Petitioner ever reported any type of work injury to him in April, 2008, let alone two injuries in two consecutive days. Mr. Ruholl testified that it is his responsibility to fill out an accident report for any Sun Chemical employees who inform him, and that it would be a serious violation of company rules if he failed to do so. Mr. Ruholl testified that he did recall that at some time in April, 2008, the Petitioner told him his shoulder was bothering him, but that Petitioner never said it had anything to do with work so Mr. Ruholl did not inquire further. Mr. Ruholl testified that Petitioner applied for, and received, short term disability benefits which could not have been paid if the Petitioner had been injured at work. Mr. Ruholl testified that the first he learned of Petitioner's accident claim in January, 2010, when he received a Sun Chemical Incident Report Form 787 from his supervisor, Joe Halter. PX1.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner failed to meet his burden of proof. In support of that finding, the Arbitrator relies on the Petitioner's treating medical records, which indicate the Petitioner complained of arm pain from playing golf. These records are bereft of the Petitioner mentioning an injury while working. It is quite incredible that the Petitioner was able to describe in detail 5 years after the alleged accident date at the arbitration hearing how he hurt his shoulder while pushing bins, yet there is no mention of this activity in the medical records taken within the month after the alleged occurrences. All of these factors support the Arbitrator's finding that the Petitioner's testimony lacked credibility. Accordingly, the Petitioner's claim is denied.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alvarez Enrique,
Petitioner,
vs.

14IWCC0187

NO: 07 WC 25207

Burch Services,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 1, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAR 17 2014
KWL/vf
O-12/17/13
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALVAREZ, ENRIQUE
Employee/Petitioner

Case# **07WC025207**

14IWCC0187

BURCH SERVICES
Employer/Respondent

On 4/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2044 ALVARO COOK LTD
149 S LINCOLNWAY
SUITE 200
NORTH AURORA, IL 60542

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
HEATHER L BOYER
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

ENRIQUE ALVAREZ
Employee/Petitioner

v.

BURCH SERVICES
Employer/Respondent

Case # **07** WC **25207**

Consolidated cases: _

14IWCC0187

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 **Arbitrator George Andros**, Arbitrator of the Commission, in the city of **Geneva**, on **12/13/12**. By stipulation, the parties agree:

On the date of accident, **09/11/06**, 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 **$31,527.60**, and the average weekly wage was **$606.30**.

At the time of injury, Petitioner was **33** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of **$47,996.94** for TTD, **$352.79** for TPD, **$52,026.28** for maintenance, and $ for other benefits, for a total credit of **$100,376.01**.

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 $338.41/week for the duration of disability, as provided in Section **8(d)(1)** of the Act, because the injuries sustained resulted in a wage differential/impairment **of earnings**.

Respondent shall pay Petitioner wage differential benefits that have accrued from **10/05/10** through **12/13/12**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $47,996.94 for TTD, $352.79 for TPD, and $52,026.28 for maintenance benefits, for a total credit of $100,376.01 which shall not reduce the wage differential awarded.

Respondent shall pay pursuant to the fee schedule medical expenses from Dreyer Medical Clinic for dates of service 11/07/06 and 12/05/06 as well as Elmhurst Memorial Hospital for date of service 11/08/07.

Respondent shall be given a credit of $583,145.94 for medical benefits that have been paid.

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.

#01 George J. Andros
Signature of Arbitrator

March 29, 2013
Date

ICArbDecN&E p.2

APR 1 - 2013

FINDINGS OF FACTS & CONCLUSIONS OF LAW 07 WC 25207

The petitioner was hired by the respondent as an HVAC installer on May 31, 2006. His job duties included removal of old furnaces and air conditioning units and installation of new furnaces and air conditioners. As part of his job he also fabricated connections to the HVAC units with sheet metal including the installation of plenum and heating ducts. His activities involved kneeling, climbing, carrying, lifting, bending and stooping.

On September 11, 2006, the petitioner was preparing to install an air conditioning unit on the roof of a building in Aurora, Illinois. As he was climbing a ladder he fell approximately 23 feet and landed on the pavement. He sustained numerous injuries to his right arm, left arm, right leg and right hip. He was transported to Provena Mercy Medical Center in Aurora where he underwent several surgeries to repair fractures of his right arm, left arm, right leg and right hip.

The petitioner was in an off work status after his accident. After the surgeries he underwent extensive physical therapy, and was released by Dr. Jacobs-El in June of 2008, with restrictions that limited the use of his right arm, limited his ability to climb, bend, twist, and prohibited stooping and kneeling.

Due to his restrictions, the petitioner was unable to return to his previous occupation involving HVAC installation. He returned to work for the respondent performing clerical duties for approximately two weeks after which time no further light duty was available. The petitioner began a job search with the assistance of David Patsavas of Independent Rehabilitation Services which was hired by the respondent to provide vocational services. His direction is in high regard by the Arbitrator. The petitioner also enrolled in several courses at Waubonsee Community College which were paid for by the respondent.

The petitioner through his own job search efforts obtained employment at Melt Design, Inc. He worked for MDI for several weeks but required hospitalization for treatment of diabetes. Upon his release from the hospital his employment with MDI was terminated.

Thereafter, petitioner required further treatment of the injuries sustained in the accident of September 11, 2006. He underwent multiple surgeries in 2008 and 2009 of his arms and right hip. During that time the petitioner was in an off work status and receiving temporary total disability benefits paid by the respondent. On August 28, 2009, he was released by Dr. Lamberti who had performed surgery on the petitioner's right elbow.

Dr. Lamberti released the petitioner with a permanent five pound lifting restriction that prohibited pushing, pulling or grasping with his right arm (PEX #3). On October 5, 2009, the petitioner was released by Dr. Jacobs-El with permanent restrictions that prohibited climbing ladders greater than 15 feet, avoid crouching, kneeling and squatting (PEX #2).

The petitioner testified that given his restrictions he was not able to return to his previous occupation of HVAC installation and technician. Thereafter, the petitioner began a job search within his restrictions. Petitioner testified that he was interviewed and tested by Steven Blumenthal a certified vocational counselor. Mr. Blumenthal recommended that he enroll in classes to obtain a degree in computer assisted drafting and design. The petitioner was enrolled at Joliet Junior College to complete an associate's degree in computer assisted design and drafting (CADD). The petitioner's tuition and expenses were paid by the respondent and he received maintenance benefits throughout the time he was attending school.

The petitioner testified that he did not entirely finish the program and still required three courses to obtain the associate's degree in CADD. He was unable to complete the CADD program because he found employment with Chemtech Plastics working as a CADD engineer. He began work in October, 2011. He was initially hired earning a salary of $34,000.00 - $35,000.00 per year. The petitioner testified that he continued to be employed by Chemtech Plastics as a CADD engineer and was earning a $40,000.00 salary at the time of hearing.

Angela Howard testified for the respondent. Ms. Howard was the former director of Burch Services, Inc. Her duties included handling the payroll. She testified that the petitioner was earning $15.00 per hour approximately $600.00 per week at the time of his injury. Ms. Howard testified that the petitioner was employed as an HVAC installer not as a service technician. Ms. Howard further testified that on the date of injury the most experienced HVAC technicians and service technicians were earning approximately $20.00 per hour. She testified that an HVAC installer was considered experienced after five years on the job. Ms. Howard testified that Burch Services provided on the job training as well as classes for certification in various skills in the industry to all employees. Ms. Howard further testified that the petitioner was a good employee and was progressing well in developing the skills of his trade. She testified that Burch Services, Inc. is no longer in business and had been closed since November, 2010. Much of the testimony regarding his pattern of wage payments and earnings long with some discussions seemingly to spar about whether he was an HVAC installer compared to a service technician required intent listening at the hearing but are not particularly probative in the outcome.

The petitioner testified as to his current limitations with respect to lifting, bending and stooping. He testified his understanding restrictions placed on him by Dr. Jacobs-El and Dr. Lamberti were permanent. The arbitrator had the opportunity to view the petitioner's arms and noted excess bone growth in both arms, deformity of the arms and disfigurement related to surgical incisions. The petitioner testified that it was his intent to continue in the HVAC field had he not been injured and that it was the trade he was pursuing prior to his accident.

CONCLUSIONS OF LAW

Nature and Extent

The petitioner alleges that he has sustained a diminishment in earning capacity compensable under Section 8(d)(1) of the Act. Section 8(d)(1) states as follows:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% 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."

The words used in a statute are to be given their plain and commonly understood meaning and where the language of the statute is clear and unambiguous, the courts are obligated to enforce the law as enacted by the legislature, Forest City Erectors v. Industrial Commission, 264 Ill. App. 3d 436, 636 N.E.2d 969. The Arbitrator must apply the law of the Court and thus adopts Forest City as a leading case on complex issues in wage differential calculations as a matter of law. The Petitioner elected to proceed under 8(d)1.

The plain language of Section 8(d)(1) prohibits an arbitrator or the commission from awarding a percentage of a person as a whole award where the claimant has presented sufficient evidence to show a loss of earning capacity. The court in Gallianetti v. Industrial Commission ruled that the use of the word "shall" in Section 8(d)(1) meant that the commission was without discretion to award anything other than a wage differential award where a claimant proves he is entitled to benefits under Section 8(d)(1) unless a claimant waives his right to recover under that section. To qualify for a wage differential benefit, an employee must establish (1) a partial incapacity that prevents him from pursuing his "usual and customary line of employment" and (2) an impairment of earnings. Gallianetti, 315 Ill .App. 3d 721, 734 N.E.2d 482.

The wage differential is to be calculated on the presumption that, but for the injury, the employee would be in the full performance of his duties. Old Ben Cole Company v. Industrial Commission, 198 Ill. App. 3d 485, 555 N.E.2d 1201.

Prior to 1975 Section 8(d)(1) stated that a wage differential award should be based on a percentage of the difference between the "average amount which claimant earned before the accident and the average amount which a claimant is earning or is able to earn in some suitable employment or business after the accident". Illinois Rev. Stat. 1973, Chapter 48, par. 138.8 (d) (1) Public Act 79 which became effective on July 1, 1975, inserted the phrase "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" in place of the phrase "the average amount which he earned before the accident".

In General Electric v. Industrial Commission, the appellate court interpreted the 1975 amendment to the Act by strictly applying the language of the amendment which states that the Commission should calculate wage differential awards based on the amount that a claimant "would be able to earn" at the time of the hearing if the claimant were able to fully perform the duties of the occupation in which he was engaged at the time of the accident. The court found that there was no evidence suggesting that the claimant would not still be employed in the same job classification if she had not been injured and affirmed the decision of the commission which had based the wage differential award to the claimant on the amount the claimant **would have been earning at the time of hearing.** The court ruled that diminution in earning capacity is calculated by deducting a claimant's current wages from the amount that the claimant would have earned at the time of the hearing in the occupation the claimant had prior to the accident. General Electric v. Industrial Commission, 144 Ill. App. 3d 1003, 495 N.E.2d 68.

Respondent offered the testimony of Angela Howard who was the former director of Burch Services, Inc. and very articulate with excellent recollection given her family ties to the Respondent.

Ms. Howard testified that the petitioner was earning approximately $600.00 a week was working as an entry level assistant HVAC installer at the time of the accident. She further testified that technicians were paid more than installers and that it would take approximately five years for an installer to be considered experienced enough to earn technician wages. She further testified that classes were offered to all employees including the petitioner in order to obtain the training and certificates required to maintain current knowledge in the industry and increase wages. Ms Howard acknowledged that her company paid less than other HVAC companies but offered steady hours. She further testified that the petitioner took courses required by the company, was a good employee and progressing in the attainment of knowledge and experience in the industry. Ms. Howard testified that Burch Services closed in November of 2010 and had not since reopened that business (entity).

The testimony of Ms. Howard as to the petitioner's earnings in the year prior to the accident — more than six years prior to the hearing -- is not significantly probative and definitely not determinative of the amount the petitioner would be able to earn in the full performance of his occupation at the time of hearing. See the plain language of the statute this Arbitrator must follow in matters of law as in the case at bar.

The petitioner presented the testimony of Steven Blumenthal, a certified rehabilitation counselor and vocational evaluation specialist (PEX #7). His credentials are exemplary. Mr. Blumenthal testified that he reviewed the petitioner's medical records, personally interviewed the petitioner and obtained work history information from him. The information obtained in his interview revealed that the petitioner had attended school at Waubonsee Community College in 2006 to take classes in HVAC and had training on the job and from Waubonsee Community College. The petitioner also had a CFC certificate through the State of Illinois after completing training in the use of refrigerants.

Mr. Blumenthal recommended that the petitioner attend courses to obtain an associate's degree in computer aided drafting and design. Mr. Blumenthal testified that the petitioner would not be able to return to work in the HVAC field given his permanent restrictions (PEX #7 p. 22 - 23). Mr. Blumenthal also testified that the petitioner would not be able to return to any of the jobs the petitioner had held prior to his accident (PEX #7 p. 23). Mr. Blumenthal testified that if the petitioner were still employed as an experienced HVAC worker he would be earning $31.92 an hour or $66,396.00 a year according to the Illinois Department of Employment Security Wage data for the Chicago, Naperville, Joliet, Illinois metropolitan area.

Mr. Blumenthal testified that the Illinois Department of Employment Security Wage data was information commonly relied upon by vocational rehabilitation counselors in determining wages in a particular field and that that agency was considered authoritative on the subject matter (PEX #7 p. 25). Mr. Blumenthal's testimony on direct examination is adopted as material findings of fact as to the subject matter therein.

On well informed and insightful cross-examination Mr. Blumenthal testified that an HVAC worker would be considered experienced thus qualifying for an hourly wage of $31.92 per hour after a three to four year period of working in the field (PEX #7 p. 46 – 47, p. 49 – 50).

The plain language of the statute does not limit an award of 8(d)(1) to what the petitioner would be earning with the respondent or a particular employer. The statute clearly states that the basis for calculation of compensation is what the petitioner 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. Emphasis added.

The petitioner established that his occupation was full-time HVAC installation at the time of the accident. Due to the severity of his injuries and his permanent restrictions he was unable to pursue his usual and customary line of employment. Had he continued to work as an HVAC installer he would have more than six years of experience in the field at the time of hearing. The testimony of Mr. Blumenthal as to earnings in the field based on Illinois wage data is far more persuasive and based upon a broad knowledge of such matters as compared to the sincere and articulate presentation by Ms. Howard of the Respondent at bar.

The petitioner testified that at the time of hearing that he was earning $40,000.00 a year salary working for Chemtech Plastics as a CADD engineer. The difference between the $66,396.00 a year that the petitioner would be earning as an experienced HVAC worker and the $40,000.00 he is currently earning in suitable employment as a CADD engineer is $26,396.00/$507.62 per week.

Based upon the totality of the evidence and a plain reading and application of the statute at the time of the accident, The arbitrator finds as a matter of material fact and as a conclusion of law the Petitioner at bar is entitled to the payment of two thirds of that sum which is $338.41 per week for the duration of his disability.

Medical expenses

The parties have stipulated on the record that all medical treatment received was necessary. The respondent agreed to pay the bills outlined in the addendum to the request for hearing form pursuant to the fee schedule. The arbitrator hereby orders the following bills to be paid or satisfied pursuant to the fee schedule and all adopted rules and regulations their under:

Dreyer Medical Clinic D.O.S. 11/07/06 & 12/05/06	$238.00
Elmhurst Memorial Hospital D.O.S. 11/08/07	$160.00

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ 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

Timothy Hubbs,

Petitioner,

14IWCC0188

vs.

NO: 13 WC 3722

Continental General Tire,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 12, 2013 is hereby affirmed and adopted.

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

14IWCC0183

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,900.00. 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: MAR 17 2014
KWL/vf
O-12/3/2014
14

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

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

14IWCC0188

HUBBS, TIMOTHY Case# **13WC003722**

Employee/Petitioner

CONTINENTAL GENERAL TIRE

Employer/Respondent

On 6/12/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0355 WINTERS BREWSTER CROSBY ET AL
THOMAS CROSBY
PO BOX 700 111 W MAIN ST
MARION, IL 62959

0299 KEEFE & DEPAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0188

Timothy Hubbs
Employee/Petitioner

v.

Continental General Tire
Employer/Respondent

Case # 13 WC 3722

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **5/14/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0188

FINDINGS

On the date of accident, **8/4/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$7,860 (11.8 weeks)**; the average weekly wage was $666.17.

On the date of accident, Petitioner was **48** years of age, *single* with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $444.11/week for **16** weeks, commencing **1/23/13** through **5/14/13**, as provided in Section 8(b) of the Act.

Respondent shall pay all related, reasonable and necessary medical services of $2,657.45, subject to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

6/11/13
Date

ICArbDec19(b)

JUN 12 2013

Findings of Fact:

Petitioner, Timothy Hubbs testified regarding his job history as a welder in the mining industry prior to his employment with Respondent; the mechanism of injury and symptoms of the accident of August 4, 2012 (Respondent does not dispute accident); medical care received from Respondent and the Petitioner's treating doctors; termination by Respondent due to his physical inability to meet mandatory production quotas; his attempt to return to employment as a welder after being terminated by Respondent; and his current condition of ill-being. Petitioner is a resident of Marion, Illinois who was employed with Respondent from April 30, 2012 until October 31, 2012. Prior to coming to work for Respondent, Petitioner had a 25 year history as a welder in the mining industry and until April 2012, had been employed by Peabody Coal in Wyoming. Petitioner moved back to Illinois to be closer to his family.

Respondent has stipulated Petitioner injured his shoulder at an accident at work on August 4, 2012. Petitioner worked as a truck tire builder for Respondent. He worked in tandem with a co-worker and assembled truck tires in a two stage process. Petitioner's task was to feed rubberized steel belting from a 300-500 roll (breaker) into a splicing/rolling machine. Petitioner was required to move and align the heavy breaker cart with a roller, and slide the cart into the tire assembler. Once in the assembler, the breaker's steel belting is fed into the machine and is stretched around a drum and bonded into the shape of a tire. The formed tire belts are matched to a tire carcass (assembled and delivered from the co-worker) and the steel belting is machine pressed into the carcass and inflated. After the breaker's steel belting is used, the Petitioner removes the breaker cart and inserts a fully loaded breaker into the machine. During the second part of the shift, Petitioner and his co-worker switched jobs. Petitioner and his shift co-worker had a mandatory shift production quota for both the quantity and quality of tires produced. To meet the shift quota, both workers had to work at full capacity.

On August 4, 2012 Petitioner misaligned a full breaker, using both arms he jerked the cart toward him to realign it onto the roller that slid the breaker cart into the correct position in the tire assembler. Petitioner testified when he jerked back, he felt a pop and burning pain that extended from his left upper bicep into the back of his shoulder. Petitioner's co-worker and supervisor knew Petitioner had injured his left shoulder and his supervisor instructed Petitioner to report to Respondent's Health Service for medical care. Petitioner reported his injury and described the pain in his shoulder to the Health Service LPN, who offered to ice Petitioner's shoulder for the balance of the shift and requested that Petitioner see the company doctor after finishing his shift the next day. Petitioner declined the offer to ice his shoulder and asked to return to work, stating his pain had lessened. On August 5, 2012 after his midnight to 7:00 a.m. shift, Petitioner reported to Respondent's Health Service and saw that a number of other employees were waiting to see the doctor. Petitioner was informed the doctor would not arrive for an hour, so Petitioner chose to leave hoping the shoulder problem would work itself out. The Health Service nurse encouraged him to return if the shoulder pain persisted.

After the August 4, 2012 accident, Petitioner testified that he could not hold any weight in his left hand with his arm extended away from his body. Petitioner testified that reaching out to lift a glass of tea or raising and holding a phone to his ear could result in the onset of numbness in the left hand and shooting pain to the shoulder. Hoping the shoulder injury would resolve with time, Petitioner continued to work regular duty. Petitioner could no longer move a loaded breaker cart using his left arm and his worked slowed due to the difficulty in positioning and docking the breakers while using only his right arm.

Due to his continuing inability to push and lift with his left arm, on September 13, 2012, Petitioner sought care from Dr. James Alexander, who had been Petitioner's personal medical doctor of fifteen years. Petitioner provided a detailed history of the August 4, 2012 accident. Dr. Alexander questioned if he had any

14IWCC0188

other incidents of pain in his left shoulder prior to the work accident. Petitioner was aware that Dr. Alexander is a contract company physician for nine local coal mines. (Pet. Ex. 6-12, Ex. A to Dr. Alexander Dep.). Petitioner stated he had experienced left shoulder pain which had resolved after a short period when he moved some items into storage for his daughter on July 27, 2012. Petitioner told Dr. Alexander that while using a two wheel dolly to move an empty chest freezer, he titled the dolly up with his right arm and guided the chest with his left arm fully extended. Petitioner reported he felt a pain in his left shoulder that resolved before he moved the next load. Dr. Alexander told Petitioner that his left shoulder had been injured by the earlier event and the Doctor suspected that Petitioner had torn his rotator cuff when he pulled on the heavy breaker cart. Dr. Alexander told Petitioner to request Respondent's company doctor to get an MRI to determine if he had a torn rotator cuff. On September 15, 2012 after completing his next shift, Petitioner presented to Respondent's Health Service and reported that his left shoulder condition had not improved and that holding his left arm up with anything in his left hand could cause episodes of shooting pain into his left shoulder or numbness radiating from his shoulder down to his left hand. Petitioner reported to Respondent's Health Service nurse that Dr. Alexander suspected Petitioner had torn his rotator cuff in the August 4, 2012 accident and that he needed an MRI. (Pet. Ex. 6-43, Ex. D to Dr. Alexander Dep.). The Health Service nurse scheduled Petitioner an appointment for the company doctor, Dr. Bleyer, after his shift on September 17, 2012.

Petitioner told Dr. Bleyer of the August 4, 2012 pulling injury to his left shoulder caused by jerking the breaker cart and about the pain and numbness he experienced since the work accident (Pet. Ex. 6-44, Ex. D to Dr. Alexander Dep.). Petitioner also told Dr. Bleyer about Dr. Alexander's suspicion that Petitioner had suffered a rotator cuff tear and that he needed an MRI. Respondent's doctor did not order or approve an MRI of the left shoulder. Respondent's doctor prescribed three weeks of physical therapy with Respondent's contracted physical therapy provider, Work-Fit and continued Petitioner on regular work (Pet. Ex. 6-45, Ex. D to Dr. Alexander Dep.). On October 5, 2012, Work Fit physical therapists halted Petitioner's physical therapy because he had no improvement (Pet. Ex. 6-50, Ex. D to Dr. Alexander Dep.). When Petitioner halted therapy, the Work Fit physical therapist noted Dr. Alexander's impression of a possible rotator cuff tear and request for MRI. (Pet. Ex. 6-46, Ex. D to Dr. Alexander Dep.). On October 8, 2012, after the prescribed physical therapy was halted, Petitioner had another consultation with Respondent's contract doctor. Petitioner was seen at by Dr. Colon at Health Service. Petitioner expressed that he still experienced pain and numbness if he held anything and lifted his left arm. Dr. Colon's assessment note indicated the doctor's uncertainty whether the painful restriction to left shoulder movement was caused by a labrum tear or tendinitis. Dr. Colon did not approve or order the MRI, but sent Petitioner for x-rays and allowed him to continue regular work (Pet. Ex. 6-46, 6-56, Ex. D to Dr. Alexander Dep.).

Petitioner testified that being unable to lift or push the breaker cart combined with his left shoulder restrictions that he could not meet his shift production quota. Petitioner received multiple warnings of quota deficiencies and was terminated on October 31, 2012 for inability to meet quota. Upon being fired by Respondent, Petitioner immediately applied for work as a welder with CCC Services, a mining equipment company, assembling a drag line in North Carolina. Petitioner commenced work as a welder in North Carolina on November 7, 2012. Petitioner continued to seek authorization from Respondent for the MRI Dr. Alexander said was needed to diagnose and treat his work related shoulder injury. Petitioner testified that in order to meet his financial obligations; he had no choice but to work as a welder while waiting for medical treatment for his left shoulder. Petitioner testified that during the five weeks (11/7/12 -12/22/12) he worked as welder he remained unable to support weight in his left hand unless his arm was hanging straight down, fully extended, below his shoulder. Petitioner testified he was able to work as a welder despite restricted use of his left arm by

supporting his left arm on his body and using it to help guide the welder. Petitioner was hired to help assemble a multi-story dragline to be used to remove overburden in surface coal mines. Petitioner operated a wire fed welder which he held in his dominant right hand. Petitioner's job was to reassemble the metal plates that made up the 50 foot round metal platform that the dragline was erected on, called the "tub". The tub was metal walls that curve inward and rise almost six feet above the metal floor. The tub is divided into compartments. Petitioner testified he worked alone in a section of the tub welding floor and wall seams. The schedule of the work required Petitioner to weld together the floor and lower wall seams of tub. In order to enter the tub, Petitioner had to climb down a short ladder and carry a bucket of tools and his 30 pound welder. Petitioner testified the weakness and painful motion of his left shoulder prevented him from lifting with his left arm. In order for Petitioner to carry his equipment into the tub, he had to use his right arm to reach out to lift his tool bucket onto the ladder. Petitioner described that would hold and operate the wire welder with his dominant right hand and used his left hand only to help guide the welder. Petitioner described how he had to anchor his left elbow on his leg or knee to support the weight of his left arm so that his left hand could steady and guide the welder he held in his right hand. By bracing his left arm first on his leg while sitting on the floor welding floor seams and then sitting on a bucket and bracing his left elbow on his knee Petitioner was able to use both hands to weld until the height of the wall seam prevented using a braced left arm, at which point, he guided and operated the welder with his right hand alone. Petitioner did not have any quota or time limit on his welding as solid quality welds were his employer's priority. On December 22, 2012 Petitioner informed his North Carolina employer that he would be seeking medical treatment for his left shoulder and would need additional time off after the holidays.

On January 18, 2013, after returning to Illinois, Petitioner made an out of pocket cash payment to get an MRI of his left shoulder at InMed Diagnostics. (Pet. Ex. 6-26, Ex. B to Dr. Alexander Dep.). The MRI revealed a full thickness tear of the rotator cuff (Pet. Ex. 6-26, Ex. B to Dr. Alexander Dep.). In consultation with Dr. Alexander, Petitioner was referred to an orthopaedic surgeon, Dr. J.T. Davis, of Orthopaedic Institute of Southern Illinois (Pet. Ex. 6-29, Ex. C to Dr. Alexander Dep.). On January 23, 2013, Dr. Davis placed a left hand/arm light weight restriction with no overhead work on Petitioner until surgical repair of the rotator cuff was approved and completed (Pet. Ex. 6-33, Ex. C to Dr. Alexander Dep.). Upon informing his employer in North Carolina of the medical restrictions, Petitioner was informed he would not be allowed to work until released to full duty work. Petitioner's testimony was credible and consistent with the medical records.

MEDICAL EVIDENCE:

Deposition of James Alexander, M.D. Dr. Alexander is a board certified family practitioner who is also a company doctor for nine local coal mines (Pet. Ex. 6-12, Ex. A to Dr. Alexander Dep.). Dr. Alexander has been Petitioner's primary care doctor for over fifteen years (Pet. Ex. 6-11, pgs. 42-43 to Dr. Alexander Dep.). Dr. Alexander's office had prior to the August 4, 2012 accident treated Petitioner for symptoms caused from minor arthritic changes in his shoulders bi-laterally. Dr. Alexander's records show that while seeking treatment for sinus problems in early July 2012, Petitioner had complaints of achiness in his shoulders (Pet. Ex. 6-16, Ex. B to Dr. Alexander Dep.). Dr. Alexander's nurse practitioner injected both shoulders with Xylocaine (Pet. Ex. 6-2, p.7, lines 23-25). Petitioner testified he had in the past received two shots for arthritis in the AC joint region of his right shoulder, but had never before July 2012 received a shot in the left shoulder. Petitioner

testified that the shots resolved the arthritic symptoms immediately and that he had no pain in his left shoulder when he pulled on the breaker cart and injured his left shoulder on August 4, 2012. Dr. Alexander's office notes reflect Petitioner gave a history of a July 27, 2012 incident which caused temporary left shoulder pain when Petitioner moved a freezer with his left arm extended (Pet. Ex. 6-19, Ex. B to Dr. Alexander Dep.). Dr. Alexander opined that the transitory shoulder pain at the time of moving the freezer probably caused tendon inflammation in the left shoulder. However, Dr. Alexander agreed with Dr. Davis's assessment that the August 4, 2012 push/pull accident with belt-breaker cart that resulted in the immediate onset of shoulder pain, shooting pain and numbness and loss of function of the left arm was the medical cause of the rotator cuff tear. (Pet. Ex. 6-5, p. 20, lines 15-20). Dr. Alexander testified neither the shoulder arthritis nor moving the freezer caused the rotator cuff tendon rupture (Pet. Ex. 6-5, p. 20, lines 15-21). After the push/pull work accident, Petitioner complained of on-going left hand weakness, numbness and pain shooting from the left shoulder into the left arm, which symptoms supported Dr. Alexander's impression that Petitioner tore his rotator cuff while jerking the breaker cart. Dr. Alexander testified during his first examination of Petitioner's left shoulder on September 13, 2012, he had the impression that the rotator cuff was torn and requested an MRI for confirmation (Pet. Ex. 6-4, p. 14-15). On cross examination, Dr. Alexander stated that due to his electronic medical note taking program, he did not have the capability of recording patient histories in a narrative fashion but believes that Petitioner gave the same history to him that he later gave to Dr. Davis (Pet. Ex. 6-6, p. 24-25). Dr. Alexander admitted that he did not have an independent recollection of the details of the history of the work accident given by Petitioner. Dr. Alexander testified he did not place restrictions on Petitioner since he was aware Respondent had on-site nurses, doctors and therapists who could assess the shoulder injury and prescribe appropriate light duty work (Pet. Ex. 6-10, p. 40, lines 1-6). Dr. Alexander agreed that surgical repair of the rotator cuff is reasonable and necessary and should be done as soon as possible work (Pet. Ex. 6-6, p. 21, lines 1-10).

On January 23, 2013, Dr. J.T. Davis, of the Orthopaedic Institute of Southern Illinois saw Petitioner on consultative referral from Dr. Alexander. Dr. Davis's detailed narrative history contains the work push/pull accident of August 4, 2012 and also recorded a history of temporary left shoulder pain experienced while moving a freezer. (Pet. Ex. 6-29, Ex. C to Dr. Alexander Dep.). Dr. Davis noted that the MRI does not show retraction of the torn rotator cuff, supporting Dr. Davis's opinion that the tear resulted from a recent acute injury, not chronic arthritis (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.). Dr. Davis recorded his strong opinion based on a reasonable degree of medical certainty that even if Petitioner had pre-existing rotator cuff tendonitis or bursitis, it was the push/pull work accident of August 4, 2012 that caused the rotator cuff tear (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.). Given that the full thickness tear will not repair or heal absent surgical intervention, Dr. Davis recommended a rotator cuff repair (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.). Dr. Davis placed pre-surgical restrictions for the left arm of no pushing or pulling, no lifting more than ten to fifteen pounds and no overhead activities (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.).

Respondent submitted the narrative report of IME, Dr. George Paletta, Jr. dated April 1, 2013. Dr. Paletta reviewed the report of Dr. Davis, the medical records and deposition of Dr. Alexander, the MRI of January 18, 2013 and the medical records from Respondent's Health Service and Work Fit. Dr. Paletta took a history of the August 4, 2012 accident that was consistent in detail with the findings contained in the treating doctors' medical records. Dr. Paletta conducted a physical examination; significant findings included: left arm external rotation to 40 degrees with pain at the end range, pain on O'Brien's testing thumb up and thumb down, strength is limited by discomfort, and weakness on liftoff testing. (Resp. Ex. 1, p.4). Dr. Paletta's impression of the MRI was of a partial or full thickness tear of the rotator cuff left shoulder (Resp. Ex. 1, p.4). Dr. Paletta agreed that the presence of a full thickness rotator cuff tear would make the surgery suggested by Dr. Davis

reasonable and necessary (Resp. Ex. 1, p.3). Though Dr. Paletta could not state within a reasonable degree of medical certainty that the August 4, 2012 work accident caused the rotator cuff tear due to prior shoulder symptoms and treatment for arthritis; Dr. Paletta did not opine the August 4, 2012 work injury was not the cause of the rotator cuff tear nor did he offer any opinion within a reasonable degree of medical certainty as to the cause of the rotator cuff tear (Resp. Ex. 1, p.4).

Respondent called Steve Crane, Continental Tire Company's Worker's Compensation Director for North American Operations, who testified he manages the worker's compensation program covering over 75,000 Continental Tire employees. Mr. Crane testified that workers compensation claims are managed by a third party administrator. Mr Crane testified he was not aware of Petitioner having made a request to Respondent for an MRI of his left shoulder. On cross examination, Mr. Crane explained the Continental Tire plant in Mount Vernon has its own full time Health Service staffed by nurses and contract doctors and that the company uses a physical therapy provider, WorkFit, to treat Continental employees who have work injuries. Mr. Crane was shown the records of Continental Tire's Health Service and WorkFit concerning assessment and treatment of Petitioner's August 4, 2012 work injury. After reading the chart, Mr. Crane admitted that the Continental Tire Health Service Department records do reflect multiple references to Petitioner's Primary Care Doctor's request for an MRI. Mr. Crane testified he had not read the Continental Tire's Health Service records before testifying that Petitioner had made no request of Respondent for an MRI of his left shoulder. Mr. Crane explained his job duties do not include tracking the medical records of employees injured at work.

Based on the foregoing, the Arbitrator makes the following conclusions:

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

The Arbitrator finds that Petitioner's current conditions of ill-being in the left shoulder are casually related to the undisputed August 4, 2012 accident where Petitioner injured his left shoulder when he pulled a loaded belt breaker cart.

K. Is Petitioner entitled to past and prospective medical care?

The Arbitrator finds that Respondent shall pay Petitioner for all past medical treatment related to Petitioner's condition of ill being in the amount of $2,657.45 as set forth in Petitioner's Exhibit 1; Respondent shall pay said charges subject to the fee schedule in the amounts provided for in Section 8.2 of the Act. The Arbitrator concludes that the above medical services were reasonable, necessary and related to the care of injuries sustained in accident of August 4, 2012. The Arbitrator finds that as a result of the work accident of August 4, 2012 Petitioner sustained a tear of his left rotator cuff and that surgical repair and post-surgical treatment is reasonable and necessary. Respondent shall pay the charges of medical treatment including surgical repair of Petitioner's left shoulder in amounts provided for in Section 8.2 of the Act.

L. Is Petitioner entitled to TTD?

The Arbitrator finds that Petitioner's treating doctor, JT Davis M.D., on January 23, 2013 placed medical restrictions on the use of Petitioner's left upper extremity which prevent him from returning employment. Respondent shall pay Petitioner TTD benefits commencing on January 23, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth Horton,

Petitioner,

vs.

No. 11WC016010

14IWCC0189

State of Illinois,
Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, and permanent disability, and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

FACTS

On August 25, 2010, Petitioner treated with Dr. John McClellan as a result of her primary care physician's recommendation. Petitioner complained of right shoulder, and bilateral wrist pain. Dr. McClellan noted that Petitioner's left wrist symptoms began gradually about three to four months prior and her right wrist symptoms began suddenly about nine months prior. Petitioner reported that she had bilateral wrist tingling and aching, and had pain rated seven out of ten and worsened with keyboard use. Petitioner also reported that she had prior medical treatment for her wrists which consisted of wearing wrist braces and taking non-steroidal anti-inflammatory medication. Petitioner's right wrist was more symptomatic than the left wrist. On examination, Petitioner was five feet and four inches tall and weighed 270 pounds. Petitioner's

left wrist examination was unremarkable with negative Phalen's and Tinel's tests. Petitioner's right wrist examination was generally unremarkable except for an equivocal Tinel's test. Dr. McClellan noted that Petitioner underwent electromyography studies on April 16, 2010, which showed mild median sensory and motor neuropathy on the right as well as C7 radiculopathy on the left. Dr. McClellan diagnosed Petitioner with bilateral carpal tunnel syndrome and right shoulder bicipital tendonitis, and recommended that Petitioner undergo a right wrist endoscopic carpal tunnel release, which he scheduled for November 19, 2010.

On October 1, 2010, Petitioner completed and signed a Workers' Compensation Employee's Notice of Injury form. The form states that Petitioner sustained injuries to "Both wrists, Right shoulder, [and] Left elbow," while performing "Regular caseworker duties, typing, [and] filing." Petitioner also indicated that "this is an ongoing problem, but has increasingly gotten worse."

On October 13, 2010, Dr. McClellan completed a request for reasonable accommodation form and recommended that Petitioner receive desk, chair and keyboard accommodations.

On October 21, 2010, Petitioner treated with her primary care physician, Dr. Wanda Hatter-Stewart, for a lap-band consult and completion of FMLA forms. Dr. Hatter-Stewart noted that Petitioner had a history of hypertension, gastric bypass surgery and obesity. On examination, Petitioner had "positive tinnels and phalens." Dr. Hatter-Stewart diagnosed Petitioner with "lateral epicondylitis of elbow," "carpal tunnel syndrome" and abnormal weight gain; and recommended that Petitioner follow up in three months.

On January 5, 2011, Petitioner returned to Dr. Hatter-Stewart and complained of bilateral wrist and hand pain as well as pressure in her head when she laughed. Petitioner also asked Dr. Hatter-Stewart to complete FMLA forms for carpal tunnel syndrome. On examination, Petitioner had "positive tinnels and phalens." Dr. Hatter-Stewart diagnosed Petitioner with abnormal weight gain, gastric lap band adjustment, sinus headache, cervical radiculopathy on the left, "lateral epicondylitis of elbow," and "carpal tunnel syndrome;" and recommended Petitioner return in one month.

On May 11, 2011, Petitioner returned to Dr. Hatter-Stewart who noted that Petitioner requested to be off work until she completed physical therapy. Dr. Hatter-Stewart also noted, "[Petitioner] states employer changed her to a position that requires more typing than the original position; this despite the letter from us asking typing [sic]. PT c/o the increase in typing is causing her more pain. Has appt. with ortho hand tomorrow and will be starting OT." Dr. Hatter-Stewart diagnosed Petitioner with "carpal tunnel syndrome," and recommended that she return in six weeks as well as follow up with her orthopedic physician and occupational therapist. Dr. Hatter-Stewart's progress notes dated October 21, 2010; January 5, 2011; and May 11, 2011; do not specify whether the diagnoses of "lateral epicondylitis of elbow" and "carpal tunnel syndrome" were in reference to a specific wrist or elbow.

On May 12, 2011, Petitioner returned to Dr. McClellan. Dr. McClellan noted that Respondent refused to authorize Petitioner's surgery and it had been postponed. Petitioner

reported that her bilateral wrist symptoms began about one to two years prior and continued to worsen. Petitioner's symptoms worsened with gripping and grasping activities, flexion and extension, keyboard use, lifting, sleeping and repetitious tasks. Her left wrist was more symptomatic than the right wrist. Petitioner's clinical examination was unchanged from the August 25, 2010, visit. Dr. McClellan recommended that Petitioner undergo repeat electromyography and nerve conduction studies (EMG/NCV studies).

On May 20, 2011, Petitioner underwent EMG/NCV studies of the left upper extremity, which produced normal results.

On June 14, 2011, Dr. Hatter-Stewart completed a medical review form in support of a reasonable accommodation request for Petitioner's upper extremity pain and paresthesias. Dr. Hatter-Stewart opined that Petitioner could not perform typing duties because of her disability and recommended that Petitioner receive dictation software, and accommodations to her desk and keyboard as typing aggravated Petitioner's carpal tunnel syndrome pain. Dr. Hatter-Stewart also indicated that Petitioner would be temporarily and totally disabled until June 20, 2011.

On July 27, 2011, Dr. McClellan reexamined Petitioner who reported that she worked 7.5 hours per day and typed at least 5.5 hours per day. Petitioner also reported that her bilateral wrist pain had decreased and she felt that "the function ha[d] returned to normal" in her left wrist and "the function [was] improving" in her right wrist. Petitioner estimated that her right wrist pain had improved 70 percent and her left wrist pain had improved 75 percent. Dr. McClellan recommended that Petitioner obtain a wrist rest and an ergonomic keyboard for her left wrist problems and undergo surgery for her right wrist. Dr. McClellan opined: "[w]e discussed her work environment and how she is typing for over 5.5 hours daily. Based [on] her 11 years with the State of Illinois and the amount of typing that she does, it is my medical opinion that the carpal tunnel syndrome was either caused by or exacerbated by her job."

On November 16, 2011, Dr. Michael Vender examined Petitioner at Respondent's request and generated a report. In his report, Dr. Vender noted that Petitioner developed symptoms in both upper extremities in April of 2009. On examination, Petitioner was five feet and four inches tall and weighed 300 pounds. Petitioner's range of motion in the right wrist was 70/60, compared to 70/70 on the left. Dr. Vender noted that he did not have Petitioner's EMG/NCV studies to review and recommended new EMG/NCV studies. Dr. Vender opined that Petitioner should undergo bilateral carpal tunnel releases assuming that the EMG/NCV studies supported Petitioner's diagnosis of bilateral carpal tunnel syndrome. Dr. Vender reviewed a "position description, demands of the job, and an ergonomic evaluation" that are not included in the record, and opined further:

> "Ms. Horton's job activities are that of an office-based and sedentary nature and would not be considered contributory to the development of possible carpal tunnel syndrome. Ms. Horton would be able to perform her normal work activities at this time. Ms. Horton's evaluation was remarkable for an increased body mass index which would represent a significant medical risk factor for the development of carpal tunnel syndrome."

On January 13, 2012, Dr. Vender generated an addendum to his November 17, 2011, section 12 examination report. Dr. Vender reviewed EMG/NCV studies dated April 16, 2010, and opined:

> "The results provided would be consistent with my impressions, at least on the right side. It does not correlate appropriately with my clinical impressions on the left side. I would consider performing [a] carpal tunnel release on the right. Before proceeding with surgery on the left or possibly even before proceeding with any surgery, I would consider repeat electrodiagnostic studies. This information does not change other comments noted in my report of November 17, 2011."

On February 8, 2012, Dr. McClellan generated a report in response to Dr. Vender's opinions, which states:

> "I would disagree with Dr. Vender and based upon the history that I have is that Elizabeth Horton types in her job capacity five and a half hours daily of the seven and a half hours that she works, and it is fairly well known that carpal tunnel can be derived from excessive typing so therefore I would not modify my opinion that the job that she presently has either caused or exacerbated carpal tunnel syndrome. At this point, I recommend a right endoscopic carpal tunnel release."

At his October 26, 2012, deposition, Dr. McClellan testified that he is a board certified orthopedic surgeon. Prior to treating Petitioner for bilateral wrist complaints, Dr. McClellan treated Petitioner for unrelated orthopedic problems. When asked how he formed his opinion that Petitioner's job either caused or exacerbated her bilateral wrist symptoms, Dr. McClellan stated that "typing is one of the occupations that causes carpal tunnel syndrome" and agreed that typing for five and a half hours per day for five days per week for about eleven years could cause carpal tunnel syndrome. On cross examination, Dr. McClellan acknowledged that less than 5 percent of the 20 percent of hand conditions that he treats in his practice are carpal tunnel syndrome injuries. Dr. McClellan also acknowledged that he relied on Petitioner's description of her injuries in forming his opinions and he did not review a job description. Dr. McClellan opined that morbid obesity does not cause carpal tunnel syndrome as he had never read that weight loss was a treatment for carpal tunnel syndrome and "[y]ou can't say that morbid obesity causes carpal tunnel syndrome because there are people who are morbidly obese who do not have carpal tunnel syndrome."

At his December 14, 2012, deposition, Dr. Vender testified that he is a board certified orthopedic surgeon, specializing in hand surgery. The most common condition that Dr. Vender treats is carpal tunnel syndrome and trigger finger injuries. Dr. Vender opined that while most cases of carpal tunnel syndrome are idiopathic, there are some risk factors for developing the condition such as forceful activities performed on a regular and persistent basis, age, gender and obesity. Dr. Vender also opined that Petitioner's job, although "repetitive in the sense that there are different activities she does, some of which will involve repetitiveness," was not forceful. Petitioner's body mass index, which was over 40, put her at an increased risk for developing

carpal tunnel syndrome. In forming his opinions, Dr. Vender referenced some medical studies which produced results indicating that there is a lack of a causal relationship between carpal tunnel syndrome and typing. On cross-examination, Dr. Vender acknowledged that he did not know how many hours Petitioner typed each day.

At the March 27, 2013, arbitration hearing, Petitioner testified that she has worked as a caseworker for Respondent for approximately 13 years. Petitioner's job duties consisted of typing, data entry and interviewing clients. Prior to August of 2010, Petitioner's work station included a desk, a chair, a computer and a standard keyboard. Following Petitioner's August 25, 2010, appointment with Dr. McClellan, Petitioner returned to full duty work and reported her bilateral carpal tunnel syndrome diagnosis to her supervisor. Petitioner continued working and did not undergo the right carpal tunnel release that Dr. McClellan recommended because she could not afford to take time off work. Subsequently, Petitioner began occupational therapy at Dr. Hatter-Stewart's recommendation. Respondent did not accommodate the work restrictions that Dr. Hatter-Stewart placed on July 7, 2011. Petitioner missed work from May 11, 2011, through October 28, 2011, due to her bilateral wrist pain.

Petitioner testified that she sits in front of a computer for 7.5 hours per day and that she types for 5.5 hours per day. Although Petitioner is right-handed, she uses both hands to type. Petitioner stated that she performs "the exact same job as [she] did prior to the work injury." Petitioner continues to experience bilateral wrist pain that radiates into her shoulders as well as tingling in her fingertips, and she wears wrist braces at work which were recommended by a doctor. Petitioner has not undergone the right carpal tunnel release that Dr. McClellan continued to recommend because she "felt like [she] was going to have problems if [she] tried to go back to work [after the surgery]" and she "figured it was better for [her] to just try to go back to work and work with the situation they gave [her]."

On cross-examination, Petitioner clarified her work duties prior to the time that she stopped performing client interviews. Petitioner testified that she worked from 8 a.m. to 4 p.m. or from 8 a.m. to 4:30 p.m., and she either took a 30 or 60 minute lunch break in addition to two 15 minute breaks and some unscheduled restroom breaks. A client interview consisted of asking demographic questions and entering the information into a computer during the interview. Petitioner used a mouse to click on different computer screens while entering data. Occasionally, Petitioner filed case records, which weighed about five to ten pounds, and also walked to a printer located 20 feet from her desk several times a day. Petitioner also read and responded to emails, and answered the telephone periodically.

Further, Petitioner acknowledged that she reported her hand and wrist symptoms to a supervisor prior to completing an injury report on October 1, 2010. When Petitioner returned to work in October of 2011, Respondent approved her request for accommodations and gave her a stand for papers, a telephone headset and an adjustable keyboard tray. Petitioner also acknowledged that although her job title has never changed, she no longer interviews clients and types more than she did in the past. Petitioner is able to perform her full work duties. On redirect examination, Petitioner testified that she received her workstation modifications in late October of 2011.

Ms. Barbara Pittman, a case manager for the Department of Human Services and Petitioner's supervisor, testified on Respondent's behalf. Ms. Pittman testified that she managed six other caseworkers in addition to Petitioner. In August of 2010, caseworkers interviewed and assisted clients as the clients completed a paper application. Afterward, the caseworker would "process" the application by entering the application information into a computer. Caseworkers were not required to type during the interview. On average, caseworkers processed applications for two to three hours per day and typed for about one to two hours per day. Ms. Pittman performs the same job duties that a caseworker performs and can see the caseworkers that she manages from her cubicle. In addition, Ms. Pittman walks around the office periodically to observe the caseworkers. Caseworkers are required to complete a log of how much work they complete each day and there has never been a time when a caseworker would type for five and a half hours in one day. Since August of 2010, Petitioner's job duties have changed and she no longer conducts client interviews, which has resulted in increased typing duties. Currently, Petitioner performs about five to six hours of intermittent typing per workday. Ms. Pittman testified that Petitioner's work productivity was "great." On cross-examination, Ms. Pittman testified that interviews lasted anywhere from 15 to 30 minutes, and none of the caseworkers typed while interviewing clients, including Petitioner. During an interview, caseworkers were only required to help clients complete paper applications.

DISCUSSION

The Arbitrator found Petitioner proved that she sustained compensable repetitive trauma injuries to her hands which manifested on August 25, 2010. The Commission disagrees.

The Commission finds Petitioner failed to prove that she sustained work-related repetitive trauma injuries as Dr. McClellan's opinions are not credible or persuasive. On August 25, 2010, Dr. McClellan noted that Petitioner had an unremarkable left wrist examination, an equivocal Tinel's test on the right and EMG results that showed mild median sensory and motor neuropathy on the right as well as C7 radiculopathy on the left. Dr. McClellan diagnosed Petitioner with bilateral carpal tunnel syndrome despite having no objective support for the left wrist diagnosis. The Commission finds Dr. McClellan's opinion that morbid obesity does not cause carpal tunnel syndrome because he has never read that weight loss was a treatment for carpal tunnel syndrome and because "there are people who are morbidly obese who do not have carpal tunnel syndrome," is unpersuasive. Dr. Vender's opinion that Petitioner's carpal tunnel syndrome was not causally related to her work duties is more persuasive based on his medical qualifications and knowledge of the risk factors associated with the development of carpal tunnel syndrome.

Lastly, the Commission finds that Petitioner's testimony was inconsistent with the evidence. Petitioner testified that she currently sits in front of a computer for 7.5 hours per day and types for 5.5 hours per day. Petitioner also testified that she performs "the exact same job as [she] did prior to the work injury." On cross-examination, Petitioner acknowledged that she currently types more than she did in the past. The Commission notes that on May 11, 2011, Dr. Hatter-Stewart indicated that Petitioner's employer "changed her to a position that requires more typing than the original position." Contrary to Petitioner's testimony on direct examination, the

14IWCC0189

evidence shows that around May 11, 2011, her job duties changed and she began to type more. Petitioner testified that she currently types 5.5 hours per day but did not testify as to how often she typed prior to the change in her job duties. The Commission also notes that in forming his opinions, Dr. McClellan relied on the fact that Petitioner typed for 5.5 hours per day for about eleven years.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on April 18, 2013, is hereby reversed.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2014
MPL/db
o-01/22/14
352

Michael P. Latz

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HORTON, ELIZABETH
Employee/Petitioner

Case# **11WC016010**

STATE OF ILLINOIS
Employer/Respondent

14IWCC0189

On 4/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4681 MARTAY LAW OFFICES
STEPHEN R MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

5132 ASSISTANT ATTORNEY GENERAL
STACEY R LASKIN
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CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

APR 18 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

14IWCC0189

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

ELIZABETH HORTON
Employee/Petitioner

Case #11 WC 16010

v.

STATE OF ILLINOIS
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on March 27, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 25, 2010, the respondent was operating under and subject to the provisions of the Act.

- On this date, an employee-employer relationship existed between the petitioner and respondent.

- In the year preceding the injury, the petitioner earned $54,912.00; the average weekly wage was $1,056.00.

- At the time of injury, the petitioner was 41 years of age, *single* with no children under 18.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $704.00/week for one week, from June 14 through 20, 2011, which is the period of temporary total disability for which compensation is payable.

- The respondent shall pay the petitioner the sum of $633.60/week for a further period of 20.5 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 6% loss of use of her right hand and 4% loss of use of her left hand.

- The respondent shall pay the petitioner compensation that has accrued from August 25, 2010, through March 27, 2013, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for her right carpal tunnel syndrome and left wrist/hand pain was reasonable and necessary. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

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

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

Robert E. O'Dean

Robert Williams

4/18/13

Date

APR 18 2013

FINDINGS OF FACTS:

The petitioner, a caseworker for nine years, was examined by Dr. John McClellan of Bone & Joint Physicians on August 25, 2010, for right shoulder symptoms that began gradually 4-5 weeks earlier, left wrist symptoms that began gradually 3-4 months earlier and right wrist symptoms that began suddenly nine months earlier and on January 20, 2010. She reported that her wrists symptoms increased with keyboard use and typing. The doctor noted that an EMG report indicated mild median sensory and motor neuropathy on the right and recommended a right carpal tunnel release. His diagnosis was right shoulder bicipital tendinitis and bilateral carpal tunnel syndrome.

The petitioner saw her primary care physician, Dr. Wanda Hatter Stewart, of Family Christian Health Center on October 21, 2010. The doctor's diagnosis was carpal tunnel syndrome and lateral epicondylitis of elbow. She saw Dr. Bridgette Arnett of South Suburban Neurology on November 18, 2010, for vertigo and dizziness that started four to five months earlier. The petitioner followed up with Dr. Stewart on January 5, 2011, and reported continuing bilateral hand/wrist pain. On April 27, 2011, Dr. Stewart noted that the petitioner's chief complaints were right arm, neck and shoulder pain and left hand, arm and shoulder pain. The petitioner's chief complaint on May 11, 2011, to Dr. Stewart was carpal tunnel.

On May 12, 2011, the petitioner returned to Dr. McClellan with right wrist and left wrist/hand pain. An EMG of her left upper extremity on May 20, 2011, was normal. On June 14, 2011, Dr. Stewart prepared a "Request for Reasonable Accommodation" and an "Authorization for Disability Leave and Return to Work" for the petitioner through June 20, 2011. The accommodations requested were dictation software, desk and

keyboard. She had a gastric band adjustment on July 6, 2011. Dr. McClellan saw the petitioner on July 27, 2011, and reiterated his diagnosis of bilateral carpal tunnel syndrome. He recommended an ergonomic keyboard and wrist rests for the petitioner. The petitioner saw Dr. Stewart on August 10, 2011, for abdomen pain and on September 6, 2011, for left hip and thigh pain.

At the request of the respondent, Dr. Michael Vender evaluated the petitioner on November 16, 2011, and opined the petitioner's work activities were sedentary and are not considered contributory to the development of carpal tunnel syndrome. On February 8, 2012, Dr. McClellan opined that carpal tunnel can be derived from excessive typing and that her job caused or exacerbated her carpal tunnel syndrome.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that she sustained an accident on August 25, 2010, arising out of and in the course of her employment with the respondent.

The weight of Dr. McClellan's opinion is undermined by his lack of knowledge of the major contributing causes of carpal tunnel syndrome. Moreover, the doctor's deduction that morbid obesity cannot be proven as a cause of carpal tunnel syndrome since it is not a ubiquitous condition with obesity also would negate prolonged typing as a causative factor. However, Commission decisions and case law has established the precedent of a causal relationship of carpal tunnel syndrome with the prolonged repetition and hands positioning required with typing documents. Although Dr. Vender indicated that he based his opinion on various medical studies, without a more substantial

evidentiary basis, it is not sufficient to counter the precedents set by case law of a causal relationship of carpal tunnel syndrome with prolonged typing.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The petitioner provided the respondent with an executed "Workers' Compensation Employee's Notice of Injury" on October 1, 2010. The respondent received timely notice of the petitioner's injury.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO THE PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for her right carpal tunnel syndrome and left wrist/hand pain was reasonable and necessary.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that her current condition of ill-being with her right carpal tunnel syndrome and her left wrist/hand pain is causally related to the work injury.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based on the medical evidence, the petitioner was off of work due to her work injury and pursuant to her doctor's recommendation from June 14th through the 20th, 2011. Other than Petitioner's Exhibit #4, there is no other medical evidence that the petitioner's doctor provided her with a written authorization to stop working or to limit her work activities. Nor was there sufficient evidence that the respondent was notified of the off-work or work limitation authorization.

The respondent shall pay the petitioner temporary total disability benefits of $704.00/week for one week, from June 14 through 20, 2011, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of tingling in her fingers and bilateral wrist pain up to her shoulders. She wears wrist splints and takes ibuprofen.

The respondent shall pay the petitioner the sum of $633.60/week for a further period of 20.5 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 6% loss of use of her right hand and 4% loss of use of her left hand.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aimee Duluski,

Petitioner,

vs. No. 10WC028861

14IWCC0190

Tazewell County,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

FACTS

Pre-accident medical records show that on December 29, 2009, Petitioner treated with Dr. Jill Wirth, her family doctor. Dr. Wirth noted that Petitioner's chief complaint was "joint pain in knees and elbows more so it [sic] elbow." Dr. Wirth also noted that Petitioner's joint pains began a few months prior after participating in a "body pump class" and her pain worsened after participating in the "Jingle Bell run" in early December. Petitioner reported that her knees swelled occasionally and her right knee was more bothersome than her left knee. Petitioner also reported having increased fatigue and stated that although she had visited Wisconsin recently, she did not remember having tick bites. On examination, Petitioner had upper and lower extremity joint pain, some tenderness in the medial joint line and proximal insertion of the medial collateral ligament in the right knee, and no joint line tenderness in the left knee. Dr. Wirth diagnosed Petitioner with pain in multiple joints, and recommended that Petitioner undergo various blood tests such as Lyme disease, rheumatoid factor and thyroid tests.

On January 18, 2010, Petitioner treated with Dr. Brad Roberts, a doctor of osteopathic medicine. Dr. Roberts noted that Petitioner had a right knee MRI which showed a mildly complex non-displaced tear of the posterior horn of the medial meniscus, diagnosed Petitioner with a medial meniscal tear and performed a right knee injection.

On March 1, 2010, Petitioner returned to Dr. Roberts and reported that her right knee was better except for some instability. Petitioner also reported that she wished to avoid surgery and wanted to undergo physical therapy. Dr. Roberts recommended that Petitioner undergo physical therapy as requested and noted that she could return as needed. That day, Petitioner underwent her first physical therapy session and reported having continued intermittent right anteromedial knee pain, but had no pain that day. The physical therapist noted that Petitioner had very little impairment and conservative treatment was appropriate.

On May 25, 2010, Petitioner sought treatment with Dr. Wirth who noted, "[p]atient here for Lt knee pain hurt yesterday bending down to pick chart [sic]." Dr. Wirth also noted, "[y]esterday, she squatted down and she felt some pain in the left knee on the medial aspect." Petitioner reported that she could not straighten her left knee, experienced significant pain with walking and climbing stairs, and her left knee felt as if it were "locked." Dr. Wirth noted Petitioner had no known previous injury. On examination, Petitioner had an antalgic gait along with left knee medial joint line tenderness and minimal swelling. Dr. Wirth diagnosed Petitioner with left knee pain, noted that Petitioner had a possible medial meniscus injury, recommended an MRI and performed a left knee injection.

On June 7, 2010, Petitioner treated with Dr. Brent Johnson, an orthopedic surgeon, at Dr. Wirth's recommendation. Dr. Johnson noted: "[Petitioner] reports she injured [her left knee] 2 weeks ago while at work on May 24, 2010. She reports she was bending down to lift up a file out of her cabinet and felt a pop in her knee. She reports she felt a ripping sensation on the inside part of her knee and since then has been having pain on the medial aspect." Petitioner also reported having constant throbbing-type pain in the left knee and associated swelling. On examination of the left knee, Petitioner had "a small effusion," medial joint line tenderness and a positive McMurray's test. Dr. Johnson noted that Petitioner's left knee MRI showed a large, flap-type tear in the posterior horn of the medial meniscus. Dr. Johnson diagnosed Petitioner with a medial meniscus tear, and recommended that Petitioner undergo a left knee arthroscopy and partial meniscectomy based on her significant pain and mechanical symptoms.

On June 22, 2010, Dr. Johnson performed a left knee arthroscopy and partial medial meniscectomy. In his report of operation, Dr. Johnson noted that Petitioner had a radial tear in the posterior horn of the medial meniscus with a loose meniscal flap.

On October 13, 2010, Petitioner returned to Dr. Johnson and reported having some mild aching in the left knee with no significant pain or swelling. Petitioner also reported that she was able to walk three to four miles per day up to four times per week. On examination, Petitioner's left knee was non-tender with palpation and she had full range of motion. Dr. Johnson opined that Petitioner had reached maximum medical improvement, and recommended that Petitioner perform activities as tolerated and return on an as needed basis.

At his January 31, 2011, deposition, Dr. Johnson opined that the May 24, 2010, accident caused Petitioner's torn meniscus. Dr. Johnson also opined that Petitioner is at a "slight increased risk" of developing osteoarthritis in the left knee as a result of the surgery she underwent. Dr. Johnson did not expect Petitioner to have further swelling or pain in the left knee; however, continued pain after surgery could occur. On cross-examination, Dr. Johnson testified that Petitioner had not returned for treatment since October 13, 2010. Dr. Johnson acknowledged that a person could sustain a meniscus tear if he or she were bending down or twisting their knee and "reaching down to pick something up off the floor, even if they were not at work." However, Dr. Johnson also acknowledged that it would be uncommon for a person of Petitioner's age to develop a meniscus tear from day-to-day activities, and people who run are not more prone to developing meniscus injuries.

On May 4, 2011, Petitioner returned to Dr. Johnson and reported that she was doing "much, much better." Petitioner was able to participate in the body pump exercise class without pain or difficulty. Dr. Johnson noted that Petitioner's Plica syndrome had resolved, opined that Petitioner had reached maximum medical improvement, and recommended that Petitioner continue with activities as tolerated and follow up as needed.

On July 26, 2011, Dr. Richard Lehman, an orthopedic surgeon, performed a section 12 examination of Petitioner at Respondent's request. Dr. Lehman noted that Petitioner reported sustaining a left knee injury on May 24, 2010, when she "was picking up a very large file, bent over to pull up and felt that her left knee ripped apart." Dr. Lehman reviewed Petitioner's left knee MRI and opined that it showed a "nondisplaced oblique horizontal cleavage tear through the posterior horn and apex of the medial meniscus," which was noted to be degenerative in nature. Dr. Lehman opined that horizontal cleavage tears are degenerative in nature. Further, Dr. Lehman noted that in January of 2010, Petitioner underwent a right knee MRI that showed a mildly complex non-displaced tear of the posterior horn of the medial meniscus, and stated that "[t]his would be a similar meniscal pathology to the meniscal tear eventually identified into her left knee." Lastly, Dr. Lehman opined:

> "I do not believe that her current problems were caused by her work related injury. I do not believe she will have impairment in the future, nor does she have impairment now from this incident. I believe that this patient's meniscus tear is preexisting for a number of reasons, the most being that she had a traumatic injury to her knee by her history and had absolutely no swelling in her knee the day after her injury. I also believe that the patient had a horizontal cleavage tear which was characterized as degenerative on the patient's MRI but horizontal cleavage tears and the type of tear that was identified, a large severe tear of the meniscus, if were acute would have caused bleeding and without question would have had some swelling in the joint and some severity of inflammation in the joint and this was not identified. Furthermore, the patient had a similar pathological process in the right knee which is consistent with the same degenerative process in the knee.
>
> Based on these findings it would be very difficult to state that she had an acute pathological process to her knee. The only way that this could be identified

would be if she were to have swelling or bone marrow edema or some acute findings on her MRI, given the size and severity of the tear and noted in the MRI is the degenerative nature of the tear [sic]."

At his March 13, 2012, deposition, Dr. Lehman reiterated the opinions found in his July 26, 2011, section 12 report. On cross-examination, Dr. Lehman acknowledged that he did not know whether Petitioner lifted the file from the floor, from a desk or from a file cabinet at the time of her injury. Dr. Lehman agreed that a tearing or ripping sensation in the knee is consistent with an injury; however, Dr. Lehman opined that Petitioner did not further injure her preexisting degenerative left knee condition on May 24, 2010.

At the July 25, 2012, arbitration hearing, Petitioner testified that she works as a public defender about three to four days per week, and also works as a part-time guardian ad litem for Respondent. In addition, Petitioner has a private business working with the Department of Children and Family Services periodically. Petitioner is required to maintain her own office space while working for Respondent.

Petitioner testified that on May 24, 2010, while in the process of preparing to meet with a public defender client, she bent down to pick up a large file from the bottom drawer of a file cabinet. Petitioner stated: "when I bent down to pull it I bent and yanked it and my knee just - - it just ripped and popped open." Petitioner screamed and felt an immediate burning sensation at the time of the injury. She told her colleague's secretary that she hurt her knee and asked her to bring the client upstairs as she could not walk down the stairs. Petitioner testified that the file she lifted was a seven to eight inch thick legal file. At the request of her attorney, Petitioner demonstrated how she injured her left knee and the following dialogue occurred:

"THE WITNESS: The file cabinet goes like this. It's one of those old ones where you open it, you pull it down, and then I bent down like this actually, a squat.

THE ARBITRATOR: Squatted?
THE WITNESS: Yeah, and I was pulling like this and as I pulled it, it just ripped up. It just - -

THE ARBITRATOR: Did you pull it out?
THE WITNESS: The file?

THE ARBITRATOR: Yeah.
THE WITNESS: Yeah, it was while I was pulling it; pulling it out.

THE ARBITRATOR: Pulling it out?
THE WITNESS: Yeah, and I did get the file out because I had her come again, but - -

THE ARBITRATOR: So you felt it when you were in a squatted down position pulling it out?

THE WITNESS: Yeah, kind of like in a frog position. I know that sounds weird, but just kind of - -

QUESTIONS BY [PETITIONER'S ATTORNEY]:

Q. Being a baseball fan I described it as a catcher's squat. That's the kind of situation you were in. However, you described how your knee felt. Did you have any problems with it? Did it swell up? Did you have any other issues with it as the day went on after you had the problem and were seeing the client?

A. Oh yeah, it hurt. It got worse and worse and then I made it home and I told my husband I think I really did something to my knee. And the next morning I could not - - I could barely walk. I could not walk my child into school and I did drop off so I got into the doctor [sic]."

Petitioner noted that the right knee pain she felt in December of 2009 began gradually after running a race, and was unlike the pain she felt in her left knee on the day of the accident.

Currently, Petitioner does not water or snow ski as she used to and no longer runs or participates in her body pump class, which is an exercise routine with weights. Instead, Petitioner participates in a spin class. Petitioner also wears different shoes for work and has to "watch [] the incline of [her] shoes." Petitioner's left knee aches at the end of the day and she ices it and takes Ibuprofen for her pain.

Ms. Terry Ales, the legal secretary employed by Petitioner's colleague, testified on Petitioner's behalf. Ms. Ales testified that although she does "some courtesy things" for Petitioner like seating clients when Petitioner is in court, she does not work for Petitioner. On May 24, 2010, Ms. Ales heard Petitioner scream out in pain. Ms. Ales turned around when she heard Petitioner scream and saw her attempt to walk out of her office. Petitioner told Ms. Ales that she hurt her knee and asked Ms. Ales to bring the client upstairs because Petitioner could not walk down the stairs. On cross-examination, Ms. Ales acknowledged that she did not see Petitioner injure her knee.

DISCUSSION

The Arbitrator found Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment with Respondent on May 24, 2010. The Arbitrator reasoned that "the credible evidence supports a finding that the 'rip and tear' of petitioner's left knee occurred as she was simply bending down to retrieve a file from the filing cabinet" and "petitioner had not twisted or torqued her left knee as she squatted and had not yet reached for or pulled the case file until after she felt the rip and tear in her knee." Given her findings, the Arbitrator concluded Petitioner was not exposed to a risk of injury greater than that to which the general public is exposed. The Commission disagrees.

The Commission finds Petitioner credibly testified that she felt a ripping and popping sensation in her left knee as she yanked and pulled a large, seven to eight inch thick file out of the bottom drawer of a file cabinet while squatting. Contrary to the Arbitrator's findings, Petitioner specifically stated that she was squatting down in a "frog position" and she felt a ripping sensation while she pulled the file out of the cabinet. The Commission finds that having to lift large case files as thick as seven to eight inches from the bottom drawer of a file cabinet is an activity that exposed Petitioner to a risk of injury greater than that to which the general public is exposed.

The Commission also finds that Petitioner's description of the mechanism of injury is consistent with the histories contained in the medical records, and any differences between the two constitute semantic differences and a lack of detail. Dr. Wirth's May 25, 2010, progress note states that Petitioner "hurt [her left knee] yesterday bending down to pick chart [sic]" and "she squatted down and she felt some pain in the left knee on the medial aspect." The description contained in Dr. Wirth's note is accurate although it does not contain all of the details Petitioner provided at the arbitration hearing. Dr. Johnson's June 7, 2010, note states that on the day of accident, Petitioner was "bending down to lift up a file out of her cabinet and felt a pop in her knee" as well as "a ripping sensation on the inside part of her knee." The description contained in Dr. Johnson's note is also accurate even though it does not precisely state all of the details contained in Petitioner's testimony. Finally, Dr. Lehman's section 12 report states that Petitioner "was picking up a very large file, bent over to pull up and felt that her left knee ripped apart." The description in Dr. Lehman's report, although imprecise and lacking in detail, does not contradict Petitioner's testimony.

In regards to causation, the Commission finds that Dr. Johnson's opinions are more credible and persuasive than Dr. Lehman's opinions. At his deposition, Dr. Johnson opined that the May 24, 2010, accident caused Petitioner's torn meniscus and it would be uncommon for a person of Petitioner's age to develop a meniscus tear from day-to-day activities. Dr. Lehman's opinion that Petitioner's left knee medial meniscus tear is degenerative in nature and is not causally related to the May 24, 2010, accident is not credible. Dr. Lehman believed that Petitioner's left knee meniscus tear was preexistent because "[Petitioner] had a traumatic injury to her knee by her history and *had absolutely no swelling in her knee the day after her injury*." (Emphasis added). Dr. Lehman also opined that the only way he could state that Petitioner's medial meniscus tear was acute is if she had swelling, bone marrow edema or some acute findings on her MRI. The Commission points out that Dr. Wirth's progress note from the day after the accident shows that Petitioner had some swelling on examination. Dr. Johnson's June 7, 2010, progress note states that Petitioner complained of left knee pain and swelling, and Petitioner had "a small effusion" on examination. The Commission finds Petitioner proved that her left knee condition is causally related to the May 24, 2010, work accident based on a chain of causation analysis and Dr. Johnson's opinions. The Commission awards Petitioner all reasonable and necessary medical expenses related to her left knee condition in the amount of $1,013.96.

With respect to the nature and extent of Petitioner's injuries, the Commission finds that her injuries caused the loss of use of 15 percent of the left leg. The Commission notes Dr.

Johnson opined that although he did not expect Petitioner to have further swelling or pain in the left knee, it could occur. Additionally, Dr. Johnson opined that Petitioner is at a "slight increased risk" of developing osteoarthritis in the left knee as a result of the surgery she underwent. Petitioner testified that her left knee aches at the end of the day, and she ices it and takes Ibuprofen for her pain.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on August 16, 2012, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all reasonable and necessary medical expenses related to her left knee condition in the amount of $1,013.96 under §8(a) and §8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $424.20 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injury sustained caused permanent partial disability equivalent to 15% loss of use of the left leg.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2014
MJB/db
o-01/28/14
52

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DULUSKI, AIMEE
Employee/Petitioner

Case# **10WC028861**

14IWCC0190

TAZEWELL COUNTY
Employer/Respondent

On 8/16/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

BROWN & GLANCY LLC
JOEL E BROWN
416 MAIN ST SUITE 1300
PEORIA, IL 61602

1337 KNELL & KELLY LLC
STEPHEN P KELLY
504 FAYETTE ST
PEORIA, IL 61603

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

AIMEE DLUSKI,
Employee/Petitioner

v.

TAZEWELL COUNTY,
Employer/Respondent

Case # 10 WC 28861

Consolidated cases: _____

14IWCC0190

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Peoria**, on **7/25/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0190

FINDINGS

On **5/24/10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$36,764.00**; the average weekly wage was **$707.00**.

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

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10. The petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

8/13/12
Date

AUG 16 2012

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 36 year old public defender, alleges she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10. Petitioner works for the County of Tazewell. She is required to maintain her own office space. Petitioner shares a loft with another attorney. Petitioner has 450 clients and keeps all their files in a filing cabinet. Petitioner initially testified that when she bent down to get a file out of the bottom filing cabinet she felt her knee rip and pop. The file she was going to retrieve was a legal size file about 7-8 inches deep. Upon further direct testimony Petitioner provided a slightly different accident history. She testified that she squatted down and was pulling the file out of the filing cabinet when she felt the pain in her left knee. She testified that she felt pain in the squat position and in the process of pulling out the file.

Prior to 5/24/10, in December of 2009 petitioner presented to Dr. Wirth, her primary care physician. She complained of joint pain in her knees and elbows, more so in the elbows that started 3 months ago while doing a body pump class. She said she started having pain in the elbows that worsened after running the Jingle Bell run in early December. She reported that her knees swelled occasionally, and her right knee was the most bothersome on the medial aspect. She denied any injury to her joints. She stated the pain was mostly in her elbows and knees and alternates as to which is the most painful. She reported that her right knee bothered her when going up and down stairs and getting in and out of the car. She said holding weights bothered her elbows, and she was unable to lift her children without discomfort. Following an examination she was assessed with joint pain of multiple joints. Dr. Wirth was suspicious of a systemic cause due to multiple joint involvement. Blood work was ordered.

On 1/18/10 petitioner presented to Midwest Orthopedic by Dr. Brad Roberts. Petitioner believed her right knee pain had been ongoing for a couple of months, and she had an exacerbation on 12/5/09. She reported increased pain going up and down stairs. She also complained of pain in her left elbow. Petitioner had been treated for presumptive lateral epicondylitis involving the left elbow and potential meniscal injury in the right knee. An MRI of the right knee revealed a mildly complex nondisplaced tear of the posterior horn of the medial meniscus. Also noted was focal marrow edema within the medial femoral condyle suggestive of a bone contusion. Additionally, there was mild cartilage thinning within the patellofemoral compartment. Petitioner was examined and an injection was performed. She was given home exercises.

On 3/1/10 petitioner was still feeling some instability in her right knee. Following an examination Dr. Roberts prescribed a formal physical therapy. Petitioner was released from care for her right knee.

On 5/25/10 petitioner presented to Dr. Wirth. She complained of left knee pain. It was noted "patient here for Lt knee pain hurt yesterday bending down to pick chart." Petitioner gave a history of squatting down and feeling some pain in the left knee of the medical aspect. She complained that she could not straighten her knee and felt like it was locked. She reported pain with walking, and stated that stairs are very painful. She also reported pain getting in and out of the car. She denied any previous injury. Following an examination Dr. Wirth assessed left knee pain. She suspected that petitioner may have a medial meniscus injury. Dr. Wirth injected petitioner's left knee and ordered an MRI.

On 6/7/10 petitioner presented to Dr. Brent Johnson at the request of Dr. Wirth. She reported that she was bending down to lift up a file out her cabinet and felt a pop in her knee. She reported that she felt a ripping sensation on the inside part of her knee and since then has been having pain on the medial aspect. She described a constant throbbing type pain. She reported associated swelling, as well as pain. She reported that it has not significantly improved or worsened over time. She reported that it is exacerbated with standing, walking, exercising, bending, squatting, kneeling and stairs. Following an examination and review of the MRI, Dr. Johnson assessed a medial meniscus tear. Dr. Johnson recommended a left knee arthroscopy and partial meniscectomy.

On 6/22/10 petitioner underwent a left knee arthroscopy and partial medical meniscectomy. This procedure was performed by Dr. Brent Johnson. Petitioner followed up postoperatively with Dr. Johnson. This treatment included a course of physical therapy.

On 7/24/10 petitioner's Application for Adjustment of Claim was filed. The date of accident was identified as 5/24/10. How the accident occurred was identified as "Petitioner was bending down to pick up a large case file," when she injured her left leg and knee.

On 9/1/10 petitioner presented to Dr. Johnson and reported that she was 95% improved. She stated that her left knee bothers her a little bit when she tries to wear heels.

On 10/13/10 petitioner returned to Dr. Johnson. She reported that she was doing about the same as her last visit. She complained of some aching in the knee. She noted no significant pain or swelling. She stated that she was walking 3-4 miles a day, up to 4 times a week. An examination revealed a knee nontender to palpation, no joint line tenderness, and full knee range of motion. Dr. Johnson's assessment was status post left knee arthroscopy and partial meniscectomy. Dr. Johnson released petitioner to work with no restrictions. He was of the opinion that petitioner had reached maximum medical improvement. Dr. Johnson released petitioner from his care.

On 1/31/11 the evidence deposition of Dr. Brent Johnson was taken on behalf of the petitioner. Dr. Johnson opined that the type of activity petitioner described as the mechanism of her injury did not involve any twisting or torque of her knee. He opined that a meniscal tear can occur if someone were reaching down to pick something up off the floor, even if they were not at work. He was of the opinion that bending down, bending the knee or twisting the knee is an activity that all of us do on a day to day basis from time to time. Dr. Johnson was of the opinion that at petitioner's age, it would be pretty uncommon that everyday day to day activities would cause a meniscus tear. Dr. Johnson admitted that petitioner has some evidence of Grade II chondromalacia in her left knee and some deterioration in her left knee.

On 5/4/11 petitioner returned to Dr. Johnson for follow-up of her left knee. She reported that she was doing much, much better. She reported that she was able to resume activities such as Body Pump without any pain or difficulty. An examination revealed no evidence of effusion. Range of motion was 4/0/135 degrees. She was nontender to palpation. Dr. Johnson assessed status post left knee arthroscopy and partial meniscectomy, and a resolved plica syndrome. Dr. Johnson continued petitioner's activities as tolerated. He continued her work without restrictions. He indicated that she was at maximum medical improvement and could follow up on as needed basis.

On 7/26/11 petitioner underwent a Section 12 examination performed by Dr. Richard Lehman. She gave a history of injuring her left knee on 5/24/10. She gave a history of working as a public defender. She reported that she was picking up a very large file, bent over to pull up and felt that her left knee ripped apart. In addition to an examination, Dr. Lehman performed a record review. Petitioner stated that she was injured while lifting a chart and felt that her knee tore apart at that time. Dr. Lehman reviewed the MRI and noted that there was no fluid on the knee. This lead him to believe that petitioner had a chronic degenerative tear of the medial meniscus based on the fact that the size and severity of the meniscus with no history of swelling in the knee at the time of the injury. Dr. Lehman reviewed x-rays of the left knee that showed mild degenerative changes on her knee. Following an examination Dr. Lehman's impression was that petitioner's symptoms continue to be somewhat problematic with grinding that had improved since the surgery. His diagnosis was a torn medial meniscus and mild degenerative joint disease patellofemoral articulation. He was of the opinion that her prognosis was good.

Dr. Lehman did not believe petitioner needed any further treatment. He was of the opinion she could work without restrictions. He did not believe her current problems were caused by her work related injury. Dr. Lehman was of the opinion that petitioner's meniscus tear was preexisting for a number of

reasons, the most being that she had a traumatic injury to her knee by her history and had absolutely no swelling in her knee the day after her injury. He also believed the patient had a horizontal cleavage tear which was characterized as degenerative on the petitioner's MRI, but horizontal cleavage tears and the type of tear that was identified, a large severe tear of the meniscus, if it were acute would have caused bleeding and without question would have had some swelling in the joint and some severity of inflammation in the joint, and this was not identified. Furthermore, Dr. Lehman was of the opinion that the petitioner had a similar pathological process in the right knee which was consistent with the same degenerative process in the knee. Based on these findings, Dr. Lehman felt it would be very difficult to state that she had an acute pathological process to her knee.

On 3/13/12 the evidence deposition of Dr. Lehman was taken on behalf of the respondent. Dr. Lehman opined that petitioner had no acute injury on 5/24/10. He also doubted her history that she had pain in her left knee on that day. He based this on the fact the MRI of the knee taken the next day showed no acute findings. Dr. Lehman was of the opinion that if petitioner bent with her knees to retrieve the file and had no rotational stress then he did not believe that that is a biomechanical mechanism that can hurt her knee. He did not believe petitioner had any rotational torque to her knee when she bent down. Dr. Johnson opined that it is not possible that petitioner had some preexisting degenerative change in the left knee that she further injured when bending over and lifting the file on 5/24/10.

Terry Ales was called as a witness on behalf of respondent. Ales is the secretary to Angela Madison, the attorney petitioner shares loft space with. Ales is not petitioner's secretary, but may do courtesy things for her such as answering phones and escorting clients to her office. Ales testified that on 5/24/10 she was working. Although she did not see the accident occur she did hear petitioner scream out in pain. She then turned around and saw petitioner come out of the office and petitioner told her that she hurt her left knee. Ales then went and got petitioner's client for her.

Since 5/24/10 petitioner can no longer run, snow ski or water ski. She stated that she is more cautious when she body pumps with weights. She has also modified her work wardrobe with respect to the height of her heel. Petitioner also testified that when she stands on concrete she has increased pain in her knee and it aches more at the end to the day. For her complaints she ices the knee and takes ibuprofen. Petitioner does do spinning, walking and playing with her kids.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

There are three categories of risk to which an employee may be exposed: (a) risks distinctly associated with the employment, (b) personal risks, and (c) neutral risks that have no particular employment or personal characteristics, Illinois Institute of Technology Research Institute v. Industrial Commission, 314 Ill.App.3d 149, 731 N.E.2d 795, 247 Ill.Dec. 22 (1st Dist. 2000). With regards to a neutral risk, the question of whether an injury arose out of the employment rests on a determination of whether the claimant was exposed to a risk of injury to a greater extent than that to which the general public was exposed.

In the case at bar, the petitioner gave various histories as to the mechanism of injury. The first history was to Dr. Wirth on 5/25/12. Dr. Wirth's records note "patient here for Lt knee pain hurt yesterday bending down to pick chart." On 6/7/10 petitioner presented to Dr. Johnson and reported that she was bending down to lift up a file out of her cabinet and felt a pop in her knee. On 7/24/10 petitioner filed her Application for Adjustment of Claim and identified the accident as "petitioner was bending down to pick up a large case file."

On 7/26/11, 14 months after the incident, petitioner's accident history changed slightly. Petitioner reported to Dr. Lehman that she bent over to pull up a large file and felt that her left knee ripped apart. Petitioner also stated she was injured while lifting a chart and felt that her knee tore apart at that time. Then at trial on 7/24/12 petitioner initially testified that when she bent down to get a file out of the bottom filing cabinet she felt her knee rip and pop. Then after further questioning by her attorney petitioner provided a slightly different history. She testified that she squatted down and was pulling the file out of the filing cabinet when she felt the pain in her left knee. She testified that she felt the pain in the squat position and in the process of pulling out the file. None of the histories petitioner provided included any twisting or torque of the left knee.

It is also important to note that prior to this accident petitioner had a history in late December of 2009 of significant joint pain in both her elbows and knees. She was assessed with joint pain of multiple joints. Petitioner was also found to have evidence of preexisting Grade II chondromalacia and deterioration in her left knee.

Given these multiple accident histories, the arbitrator finds the histories most contemporaneous to the incident the most credible. The arbitrator finds that over time, accident histories often change to conform to the proof necessary to find a case compensable.

In the case at bar, the very first documented history of the accident given the day after the incident is that petitioner hurt her left knee bending down to pick chart. There is no reference, at that point, to petitioner actually getting to the point of lifting the chart. Again on 6/7/10 she reported that she felt a pop in her knee while bending down to lift up a file out of her cabinet. Again, the injury is reported as occurring when she was bending and there is no indication that the injury occurred while she was squatting down and pulling the file out of the cabinet. Even her Application for Adjustment of Claim states that she was injured as she was bending down to pick up large case file. None of these histories support a finding other than that the injury occurred when petitioner bent down to get the file. There is nothing in these accident histories to suggest that petitioner was already down and in the process of pulling out the case file when the pop and pain occurred.

It is not until 14 months after the incident when petitioner presents to respondent's examining physician that her accident history changed slightly. Petitioner initially gave a history of bending over to pull up a large file and felt that her left knee ripped apart. This history is consistent with the prior accident histories which support a finding that the rip and pop occurred as she was bending down. Petitioner then went on and stated that she injured herself while lifting a chart. This is the first time petitioner made any mention that the injury did not occur until after she was in the process of lifting the file. At trial, petitioner also gave inconsistent accident histories. She initially testified that when she bent down to get a file out of the bottom filing cabinet she felt her knee rip and pop. It was not until after further questioning by her attorney that her accident history again changed to reflect that she did not feel the pain in her left knee until after she had squatted down and was pulling the file out of the filing cabinet. The arbitrator finds that if this was in fact what had occurred there is no reason that petitioner could not have provided this history to the healthcare providers she saw most contemporaneous to the injury.

Based on the above, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10. The arbitrator finds the credible evidence supports a finding that the "rip and tear" of petitioner's left knee occurred as she was simply bending down to retrieve a file from the filing cabinet. The arbitrator reasonably infers from the credible evidence that the petitioner had not twisted or torqued her left knee as she squatted and had not yet reached for or pulled the case file until after she felt the rip and tear in her knee.

Given the finding that the rip and tear of petitioner's knee occurred when petitioner simply squatted, the arbitrator finds the petitioner was not exposed to a risk of injury to a greater extent than that to which the general public was exposed. Petitioner provided no evidence to support a finding that she had anything in her hands when she was squatting, or that her knee twisted when she was squatting, or that she had to squat more times than the general public due to her work activities. There is nothing in the evidence to suggest any other finding than that the petitioner sustained her left knee injury while she was bending down. The arbitrator finds this is a risk the general public is exposed to many times a day. The arbitrator also notes that there is evidence in the credible medical records that show petitioner had preexisting degenerative problems with her left knee for which she received treatment as recently as 6 months prior to the incident.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10 the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Chris Ragan,

Petitioner,

vs. No. 10WC005322

Continental Tire North America,

14IWCC0191

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, the necessity of medical treatment, temporary disability, permanent disability and "credit," and being advised of the facts and law, modifies the decision of the Arbitrator as stated below, and otherwise affirms and adopts the decision of the Arbitrator which is attached hereto and made a part hereof.

FACTS

At the May 3, 2012, arbitration hearing, Petitioner testified that his job as a truck tire builder requires a significant amount of reaching, pulling and throwing. Petitioner also testified that he uses his left arm for overhead lifting more often than he uses his right arm because of the way that his workstation is set up. Petitioner's job description shows that a truck tire builder must perform medium to heavy work, must have full range of motion in both arms and must "lift 50 or more pounds on an occasional to frequent basis."

A pre-accident report of operation shows that on April 12, 2007, Dr. Paletta performed a left shoulder diagnostic arthroscopy, debridement of a posterosuperior labral tear, subacromial

decompression and bursectomy with acromioplasty. Petitioner testified that he received a settlement award for 25 percent loss of use of the left arm for the prior work injury associated with the 2007 surgery. Petitioner also testified that after being released from Dr. Paletta's care following the 2007 surgery, he was not pain-free but his left shoulder symptoms improved and were nothing like what he had experienced prior to the surgery.

On January 29, 2010, Petitioner felt increased pain in his left shoulder while building tires for Respondent. That day, Petitioner completed a statement of events and an injury report, stating that he injured his left shoulder, along with his elbows, while performing repetitive motion job duties. On February 8, 2010, Petitioner treated at the health services department located in Respondent's plant and continued to complain of left shoulder pain. Petitioner reported that his left shoulder bothered him more at work and was referred to Work Fit for physical therapy. Medical records from Work Fit show that Petitioner underwent physical therapy for his left shoulder in February and March of 2010.

In his April 23, 2010, report, Dr. Paletta noted that he treated Petitioner for a left shoulder superior labrum from anterior to posterior (SLAP) tear approximately three years before and performed surgery in April of 2007. Dr. Paletta also noted: "[Petitioner] did quite well and was returned to full work and continued to do well until about December or January of this year when he began to note the onset of some left shoulder pain and tightness." On examination, Petitioner had positive left shoulder impingement signs. Dr. Paletta reviewed left shoulder x-rays that showed a normal bony anatomy and no significant degenerative changes. Dr. Paletta diagnosed Petitioner with left shoulder impingement syndrome, noted that there was no evidence of a recurrent SLAP tear, and recommended that Petitioner undergo a subacromial injection and return to full duty work.

On May 26, 2010, Petitioner treated with Dr. Stiver and reported that his left shoulder symptoms began on January 29, 2010, due to "[w]ork repetitive motion." Petitioner also reported that his left shoulder achiness was different from the symptoms associated with his previous SLAP tear. Dr. Stiver examined Petitioner and noted that he had a mildly positive Grind's test and crepitance. Dr. Stiver noted that Petitioner either had possible irritation from a prior labral repair or impingement syndrome, and recommended a left shoulder MRI. The July 9, 2010, left shoulder MRI showed increased signal within the supraspinatus tendon which was compatible with tendinopathy, an intact rotator cuff, a possible previous surgery at the acromioclavicular joint, and a normal glenoid labrum and biceps labral complex.

On July 16, 2010, Petitioner returned to Dr. Stiver who noted that the MRI showed "what looks to be like impingement with spurring." Dr. Stiver opined that Petitioner would require an arthroscopic subacromial decompression at some point and noted that Petitioner wanted to have surgery for his left shoulder after he had surgery for his elbows. On August 24, 2010, Petitioner underwent surgery for his right elbow; and on September 17, 2010, Petitioner underwent surgery for his left elbow. Subsequently, Petitioner underwent physical therapy and returned to full duty work on November 22, 2010. Petitioner testified that while he was off work for his bilateral elbow condition, his left shoulder symptoms did not improve.

On March 14, 2011, Dr. Stiver generated a letter to Petitioner's attorney and opined:

> "Chris Ragan's job activities performed as a truck tire builder have aggravated his left shoulder and necessitating [sic] arthroscopic subacromial decompression on his left shoulder as outlined last summer. He had a SLAP repair approximately 3 years ago in 2007 and had done well until he was starting to do the tire repair activities with lifting and started having more pain, crepitus, and grating. As a result he has developed spurring with impingement symptoms on the left shoulder necessitating the subacromial decompression. This is directly work related."

During Dr. Lehman's May 24, 2011, section 12 examination, Petitioner had significant complaints of pain in his left shoulder, tenderness in the area of the AC joint, a "Hawkins test [that] seem[ed] to be positive subjectively," pain with full forward flexion and internal rotation, and a negative Lidocaine stress test. Dr. Lehman opined that Petitioner's work activities did not cause or aggravate Petitioner's left shoulder condition, and stated:

> "I do not believe there is any objective evidence that there is pathology in his left shoulder. The patient had a negative MRI in terms of impingement processes and had a negative Lidocaine challenge test. It would be my opinion based on reviewing the medical records that the patient has no significant pathology in his shoulder other than tendinopathy, which is a long term process and is a degenerative process. There appears to be 1) no rotator cuff tear and 2) there appears to be no objective impingement syndrome and lastly, when we injected the subacromial space his pain did not improve. The medical literature clearly states that with a negative Lidocaine challenge the chances for resolution of shoulder pain arthroscopically with a subacromial decompression are greatly decreased. Based on this, I do not believe that the patient requires further care and treatment of his left shoulder and again, there appears to be no definitive diagnosis on his exam and MRI. This patient does not in fact have impingement syndrome."

On August 8, 2011, Dr. Stiver performed a left shoulder subacromial decompression and found "a lot of bursal tissue" in the subacromial space. Dr. Stiver last treated Petitioner on October 12, 2011, and noted that Petitioner was doing well except for a "twinge in the upper part of his shoulder when he just twists or turns it a certain way." Dr. Stiver noted that Petitioner had good strength, prescribed a Medrol Dosepak and Prednisone for about two to three weeks, and recommended that Petitioner follow up in four weeks unless he was asymptomatic. Petitioner was off work from August 8, 2011, through October 30, 2011.

At his January 13, 2012, deposition, Dr. Stiver opined that Petitioner's MRI showed inflammation of the supraspinatus, one of the rotator cuff muscles, as well as swelling within the tendon. Dr. Stiver noted that impingement syndrome is an irritation of the supraspinatus tendon. On cross-examination, Dr. Stiver noted that during Petitioner's left shoulder surgery, he found thickened or inflamed bursal tissue, which covers the supraspinatus tendon. Dr. Stiver opined

that the inflamed bursal tissue caused Petitioner's symptoms. Dr. Stiver also opined that Petitioner's left shoulder MRI showed soft tissue impingement and spurring underneath the acromion, and that spurring has "got to be huge to see on a plain x-ray." Lastly, Dr. Stiver opined that Petitioner's condition would not have improved when he stopped performing repetitive activities if he had already developed bursal tissue in the left shoulder. Dr. Stiver noted that on October 12, 2011, Petitioner had no functional loss in his left shoulder.

At his March 29, 2012, deposition, Dr. Lehman opined that x-rays will show "a substantial subacromial spur" if present, and the x-rays that he performed at the time of the section 12 examination showed no evidence of subacromial spurring. Dr. Lehman also opined that a Lidocaine stress test is when Lidocaine is injected into the subacromial space to see whether the place that is injected is the source of the symptoms. On cross-examination, Dr. Lehman agreed that supraspinatus tendinopathy can cause pain.

DISCUSSION

The Arbitrator found that Petitioner did not sustain a work-related repetitive trauma injury to his left shoulder that manifested on January 29, 2010. The Commission disagrees.

The Commission finds that Dr. Paletta's opinions are credible and persuasive as he performed Petitioner's April 2007 left shoulder surgery and had first-hand knowledge of Petitioner's left shoulder condition during that time. In his report, Dr. Paletta noted that Petitioner "did quite well" after undergoing the 2007 surgery for a SLAP tear, and "was returned to full work and continued to do well until about December or January of [2010] when he began to note the onset of some left shoulder pain and tightness." This is consistent with Petitioner's testimony that his left shoulder symptoms improved and were nothing like what he had experienced prior to the 2007 surgery. In addition, the Commission finds that Dr. Stiver's opinions are more persuasive than Dr. Lehman's opinions. The July 9, 2010, left shoulder MRI showed increased signal within the supraspinatus tendon, which was compatible with tendinopathy. Dr. Stiver opined that impingement syndrome is an irritation of the supraspinatus tendon, and the MRI showed inflammation and swelling of the supraspinatus tendon, which is evidence of impingement syndrome. In apparent agreement with each other, Dr. Stiver opined that spurring has "got to be huge to see on a plain x-ray," and Dr. Lehman testified that x-rays will show "a substantial subacromial spur." The Commission notes that both Dr. Paletta and Dr. Stiver diagnosed Petitioner with left shoulder impingement syndrome.

The Commission finds that Petitioner's left shoulder SLAP tear resolved after the 2007 surgery and Petitioner returned to full duty work until January 29, 2010, when his repetitive trauma injuries to the elbows and left shoulder manifested. The Commission awards all medical expenses related to Petitioner's left shoulder condition, in addition to the medical expenses the Arbitrator awarded for treatment related to Petitioner's bilateral elbow condition. The Commission also awards Petitioner additional temporary total disability benefits from August 8, 2011, through October 30, 2011.

With respect to the nature and extent of Petitioner's left shoulder disability, Petitioner testified that after Dr. Stiver performed the left shoulder surgery, the constant tightness he had experienced prior to the surgery improved. Currently, Petitioner's left shoulder tires more easily and it is more difficult to perform his work duties and overhead activities than it was prior to the surgery. Additionally, Petitioner's left shoulder aches when he lies down on his left side, and he experiences some left shoulder weakness. At his deposition, Dr. Stiver testified that as of October 12, 2011, Petitioner had no functional loss in his left shoulder. The Commission finds that Petitioner's left shoulder injury caused the loss of use of 7.5 percent of the person-as-a-whole pursuant to section 8(d)(2).

In regards to Petitioner's permanency award for a prior left arm injury, the Commission finds that Respondent is not entitled to credit. In *Killian v. The Industrial Comm'n*, 148 Ill. App. 3d 975, 500 N.E.2d 450 (1st Dist. 1986), the appellate court denied an employer credit under section 8(e)(17) of the Act for a prior permanent partial disability award made to a claimant for an injury to the back. Thereafter, the claimant reinjured his back two times. As a result of the subsequent back injuries, the Commission found that the claimant sustained a loss to the person-as-a-whole under section 8(d)(2), and found that the employer was entitled to credit for the prior permanency award. On appeal, the appellate court found that the employer was not entitled to credit for the prior permanency award; reasoning that an employer can receive a credit for previously paid benefits only when an employee has reinjured a body part or member listed in section 8(e), and the "back" is not listed as a "member" under section 8(e). In addition, the appellate court held that "credits should be interpreted narrowly and should not be extended by implication." *Killian*, 148 Ill. App. 3d at 979.

In the instant case, Petitioner received a permanency award for a prior left shoulder injury under section 8(e)(10). Subsequently, the appellate court held that permanency awards for shoulder injuries must be awarded under section 8(d)(2), instead of as a scheduled loss to the arm under section 8(e). *Will County Forest Preserve District v. Workers' Compensation Comm'n*, 970 N.E.2d 16, 25 (3d Dist. 2012). In accordance with *Will County*, the Commission has awarded Petitioner permanent partial disability benefits under section 8(d)(2) for his left shoulder injury, which is the subject of the instant case. The Commission finds that Respondent is not entitled to credit for the prior left shoulder injury as an employer can receive a credit for previously paid benefits only when an employee has reinjured a body part or member listed in section 8(e), and the "shoulder" is not a "member" under section 8(e). The Commission declines to extend the concept of credit to the interpretation of section 8(d)(2) in accordance with *Killian*.

Lastly, the Commission affirms the Arbitrator's award of medical expenses, temporary total disability benefits and permanent partial disability benefits with respect to Petitioner's compensable repetitive trauma injuries to the right and left elbows.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on November 1, 2012, is hereby modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all reasonable and necessary medical expenses for treatment related to Petitioner's left shoulder and bilateral elbow conditions under §8(a) and §8.2 of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $564.70 per week for 21-6/7 weeks, from August 24, 2010, through October 31, 2010, and from August 8, 2011, through October 30, 2011, which are the periods of temporary total disability for which compensation is payable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $508.23 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, because the injuries sustained caused permanent partial disability equivalent to 7.5 percent loss of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $508.23 per week for a period of 82.23 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused permanent partial disability equivalent to 15% loss of use of the left arm and 17.5% loss of use of the right arm.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $43,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2014
MJB/db
o-01/28/14
52

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAGAN, CHRIS
Employee/Petitioner

Case# **10WC005322**

CONTINENTAL TIRE NORTH AMERICA INC
Employer/Respondent

14IWCC0191

On 11/1/2012, 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 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1459 LEVENHAGEN LAW FIRM PC
T FRITZ LEVENHAGEN
4495 N ILLINOIS ST SUITE E
BELLEVILLE, IL 62226

0299 KEEFE & DEPAULI PC
JAMES K KEEFE JR
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FAIRVIEW HTS, IL 62208

0693 FEIRICH MAGER GREEN & RYAN
KEVIN L MECHLER
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Chris Ragan
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # 10 WC 05322

Consolidated cases: _____

14IWCC0191

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **May 3, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent with respect to the shoulder only?
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 to the shoulder only?
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 related to the testing and treatment of the shoulder? Has Respondent paid all appropriate charges for all reasonable and necessary medical services for the shoulder only?
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 _____

14IWCC0191

FINDINGS

On **January 29, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment as to the Petitioner's left shoulder.

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

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

In the year preceding the injury, Petitioner earned $**34,923.95**; the average weekly wage was $**847.05**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**4,194.91** for TTD, $ for TPD, $ for maintenance, and $**4,180.00** for non occupational indemnity disability benefits and $11,181.06 in other benefits.

Respondent is entitled to a credit for any money previously paid with respect to this claim under Section 8(j) of the Act.

ORDER

The Respondent shall pay the Petitioner Temporary Total Disability benefits from August 24, 2010 through October 31, 2010.

The Respondent shall pay the Petitioner $508.23 / week for 37.95 weeks as the Petitioner sustained a 15% loss of the use of the left arm.

The Respondent shall pay the Petitioner $508.23 / week for 44.28 weeks as the Petitioner has sustained a loss of 17.5% of the right arm.

The Petitioner is not awarded the medical bills for the left shoulder with total balances of $12,845.69 because the testing and treatment for the left shoulder was not reasonable, necessary or causally related to his work activities.

The Petitioner is not awarded any PPD benefits for the shoulder as the Petitioner failed to prove that the condition arose out of and in the course of his employment.

The Respondent is entitled to credit for amounts paid by work comp for the elbows and group for the left shoulder.

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

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

Deborah L. Simpson
Signature of Arbitrator

Oct. 31, 2012
Date

NOV - 1 2012

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Chris Ragan,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 10 WC 05322**
	)	
Continental Tire North America,	)	
	)	
Respondent.	)	**14IWCC0191**
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on January 29, 2010, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They further agree that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act, that the Petitioner sustained accidental injuries or was last exposed to an occupational disease that arose out of and in the course of employment as to his elbows only, and petitioner's current condition of ill-being is causally connected to this injury or exposure as to his elbows only. Finally, the parties agree that the petitioner is entitled to TTD from 8/24/10 through 10/13/10.

At issue in this hearing is as follows: (1) did the Petitioner sustain accidental injuries on January 29, 2010 to his left shoulder that arose out of and in the course of his employment with the Respondent; (2) is the Petitioner's current condition of ill being with respect to his left shoulder causally connected to this injury or exposure; (3) is the Respondent liable for the unpaid medical bills contained in Petitioner's Exhibit number 1 with respect to testing and treating the Petitioner's left shoulder; (4) Is the Petitioner entitled to TTD from 10/14/10 through 10/31/10 and 08/08/11 through 10/30/11; and (5) the nature and extent of the injury.

STATEMENT OF FACTS

The Petitioner is employed by the Respondent as a truck tire builder. He has worked for the Respondent in that position since January of 1992. The Petitioner alleges that he sustained injuries to both of his elbows and to his left shoulder as a result of his repetitive work activities working for the Respondent as a truck tire builder. As to the bilateral elbow condition the only issues in dispute between the Petitioner and Respondent are the claim for TTD benefits from October 14, through October 31, 2010, and the nature and extent of the injury. The Respondent disputes all issues regarding the left shoulder.

The Petitioner testified that his job duties as a truck tire builder are described in a job description attached to Dr. Beatty's medical records which he wrote out for the doctor. (P. Ex. 3) He stated that he is required to repetitively push and pull on sidewall books, shoulder pad books, bead books, and ply-up cassettes. As part of his job he is required to scrape out inner liners on the tires. While building truck tires, he is required to meet a rate of 150 tires per shift. He throws tire tread weighing 30 - 60 pounds on a tread tray and performs repetitive lifting at or above shoulder level. He testified that the way that the machine is set up at his work station he uses his left arm more for overhead lifting than his right arm. He is required to use hand and power tools including a zip stitcher, hand stitchers, rubber knifes and a paint brush. (P. Ex. 3). He testified that the job description he provided to Dr. Beatty and the job description attached to the deposition of Dr. Lehman (marked as P. Ex. 4) accurately describes some of the job duties that he was required to perform as a truck tire builder leading up to his injury of January 29, 2010.

The Petitioner testified that on January 29, 2010, he was performing his regular job duties as a truck tire builder and while he was building a tire his arms and elbows got very painful. As he was lifting, he felt increased pain in both of his elbows and his left shoulder. He knew that he was going to need medical treatment so he reported the injury to his supervisor. When he reported the injury to his employer a written Injury/Incident/Illness Report had to be prepared and signed by the Petitioner's supervisor. This was done on January 29, 2010.

On January 29, 2010, the Petitioner was sent to Health Services at the plant. The doctor at Health Services told the Petitioner to wear wrist splints and referred him to Work-Fit, the onsite physical therapy facility. The Petitioner testified that he had physical therapy for his left shoulder at Work Fit. The records reflect that the Petitioner was not able to attend physical therapy before or after work due to child care issues, he was allowed to attend physical therapy on work time. (P. Ex. 2)

On March 18, 2010, petitioner saw Michael Beatty, M.D. for the treatment of his bilateral elbow symptoms. Dr. Beatty noted that petitioner was a truck tire builder who noticed fifth finger numbness over the past few months. Dr. Beatty's examination found a positive Tinel's at the bilateral cubital tunnels. Dr. Beatty recommended nerve testing. Dr. Beatty also reviewed the petitioner's handwritten job description and in his letter of March 25, 2010, to T.Fritz Levenhagen, Esq. he wrote "... it would be my opinion with the knowledge of his work activity as a truck tire builder that that activity would be the causative basis for the development of the cubital tunnel problems involving the ulnar nerve." (P. Ex. 3)

The Petitioner returned to Health Services and saw Dr. Byler who issued a prescription for physical therapy which was performed at Hamilton Memorial Hospital. The Petitioner received physical therapy for both his elbows and his left shoulder at Hamilton Memorial Hospital. (P. Ex. 9) The Petitioner testified that he had difficulties with tenderness on his left shoulder and that the therapist had to adjust his therapy when using a warm pack on it. The pressure of the warm pack caused the Petitioner increased pain.

Dr. Beatty ordered nerve conduction studies that were performed on April 1, 2010 by Dr. Edward Trudeau. The testing was consistent with bilateral cubital tunnel syndrome. (P. Ex 4).

The nerve conduction studies confirmed Dr. Beatty's diagnosis of bilateral cubital tunnel syndrome. There was no current evidence of cervical radiculopathy or brachial plexopathy or mononeuritis in the left shoulder. The Dr. Trudeau thought that perhaps it was too early or too mild to document electrodiagnostically at that point in time. (P. Ex. 4, report page 5 of 8) Based upon the nerve conduction studies, Dr. Beatty recommended bilateral cubital tunnel releases. (P. Ex. 3).

On April 23, 2010, the Respondent sent the Petitioner to be examined by George A. Paletta, Jr., M.D. at the Orthopedic Center of St. Louis. According to Dr. Paletta's report the petitioner complained of bilateral elbow pain and numbness and tingling in the fourth and fifth fingers. Dr. Paletta found positive impingement signs in the left shoulder and positive ulnar nerve compression tests and positive Tinel's sign at the elbows. Dr. Paletta reviewed the nerve studies and shoulder x-rays. Dr. Paletta diagnosed impingement syndrome of the left shoulder and bilateral cubital tunnel syndrome, left greater than right. Dr. Paletta recommended an injection into the left shoulder and surgical intervention for the elbows. In his report, Dr. Paletta states "In my opinion, his ulnar neuropathy or cubital tunnel syndrome is causally related to the repetitive nature of his work requirements." (R. Ex. 8)

The Petitioner had previously undergone a left shoulder surgery with Dr. Paletta on April 12, 2007, that consisted of repair of a labral tear, subacromial decompression, bursectomy and acromioplasty. (R. Ex. 7) The Petitioner received an award for 25% loss of use of the left arm for that injury and surgery. (R. Ex 10). The Petitioner testified that the shoulder symptoms improved but never totally resolved from the 2007 surgery.

On May 26, 2010, petitioner saw Phillip Stiver, M.D. in Evansville, Indiana for treatment of his left shoulder symptoms. Dr. Stiver noted that petitioner underwent a prior SLAP repair in 2007 and recently began having achiness in the left shoulder area. On examination, Dr. Stiver found crepitance and a positive Grind's test. Dr. Stiver's impression was possible irritation from the prior labral repair or impingement syndrome. He ordered a left shoulder MRI scan. The Petitioner was allowed to return to work full duty with no restrictions. (P. Ex. 6, deposition exhibit #2 attached).

On July 9, 2010, an MRI of the left shoulder was performed at St. Mary's Medical Center in Evansville, Indiana. According to the report of the radiologist, findings were consistent with supraspinatus tendinopathy. (P. Ex. 6, deposition exhibit #2 attached)

On July 16, 2010, Dr. Stiver reviewed the results of the MRI scan with the Petitioner. Dr. Stiver found impingement and spurring on the MRI scan and recommended surgical intervention. The Petitioner was permitted to work pending approval of worker's compensation for the surgery. Worker's compensation denied the surgery. (P. Ex. 6, deposition exhibit #2 attached)

On August 24, 2010, Dr. Beatty performed a release of the ulnar compressive neuropathy at the right elbow at Anderson Hospital. According to the operative report, Dr. Beatty identified the ulnar nerve proximal to the medial epicondyle and found it to be covered by an intermuscular band that was released. Dr. Beatty then proceeded to identify the nerve at its entry point at the

medial epicondyle and visualized a very tight musculofascial banding in that area which was released. Dr. Beatty relieved compression from the ulnar nerve well into the forearm. Dr. Beatty took Petitioner off work as of August 24, 2010. (P. Ex. 3)

On September 17, 2010, Dr. Beatty performed a release of the ulnar compressive neuropathy at the left elbow at Anderson Hospital. According to the operative report, an incision was made and Dr. Beatty approached proximal to the medial epicondyle where he had to incise through an area of overlying intermuscular band to uncover, identify, and demonstrate the ulnar nerve proximal. Dr. Beatty felt this could account for compression of the nerve. Just distal to the medial epicondyle, Dr. Beatty found a thick fascial muscular attachment that was incised and released the nerve. (P. Ex. 3)

On September 24, 2010 the Petitioner saw Dr. Beatty for follow-up after his surgery. The sutures were removed from the left elbow and he was given permission to begin physical therapy on his right elbow. He was instructed to return in four weeks. (P. Ex. 3)

On October 12, 2010, respondent sent petitioner for a Section 12 examination with David Brown, M.D. Dr. Brown recommended that petitioner continue with supervised therapy and return to work with restrictions. Dr. Brown opined that the Petitioner could return to work with full use of his right arm and with about a five to ten pound lifting limit with the left upper extremity. It was further stated that he could return to full duty with no restrictions in four to five weeks. (R. Ex. 2)

On October 25, 2010 the Petitioner saw his Dr. Beatty for follow-up at which time he was given permission to return to work limited duty for two weeks with the plan being he would progress to full duty in two weeks. (P. Ex. 3) The Petitioner testified that he chose to continue to remain off from work at the recommendation of his treating surgeon, Dr. Beatty. Petitioner remained off from work at Dr. Beatty's recommendation continuously from August 24, 2010 until October 31, 2010.

On November 10, 2010, the Petitioner reported by telephone to Dr. Beatty that he was still experiencing discomfort on the limited duty and would like to continue on limited duty for another week before returning to full duty. Dr. Beatty agreed and wrote a slip ordering one more week of restricted duty, return to full duty on November 22, 2010. (P. Ex. 3)

On March 14, 2011, Dr. Stiver wrote a letter to T. Fritz Levenhagen, attorney at law. In that letter he wrote that the spurring and impingement that the Petitioner suffered in his left shoulder was in his opinion directly related to the Petitioner's work duties. (P. Ex. 6, deposition exhibit 2 attached)

On May 24, 2011, petitioner saw Richard Lehman, M.D. pursuant to Section 12 of the Act. Dr. Lehman did not find any objection evidence of pathology in petitioner's left shoulder and stated that he did not believe that petitioner's work activities aggravated his left shoulder. He stated, and testified at his deposition that the treatment that the Petitioner had received to date, including the excellent x-rays that were taken at Dr. Lehman's office were reasonable and necessary. He opined that the Petitioner did not need any other treatment for his left shoulder.

(R. Ex. 9, pp. 18-25, plus R. deposition exhibit #2 attached) Dr. Lehman opined further that Dr. Paletta was seeking to treat the subjective complaints of the Petitioner rather than the objective findings, which were that there was no impingement or degeneration and there has to be objective findings before doctors treat with invasive techniques such as injections. (R. Ex. 9 pp. 23-26)

On July 20, 2011 petitioner returned to Dr. Stiver with complaints of continuing achiness, crepitance, and grating the left shoulder. Dr. Stiver renewed his recommendation for surgical intervention and the procedure was scheduled. The Petitioner indicated he would go through his private insurance and worry about worker's compensation in the future. (P. Ex. 6, deposition exhibit #2 attached)

On August 8, 2011, Dr. Stiver performed a left shoulder arthroscopic subacromial decompression at St. Mary's Surgicare in Evansville, Indiana. The Petitioner remained off from work at the recommendation of Dr. Stiver from August 8, 2011 until October 30, 2011 after the surgery. (P. Ex. 6, deposition exhibit #2 attached) The Petitioner attended physical therapy at Hamilton Memorial Hospital for his left shoulder condition. (P. Ex. 9)

The Petitioner last saw Dr. Stiver on October 12, 2011 at which time he was prescribed a Medrol Dosepak. (P. Ex. 6, deposition exhibit #2 attached)

The Petitioner took Dr. Stiver's deposition on January 13, 2012. At that time Dr. Stiver testified that he diagnosed the Petitioner with impingement syndrome, which is really an irritation of the supraspinatus tendon, based upon his review of the July 9, 2010, MRI and clinical examination. (P. Ex. 6 p. 10). He recommended surgery that would involve shaving off the undersurface of the acromion to remove any spurring. (P. Ex. 6 pp. 10-11). Dr. Stiver then testified that he performed the subacromial decompression on August 8, 2011. (P. Ex. 6 pp. 11-12). Dr. Stiver opined, based upon Petitioner's job description that required a lot of lifting, pushing, pulling and use of the arm at shoulder height or above that the job activities as a tire builder were a cause in the condition and the need for surgery. (P. Ex. 6 pp. 15-16).

On cross examination, Dr. Stiver admitted that the x-rays he performed at his office of the Petitioner's left shoulder were normal. (P. Ex. 6 p. 29). He admitted that the radiologist did not report any soft tissue spurring on the July 9, 2010, left shoulder MRI. (P. Ex. 6 pp. 30-31). He also acknowledged that if a relationship existed between the jobs duties and left shoulder symptoms then if Petitioner refrained from those activities he would expect the symptoms to improve. (P. Ex. 6 pp. 33-34). Dr. Stiver admitted that as of October 12, 2011, there was no functional loss in the left shoulder as a result of the surgery. (P. Ex. 6 p. 36).

The Respondent took the deposition of Dr. Richard Lehman on March 29, 2012. Dr. Lehman testified that the x-rays performed at his office showed normal spacing at the AC joint with no evidence of subacromial spurring or AC joint arthritis. (R. Ex. 9 p. 9). He testified that x-rays would pick up any substantial subacromial spur or loss of distance between the acromial humeral space. (R. Ex. 9 pp. 9-10). He testified that upon his physical examination of the Petitioner that there was no objective evidence of impingement syndrome. (R. Ex. 9 p. 10). He also explained that the lidocaine stress test was negative and that the test is used to determine the

source of the patients' symptoms or pathology. (R. Ex. 9 pp.10-11). Dr. Lehman opined within a reasonable degree of medical certainty that because he could not identify any pathology in Petitioner's left shoulder that he did not require any additional testing or treatment for the pain that the Petitioner was experiencing. (R. Ex. 9 pp. 11-12).

Dr. Lehman reviewed the operative report and medical records from Dr. Stiver. After doing so, he stated that in his opinion the surgery was neither reasonable nor necessary. (R. Ex. 9 pp. 13-14). Dr. Lehman testified that the typical treatment regimen for subacromial bursitis is anti-inflammatory medication followed by physical therapy which in 85-90% of the cases improves the condition. (R. Ex. 9 p. 15). If those methods fail, then cortisone injections are typically offered before surgery. (R. Ex. 9 p. 15). Finally, Dr. Lehman opined that the complaints in Petitioner's left shoulder would not be related to his job duties at Respondent. (R. Ex. 9 p. 15).

The Petitioner testified that he has been fully released by Dr. Stiver and has no further appointments. The Petitioner testified that he remained off from work at the recommendation of Dr. Beatty from August 24, 2010 through October 31, 2010. He testified that, similar to when he was placed on light duty and undergoing physical therapy, during the time he was off of work for the two surgeries his symptoms with respect to his left shoulder did not improve. The Petitioner further testified that he was paid his temporary total disability benefits from August 24, 2010 until October 14, 2010.

Following his left shoulder surgery, the Petitioner remained off from work at the recommendation of Dr. Stiver from August 8, 2011 through October 30, 2011. During the time that he remained off from work for his left shoulder condition, he received gross Accident & Health Benefits in the amount of $4,180.00.

The Petitioner testified that the medical bills admitted into evidence at arbitration as Petitioner's Exhibit #1 pertain to the treatment that he received for his left shoulder injury. Petitioner testified that the treatments he received improved his symptoms. The Petitioner testified that although he has had improvement with his elbows, he continues to have aching discomfort at a level of a 2 on a scale of 1 to 10. He testified that he especially has pain in his elbows when stitching tires, throwing tread and bead dumping. This discomfort he experiences increases with activities.

The Petitioner testified that he also experiences increased discomfort during cold weather. Petitioner testified that he has difficulty holding a power washer when he washes his car because of elbow discomfort. He constantly switches hands, his arms ache and tire easy. The Petitioner feels that he has loss of strength in his elbows and has difficulty picking up and holding his 5-year old daughter for any period of time due to his loss of strength and the fact that his arms tire easily; he cannot play sports with his son like catch or baseball.

The Petitioner further testified that his elbows wake him up at night. Some nights he will only sleep three to four hours at a time. His elbows wake him up with tingling. He still takes Tylenol once a day because of his elbow symptoms. He testified that his elbow pain comes and goes and that some days his discomfort is worse than others.

With regard to his left shoulder, the Petitioner testified that the shoulder surgery performed by Dr. Stiver improved his symptoms and that before the surgery his shoulder was tight and the tightness was constant even when he was performing light duty. He testified that he has lost strength in his shoulder since his injury and that he has difficulty sleeping on his left side because of shoulder discomfort. He has difficulty with overhead activities in using his left arm and shoulder. He has difficulty playing sports with his son and especially shooting a basketball because of his left shoulder condition. He mentioned that he had difficulty pushing and pulling on cassettes and picking up and loading the KUK using his left shoulder. He has definitely noticed a loss of strength in his left shoulder.

The Petitioner acknowledged that light duty was offered to him at the time that Dr. Brown released him to light duty. Petitioner testified that he decided to remain off from work at the recommendation of his treating surgeon rather than attempt to return to a light duty position. However, the petitioner did not believe that the light duty position would have caused him any physical harm.

CONCLUSIONS OF LAW

An injury is accidental within the meaning of the Worker's Compensation Act when it is traceable to a definite time, place and cause and occurs in the course of the employment unexpectedly and without affirmative act or design of the employee. *Matthiessen & Hegeler Zinc Co. v Industrial Board,* 284 Ill. 378, 120 N.E. 2d 249, 251 (1918) If the condition or injury is not shown to be traceable to a definite time, place and cause and no evidence shows that the work activity caused the physical condition, compensation will be denied. *Johnson v. Industrial Commission,* 89 Ill.2d 438, 433 N.E.2d 649, 60 Ill.Dec. 607 (1982)

An injury arises out of one's employment if it has its' origin in a risk that is connected to or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. vs IndustrialCommission,* 58 Ill. 2d 226, 317 N.E.2d 515 (1974) "Arising out of" is primarily concerned with the causal connection to the employment. The majority of cases look for facts that establish or demonstrate an increased risk to which the employee is subjected to by the situation as compared to the risk that the general public is exposed to.

We therefore hold that the date of an accidental injury in a repetitive trauma compensation case is the date on which the injury "manifests itself." Manifests itself means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home vs Industrial Commission,* 115 Ill.2d 524, 505 N.E.2d 1026, 1029, 106 Ill.Dec. 235 (1987)

In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed

disability. See *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953)

The burden is on the party seeking the award to prove by a preponderance of credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Hannibal, Inc. v. Industrial Commission*, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967)

Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Commission*, 37 Ill.2d 123, 227 N.E.2d 65 (1967)

Did the Petitioner sustain accidental injuries on January 29, 2010 to his left shoulder that arose out of and in the course of his employment with the Respondent? Is the Petitioner's current condition of ill being with respect to his left shoulder causally connected to this injury or exposure?

These two questions are closely related and the evidence for both of them is the same so they will be discussed together.

Both Dr. Paletta and Dr. Stiver initially diagnosed the Petitioner with left shoulder impingement, Dr. Stiver admitted on cross examination that the x-rays did not support that diagnosis. Dr. Lehman, examining the Petitioner and reviewing the same x-rays did not find that the Petitioner had left shoulder impingement syndrome. Petitioner did not prove that he sustained an injury to his shoulder on January 29, 2010.

While Dr. Paletta and Dr. Stiver diagnosed left shoulder impingement syndrome in 2010, the Petitioner did not prove that the condition is causally related to his job activities. This conclusion is based primarily upon the Petitioner's testimony that even though he felt the pain started with his job activities, he testified that the condition worsened when he was initially placed on light duty and worsened again when he was off work nearly two months for the bilateral elbow surgeries.

The Petitioner's testimony confirms the opinions of Dr. Stiver and Dr. Lehman that if an activity is responsible for a condition and the activity is removed then the condition should improve. Here, Petitioner unequivocally stated the condition did not improve when the work activities were removed by placing him on restricted duty and later when he was off of work for the two elbow surgeries. Further, Petitioner testified that prior to January 29, 2010, he still experienced left shoulder problems with overhead activities away from work.

The Petitioner did not prove that he sustained an accidental injury involving left shoulder impingement syndrome and did not prove that the condition is causally related to his work activities for Respondent.

Is the Respondent liable for the unpaid medical bills contained in Petitioner's Exhibit number 1 with respect to testing and treating the Petitioner's left shoulder?

There was no objective evidence to support the diagnosis of impingement syndrome for surgery. There were no objective tests establishing that the Petitioner had any impingement in his shoulder before the surgery on May 24, 2011. Dr. Lehman was the last physician to examine the Petitioner before surgery on May 24, 2011. He testified that based upon the examination and the negative lidocaine test there was no evidence of impingement syndrome. The examination was consistent with the x-rays from all three physicians that did not show any spurring consistent with impingement syndrome.

The Petitioner did not attempt any conservative treatments prior to surgery when at least an injection was offered. Dr. Paletta, who performed Petitioner's left shoulder surgery in 2007, felt medications and an injection were a reasonable course of treatment for the Petitioner's left shoulder. Dr. Lehman testified that the typical course for impingement syndrome is medications, physical therapy and then injections before undergoing surgery. Other than the physical therapy in early 2010 when the Petitioner first complained of the pain and which was stopped at the Petitioner's request the Petitioner did not attempt any other conservative treatments.

The Petitioner did not prove that the left shoulder surgery performed by Dr. Stiver on August 8, 2011, was reasonable and necessary

Is the Petitioner entitled to TTD from 10/14/10 through 10/31/10 and 08/08/11 through 10/30/11?

The Petitioner has undergone two surgeries for the injuries to his elbows which arose out of and in the course of his employment and were related to his current condition of ill being. His treating physician took the Petitioner off of work beginning on August 24, 2010 with the first elbow surgery and kept him off of work from that date until after the second surgery which occurred on September 17, 2010. The Petitioner was released by his treating physician to return to work light duty beginning on October 31, 2010. He was permitted to return to work full duty on November 22, 2010. The Petitioner is entitled to TTD from October 14, 2010 through October 31, 2010.

The Respondent offered light duty based upon the determination of Dr. Lehman that the Petitioner could return to work and the Petitioner refused the light duty. However, it was Dr. Lehman's opinion that the Petitioner could have returned on October 14, 2010, but as Dr. Lehman pointed out in his report after the Section 12 examination, he is not the treating physician.

The Petitioner is not entitled to TTD for the time that he was off between August 8, 2011 and October 31, 2011 for the shoulder surgery.

The Respondent shall pay temporary total disability benefits to the Petitioner for the time period between October 14, 2010 and October 31, 2010, the additional time that the treating physician kept the Petitioner off of work. The Respondent shall have a credit for all temporary

total disability benefits previously paid and shall receive a credit for $4,180.00 in accrued non-occupational disability benefits paid.

What is the nature and extent of the injury?

As a result of the injuries sustained on January 29, 2010, the petitioner sustained 15% permanent partial disability of the left arm and a 17.5% permanent partial disability of the right arm based upon the diagnosis and treatment of the Petitioner's cubital tunnel.

ORDER OF THE ARBITRATOR

The Respondent shall pay the Petitioner Temporary Total Disability benefits from August 24, 2010 through October 31, 2010.

The Respondent shall pay the Petitioner $508.23 / week for 37.95 weeks as the Petitioner sustained a 15% loss of the use of the left arm.

The Respondent shall pay the Petitioner $508.23 / week for 44.28 weeks as the Petitioner has sustained a loss of 17.5% of the right arm.

The Petitioner is not awarded the medical bills for the left shoulder with total balances of $12,845.69 because the testing and treatment for the left shoulder was not reasonable, necessary or causally related to his work activities.

The Petitioner is not awarded any PPD benefits for the shoulder as the Petitioner failed to prove that the condition arose out of and in the course of his employment.

The Respondent is entitled to credit for amounts paid by work comp for the elbows and group for the left shoulder.

Deborah L. Simpson
Signature of Arbitrator

Oct 31, 2012
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tommy Oliver,

Petitioner,

vs. No. 11WC028718

Rausch Construction Company Inc.,

14IWCC0192

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to an order of remand from the Circuit Court of Cook County. In accordance with the order of the circuit court entered on June 27, 2013, the Commission considers the issues of penalties pursuant to sections 19(k) and 19(l), and attorney fees pursuant to section 16 of the Illinois Workers' Compensation Act, and being advised of the facts and law, finds that Petitioner is not entitled to penalties or attorney fees as stated below.

On July 28, 2011, Petitioner filed an Application for Adjustment of Claim, alleging that on July 20, 2011, he sustained injuries to his body as a whole while working for Respondent. Subsequently, Petitioner amended the application to allege that the work accident occurred on July 19, 2011.

On October 3, 2011, Petitioner filed a petition for penalties pursuant to sections 19(l) and 19(k) and attorney fees pursuant to section 16, claiming that Respondent had not paid temporary total disability benefits or Petitioner's medical bills. On October 4, 2011, Respondent filed a

response asserting that it had subpoenaed Petitioner's medical records and informed Petitioner's attorney of its need for additional records to determine compensability. In her decision, the Arbitrator made no specific findings with respect to penalties and attorney fees; however, she awarded section 19(l) penalties in the sum of $4,230.00, section 19(k) penalties in the sum of $17,011.59 and section 16 attorney fees in the sum of $6,804.64.

On review, Respondent argued that the Arbitrator erred by awarding penalties and fees. Respondent maintained that Petitioner's failure to report a work injury on the alleged date of accident was a reasonable basis for challenging liability. Respondent relied on the testimony of Patrick Kutzer, Respondent's site superintendant and Petitioner's supervisor on July 19, 2011, who testified that Petitioner did not appear to be in pain and did not report an accident on that date. Petitioner did not inform Mr. Kutzer of his reported work injury until July 25, 2011. Respondent posited that Petitioner could have sustained a right elbow injury between July 19, 2011, and July 25, 2011.

In response, Petitioner contended that Respondent's failure to pay temporary total disability benefits and medical bills was unreasonable, vexatious and solely for the purpose of delay as the medical records fully supported Petitioner's claim. The fact that Petitioner reported the accident six days after it occurred does not create a reasonable basis for Respondent's failure to pay benefits as Petitioner credibly testified that his right elbow condition worsened after he went home on July 19, 2011.

On November 26, 2012, the Commission issued a Decision and Opinion on Review and found that:

> "penalties pursuant to sections 19(k) and 19(l), and attorney fees pursuant to section 16 should not be imposed against Respondent in the present case. Respondent's conduct in the defense of this claim was neither unreasonable nor vexatious as **there were legitimate issues in dispute with respect to accident and causal connection, such as Petitioner's failure to report a work accident on his last day of work, Petitioner's request to fill out an accident report six days after the reported work injury and Mr. Kutzer's testimony.**" (Emphasis added).

Petitioner appealed to the Circuit Court of Cook County.

On June 27, 2013, the circuit court issued an order on appeal, stating:

> "This matter is remanded to the Illinois Workers' Compensation Commission for further findings of fact regarding the Commission's decision regarding penalties and attorneys fees. If testimony has not been taken on this issue, then such testimony should be heard. If facts have already been presented on this then the Commission needs to reduce its inferences to findings of fact."

In compliance with the circuit court's order, the Commission expands on the reasons why it found Petitioner ineligible for penalties and attorney fees as stated in its November 26, 2012, Decision and Opinion on Review. The Commission denies Petitioner's request for penalties pursuant to sections 19(k) and 19(l) and attorney fees pursuant to section 16 based on the following: (1) although Petitioner alleged he injured his right elbow on his last day of work, he failed to report he had sustained a work accident that day; (2) Petitioner sought medical treatment and requested to complete an accident report six days after the reported work injury; and (3) Mr. Kutzer, Petitioner's supervisor on the day of the accident, testified that Petitioner did not appear to be in pain and did not report an accident on the day he claimed it occurred. These facts provide reasonable explanations for Respondent's denial of Petitioner's claim and show that Respondent's refusal to pay benefits was not frivolous, vexatious or solely for the purpose of delay.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is not entitled to penalties pursuant to sections 19(k) and 19(l), and attorney fees pursuant to section 16 of the Act.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2014
SJM/db
o-02/13/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OLIVER, TOMMY
Employee/Petitioner

Case# **11WC028718**

14IWCC0192

RAUSCH CONSTRUCTION CO INC
Employer/Respondent

On 3/9/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MITCHELL HORWITZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

1832 ALHOLM MONAHAN KLAUKE ET AL
BETH YOUNG
221 N LASALLE ST SUITE 450
CHICAGO, IL 60601

14IWCC0192

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

Tommy Oliver
Employee/Petitioner

v.

Rausch Construction Co., Inc.
Employer/Respondent

Case # **11** WC **28718**

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 **J. Kinnaman**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **2/21/2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/19/2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$84,801.60**; the average weekly wage was **$1,630.80**.

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

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,087.20/week for 12.429 weeks, commencing 8/1/2011 through 10/25/2011, as provided in Section 8(b) of the Act.
Respondent shall pay reasonable and necessary medical services of $20,510.37, as provided in Sections 8(a) and 8.2 of the Act.
Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 50.6 weeks, because the injuries sustained caused the 20% loss of the right arm, in addition to Petitioner's previous loss of use of 20% of the right arm, as provided in Section 8(e) of the Act. Respondent shall have credit for Petitioner's prior loss of use of the right arm, to the extent of 47 weeks. Petitioner now has a 40% loss of use of the right arm.
Respondent shall pay to Petitioner attorneys' fees of $6,804.64, as provided in Section 16 of the Act; and penalties of $17,011.59, as provided in Section 19(k) of the Act; and $4,230.00, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

March 6, 2012
Date

MAR - 9 2012

This matter was originally tried before Arb. Galicia on Oct. 4, 2011. After the close of proofs, Arb. Galicia's appointment terminated and the case was assigned to the undersigned. On Nov. 10, 2011, Respondent filed a motion for a new hearing, which was allowed. ARBXGroupX4. The claim was tried de novo on Feb. 21, 2012.

Petitioner testified he is a pile driver. A pile driver constructs foundation walls for high rise buildings and to hold back water. He cited the corrugated steel walls used to hold back Lake Michigan around the Shedd aquarium or the walls shown in PX6A around Belmont Harbor as examples. Pile drivers batter a pile into the earth to hold up the sheets and do tie backs to secure the steel walls to the piles. They also do a lot of heavy lifting of things like chain, cable and shackles, lifting up to 150 to 200 lbs. Pile drivers cut and weld the steel sheets, wearing a protective face shield and protective leather so they don't get burned. Petitioner testified he gets bumps and bruises on the job; he doesn't report each one.

Petitioner testified he was working for Respondent on July 19, 2011. They were burning a wall at Belmont Harbor to cut it to grade. This means they were cutting the steel wall so it was level with the ground behind it and the concrete cap could be placed on top. Some of the sheets had chemical in them, which the pile drivers burn off. Petitioner was wearing protective clothing and goggles, not a helmet, because he was just burning, not welding. He was using an acetylene and oxygen torch to cut the steel. He was working with Tita Gosten, a co-worker, to burn off pieces of steel. Petitioner marked PX6A with an X to show where he was positioned. As he was cutting the wall to grade, the fire from the torch on the sheeting and the chemical in the sheeting was extremely hot and caused him to strike the back of his right elbow on the steel. Petitioner testified he said "Damn, it hurts" but figured it wasn't that bad. He kept working and was laid off as of the end of the day. At that time, he noticed there was a little swelling and he had busted the skin a little bit. He did not report the bump to his elbow that day. He testified he is left handed.

Petitioner noticed over the next few days that his arm started swelling. He saw Dr. Waxman on July 25, 2011. The doctor's note shows Petitioner reported he hit his elbow on a metal beam at work a week or so ago. He complained of swelling and some discomfort that night. Dr. Waxman also noted Petitioner had a triceps avulsion which had been repaired 10 or so years earlier. On exam there was swelling over the olecranon bursa of the right elbow with significant weakness of elbow extension. The doctor suspected another triceps avulsion, noting a little bone fragment proximally in the posterior arm. He ordered an MRI. It was done the next day, July 26, 2011 and showed a full-thickness tear of the triceps tendon. PX1.

Petitioner testified he called Respondent on Monday, July 25, 2011 after seeing Dr. Waxman. He spoke to a secretary and asked to get an accident report done. She referred him to Pat, his foreman. He called Pat Kutzer on July 25, 2011and told him he "...wanted to report it because I think I'm hurt." Tr.30. Petitioner testified Pat told him he should

have reported it that day, and would not give him an accident report, even though Petitioner tried to explain he didn't know he was hurt at the time. Petitioner filed this claim on July 28, 2011. ARBX2.

Petitioner underwent surgery on Aug. 1, 2011, a "repair of rerupture, right biceps tendon.". Petitioner's prior surgery and the incident in which he hit his elbow on a steel beam 10 days earlier were both noted in the operative report. It also shows Dr. Waxman identified a defect in the triceps tendon and observed a significant amount of bursal and scar tissue overlying the triceps. The doctor wrote that the appearance of the tissue and all the scar tissue, made it appear Petitioner's ruptured left triceps tendon may not have been just two weeks old, "although the injury and swelling were certainly just at that point, and he had no real significant issues prior to that, so some of the scar tissue certainly could have been from the prior triceps repair." PX2. Petitioner followed up with Dr. Waxman post-surgery and underwent physical therapy beginning Aug. 18, 2011. The therapist recorded Petitioner's report that he was injured when welding and a piece of fire/slag fell on his chest and burned him, causing him to react and hit his elbow on a steel support, rupturing his triceps. Petitioner was discharged from therapy on Oct. 24, 2001. PX3.

Dr. Waxman released Petitioner to return to work with no lifting over 15 lbs. with the right arm and told him to continue his strengthening exercises and not trying to do too much too quickly, particularly at work. On Dec. 14, 2011, Dr. Waxman noted Petitioner was "pretty much doing all of his normal activities" but advised him to slowly get back to heavy lifting writing it could take six to nine months to do so. At that time, Petitioner had full range of motion with some mild triceps weakness, good flexion strength and no tenderness. PX1.

Petitioner testified that when he was released Oct. 25, 2011, he went back to work with the help of others. Most of the time, Petitioner is a foreman. He testified he notices he doesn't have full use of his arm. When he's welding it hurts to keep his right arm elevated. He has pain in the joints of the arm. Lifting hurts especially, lifting something into a truck. He understands this is just something he has to live with. He has not been back to Dr. Waxman. The doctor gave him some pain pills, but he doesn't use them unless it's bad. Petitioner testified he injured his right arm in 1999 when he fell 20 feet while working. He did not remember when he stopped treating for that injury but thought it was about a year later. From 2000 until July19, 2011 he had no treatment for his right arm. Petitioner also testified Respondent has never paid any benefits related to the July 19, 2011 injury, telling him only it was because he didn't report the accident on the day it happened.

On cross-examination, Petitioner testified he had been a pile driver for more than 20 years at the time of his injury. He assumes Tita Gosten saw him bump his elbow. Tita told Petitioner he heard him say he hurt himself and asked Petitioner if he was ok. He hollered out a little bit after he bumped his elbow. But "I didn't holler out because I

thumped by elbow. I hollered out because the fire hit me in the chest. When I hit my elbow, I said oh, shit... and then he asked me, was I okay?" Tr. 47. When he left for the day on July 19, 2011, he knew the job was over. Petitioner testified first that the accident probably occurred in the afternoon, then that it was probably before noon and then that he was assuming it happened sometime in the afternoon. Tr.48-9. In the period from July 20, 2011 to July 25, 2011, he didn't work or do any work around the house or play any sports. On July 19, 2011, he noticed bruising when he got in his truck and pulled off his clothes. He noticed a little blood but didn't pay it any mind and then it started swelling that night and got worse over the next couple of days. He didn't call Respondent or go to a doctor during this period. He only worked for Respondent for three days. They gave him paperwork that included their accident reporting policy that he could have read if he wanted. He fell about 20 ft. on May 4, 1998 and injured his right elbow. He had surgery for that accident. From roughly 2000 to 2011, he never treated for his right elbow. After the rehab, which was painful, his arm was good and he worked full time. He did no gym activities where he was lifting weights in the period from July 19 to July 25, 2011. After he was released to work Oct. 25, 2011, he had a job working for Aretha Construction, but he didn't know the dates when he started and when he was laid off. He last treated for his right elbow injury Dec. 14, 2011.

Patrick Kutzer testified for Respondent. He is a union carpenter working for Respondent as a site superintendent. In July, 2011 he was working for Respondent at Belmont Harbor. Petitioner worked for him as one of a four-man pile driving crew on a Friday, Monday, and Tuesday, which would be July 15, 18, and 19, 2011. During those three days he interacted with Petitioner before work started, at break times and lunch times. On July 19, 2011Kutzer supervised Petitioner's work all day. When he saw Petitioner in the course of the day, he didn't notice Petitioner having any pain or problems. He testified first that he didn't recall speaking to Petitioner that day but then testified he knew they spoke after work because it was Petitioner's last day. Kutzer testified he shook Petitioner's had and thanked him for his help and said he hoped to run into him again on another job. He has not seen Petitioner since July 19, 201. The following Monday Petitioner called to say he wanted Kutzer to fill out an accident report for the last day he was there because he had hurt himself at work. This would have been on July 25, 2011. Kutzer said he "couldn't fill out an accident report a week after the incident occurred." Tr. 67. It was Kutzer's experience as a superintendent or a job foreman that "we have always had to fill it out the day of the incident. I didn't know you could even fill one out after the fact." Tr.68. After July 19, 2011 the job continued at Belmont Harbor but they didn't have work for a four- man crew anymore; other pile drivers were also laid off. Kutzer has burned sheet pile with a torch hundreds of times. You are cutting it with an oxy-acetylene torch. "....sometimes that molten metal or sparks or slag will blow back at you in your direction, not away from you...It happens regularly. Tr.70-1. On cross-examination, Kutzer testified he knows of no factual basis to dispute that Petitioner got injured at work on July 19, 2011, or of any medical basis to dispute the injury. As far as Kutzer knows, the only issue the employer has with this case is that Petitioner reported it six days after the accident.

PX4 consists of Petitioner's medical bills. He is claiming reimbursement pursuant to sec. 8(a) and 8.2 of the Act for unpaid amounts as follows: $13,047.33, Highland Park Hospital; $8,424.72, Illinois Bone & Joint; $1,431.17, Northshore University Health System Anesthesia; $168.78, Northshore University Health System Lab; $429.70, Northshore University Health System Physician Billing; $23,501.70 total. Respondent questioned whether the bills had been fully reduced to the amounts allowed by the medical fee schedule and was given time to do its own analysis of the bills. In its proposed decision, Respondent argued it was not liable for any of the bills. If liability were found, Respondent argued Highland Park Hospital was only entitled to $10,056.00 representing 76% of its charges because the bill did not include CPT codes.

RX2 is a certified copy of the Commission's records in 98WC56083 showing Petitioner's prior settlement for 20% loss of use of his right arm for an accident on May 4, 1998. Petitioner agreed Respondent was entitled to credit for that settlement. Tr.82. In his proposed decision, Petitioner claimed interest on his unpaid medical bills pursuant to sec. 8.2(d)(3) of the Act.

The Arbitrator concludes:

1. Petitioner sustained a compensable accident on July 19, 2011 when he struck his the back of his right elbow on a steel wall. He testified he was cutting the wall using a torch when he was struck by molten metal and, in reaction, hit his elbow. His job superintendent, Pat Kutzer testified sparks or metal or slag regularly blow back on workers. Petitioner described the accident to treating doctor Waxman and his physical therapist. Although Petitioner did not report the accident the same day, his testimony that he did not realize he'd suffered a serious injury was credible. Striking one's elbow is often acutely, but temporarily, painful so a reasonable person might not realize serious there was a serious injury.
2. Petitioner gave timely notice of his accident. Respondent's witness, Pat Kutzer, corroborated Petitioner's testimony that he reported the accident on July 15, 2011, six days after the accident and well within the 45 days allowed by the Act.
3. Petitioner's right triceps rupture was causally connected to his accident of July 19, 2011. Petitioner had a prior right triceps rupture in 1998 which resulted in surgery. There is no evidence he had any complaints, restrictions, lost time or medical treatment to his right triceps in the period between his return to the heavy work of a pile driver in 2000 and July 19, 2011. Dr. Waxman's surgery was to repair the rerupture and he identified the defect, although he was surprised at the amount of scar tissue he found.
4. Petitioner was temporarily totally disabled commencing Aug. 1, 2011 through Oct. 25, 2011, a period of 12-3/7 weeks. This is based on the records of Dr. Waxman showing Petitioner underwent surgery Aug. 1, 2011 and was released with restrictions on Oct. 25, 2011. Although the first off work authorization is dated Aug. 4, 2011, it is apparent Petitioner was physically unable to work beginning the day of his surgery.

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

Ray Williams,

Petitioner,

vs.

No. 11WC009552

14IWCC0193

Rush Medical Center University,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission clarifies that the names of the medical practitioners who treated Petitioner at Rush University Medical Center Employee Health, "respondent's facility," are illegible as most of the medical records are handwritten, and it is unclear whether Petitioner treated with a physician named Mamta Malik while at Rush.

14IWCC0193

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on March 8, 2013, is hereby clarified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all reasonable and necessary medical expenses for his lumbar spine condition, incurred on or before March 8, 2011, under §8(a) and §8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $576.22 per week for 7-2/7 weeks, from January 14, 2011, through March 5, 2011, which is the period of temporary total disability for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Stephen J. Mathis

DATED: MAR 18 2014
SM/db
o-02/13/14
44

David L. Gore

Mario Basurto

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

WILLIAMS, RAYMOND
Employee/Petitioner

Case# **11WC009552**

RUSH PRESBYTERIAN UNIVERSITY
Employer/Respondent

14IWCC0193

On 3/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4188 LAW OFFICES OF KIRK MOYER PC
33 N COUNTY ST
SUITE 602
WAUKEGAN, IL 60085

2965 KEEFE CAMPBELL BIERY & ASSOC
JAMES EGAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

2512 THE ROMAKER LAW FIRM
CHARLES P ROMAKER
134 N LASALLE ST SUITE 840
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

RAYMOND WILLIAMS
Employee/Petitioner

Case #11 WC 9552

v.

RUSH PRESBYTERIAN UNIVERSITY
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 14, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On January 14, 2011, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $44,945.03; the average weekly wage was $864.33.
- At the time of injury, the petitioner was 58 years of age, *married* with no children under 18.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $576.22/week for 7-2/7 weeks, from January 14, 2011, through March 5, 2011, which is the period of temporary total disability for which compensation is payable.
- The medical care rendered the petitioner for his lumbar spine through March 8, 2011, was reasonable and necessary. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Robert L. Williams

Robert Williams

3/8/13

Date

MAR 8 - 2013

FINDINGS OF FACTS:

On January 14, 2011, the petitioner, an electrician, injured his back while trying to prevent a 12-foot ladder from falling. He received immediate care at respondent's facility for a lumbar strain/lumbago with Dr. Mamta Malik.

A lumbar MRI on January 25th revealed degenerative disc and facet changes at L4-L5 with mild to moderate foraminal stenosis, greater on the right and narrowing of the lateral recesses with mild central stenosis and a small disc protrusion or osteophyte at L5/S1 extending into the left foramen along with degenerative changes involving the left L5/sacral articulation. The petitioner followed up through January 26th, at which time he was released to full-duty work.

On February 5th, the petitioner started chiropractic care with Dr. James Kopsian and was advised not to work. Dr. Aleksandr Goldvekht at Advanced Physical Medicine evaluated the petitioner on February 10th and noted that an MRI showed a L5/S1 disc protrusion with foraminal stenosis. He advised the petitioner not to work. Dr. Goldvekht's diagnosis was lumbar disc syndrome, strain/sprain of the lumbar spine, and radiculitis. He advised the petitioner not to work until March 3rd and prescribed physical therapy, medication and a lumbar orthotic. On March 3rd, Dr. Goldvekht released the petitioner to full-duty work without restrictions beginning March 8, 2011.

On March 7th, the petitioner was evaluated pursuant to Section 12 by Dr. Zelby and reported sharp pains in his low back extending into the lower lumbar region bilaterally since the accident. The doctor opined that except for the petitioner's diabetic peripheral neuropathy and non-anatomic sensory changes, he had a normal neurologic and spine examination and was at MMI.

The petitioner was evaluated by Dr. Harel Deutsch of Rush University on August 26th pursuant to the request of Dr. Rohini Bhat and reported nine months of low back and anterior leg pain that had gradually increased over the past few weeks. Dr. Deutsch noted no low back tenderness to palpation, limited range of motion in all directions, normal paraspinal muscle bulk, no erythema or swelling and a loss of signal at L4/5 and diffuse disc bulging with facet arthropathy on a diagnostic study. On September 13th, the petitioner had an anterior lumbar interbody fusion of L4-5 by Dr. Deutsch at Rush. At a follow-up on October 28th, the petitioner reported some improvement from the surgery and Dr. Deutsch opined that the petitioner should be able to return to work in two months.

On March 28, 2012, Dr. Deutsch opined that the petitioner exacerbated his pre-existing degenerative disc disease condition. X-rays on May 8th revealed a partial sacralization of L5 bilaterally, fusion at L4 and L5 and a narrowing of the L4-5 disc space. On July 3rd, the petitioner saw Dr. Krzysztof Siemionow for an evaluation, who recommended a CT scan and MRI to determine if there was a non-union of the L4-L5 fusion. An MRI on August 2nd revealed the fusion at L4 and L5, an element of congenital mid/lower lumbar spinal canal narrowing and degenerative disc, endplate and joint changes with stenosis worst at L4-5.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar spine through March 8, 2011, was reasonable and necessary. The petitioner failed to prove that the medical care rendered after March 8, 2011, was reasonable and necessary, including the lumbar fusion by Dr. Deutsch. The petitioner was released to full-duty work by Dr. Malik on January

26, 2011, and after starting treatment with Dr. Goldvekht on February 10, 2011, he was released to work without restrictions by him on March 3, 2011. He did not complain of back pain or symptoms nor did he seek medical care again until August 28, 2011, at which time he reported that his back pain had gradually increased over the prior few weeks. Also, on March 7, 2011, Dr. Zelby noted that the petitioner's neurological and spine examination was normal and that he was at maximum medical improvement. Further, Dr. Zelby opined at his deposition that the MRI showed that the petitioner's disc space heights were maintained indicating only mild degenerative disc disease, which was not indicative for surgery. Moreover, the petitioner complained that his back pain was worst after surgery. The opinions of Dr. Deutsch and Dr. Siemionow are not consistent with the evidence and are not given any weight.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that his current condition of ill-being with his lumbar spine is causally related to the work injury.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The respondent shall pay the petitioner temporary total disability benefits of $576.22/week for 7-2/7 weeks, from January 14, 2011, through March 5, 2011, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner failed to prove that the care recommended by Dr. Siemionow is reasonable medical care necessary to relieve the effects of the work injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ Affirm 07 WC 19768	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with comment	☐ Rate Adjustment Fund (§8(g))
☒ Reverse 07 WC 19686	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Henry,

Petitioner,

vs.

NO: 07 WC 19686
07 WC 19769

Sodexho,

14IWCC0194

Respondent.

DECISION AND OPINION ON REVIEW

Petitioner and Respondent appeal the Decision of Arbitrator Erbacci in a §19(b) proceeding finding that for case 07 WC 19686, Petitioner sustained accidental injuries arising out of and in the course of his employment on June 1, 2006, that timely notice was given to Respondent, that a causal relationship exists between those injuries and his condition of ill-being for his right knee, but that Petitioner failed to prove that a causal relationship exists between those injuries and his condition of ill-being for his left shoulder and left arm, that Petitioner was temporarily totally disabled from November 14, 2007, the date of right knee surgery, through June 11, 2008, the date of a functional capacity evaluation, a period of 30 weeks at $412.00 per week, that Respondent was entitled to credit of $23,739.20 for paid TTD benefits, ordered Respondent to pay all medical expenses for Petitioner's right knee treatment and found Petitioner failed to prove entitlement to vocational rehabilitation and maintenance benefits. The issues on Review are whether Petitioner sustained accidental injuries arising out of and in the course of his employment, whether timely notice was given to Respondent, whether a causal relationship exists between those injuries and Petitioner's current condition of ill-being and if so, the extent of Petitioner's temporary total disability, the amount of reasonable and necessary medical expenses and whether Petitioner is entitled to vocational rehabilitation and maintenance benefits.

The Commission, after reviewing the entire record, reverses the Decision of the Arbitrator for case 07 WC 19686 finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on June 1, 2006, failed to prove he gave timely notice to Respondent and failed to prove that a causal relationship exists and denies Petitioner's claim for the reasons set forth below.

Petitioner appeals the Decision of Arbitrator Erbacci in a §19(b) proceeding finding that for case 07 WC 19769, Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on March 27, 2007, failed to prove he gave timely notice to Respondent and failed to prove that a causal relationship exists and denied Petitioner's claim. The issues on Review are whether Petitioner sustained accidental injuries arising out of and in the course of his employment, whether timely notice was given to Respondent, whether a causal relationship exists between those injuries and Petitioner's current condition of ill-being and if so, the extent of Petitioner's temporary total disability, the amount of reasonable and necessary medical expenses and whether Petitioner is entitled to vocational rehabilitation and maintenance benefits. The Commission, after reviewing the entire record, affirms the Decision of the Arbitrator for case 07 WC 19769 for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner filed an Application for Adjustment of Claim on May 2, 2007, which listed a date of accident of June 1, 2006 and alleged injury to the right knee and leg within the course of his employment. This claim was assigned case number 07 WC 19686.

Petitioner also filed an Application for Adjustment of Claim on May 2, 2007, which listed a date of accident of March 27, 2007 and alleged injury to the right knee and leg within the course of his employment. This claim was assigned case number 07 WC 19769.

2. The claims were consolidated for arbitration hearing held on April 25, 2013. Petitioner's attorney voluntarily dismissed case 07 WC 19685, an Application for Adjustment of Claim that was filed claiming a left arm injury on September 1, 2005 (Tr 7). At this hearing Petitioner, a 51 year old school maintenance worker, testified he is not currently employed. He began working for Respondent in 2003 (Tr 9). He worked in the Maintenance Department and would do plumbing, electrical, carpentry and anything else needed at the school (Tr 9). In 2006 the main supervisor was Bruce Davis (Tr 9). Petitioner was assigned to work at Stevenson High School (Tr 10). Petitioner testified that on June 1, 2006, "We got a load of carpeting in and the Maintenance Department was sent out to unload the truck. We had two guys with two different forklifts going. One guy had the skewer that would, like, grab the carpet; and the other guy had a forklift that had a long cable on it, with the bar at the end. My job was to take that, the bar with

the long cable, throw it through the core of the carpeting and it would pull it to the front of the truck. And then I would straighten the bar so he could back up. And then we would go through the whole process again. And then the other person would come and with the other forklift truck with the skewer or whatever and he would take the carpet and take it off of the truck, once it was at the back of the trailer. So I had – Well, I was working with Jim Managо with the cable and the bar, going through, and then Jose Rivera was the guy on the forklift truck. And we were going along for a while. And then Bruce Davis all of sudden was on the forklift truck and he came in. I had three carpets there because – well, I had three carpets lined up in the back of the truck, and he came in really fast because he hadn't been there because Jose was driving the truck, and then he skewered the one load of carpet and I was still trying to get the – or I had just gotten the cable out of the roll, and when he started he skewered the roll and I didn't have a chance to back up because there were, like, eight or ten-foot rolls of carpeting, you know, like this big (indicating), like – I don't know how to say that, you know, for Henry, but you couldn't put your arms; they were real big. The diameter of the carpeting, yeah, right. So when he skewered it and he started to back up, he didn't go straight. He went at an angle. And what it did, I was trying to back up away from the carpeting to get out of the way and he pinned my leg between two rolls of this carpeting" (Tr 10-11). "My right leg. And as he was backing up and he was kind of like lifting at the same time, well, first my leg got crushed in. And I said, "Well," to myself, "this isn't too bad because it's just, you know, pressure." But as he was lifting up and going out at an angle and he was pushing the carpeting in, it cleared the top roll of that piece of carpeting and he steamrolled me and it twisted the top part of my body in a circle, while the bottom – well, well, below my knee was trapped between the two big rolls of carpeting." (Tr 12-13). Mr. Davis lifted the roll and left with it. Petitioner was in a lot of pain. He was able to push the roll of carpet with his other leg and free himself (Tr 13). His right leg was really hurting (Tr 13).

Petitioner testified that Jim Managо came up with the other forklift and asked him what was going on because he was acting a little different (Tr 14). Jim Managо was kind of the go-to guy and, "He is not really an official supervisor, but he is put in charge when there is no other supervisors around." (Tr 14). Jim Managо had been at the school since it opened. Jim Managо can tell Petitioner where to go and what to do and to stop doing some sort of activity and do something else (Tr 14-15). Petitioner observed Jim Managо exercising supervising other employees (Tr 16). When Jim Managо came into the trailer, Petitioner told him, "I told him that Bruce just hit me or he just twisted me up with the forklift truck." (Tr 16). Petitioner testified he got himself out of the truck and started going into the building. He heard Bruce Davis zipping around in the forklift and Petitioner looked at him and stayed out of his way and found himself a quiet corner (Tr 17). He rested and did not do anything after that (Tr 17). At that time, Petitioner did not think he could do anything and was hobbling and limping (Tr 17).

Towards the evening, Petitioner spoke with night supervisor Calvin Carter in the Maintenance Department by his toolshed (Tr 18). No one else was present. Petitioner testified he told Calvin Carter, "Bruce hit me with the forklift truck." (Tr 18). Petitioner then went home (Tr 18). The next day, Friday, June 2, 2006, Petitioner took it real slow as he was hurting and

did not do much (Tr 18-19). He relaxed over the weekend and he did not take pain medications (Tr 19). Petitioner took a vacation at the end of July 2006 (Tr 19). Over his vacation, his right knee got better (Tr 20). Petitioner thought it was something that would just pass (Tr 20). He returned to work after his vacation and continued to work through March 26, 2007. During that time, Petitioner continued to work pretty much on his own and did what he wanted. He vacuumed the dryers in the bathrooms and also worked on the drinking fountains (Tr 21). He would feel better and then do something heavier and his right leg and left arm would hurt and he would stop (Tr 21).

On March 26, 2007, Petitioner was working in the new building and they were taking up carpeting. They were pulling the carpeting off the floor (Tr 22). He began work at 8:00 a.m. and worked through the day (Tr 22). Removing the carpeting entailed using a shovel and spade with a flat edge. Petitioner testified, "I would put the shovel in my left hand, the handle. And then the right hand I grabbed, you know, towards the base. And I would take it and I would jam it between the cement floor and the carpeting where the grove was. And you just keep on slamming it, trying to break the bond between the carpeting and the cement floor." (Tr 23-24). He had to use his upper body to push (Tr 24). His motion was like a baseball pitcher, bending his legs, throwing back his left leg, bending his right leg, twisting his body, bending his torso and slamming into it (Tr 24). He is tall and had to bend his right knee to get lower into the carpeting (Tr 24). He was using his left hand and his whole left arm for slamming and his right arm for lifting (Tr 25). Petitioner worked with the carpeting all day. The carpeting was cut into rolls and he was supposed to carry the rolls to a truck outside. By the end of the day, Petitioner could not get the carpet rolls on his left shoulder anymore as he did not have the strength and the pain was starting to overtake him and he just could not do it anymore (Tr 26). His left shoulder and right leg were in pain (Tr 26). Every slam would jar his body (Tr 26).

Petitioner testified he came to work on March 27, 2007 and tried to do carpet removal (Tr 27). He put in about 3 slams and could not take the pain anymore. Petitioner testified, "My leg, my arm, my entire body, I was so racked with pain I didn't know where it was coming from at that point in time." (Tr 27). He told the guys, "I'm just not a mule. I can't take it anymore. This is it, guys." Petitioner stated that the guys said they would cover for him and he said he could not (Tr 27). Petitioner went to Bruce Davis and said, "I can't take it anymore. I've got to go, you know, I've got to see a doctor. I just can't take it anymore." (Tr 27-28). Petitioner testified that Bruce Davis said, "Well, go." (Tr 28).

Petitioner testified that he had his own tools at work and carried those tools on his left shoulder and experienced pain (Tr 28). Later, he acquired a cart to carry his tools. His toolbag weighed only about 10 pounds or so (Tr 29). He carried his toolbag at Respondent's facility on his left shoulder for 4½ years (Tr 29). He started using the cart after he started having pain in his left shoulder (Tr 29). Petitioner's conversation with Bruce Davis occurred on like April 3, 2007 or something like that. He had called Bruce up and he was on vacation, so Petitioner had to wait until he came back from his spring break vacation (Tr 29). When he talked to Bruce Davis on

March 27, 2007, Petitioner told him about both his left shoulder and right knee and that he was so racked with pain that everything hurt (Tr 30). Petitioner was not exactly sure if he came to work between March 28, 2007 and April 4, 2007, but he remembered they said they were still doing carpeting and not to come in (Tr 30).

Petitioner testified he saw Dr. Young on either April 3, 2007 or April 4, 2007 (Tr 31). Respondent's attorney stipulated to the deposition testimony of Dr. Young with respect to Petitioner's medical treatment (Tr 31). Petitioner believed Dr. Young gave him restrictions (Tr 32). Prior to Dr. Young giving him restrictions, Petitioner did not have restrictions for his left shoulder or right knee (Tr 32). Petitioner gave those restrictions to Arland at Respondent's facility (Tr 32). Petitioner thought Bruce Davis was on a fishing trip at that time (Tr 32). When he gave him the restrictions, Arland walked back into Ted Yarborough's office; Petitioner was not in Ted Yarborough's office and did not overhear what they were saying; Arland was an appointed supervisor (Tr 33-34). Petitioner thought Arland came out and told him that Ted Yarborough wanted to talk to him (Tr 34). Petitioner thought he went into Ted Yarborough's office and talked to him (Tr 34). Petitioner stated that Ted Yarborough told him, "Don't come back until your restrictions are lifted." (Tr 34).

Petitioner testified he underwent a right knee MRI on April 18, 2007 (Tr 34). Dr. Young recommended right knee surgery on June 11, 2007 and continued his restrictions (Tr 35). Petitioner underwent right knee surgery on November 14, 2007 (Tr 35). Petitioner identified Px15 as a true and accurate copy of the FMLA papers he received from Bruce Davis (Tr 35). He did not fill out any of those documents himself and there was handwriting on the papers already (Tr 35). Petitioner saw that Bruce Davis had signed and dated the first page of Px15 June 19, 2007 (Tr 36). On the second page of Px15, Bruce Davis gave him until July 2, 2007 to return the documents (Tr 36). Petitioner did not checkmark Section 1 of the Leave of Absence Form, which states, "Unable to perform job due to serious medical condition" and "This condition is as a result of working at Sodexho"; both are checkmarked with an "X" (Tr 36). Those checkmarks were there when Petitioner received the document (Tr 36). On July 11, 2007, Petitioner received a letter from Respondent terminating his employment (Tr 36). Petitioner identified Px10 as a true and accurate copy of this letter (Tr 37). The letter is from Ted Yarborough. Mr. Yarborough never offered him a job within his restrictions (Tr 37-38). Petitioner continued to have restrictions. Petitioner stated that workers' compensation approved the right knee surgery on October 13, 2007 and he had the surgery on November 14, 2007. On December 4, 2007, Petitioner underwent a left shoulder MRI. He underwent some physical therapy for his left shoulder until the beginning of 2008 (Tr 38). Petitioner paid for physical therapy through COBRA insurance (Tr 39). Workers' compensation did not approve the physical therapy (Tr 39). Through February 22, 2008, no doctor had released him to return to work (Tr 39). Dr. Young recommended a functional capacity evaluation on February 22, 2008.

Petitioner testified he underwent a functional capacity evaluation on June 18, 2008 (Tr 39). No doctor had released his restrictions between February 22, 2008 and June 18, 2008

(Tr 39). After the functional capacity evaluation was completed, no one from Respondent offered him his job back within the parameters of the functional capacity evaluation (Tr 40). Workers' compensation did not provide any vocational training after the functional capacity evaluation (Tr 40). Petitioner was initially represented by Newland, Newland & Newland (Tr 40). Mr. Newland had attempted to obtain vocational retraining for him, but workers' compensation did not approve vocational retraining after his attorneys made a demand for same (Tr 40). At Respondent's request, Petitioner underwent a §12 evaluation by Dr. Papierski on February 5, 2009 (Tr 42). Petitioner stated he had to wait a year before he received TTD benefits through June 11, 2008 (Tr 42). He saw Dr. Young again on May 8, 2009 and on June 9, 2009, but did not recall if he recommended anything in terms of trying to find employment (Tr 44).

Petitioner testified that on September 22, 2009, he looked for work everywhere in Lake Zurick he could think of (Tr 44). He went to the College of Lake County and met with a counselor named Candy McMahon for an analysis (Tr 44). Ms. McMahon gave him a test to see what he would be good at doing (Tr 45). Prior to going to the College of Lake County, Petitioner looked for work on his own, but was not able to find anything (Tr 45). On November 16, 2009, Petitioner met with Ed Pagelia for a vocational assessment that was requested by Newland, Newland & Newland (Tr 46). Petitioner remembered he went back to the College of Grayslake after he saw Mr. Pagelia to learn how to do a job search (Tr 46). He continued to look for work. Beginning on February 11, 2009, Petitioner started keeping a log of his job search (Tr 46). He did not recall how long he kept a log for (Tr 46). Petitioner identified Px13 as a true and accurate copy of the job log he did (Tr 47). He would not have any reason to dispute that the job log shows he continued it through June 1, 2010 (Tr 47). Petitioner guessed he applied for or listed 250 jobs (Tr 47). He also looked for approximately 50 jobs that are not listed in his logs (Tr 48). Petitioner did not continue to look for work after his log ended on June 1, 2010 as he was driving his car into the ground and it cost money and he did not have money coming in (Tr 48). Since June 2010, Petitioner has stayed home a lot, he went grocery shopping and he got Social Security Disability, which saved his life (Tr 48).

Petitioner testified he returned to Dr. Young on November 14, 2011 and he continued his restrictions (Tr 49). Through the years his left shoulder has been getting worse. When he tries to hang his laundry, he cannot even hold a clothespin and his left shoulder and left arm cave (Tr 49). He has left shoulder pain into his left arm (Tr 49). Petitioner has difficulty sleeping with his left arm and he does not know what to do with it as it is hurting (Tr 50). His right knee is not too bad. Petitioner can feel great, but if he stands up and does the dishes and if he leans forward too far and hits the spot where cartilage was taken out, he can be down for 2 days (Tr 50). For his right knee, Petitioner does not even want to get out of bed as his right knee hurts. Sometimes he is in right knee pain so badly he regrets having to go to the bathroom (Tr 50). The pain overtakes the pleasure during sex, so that is over with (Tr 51). Petitioner can stand up and go down and he sits and stands as far as he has to. He drove his car for an hour and had to take a break because the pain was so bad from being crunched up. He has to be able to stretch his right knee (Tr 51).

3. On cross-examination, Petitioner testified that one of his resumes is on top of his job search documents (Tr 51). He typed the resume and can use a computer (Tr 52). He cannot type and he pecks. He was a technician (Tr 52). The resume was done after July 2007. He first sent out his resume sometime in 2008 (Tr 52). The pictures in his job search logs were from businesscards he got from the places he went to looking for work (Tr 53). Petitioner would go into a business and ask for a job. On Page 1 is listed Affiliated Enterprises, which did not have a businesscard; Petitioner went to human resources there and was open to do anything they wanted; they did not advertise a job opening. Only the ones listed with a newspaper ad were looking for employees (Tr 54-55). The first 19 pages of his logs, Petitioner just walked in and asked, "Can I work for you?"; they were not advertising to hire people (Tr 55). Thirty pages of Px13 were cold calls (Tr 55). Petitioner testified he applied for every single job listed in Px13 (Tr 56). There was an ad for a fire service technician for which Petitioner sent a resume to; there was no phone number or address to follow-up; this was on the internet and Petitioner did not receive anything from anybody (Tr 56-57). In Wauconda there was an internet ad for a computer technician for which Petitioner sent a resume to, but he got no response (Tr 57). ITW was looking for a mold maintenance technician with a minimum 5 years of experience in plastic injection molding. Petitioner acknowledged that he did not have 5 years of injection molding experience (Tr 59-60). If there was something on the internet, Petitioner would send something on the internet (Tr 61). He did not know how to follow-up on the internet and that is what he needed help with (Tr 61). He did not follow-up on any of the resumes he sent on the internet (Tr 61-62). Petitioner did not go back to Respondent and ask for work, even after the functional capacity evaluation (Tr 62).

Before he worked at Respondent, Petitioner worked at Distinctive Business Products in Rolling Meadows as a field service technician for 2 years (Tr 63). He would go out and fix copiers. Before that, he was a service technician at Monotype Systems and he would repair typesetting machines and get new equipment ready to be sold (Tr 64). Before that, Petitioner worked for Plum Resources in Schaumburg from 1992 to 1993, where he made toner cartridges and recycled them, purchased supplies and trained personnel as a supervisor (Tr 67). Before that, he worked as a field service technician at Auto Logic in Des Plaines and did the same kind of thing working on copiers, laser printers and repairing them. Before that, Petitioner was a journeyman typesetter with Local 16 and worked at Writer-Types, a typesetting company (Tr 68). In his job search, Petitioner did not apply for a typesetter job because they no longer exist (Tr 68). Petitioner would tell a prospective employer that he cannot kneel, squat or crawl (Tr 72). He was looking for anything he could get (Tr 72).

The first time Petitioner saw his doctor was in April 2007 (Tr 73). He told Dr. Young the truth (Tr 73). Petitioner identified Rx1 as an Application for Adjustment of Claim that was filed claiming a left arm injury on September 1, 2005 and was filed in 2007 (Tr 73-75). Petitioner identified Rx2 as an Application for Adjustment of Claim with a date of accident of June 1, 2006 for a right leg injury. This is the accident he described with the rolls of carpeting (Tr 75). Petitioner identified Rx3 as an Application for Adjustment of Claim with a date of accident of

March 27, 2007 also for a right leg injury (Tr 76). Dr. Young's records would be false if they do not show any complaints of the left shoulder when he first saw him (Tr 76-77). Petitioner worked full duty for Respondent between September 1, 2005 and June 1, 2006 (Tr 77). During that period, Petitioner did some carpeting, ran some electrical lines, did some plumbing work, installed sinks, repaired hand dryers, repaired water fountains, repaired hand railings on the stairs and did some painting (Tr 77-78). From June 1, 2006 to March 27, 2007, Petitioner was doing his full job duties and all the things he just testified to (Tr 78-79). Other than breaks, he would be walking around and standing or kneeling or doing whatever (Tr 79). Petitioner stated that from March 27, 2007 until he sought treatment on April 4, 2007, he was told not to come back to work because they were doing carpeting and not to come back until they were not doing carpeting (Tr 80). Petitioner did not ask Bruce Davis, Calvin Carter, Jim Manago or Theodore Yarborough to come testify for him (Tr 80). Petitioner was provided a copy of the functional capacity evaluation, but did not remember when (Tr 81). Petitioner guessed he last saw Dr. Young in 2008 for his right knee (Tr 81-82). He has not seen another doctor since he last saw Dr. Young (Tr 83). Petitioner applied for Social Security Disability on October 18, 2011 and was awarded same (Tr 83). Social Security Disability benefits were backdated a year from the time he was granted them (Tr 85-86). He has never applied for unemployment benefits because he could not work (Tr 86).

Petitioner was shown Px15, the leave of absence request packet (Tr 86). Bruce Davis signed Page 2 and Page 3 of Px15 (Tr 86). The packet informed him about his eligibility for leave of absence and FMLA (Tr 87). Part of the packet is a medical certification form that his doctor is supposed to fill out. Petitioner did not ask his doctor to fill out this form (Tr 88). Petitioner also did not ask his supervisor to complete his part of the form (Tr 88). Petitioner acknowledged he got a letter from Respondent telling him he had failed to fill out the form and that was the reason he was terminated (Tr 88). Petitioner lives in a house which has stairs. He does his own repairs around the house. He does as much as he can regarding laundry, grocery shopping and yard work (Tr 89). During the carpeting event of June 1, 2006, Petitioner was the only one inside the truck (Tr 89). The first person that saw him there was Jim Manago (Tr 89). By the time Jim Manago saw him, Petitioner was in the process of standing up (Tr 89). Petitioner guessed Respondent gives employees two weeks of vacation time (Tr 90). Petitioner could not remember when he took his vacation in 2006 (Tr 90). Arland Aldridge worked for Respondent and left his employment about the same time when Petitioner was terminated (Tr 91). Dr. Young gave Petitioner restrictions on April 4, 2007 (Tr 91). Petitioner took those restrictions to Respondent, but did not remember who he gave them to (Tr 92). His doctor had ordered the functional capacity evaluation (Tr 92). Petitioner was not sure if he gave the functional capacity evaluation report to Respondent, but he thought the lawyers had it (Tr 93).

4. On re-direct examination, Petitioner testified that in Px15 job search documents, there is some reference to Monster.com and he filled out their online application. Petitioner identified Px17 as copies of his vacation time slips (Tr 94). Px17 shows Petitioner took a vacation in

July 2006. His heat exhaustion problem was in 2005. Px17 shows Petitioner was on vacation from week ending July 28, 2006 through the week ending August 11, 2006 (Tr 95). Petitioner received several restrictions from Dr. Young before he was terminated from Respondent (Tr 95). For each of those restrictions, Petitioner would go in to Ted Yarborough and give him the restrictions (Tr 96). Petitioner was not sure who he gave the April 4, 2007 restrictions to at Respondent (Tr 96). On re-cross examination, Petitioner testified that between June 1, 2006 when he hurt his right knee until when he began vacation on July 21, 2006, he worked at Respondent with his right knee hurting (Tr 98).

5. Petitioner's attorney made a motion to amend the Application for Adjustment of Claim for 07 WC 19769 (date of accident March 27, 2007) to add injury to Petitioner's left shoulder (Tr 99-100). Over objection, the Arbitrator allowed the Application for Adjustment of Claim to be amended to include injury to the left shoulder (Tr 101).

6. David Patsavas testified that he is a certified vocational rehabilitation consultant and has been since 1982 (Tr 103). His qualifications and experiences are listed in Rx4, his CV (Tr 103). He has been working in the field with work-related injuries in Illinois since 1986 (Tr 104). His assignments are 2/3^{rds} from employers and 1/3rd from injured workers (Tr 104). Petitioner's attorney objected, indicating he had not received any report from this witness as to what his opinions were going to be. Petitioner's attorney also observed Respondent's attorney provide Mr. Patsavas the job search documents during trial, which he believed was improper (Tr 104-105). Petitioner's attorney argued that under *Ghere* and the Rules, the Witness should not be permitted to provide opinions in this matter (Tr 105). Respondent's attorney stated that he had asked Petitioner's attorney for the job search records years ago and they were not provided (Tr 105). Respondent's attorney reminded the Arbitrator that there had been a hearing in front of him and at that time, Respondent's attorney requested the vocational counselors come in and testify live. At that time, the Arbitrator suggested the parties depose the vocational counselors. Respondent's attorney indicated that Petitioner's attorney never submitted his vocational counselor for deposition and that Respondent's attorney was bringing his vocational counselor to testify live because the depositions were not taken (Tr 105). Respondent's attorney argued that Petitioner's attorney knew that there were vocational rehabilitation witnesses on both sides (Tr 105). Petitioner's attorney indicated that he and Respondent's attorney had talked on a few occasions of why Petitioner's attorney was not taking the deposition of his expert. Petitioner's attorney did not want to take the deposition of his expert prior to receiving a report from Respondent. Petitioner's attorney indicated that Respondent's attorney was refusing to provide any report from Mr. Patsavas prior to taking his expert's deposition (Tr 106). The Arbitrator noted Petitioner's attorney's objection and reserved ruling on his objection and told him to raise it again in his Proposed Decision (Tr 107). The Arbitrator allowed Mr. Patsavas to testify (Tr 107).

Mr. Patsavas reviewed a copy of Px15 job search documents 2008 through 2010 a few minutes prior to this hearing (Tr 108). Mr. Patsavas opined that Petitioner did not conduct an adequate job search (Tr 109). There were too many gaps in the dates listed. He noted there is a reference to utilizing the College of Lake County job placement in September 2009 and there is a follow-up two months later and nothing else after that date. Mr. Patsavas was fully aware of the Lake County Job Placement Office, which offers job fairs at the college twice a year, and he did not see any listing for those. Mr. Patsavas did not see any confirmation of job applications submitted, except one or two. There was one rejection letter. He stated that if there is a resume attached there is a confirmation letter or e-mail that comes back to the individual that documents that they actually applied for the position (Tr 110). Mr. Patsavas opined that a good job search, a rehabilitation plan submitted to the IWCC, has usually a minimum of 20 employer contacts per week, an average of 3 to 4 per day. There could be job fairs, there could be direct contact with employers, there could be more internet applications and to just attach the resume to whatever job they are applying for (Tr 110). Mr. Patsavas thought Lake County had a number of manufacturing-type positions, assembly, CNC operators, security, just like most other counties around Chicago (Tr 110-111).

Mr. Patsavas reviewed Petitioner's resume. He opined that Petitioner had a solid work history from 1974 through July 2007 and opined he had transferrable skills (Tr 111). At Respondent's request, Mr. Patsavas had reviewed Petitioner's June 2008 functional capacity evaluation report. Mr. Patsavas opined that based upon Petitioner's resume and the his functional capacity evaluation report, Petitioner should be able to go back to a similar type of position that he was performing before, as far as maintenance technician, but there may be some accommodation needed (Tr 112-113). The functional capacity evaluation report indicated that Petitioner was functioning at least at the heavy to very heavy category of physical demand (Tr 113). Mr. Patsavas conducted a labor market survey based on the Illinois Department of Employment Security wage analysis for the second quarter of 2010. The labor market survey covered the period from March 1, 2012 through March 25, 2012. Mr. Patsavas concluded that the entry level average for Lake County is $10 per hour, $18 to medium level and up to $35 with experience (Tr 115). Some assembly-line positions could be anywhere from $13 to $18 per hour and up (Tr 115). Mr. Patsavas opined that Petitioner was not an entry-level applicant, unless he went to a job that was totally outside of his work experience (Tr 115). Within his work experience, the range of salary were between $13 and $18 per hour (Tr 115).

7. On cross-examination, Mr. Patsavas testified that he was first contacted by Respondent's attorney in February 2012 by phone and was hired to review Petitioner's file and offer review of records, along with performing a labor market survey. Mr. Patsavas reviewed the functional capacity evaluation report, Operative Report for the right knee surgery, a report from Mr. Pagelia and two reports from §12 Dr. Papierski (Tr 116). Mr. Patsavas drafted his report on April 4, 2012 (Tr 116). Mr. Patsavas provided that report to Respondent's attorney and he probably would have received it within a week of April 4, 2012 (Tr 117). He had no other correspondence with Respondent's attorney (Tr 117). Mr. Patsavas gave the report to Petitioner's attorney for

his review (Tr 117). He has worked with Respondent's attorney a half dozen times directly and with his office a dozen times (Tr 118). He gets paid $125 an hour and thus far he guessed his services were $1,000. Mr. Patsavas had reviewed Px13 job search documents a few minutes before testifying (Tr 118). He was aware the functional capacity evaluation report listed that Petitioner had difficulty holding up his arm and working overhead (Tr 120). He did not contact any of the employers he listed in his report to see if they had jobs available (Tr 120). Mr. Patsavas was shown Px18, an employability study done by Edward Pagelia, and stated he had reviewed this (Tr 121). He knows Mr. Pagelia on a professional basis (Tr 121). He understood Mr. Pagelia to be a competent vocational counselor and acknowledged that opinions can differ (Tr 121). Mr. Patsavas was not asked to provide Petitioner with placement services (Tr 122). Mr. Patsavas opined that based on the functional capacity evaluation results and Dr. Papierski's release, Petitioner would not require vocational assistance (Tr 123).

8. According to the medical records from Lake Cook Orthopedic Associates, Px6, Petitioner saw Dr. Young on April 3, 2007. The following history was noted, "This is a 51-year old patient who has had pain in his left shoulder and elbow for one year and has had pain in his right knee since June of 2006. He has difficulty with heavier workloads, particularly moving heavy objects. His problem with his knee began last summer when they were removing carpets at Stevenson High School where he is an independent maintenance contractor. He sustained an injury to the knee. His immediate boss was driving the forklift and his knee was pinned between two rolls of carpet. He was bumped and his body twisted while his leg was pinned. His knee became quite painful. He was hobbling and was noted to be dragging his leg for a period of time. This seemed to partially resolve after a vacation. When he returned to work, he had recurrent symptoms. He is having difficulty with stairs and ladders. He feels that the knee "separates" at times. The symptoms are on the inside of the knee with sharp pain; the patient points to the medial aspect of the knee. He has had symptoms in the left shoulder and elbow for about one year. He was performing heavy work, using a shovel or scraper to elevate carpet which had adhered to the floor. He was unable to continue this activity due to discomfort in the shoulder and elbow. He was told to go home. He had difficulty lifting a piece of plywood with the left arm. He believes his arm symptoms were increased by carrying a heavy tool bag over the left shoulder, as required by his employers, but he subsequently began to carry his tools on a cart because his shoulder pain was too intense."

On examination of the right knee, Dr. Young found tenderness along the medial joint line with a positive McMurray sign and there was no effusion or ligamentous laxity. On left upper extremity examination, Dr. Young found tenderness along the medial aspect of the left elbow, no instability, shoulder function was full and there was excellent strength, there was tenderness along the left AC joint and subacromial space and a positive arc sign. Right knee x-rays were taken and Dr. Young found them to be normal. X-rays of left shoulder were taken and revealed an os acromiale, but no other substantial bony anomalies. Medications were prescribed and a right knee MRI was ordered. Dr. Young noted that if meniscal damage was demonstrated, surgery may be considered. If there was no damage, then a rehabilitation exercise program for

his right knee and left shoulder would be recommended. He would consider a left shoulder MRI if symptoms continued. Dr. Young explained to Petitioner that the os acromiale is not a condition which was caused by his work and that it is something he probably has had since childhood. Dr. Young noted, "He apparently did not report the previous knee injury to his employers for fear of retribution since his boss was driving the forklift when he was injured but he feels something needs to be done as it has become apparent that his symptoms are not improving with time as he had hoped." Dr. Young noted that he was faxing his notes to Dr. Segal and that a workers' compensation claim to Gallagher-Bassett was pending.

On April 24, 2007, Petitioner reported ongoing problems, specifically with his right knee. It had continued to bother him particularly along the medial side, but not as greatly as in the past. He had difficulty sleeping at night and was symptomatic daily, but not as bad as his initial injury in June 2006. There was no change of the examination findings. Dr. Young reviewed the right knee MRI and it revealed some increased signal intensity in the medial meniscus and there did appear to be a tear in the medial meniscus, but not in the lateral meniscus and the ligamentous and tendinous structures appeared to be intact. Dr. Young's assessment was Petitioner was symptomatic with a right knee meniscal tear. Dr. Young recommended right knee arthroscopy and partial medial meniscectomy, to be scheduled in the near future. Petitioner reported he was having great difficulties with the workers' compensation adjuster.

Dr. Young noted on June 22, 2007 that Petitioner was last seen almost 2 months ago. Petitioner reported his right knee symptoms continued daily with his knee feeling swollen and stiff. He felt a sensation of shifting and had increased pain with full extension. Petitioner ambulated with an obvious limp. On right knee examination, Dr. Young found tenderness along the medial joint, slight effusion, lacking full extension and the last few degrees of extension were limited and there was no ligamentous laxity. Dr. Young's assessment was a meniscal tear. He noted that apparently there was considerable reluctance from workers' compensation to proceed with surgery. He noted Petitioner was not working. He noted Petitioner was previously doing some very heavy labor, removing and installing carpeting and heavy custodial work. Dr. Young opined that Petitioner was not able to function in his normal job at that point. Dr. Young released Petitioner to return to work with restrictions of no lifting, no squatting, no crawling, no kneeling, no pushing, no pulling, no climbing, no ladder or scaffold use and no carpet removal. He would await approval for the right knee surgery.

9. In a letter to Petitioner dated July 11, 2007, Px10, Theodore Yarbrough informed him that his employment with Respondent was terminated effective July 13, 2007. Mr. Yarbrough informed Petitioner, "You are not able to perform the essential functions of your job and you have failed to request a leave of absence with the forms you received on June 19, 2007."

10. According to the medical records of Lake Zurich Family Treatment Center, Px5, Petitioner saw Dr. Segal on November 9, 2007 for a pre-operative physical examination. Dr. Segal noted the following history, "In June pt got twisted all body between rolls of carpet and forklift truck, since than c/o severe pain right knee." Petitioner was cleared for surgery.

11. Advocate Good Sheperd Hospital records, Px3, indicate Petitioner underwent surgery on November 14, 2007. In his Operative Report of that date, Dr. Young noted a pre-operative diagnosis of medial meniscal tear right knee. Dr. Young performed an arthroscopy with multi-compartmental synovectomy. Dr. Young's post-operative diagnosis was chondromalacia patella lateral tibial plateau, medial tibial plateau, medial femoral condyle and multi-compartmental synovitis.

12. Dr. Young saw Petitioner on November 30, 2007 and noted Petitioner had undergone a right knee arthroscopy with multi-compartmental synovectomy and partial medial meniscectomy. Petitioner reported that his right knee was feeling dramatically better than prior to surgery. Petitioner reported he continued with left shoulder problems. Petitioner was to continue strengthening and massage for his right knee. Dr. Young noted that Petitioner's left shoulder continued to be painful since the time of his first visit. Dr. Young noted that the right knee seemed to take precedence as it was giving him a great deal of discomfort at that time. Petitioner reported that his job had been terminated since his previous visit. Petitioner complained of pain which radiated from his trapezius into his triceps and elbow and into his fingers. He had symptoms when working overhead and felt very tired. He could only use his left arm overhead for short periods. Petitioner reported that at the time of his injury, he was unable to flex his arm, but it seemed to gradually improve. However, he was continuing to have difficulties with his left shoulder on a daily basis. It felt like there was a weight on his left shoulder, which radiated to his elbow and forearm and he had a right sensation in his elbow. On examination of the left shoulder, Dr. Young found some tenderness along the trapezius and neck motion may be slightly correlated to his symptoms, finger, wrist and elbow function were totally normal, strength was normal, there was tenderness in the subacromial space and sensation was equivocally abnormal in the median nerve distribution of his left hand. Dr. Young's assment was that Petitioner may have sustained a traction injury to his left neck with continued symptomatology into his left hand. Dr. Young prescribed medications and ordered a left shoulder MRI and an upper extremity EMG.

On December 10, 2007, Dr. Young reviewed the left shoulder MRI, which revealed some mild degenerative changes in the AC joint as well as an os acromiale. There was no obvious rotator cuff tendon tear and no evidence of bicipital or labral abnormalities. Dr. Young noted, "I have discussed with him an os acromiale is a developmental problem. It is not acquired. It can be asymptomatic for years and then develop symptoms with this. Acromioclavicular arthritis similarly can be present for a prolonged period of time and then become increasingly symptomatic. I think the best course is probably not surgical in this patient as many of these will

resolve with more conservative measures including rehabilitative courses and anti-inflammatories, et cetera." Dr. Young prescribed medications and ordered physical therapy for his left shoulder. Dr. Young noted that right knee function was improving. (Px6).

13. According to the medical records of Barrington Rehabilitation and Sports Medicine, Px2, Petitioner was seen on December 11, 2007. In a Shoulder/Elbow Pain and Disability Index form that date, Petitioner noted the following history, "I have carried a tool bag "10 LBS" on my left shoulder for 3 years and now I have a constant dull ache throughout the shoulder. When holding my left arm up for a length of time such as holding electrician wiring I have to stop due to pain. Also lifting 75-100 LBS my left arm has lost its strength." In the Physical Therapy Shoulder Evaluation Report that date, the therapist noted that Dr. Young had referred Petitioner and diagnosed os acromiale and degenerative joint disease of the AC joint. The therapist noted Petitioner reported a history of repetitive use. The therapist noted, "Pt reports he was taking out carpet & his shoulder was hurting. Pt reports he has been holding a tool bag on his left shoulder. Pt has difficulty doing heavier work. Pt reports weakness & numbness & tingling into his LUE. Pt has difficulty doing any overhead task which he is required to do for work." On December 26, 2007, the therapist noted that Petitioner had attended 6 physical therapy sessions and reported his left shoulder was feeling better and felt stronger. Petitioner was to continue physical therapy for his left shoulder.

14. Dr. Young noted on January 8, 2008 that Petitioner was seen for his left shoulder, right knee and right great toe, which was from a high school injury and unrelated. Petitioner reported his right knee was very functional and he was quite pleased with the post-operative results. Petitioner reported his left shoulder was improving and physical therapy seemed to be helping with less pain and improved functioning. On right knee examination, Dr. Young found Petitioner ambulating without a limp, no crepitus, no instability, no effusion or erythema. On left shoulder examination, Dr. Young found nearly full range of motion, but it continued to be somewhat weak. He suspected gout of the great toe and prescribed medication. (Px6).

On February 20, 2008, the therapist at Barrington Rehabilitation and Sports Medicine noted that Petitioner had not returned for physical therapy since December 31, 2007. Petitioner was discharged from physical therapy. (Px2).

15. On February 22, 2008, Dr. Young saw Petitioner for his left shoulder and right knee. Petitioner reported he was generally better than prior to surgery, but still had cracking sensation in right knee. He had symptoms with using stairs, squatting or crawling. He had left shoulder difficulties, but was generally better. Petitioner reported that workers' compensation sent him 5 checks, then cut him off again. Petitioner reported that physical therapy had been curtailed as workers' compensation was not paying for that. Dr. Young noted that Petitioner had been doing better with physical therapy, but now the problem was starting to recur. Dr. Young found the same on right knee examination. On left shoulder examination, Dr. Young found range of motion somewhat limited at the extremes and somewhat uncomfortable with resistance.

Dr. Young recommended Petitioner undergo a functional capacity evaluation. On March 28, 2008, Dr. Young noted that Petitioner was the same and that workers' compensation was denying coverage for the functional capacity evaluation. He would await approval. (Px6).

16. According to the records of Lake County Physical Therapy, Px1, Petitioner underwent a functional capacity evaluation on June 11, 2008 performed by therapist Zubin Tantra. The following history was noted: "The patient reports that he was loading rolls of carpet in a semi-truck, when his boss used a forklift to pick up a roll, which pushed him and twisted his leg downwards and to the side and injured his right knee and twisted his body around. The patient tried to continue working for fear of losing his job. The patient worked almost an entire year as most of construction work outside is only three months. The patient stopped working one year later because he limped and could not drag his leg any more and he had gone to his doctor." The therapist noted Petitioner's employment was terminated in July 2007 and noted right knee surgery on November 14, 2007. The therapist also noted, "He was also having left shoulder pain since the beginning and was sent for physical therapy for the right shoulder after his knee surgery. Patient did not have physical therapy after knee surgery." The therapist noted Petitioner's job which involved some construction and carpeting. Petitioner worked in the summer in extreme heat conditions indoors and was exposed to fumes when demolishing drywall. He did a lot of bending, lifting, cutting and rolling carpet and carry carpet onto shoulder to truck. He had to hold fixtures overhead and lift up to 100 pounds. He did occasional outdoor work. He also set up bleachers, fixed lockers, toilets and other plumbing issues and changed lights. The therapist noted Petitioner complained of having difficulty holding his left shoulder and arm up for one to two minutes. He also complained of great difficulty up and down stairs, kneeling was very painful as was crawling and squatting.

The therapist noted that the Dictionary of Occupational Titles placed Petitioner's occupation as a General Laborer in the heavy strength category. The therapist noted that Petitioner met the strength requirements and may return to work as a General Laborer. The therapist noted that although Petitioner had excellent strength in his left shoulder and arm, he could not perform activities that required prolonged use of his arm overhead. He was unable to crouch fully and he had pain with prolonged kneeling activities. The therapist concluded, "He can return to any position in the heavy category that does not require prolonged overhead use of his left arm." The therapist recommended a work hardening program.

17. At Respondent's request, Petitioner saw Dr. Papierski on February 4, 2009 for a §12 evaluation. In his report of that date, Rx5, DepEx2, Dr. Papierski noted that Petitioner reported that in September 2005, his left shoulder began to have severe pain due to heavy lifting, some overhead. Dr. Papierski noted Petitioner reported he sustained a right knee injury on June 1, 2006 and had undergone surgery. Petitioner complained of increased right knee pain with walking up an incline. Petitioner also complained of intermittent left shoulder severe pain if he lifted up his left arm. There was no pain at rest and some stiffness. Dr. Papierski noted Petitioner reported his left shoulder symptoms began as he was required to carry a heavy tool bag

on his left shoulder. Petitioner also reported he was using a shovel or scraper to elevate carpet off the floors. Petitioner had brought the tool bag with him and Dr. Papierski noted it weighed close to the weight of a gallon of milk. Dr. Papierski reviewed Dr. Young records. Following his examination, it was Dr. Papierski's impression that Petitioner had 1) right knee chondromalacia, status post arthroscopy and 2) left shoulder rotator cuff syndrome with os acromiale and AC joint degenerative joint disease.

Dr. Papierski opined that it would appear from the medical records that Petitioner's right knee condition was causally related to the June 1, 2006 incident. Dr. Papierski opined that the chondromalacia was most likely a preexisting condition, but may have been aggravated by the June 1, 2006 incident. Dr. Papierski opined that Petitioner's left shoulder condition appeared to be degenerative in origin. Dr. Papierski opined that the activities reported by Petitioner did not appear to show any risk for the development of rotator cuff tendonitis. Dr. Papierski opined that the os acromiale was a developmental condition and not the result of any work activities. Dr. Papierski opined Petitioner's treatment was reasonable and necessary. Dr. Papierski opined Petitioner has reached maximum medical improvement for his right knee condition. Dr. Papierski opined that maximum medical improvement did not apply to the left shoulder degenerative condition as there would be ongoing degeneration and further symptoms worsening over time. Dr. Papierski noted that Petitioner demonstrated good strength and range of motion of his upper extremities and reasonably good right knee range of motion. Dr. Papierski opined Petitioner could probably function at the medium or medium heavy category and that a functional capacity evaluation might be helpful. Dr. Papierski opined there appeared to be no left arm injury for which future treatment would be needed, but there may be future treatment needed for the left arm degenerative condition. He opined that no future treatment was needed for the right knee.

18. Petitioner did not see Dr. Young again until May 8, 2009. On that date, Dr. Young reviewed the functional capacity evaluation report and noted that it was nearly normal and Petitioner had met the demands of a heavy to very heavy work load. Dr. Young noted, "Although he may be able to carry, lift, push, pull, etc, on the Functional Capacity Evaluation, this is done on a very limited timeframe and although he is able to accomplish these tasks, he is in pain and he is only able to do these for short periods of time." Dr. Young opined that Petitioner's right knee impairment was related to his work. Dr. Young opined that continuing overhead work was probably not something Petitioner would be able to tolerate in the future. Dr. Young suggested Petitioner look into vocational rehabilitation or look for lighter duty work. Dr. Young noted, "This would be involved primarily in sedentary type activities or standing and walking without significant amounts of lifting, carrying, pushing or pulling on a prolonged basis."

In a letter To Whom It May Concern dated June 10, 2009, Dr. Young noted that Petitioner was seen on May 8, 2009 after an absence of 14 months. Petitioner reported that it took him several days to recover from the functional capacity evaluation. Petitioner reported

continued right knee and left shoulder symptoms. Dr. Young opined that he did not believe that Petitioner was able to work at a heavy capacity for an 8 hour shift as a general laborer, but he may be able to perform such work activities for very short periods of time. Dr. Young opined that Petitioner's strength was good in the short term. Dr. Young opined that light labor or even a sedentary job was more consistent with his real life restrictions. (Px6).

19. Petitioner saw Dr. Young on October 13, 2009 and complained of ongoing left shoulder problems. Petitioner reported pain radiating between his neck and down into his fingers, worse with prolonged or stressful arm activities as well as difficulty sleeping. Dr. Young noted that Petitioner felt this was related to use of a shovel or scraper in the past when elevating carpeting from a floor as well as use of a heavy tool bag on his left shoulder. On left shoulder examination, Dr. Young found some tenderness in the subacromial space and over the AC joint, but Petitioner had a negative impingement sign, negative Hawkin's sign and negative drop arm sign. Forward elevation and abduction were limited at the very extremes and he had pain with overhead for 2 to 3 minutes. Dr. Young noted, "He is wondering if this is related to his work and the heavy tool bag and I have previously stated that I could not find a direct correlation to that causing his os acromiale or his shoulder pain but it could have aggravated his previously existing anatomical variant, which is the os acromiale, with heavy pressure across this area on a prolonged basis." Petitioner was to be seen as needed.

In a letter To Whom It May Concern dated November 9, 2009, Dr. Young noted Petitioner was seen on October 13, 2009 for ongoing left shoulder complaints, same as before. Dr. Young opined that it was possible that the use of this heavy tool bag on his left shoulder over a period of years, along with the use of the scrapper for elevating carpet, certainly aggravated that symptomatology in his AC joint, aggravating a chronic condition related to his work activities. (Px6).

20. At Respondent's request, Petitioner saw Dr. Papierski on January 28, 2011 for a §12 evaluation. In his report of that date, Rx5, DepEx3, Dr. Papierski noted that Petitioner reported he had not treated since his last visit because he had not gotten paid for the last 3 years. Petitioner reported he was unable to lift his left arm overhead, but later stated that he could get his left arm overhead, but could not hold it up there for any length of time. Petitioner reported that there was no left arm pain when he was not using it. He reported intermittent numbness and tingling in his left ring and middle fingers. Petitioner reported intermittent right knee pain, stiffness and swelling. Dr. Papierski noted that his impression had remained the same as before. Dr. Papierski opined there were no right knee restrictions. Dr. Papierski noted that he did not agree with Dr. Young that Petitioner was only able to perform sedentary work.

21. On November 14, 2011, Dr. Young noted that Petitioner was last seen 2½ years ago. Petitioner reported he underwent an independent medical evaluation and his pain increased intensely afterwards and for 6 months. Petitioner continued to complain of left arm pain radiating out to his fingers with any above the shoulder activity and numbness into his middle

and ring fingers. Petitioner reported having difficulty living this way and desired to proceed with further work-up even if it was out of his pocket. His right knee continued to bother him, especially with twisting, and the pain was dull and aching on a continual basis. Squatting or twisting increased his symptoms dramatically. He reported being unable to find work. Dr. Young's assessment was 1) chondromalacia; 2) rotator cuff capsule sprain and strain. Dr. Young opined that Petitioner may be suffering from cervical radiculopathy and ordered a left upper extremity EMG.

A left upper extremity EMG was performed by Dr. Schneider on December 14, 2011 and his assessment was left carpal tunnel syndrome. On December 20, 2011, Dr. Young reviewed the EMG and explained to Petitioner that occasionally a patient will have symptoms radiating to the shoulder from the carpal tunnel. Dr. Young could not assure Petitioner that performing a carpal tunnel release would alleviate his left shoulder symptoms. Dr. Young noted that there was no evidence of cervical radiculopathy. Petitioner was to follow-up as needed. (Px6).

22. In his deposition taken on June 13, 2012, Px12, Dr. Young testified he is a board certified orthopedic surgeon and recited his records, which are noted above. Dr. Young testified that the restrictions he issued on April 3, 2007 were no lifting greater than 50 pounds (Dp 10). On June 11, 2007, his restrictions were no lifting greater than 50 pounds, no squatting, no crawling, no kneeling, no pushing, no pulling or climbing on ladders or scaffolds and no carpet removal (Dp 13). Dr. Young opined that trauma can aggravate or exacerbate chondromalacia and synovitis. Dr. Young opined it is reasonable that the chondromalacia and synovitis for which he performed surgery on November 14, 2007 could or might have been caused or aggravated by the June 1, 2006 injury Petitioner suffered (Tr 16). In describing an os acromiale, Dr. Young explained that in the vast majority of patients, when they are very young the acromion developes from a couple of different pieces of bone which coalesce together and form solid bone. However, in a certain percentage of people that will not happen and an os acromiale will stay as a separate piece, which is hooked together by a very dense cartilage layer, but it is actually a separate bone. There is not really a joint there and that area of cartilaginous attachment is not as resilient as bone and he opined that it can be injured (Dp 19-20). Dr. Young opined that Petitioner's work activities could or might have aggravated the degenerative changes in his AC joint and this type of injury is more likely to be repetitive (Dp 23). Dr. Young opined that the os acromiale was aggravated by Petitioner's work activities (Dp 23). The aggravation could be either a one-time event or a repetitive injury and Dr. Young thought it was probably more repetitive in nature (Dp 24). Dr. Young opined that the rotator cuff tendonopathy certainly could be aggravated by Petitioner's work activities, which were repetitive in nature (Dp 24). Dr. Young opined that all three above can be asymptomatic and repetitive activity can cause them to then become symptomatic (Dp 25).

Dr. Young opined that the functional capacity evaluator's conclusion that Petitioner was fit to work at any level was ridiculous. He opined that Petitioner could do things for a short period, but that is different from doing them for 8 hours a day (Dp 27). Dr. Young opined

Petitioner cannot perform heavy work (Dp 33). Dr. Young opined that the restrictions for Petitioner's left shoulder and right knee are related to the work injuries discussed (Dp 34). On June 9, 2009 his restrictions were no squatting, crawling or kneeling, no standing greater than 30 minutes and no climbing ladders or scaffolds (Dp 34). Dr. Young indicated that the left upper extremity EMG ruled out cervical radiculopathy (Dp 38). He opined his charges were reasonable and necessary (Dp 39).

On cross-examination, Dr. Young testified he did not know how often Petitioner had the tool bag on his left shoulder (Dp 48). Dr. Young noted that at least a portion of Petitioner's job was getting worn carpeting off the floor with a shovel or scraper which involved pretty heavy pushing and repetitive shoveling against adhesed carpet to try and break up the adhesion to the floor (Dp 47). Dr. Young's opinions regarding the left shoulder were based partly on Petitioner constantly having the tool bag on his left shoulder and partly on the jamming of tools to elevate the carpet (Dp 48). He did not know how heavy the tool bag was (Dp 49). He imagined that if his left shoulder was hurting, Petitioner could have carried the tool bag on his right shoulder (Dp 49). Dr. Young opined that Petitioner's left shoulder complaints were caused or aggravated by carrying a tool bag on his left shoulder because of the added weight pulling across his AC joint and os acromiale on a repetitive basis (Dp 50). During the right knee surgery, no meniscal tear was found (Dp 53). Dr. Young opined that as people age, they have a tendency to have chondromalacia (Dp 53). Chondromalacia can be the result of a traumatic event (Dp 54). Synovitis can be developmental (Dp 55). Dr. Young opined that Petitioner is unable to do the functional capacity evaluation activities on a prolonged basis (Dp 61). Dr. Young did not know when Petitioner reported his knee injury to his employer (Dp 72). As far as he knows, Petitioner did not have medical treatment before he saw him on April 3, 2007 (Dp 73). Dr. Young opined that he believes Petitioner is employable (Dp 83). Dr. Young opined Petitioner does not need any more medical treatment and nothing was planned at that time (Dp 84). The last time Dr. Young saw Petitioner was on January 17, 2012 for complaints of left carpal tunnel syndrome (Dp 84-85).

On re-direct examination, Dr. Young opined that Petitioner reached maximum medical improvement for his left shoulder and right knee on May 8, 2009 (Dp 88). The left shoulder condition could have just worsened for that entire year and this March 27, 2007 incident was the one that brought Petitioner to him (Dp 93). On re-cross examination, Dr. Young testified that Petitioner did not report that he had sustained a right knee injury or left shoulder injury on March 27, 2007 (Dp 95-96).

23. In his deposition taken on March 1, 2013, Rx5, Dr. Papierski testified that he is a board certified orthopedic surgeon and recited his reports, which are noted above. Dr. Papierski was shown the June 11, 2008 functional capacity evaluation report and he reviewed same (Dp 19). Dr. Papierski agreed with the functional capacity evaluation report findings (Dp 20).

On cross-examination, Dr. Papierski testified that Petitioner did give March 27, 2007 as a date of onset or injury (Dp 21). This day was the first time he had reviewed the functional capacity evaluation report (Dp 22-23). Dr. Papierski testified that his opinions were not based on the functional capacity evaluation report (Dp 23). Dr. Papierski did not know details as to Petitioner's scraper use (Dp 43-44).

24. Petitioner submitted the following medical bills which were admitted into evidence:
-Px5: Lake Zurich Family Treatment Center 11-9-07. Charges: $330.00. Petitioner paid: $330.00. $0 balance due.
-Px3: Advocate Good Shepherd Hospital 11-14-07. Charges: $8,779.00. Workers' compensation paid: $2,115.10. First Health insurance paid: $957.55. Gallagher Basset paid: $5,706.35. $0 balance due.
-Px4: Barrington Anesthesia 11-14-07. Charges: $900.00. Blue Cross/Blue Shield paid: $336.00. Contractual Discount: $420.00. Petitioner paid: $144.00. $0 balance due.
-Px2: Barrington Rehabilitation and Sports Medicine. Charges: $1,802.00. Insurance paid: $491.17. Petitioner paid: $140.00. Adjustments: $1,170.83. $0 balance due.
-Px1: Lake County Physical Therapy. Charges: $1,400.00. Payments: $1,119.68. Adjustments: $280.32. $0 balance due.
-Px9: Prescription bills. Charges: $10.00.

25. Petitioner submitted job search records and these were admitted into evidence as Px13. Petitioner submitted Leave of Absence packet and this was admitted into evidence as Px15. Petitioner submitted vacation timeslips and these were admitted into evidence as Px17, which show that Petitioner was on vacation from the week ending July 28, 2006 through the week ending August 11, 2006. The Commission has reviewed the above.

26. Respondent submitted the Application for Adjustment of Claim for dismissed case 07 WC 19685 and this was admitted into evidence as Rx1. Respondent submitted the Application for Adjustment of Claim for case 07 WC 19686 and this was admitted into evidence as Rx2. Respondent submitted the Application for Adjustment of Claim for case 07 WC 19769 and this was admitted into evidence as Rx3. Respondent submitted the curriculum vitae of David Patsavas and this was admitted into evidence as Rx4. The Commission has reviewed the above.

Based on the record as a whole, the Commission reverses the Decision of the Arbitrator for case 07 WC 19686 finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on June 1, 2006, failed to prove he gave timely notice to Respondent and failed to prove that a causal relationship exists and denies Petitioner's claim. The Commission affirms the Decision of the Arbitrator for case 07 WC 19769.

In case 07 WC 19686, Petitioner testified to an unwitnessed occurrence on June 1, 2006 when his right knee was pinned between two rolls of carpet as he was in a delivery truck. However, the Commission finds that Petitioner failed to prove he sustained an injury to his right knee during this event. Although he testified to being in a lot of pain, Petitioner did not treat immediately after this occurrence and not until April 3, 2007, 10 months later. Petitioner continued to work at full duty after June 1, 2006 and performed the same duties as he had before that date. Petitioner was on vacation from the week ending July 28, 2006 through the week ending August 11, 2006. Following his vacation, Petitioner returned to and performed those same full duties. Petitioner did not seek treatment until April 3, 2007 when he saw Dr. Young. Petitioner reported to Dr. Young that he did not report this occurrence because his boss was involved. Yet, Petitioner testified he told Jim Manago and Calvin Carter about the occurrence on the day it happened. There was no accident reporting paperwork done. Petitioner did not call Jim Manago, Calvin Carter or Bruce Davis to testify. Both Dr. Young and §12 Dr. Papierski opine causation for the June 1, 2006 occurrence, but this is based on Petitioner's reports to them.

Regarding case 07 WC 19769, the Commission finds there is a total lack of proof for the left shoulder claim. The evidence indicates no accident occurred on March 27, 2007. Petitioner generally argued repetitive trauma in carrying a tool bag on his left shoulder for 4½ years, but did not testify to any details, other than the tool bag weighed about 10 pounds. The Commission further finds that Petitioner failed to prove he gave Respondent notice of any accidental injury to his left shoulder. Petitioner testified that he told Bruce Davis he could not take it anymore and he had to see a doctor. Petitioner also testified that he had a conversation with Bruce Davis on March 27, 2007 and that he told him about his left shoulder and right knee, but then testified this conversation took place on April 3, 2007. Petitioner did not call Bruce Davis to testify. When he saw Dr. Young on April 3, 2007, Petitioner reported he had symptoms in his left shoulder and elbow for about one year. Petitioner did not testify that he had notified anyone at Respondent about those symptoms during that period.

IT IS THEREFORE ORDERED BY THE COMMISSION that in case 07 WC 19686 since Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on June 1, 2006 and since he failed to prove a causal relationship exists, his claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that in case 07 WC 19769 since Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on March 27, 2007 and since he failed to prove a causal relationship exists, his claim for compensation is hereby denied.

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

DATED: MAR 19 2014
MB/maw
o01/16/14
43

Mario Basurto

Michael J. Brennan

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jordan Cole,

Petitioner,

vs.

NO: 10 WC 28458, 10 WC 28459

14IWCC0195

Tri County Coal, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability and permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causal connection as stated below.

Petitioner, a 23-year-old coal mine laborer, filed Applications for Adjustment of Claim alleging accidental injuries to his low back on October 28, 2009 and July 13, 2010. The Arbitrator found that Petitioner's current condition of ill-being is causally related to the injuries sustained. The Arbitrator relied on Petitioner's testimony that his symptoms dramatically increased after each accident – despite the evidence that Petitioner was already symptomatic from a pre-existing condition prior to each accident. The Arbitrator concluded that each accident was a causal factor in Petitioner's need for medical treatment, lost time and disability. The Arbitrator awarded Petitioner permanent partial disability benefits representing 20% of the person as a whole. On review, Respondent argues that the Arbitrator's decision should be reversed in its entirety. Petitioner seeks additional permanent partial disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner testified that on October 28, 2009 he was operating a roof-bolting machine,

drilling eight-foot bolts into the mine ceiling. While Petitioner held a bolt in place, using both hands, it "kicked sideways" from the bolting machine, causing Petitioner to twist his back. He experienced immediate pain in his back and told his coworker and supervisor what happened. Petitioner continued his shift and did not seek medical attention. (T. 20-22)

2. Petitioner offered the records of chiropractor Lisa Hart as Petitioner's exhibit 18. On October 30, 2009, Petitioner completed a questionnaire at Dr. Hart's office, where he had been a former patient. He noted a history of chiropractic treatment for the "same reason" but sought current treatment because the "pain got bad in the last few days." Petitioner indicated that his current symptoms began on "10-5." Dr. Hart's records note that Petitioner "works in coal mine lifting repeatedly & bending all day long" but that the current onset of symptoms began on October 5, 2009. There is no mention in the records of a specific accident or injury. Petitioner complained to Dr. Hart of pain in his low back and both legs, especially the left leg.

3. Respondent offered pre-accident records from Dr. Hart's office as Respondent's exhibit 1. The records reflect one chiropractic visit for complaints of sharp low back pain in June of 2001 and two chiropractic visits for bilateral hip pain occurring in April and May of 2005. Petitioner testified that he was very athletic when he was younger and developed back pain from lifting weights. (T. 45-46)

4. Petitioner returned to Dr. Hart for seven additional chiropractic sessions in November of 2009. He showed improvement with respect to back pain and left leg pain, with the left leg pain resolving completely by the end of November. He did, however, begin to complain of right leg pain. Dr. Hart noted that Petitioner was working on his farm. A November 23, 2009 lumbar x-ray revealed mild degenerative changes and an MRI was recommended for further evaluation. At Petitioner's final visit with Dr. Hart on November 30, 2009, Petitioner continued to complain of back pain of fluctuating levels of severity. He believed that the pain was localizing to the right of his lower back and Dr. Hart ordered an MRI of the lumbar spine. (PX 18)

5. There followed a seven-month gap in treatment where Petitioner continued to work full duty. Petitioner testified that he believed he no longer needed any treatment. (T. 25) The records show that Dr. Hart's office attempted to communicate with Petitioner for follow-up but he did not return any calls. Accordingly, the MRI scheduled for December 15, 2009 was cancelled. (PX 18)

6. On July 5, 2010, Petitioner went from his home to the emergency room at Jersey Community Hospital with complaints of severe low back pain. Petitioner reported that he was getting married several days later. He denied any inciting incident or injury. A lumbar x-ray showed a very minimal facet hypertrophy at the lower lumbar levels. The radiologist recommended an MRI if clinical findings suggest a disc bulge. Petitioner was diagnosed with left sciatica and treated with pain medication. (PX 4)

7. On July 9, 2010, Petitioner was seen by his primary care physician, Dr. Mapue. Petitioner complained of low back and left leg pain radiating to his foot, increasing in severity for two to three weeks, with additional left foot numbness. Petitioner stated that he had been in a work-related accident eight or nine months earlier. He told Dr. Mapue that he had previous

chiropractic treatment and was recently seen in the emergency room. Dr. Mapue diagnosed acute or chronic low back pain and sciatica and ordered an MRI. (PX 5)

Petitioner was married on July 10, 2010 and returned to work on July 12, 2010. Petitioner testified that he went to the emergency room on July 5, 2010 because he was concerned that his back pain would interfere with his wedding. (T. 28)

8. On July 13, 2010, one day after Petitioner returned to work, Petitioner alleged that he sustained a second accident while shoveling lightweight coal debris onto a conveyor belt. He testified that he felt a sudden pain and burning sensation from his lower back down his left leg, worse than any pain he had ever previously experienced. (T. 33) He testified that he was transported via ambulance to the emergency room, however no ambulance records appear in evidence. Petitioner arrived at the Memorial Medical Center emergency room with complaints of back pain with left leg pain and numbness. The emergency room records note that Petitioner worked in a mine and also performed welding and grinding work on a farm. Petitioner gave a history of feeling "something pull" in his lower back while shoveling at work. He stated that an MRI was already pending from an earlier injury. Petitioner's acute pain was treated with medication. An MRI revealed a large, left-sided disc herniation at L4-5. Petitioner was discharged from the emergency room with a diagnosis of sciatica. He was prescribed narcotic pain medications and anti-inflammatories. (PX 2)

9. On July 16, 2010, Petitioner returned to Dr. Mapue. He reported that his symptoms had not improved since he left the emergency room on July 13, 2010. A description of the October 28, 2009 accident appears in the records for the first time. Petitioner stated that while roof-bolting on October 28, 2009 he felt a pop on the left side of his lower back and made an incident report. He stated that his symptoms of low back pain with left-sided radiation would come and that chiropractic treatment gave him partial relief. Dr. Mapue referred petitioner to Dr. VanFleet for further evaluation. Several days later on July 19, 2010 Dr. Mapue wrote an excuse slip taking Petitioner off of work. (PX 5)

10. Petitioner filed two Applications for Adjustment of Claim on July 26, 2010. Case number 10 WC 28458 alleges that Petitioner twisted his back trying to get a bolt into a hole on October 28, 2009. Case number 10 WC 28459 alleges that Petitioner injured his low back "shoveling rocks onto a conveyor belt" on July 13, 2010.

11. On July 28, 2010, Petitioner was examined by Dr. Russell at Springfield Clinic. Petitioner stated that he hurt his back on October 28, 2009 and then reinjured his back three weeks before seeing Dr. Russell. Petitioner complained of a burning pain in his left foot and numbness with walking. He reported that he had an epidural steroid injection one month earlier and some additional chiropractic treatment without improvement. We note that there are no records corresponding to an epidural steroid injection or any chiropractic treatment in 2010.

Dr. Russell recommended surgery. Due to the large size of the fragment seen on the MRI, Dr. Russell did not believe that Petitioner's symptoms would resolve with any further conservative treatment. Dr. Russell took Petitioner off of work. Petitioner did not tell Dr. Russell that he had been in the emergency room, had seen his primary care physician and received an

order for an MRI in the week prior to July 13, 2010. Dr. Russell did not offer a causal connection opinion. (PX 7)

12. On August 13, 2010, Petitioner was examined by Dr. VanFleet. Petitioner's medical history questionnaire notes a history of low back pain from "10-28-09 running piece of equipment in mine twisted back pain started then 7-13-10 pain worsened when at work shoveling on belt twisted again & pain worsened." Petitioner claimed to have been unable to work or perform normal household duties since July 13, 2010. A pain drawing completed by Petitioner indicates low back aching and stabbing pain with anterior left leg shooting pain and left foot numbness and tingling. Notably, Petitioner failed to mention the October 5, 2009 episode, his emergency room treatment on July 5, 2010 or being seen by Dr. Mapue on July 9, 2010. Reviewing Petitioner's MRI, Dr. VanFleet identified a sequestered disc fragment posterior to the L4-5 disc space on the left side. Dr. VanFleet recommended an L4-5 hemilaminotomy, partial medial facetectomy and discectomy. (PX 2) Dr. VanFleet issued an excuse slip taking Petitioner off of work pending surgery. (PX 3)

On August 17, 2010 Dr. VanFleet performed a L4-5 hemilaminotomy, partial medial facetectomy and discectomy. The operative report states that Dr. VanFleet removed two large sequestered fragments from the spinal canal. Petitioner followed up with Dr. VanFleet on September 1, 2010 and the doctor noted Petitioner was doing "exceedingly well." On October 7, 2010 Petitioner began post-operative physical therapy at Boyd Healthcare Service. He was discharged after twelve sessions with no residual back or leg pain or foot tingling, only mild aching in the low back and left buttock. Dr. VanFleet released Petitioner to return to work without restrictions effective November 22, 2010. (PX 2)

13. On October 10, 2011, Dr. Coyle performed a record review at the request of Respondent. Dr. Coyle was skeptical about Petitioner's history in the context of a workers' compensation claim, noting the lack of documentary evidence corresponding to the October 28, 2009 accident, no explanation for the existence of the October 5, 2009 onset date in the records, the long delay in filing a claim for the October 28, 2009 accident, and the evidence in the records that the same problems Petitioner alleged on July 13, 2010 were present prior to that date. Dr. Cole opined that "based on the objective evidence in the medical record, the symptoms may have flared up on the two occasions at work but were due to pathology which already preexisted the work incidents. This is documented by the chiropractor, Dr. Hart, and Mr. Cole's primary physician, Dr. Mapue, as well as the ER records." Dr. Coyle believed that the MRI findings were consistent with a chronic condition. (RX 3)

14. Dr. VanFleet testified via deposition on December 14, 2011. Dr. VanFleet explained that a sequestration is a free fragment within the spinal cord, and that the surgical findings were consistent with Petitioner's left-sided pain complaints. Dr. VanFleet testified that Petitioner had a good recovery following surgery and has not returned with any further complaints since his release to return to full duty work. Petitioner gave Dr. VanFleet a history of two work-related accidents with injuries to his low back. Therefore, Dr. VanFleet opined that the accidents were causally related to the need for surgery. Dr. VanFleet believed that the history was consistent with the type of pathology present in Petitioner's lumbar spine, and he agreed that if Petitioner heard a pop in his low back on July 13, 2010 it could have been the nucleus extruding through

the annulus. We note that Petitioner did not give a history to the emergency room of hearing a pop in his low back on July 13, 2010. Dr. VanFleet believed the large fragment found in the spinal canal was a recent rather than longstanding pathology due to the tendency of fragments to re-absorb over time.

On cross-examination, Dr. VanFleet agreed that Petitioner had some degree of pre-existing degeneration. He could not say when the disc herniation occurred, only that he believed it must have occurred within the six months prior to the August 17, 2010 surgery.

Dr. VanFleet agreed that if the history he received was either incorrect or incomplete his opinions could change. He was not aware of Petitioner's chiropractic treatment before the first accident or that Petitioner went to the emergency room and to his primary care doctor for severe low back pain before the second accident. Dr. VanFleet agreed that additional information about medical treatment sought by Petitioner would be important in determining causation. (PX 8)

After reviewing all of the evidence, we reverse the decision of the Arbitrator and find that Petitioner failed to prove his current condition of ill-being is causally related to the accidents alleged. We note that there is no evidence to corroborate Petitioner's testimony with respect to the first accident on October 28, 2009. Not only is it absent from Dr. Hart's examination records from October 30, 2009 to November 30, 2009, but Petitioner himself did not report it on his handwritten patient questionnaire when he first sought treatment, only two days after the alleged accident. Instead, he reported an onset of pain with no trauma on a different date weeks earlier, October 5, 2009; a fact he did not deny at hearing. (T. 48-49; PX 18)

Petitioner abruptly stopped communicating with Dr. Hart's office at the end of November 2009, causing Dr. Hart to cancel the December 15, 2009 lumbar MRI. Petitioner sought no further treatment until July 5, 2010 and continued to work full duty. Although Petitioner testified that he stopped seeing Dr. Hart because he did not feel that he needed treatment, Dr. Hart's note from November 30, 2009 reflects that Petitioner had been experiencing "10/10" pain just one day earlier. (PX 18)

With respect to the July 13, 2010 accident, while the occurrence of a lifting incident is partially corroborated by the emergency room records from Memorial Medical Center, the preponderance of the evidence shows that Petitioner was already suffering from an acute episode of back pain and that the July 13, 2010 accident did not cause Petitioner to require lumbar surgery. In the weeks prior to July 13, 2010, during a period of time where Petitioner was actually on vacation from work, the records clearly show that Petitioner was suffering from severe back pain. He visited the emergency room on July 5, 2010 in so much pain that he was concerned about standing at his wedding. Petitioner was prescribed narcotic painkillers and Dr. Mapue ordered an MRI several days later. There is no evidence that Petitioner's condition resolved by the time he returned to work on July 12, 2010. We find insufficient evidence to prove that the July 13, 2010 incident is a tenable causal factor in Petitioner's current condition; Petitioner's subjective history alone is not reliable.

In conclusion, we find that Petitioner failed to meet his burden of proof on the issue of causal connection between each accident and his current condition of ill-being. Dr. VanFleet's

testimony is not persuasive on the issue of causation where he was unaware of significant medical history. Petitioner did not deny that he failed to tell Dr. VanFleet about pre-existing symptoms and periods of treatment. In contrast, Dr. Coyle reviewed all of Petitioner's records before concluding that the same condition Petitioner alleged to have occurred on each date of accident was already in progress prior to each accident. Petitioner's failure to disclose his medical history, and the contradictions between the record and Petitioner's testimony, render Petitioner's claims unreliable. Even if Petitioner's testimony is accepted in its entirety, the preponderance of the evidence shows that the accidents could have caused no more than temporary aggravations of his pre-existing condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed January 14, 2013 is hereby reversed and Petitioner's claims for benefits are denied.

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

DATED: MAR 19 2014
RWW/plv
o-1/28/14
46

Ruth W. White

Charles J. DeVriendt

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COLE, JORDAN
Employee/Petitioner

Case# **10WC028458**

10WC028459

TRI COUNTY COAL LLC
Employer/Respondent

14IWCC0195

On 1/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0895 MORMINO VELLOFF EDMONDS & SNIDER PC
SAMUEL A MORMINO JR
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ALTON, IL 62002

0332 LIVINGSTONE MUELLER ET AL
DENNIS S O'BRIEN
620 E EDWARDS ST PO BOX 335
SPRINGFIELD, IL 62705

14IWCC0195

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jordan Cole
Employee/Petitioner

v.

Tri County Coal, L.L.C.
Employer/Respondent

Case # 10 WC 028458

Consolidated cases: 10-WC-028459

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **11/13/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/28/09 & 7/13/10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury of 7/13/10, Petitioner earned **$41,088.60**; the average weekly wage was **$810.20**.

On the date of accident, Petitioner was **23** 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 pay the Petitioner temporary total disability of **$540.13** a week for **18 4/7** weeks, commencing **7/14/10** through **11/21/10** in the amount of **$10.030.99** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$7.371.43** for temporary total disability benefits that have been paid.

ORDER

Respondent shall pay Petitioner the sum of $486.12 a week for a further period of 100 weeks as provided in Section 8(d)2 of the Act because the injuries sustained caused a loss of 20% of a person as a whole.

Respondent shall pay Petitioner temporary total disability benefits of $540.13 a week for 18 4/7 weeks from 7/14/10 through 11/21/10, which is the period of temporary total disability for which compensation is payable. Respondent is allowed a credit of $7,371.43 under Section 8(j) of the Act for group, non-occupational disability benefits.

Respondent shall pay the further sums for necessary medical services, as provided in Section 8(a) of the Act, as follows: (a) Jersey Community Hospital $1,194; (b) Radiologic Physicians $62; (c) Dr. Mapue $156; (d) Memorial Medical Center $3,238.20; (e) Clinical Radiologist $385.50; (f) Dr. Brain Russell $340; (g) Dr. Timothy Vanfleet $13,388; (h) Associate Anesthesia Springfield $1,395; and (i) Orthopedic Center of Illinois $8,857, to the extent required by the Fee Schedule, Section 8.2 of the Act.

Respondent provided Petitioner's medical, surgical and hospital benefits under its group plan for Petitioner's medical expenses incurred as a result of his work injury. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against by reason of having received such benefits to the extent of such credit as provided in Section 8(j) of the Act.

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

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

Signature of Arbitrator D. Ryan McCarthy Date Jan. 8, 2013

The Arbitrator Finds the Following Facts:

The parties arbitrated these claims by consolidation, and the Arbitrator will issue one decision covering both claims.

Petitioner worked as a coalminer/roof bolter for the Respondent for approximately 1 year prior to October 28, 2009. He continued to work for the Respondent through July 13, 2010 and then to the present. Petitioner testified that in the month preceding the October 28, 2009 accident, he worked predominantly as a roof bolter and was required to operate a machine that inserted a support system in the roof of the mine. His job involved following a machine that drilled holes into the roof of the mine so that 6 to 8 foot bolts with metal plates could be inserted into the hole and affixed to the roof of the mine in order to provide support for the roof as a mining operation continued. He and a coworker were required to follow the machine, remove 6 to 8 foot approximately 1 inch thick roof bolts, with 4 by 12 inch metal plates attached, from a supply bin. He positioned the bolt into the predrilled hole and forced them up through the hole, placed them on a chuck on the machine and allowed the machine to drill them in place.

On October 28, 2009 Petitioner and a coworker were placing 8-foot bolts into the roof of the mine near an intersection of pathways. The roof at that point was less than 6 foot in height requiring Petitioner to bend the roof bolt as it forced upward into the predrilled hole. From a standing position, he was forcing the 8 foot rod into the hole, with a downward motion with both hands on the rod, he felt a sudden sharp, intense, stabbing pain in his back radiating into his left hip and thigh. He stopped and informed his supervisor of the injury and an accident report was prepared. Petitioner testified that he was able to finish his shift with difficulty.

Petitioner first sought medical treatment from Dr. Lisa Hart, D.C. on October 30, 2010. Dr. Hart's records (PE 18) reveal that Jordan Cole indicated on the intake questionnaire that he had suffered some back pain for a few weeks prior but that he was having sharp pain down both legs with pain constantly down the left leg to his thigh, which was worse over the last few days. The records indicate that on Wednesday (10/28), the date of the incident, he reported his pain as an 11 on a 10-point scale. Following Dr. Hart's examination of him he continued to work continuously and received conservative care from her through November 30, 2009. He experienced some improvement during the time he visited with Dr. Hart. When he last saw Dr. Hart, he still reported pain at a "6" level, with pain at the level of "10" on the previous day. Dr. Hart at that time recommended an MRI. Petitioner testified that he was able to work, although not symptom free, and decided to stop chiropractic care.

Petitioner continued to work fulltime through July 13, 2010. He reported that his back and left buttock pain would wax and wane with varying intensity while he continued to work fulltime in the mine as a roof bolter. Petitioner testified that he sought treatment from the emergency room at Jersey Community Hospital where he received an injection for low back pain on July 5, 2010. He reported back pain, and was diagnosed with left sciatica. He received injections and oral medications. He followed up with his family physician, Dr. Mapue on July 9, 2010. His office note contains a history that the Petitioner had an injury to his lower back 8 to 9 months prior, and that he noticed a worsening of his lower back symptoms, with radiation to his left leg and foot with numbness over the past 2 to 3 weeks. He indicated the reason for his visits to the emergency room and to Dr. Mapue was because he was getting married on July 10, 2010 and wanted some temporary relief for his ongoing back pain that started on October 28, 2009. He had scheduled his wedding during the mine shutdown and returned to work on July 12th and worked a full shift as a laborer, shoveling coal debris.

On July 13th at approximately 10:00, while shoveling debris onto a conveyor belt, he felt a "pop" and a sharp sudden shooting pain down his left leg that he described as intensely cold then intensely hot, driving him to his knees. This occurred when he was using a broad bladed utility shovel, scooping the debris, twisting at the waist and throwing it onto the conveyor belt approximately 36 inches high. He was attended to by the plant manager

who happened to drive by at that time. The plant manager loaded him onto a transportation vehicle, transported him out of the mine and then summoned an ambulance. The ambulance rushed him to Memorial Medical Center where he was treated in the emergency room. An MRI that was taken on July 13 revealed a large sequestrated herniated disc at L4-5. He was taken off work immediately and instructed to follow up with his own physician.

At the request of his employer he saw Dr. Brian Russell an orthopedic surgeon on July 28, 2010, who diagnosed a large herniation at L4-5, significantly compromising the thecal sac in the exiting nerve root. Dr. Russell recommended surgery. (PE 7). His family physician, Dr. Mapue recommended an orthopedic surgeon, Dr. Timothy Van Fleet. Dr. Van Fleet reviewed the MRI scan, which demonstrated a sequestrated fragment of the disc posterior to the body of the L5 from the L4-5 disc space on the left side. (PE 2). As a result of that, Dr. Van Fleet scheduled and performed an L4-5 hemilaminotomy, partial medial facetectomy and a discectomy operation. That surgery was performed on January 13, 2011. (PE 2). His operative report describes "sequestrated fragments of disc in the canal that were removed; two big pieces were removed at this time". (PE 2). When describing the herniated disc that was revealed on the MRI scan, both Dr. Russell, Dr. Van Fleet, the orthopedic surgeon who performed surgery, and Dr. Coyle, who performed the records review at the request of the Respondent indicate that the MRI taken on January 13, 2010 revealed the disc herniation was "large". Coyle described the herniation at that level as "very large and is occluding the left half of the spinal canal at this level". (RE 3). Dr. Russell indicated that it was a large herniation significantly compromising the thecal sac in the exiting nerve root". (PE 7). Dr. Van Fleet described it as sequestrated and a very large fragment. (PE 8). He further observed interoperatively that it was two big pieces (Page 18) and that the fragments encroached upon the spinal canal and the nerve root both. (Page 10). Dr. Van Fleet described sequestration as a condition in which the nucleus pulposus ruptures through the annulus extending beyond the confines of the disc itself so that it is no longer continuous with the disc space. (Page 6).

The Petitioner testified that while he was shoveling coal on July 13, 2010 he had to lift the shovel to waste high position and then twist at the waste shoveling onto a conveyor belt, which was 36 inches in height. He indicated that he felt a **"pop"**, he felt immediate sharp pain extended down his leg to his foot that he describes first as intensely cold then intensely hot. After having reviewed the MRI, then actually observing the disc when he removed the two disc fragments from the Petitioner, Dr. Van Fleet testified that "it was very unlikely that that large fragment would have been present for 6 months". Dr. Van Fleet testified that in most instances large fragments like that are inclined to reabsorb within the body.

Until the July 13, 2010 incident, the Petitioner was able to continue his work as a roof bolter and laborer for Respondent. The work Petitioner engaged in was extremely physical and heavy. It was only until the July 13, 2010 shoveling accident that the Petitioner was rendered unable to work because of his increased back pain and severe and debilitating radiating pain down to his left foot. The acute onset of his symptoms, were so severe that he had to be transported by ambulance to the hospital on an emergency basis. All physicians who have reviewed the MRI agree that the herniated disc was very large.

Dr. Van Fleet continued to follow Jordan after the surgery. He saw marked improvement in his condition. Petitioner returned to work following his release from Dr. Van Fleet on November 22, 2010. Petitioner has resumed work as a roof bolter for Respondent and continues to work fulltime. Petitioner testified that he continues to suffer from back pain and radiation of pain to his left lower extremity. He experiences weakness in his low back and leg especially after exertion and the heavy manual labor required at work.

Therefore the Arbitrator concludes:

The Petitioner sustained a lumbar disc injury on October 28, 2009 as result of bending and twisting while applying a roof bolt while working as a laborer in Respondent's mine. Petitioner sustained further injury to the

the L4-5 disc and an aggravation of his pre-existing condition on July 13, 2010 while shoveling the coal onto a conveyor belt. As a result of the injuries on October 28, 2009 and then on July 13, 2010, the Petitioner suffered a sequestrated herniated disc at L4-5 necessitating an L4-5 hemilaminotomy and partial medial facetectomy and a discectomy operation.

An accident need not be the sole or even principal cause of an injury to be compensable. As long as it is a cause, the resulting treatment, lost time and disability are the Respondent's responsibility.

Here you have a twenty-five year old roof bolter performing heavy physical work inside a coal mine. While he had some lumbar pain prior to October 28, 2009, he had an accepted accident resulting in lower back pain radiating down the left leg. When seen by his chiropractor two days later, he described sharp pain down both legs, the left greater than the right. He was treated on a regular basis for the next month. At his final visit on November 30, he was still in pain. His chiropractor, Dr. Hart, then recommended an MRI.

The Petitioner elected to keep working and not have the test. He testified that he was never symptom free, and that is essentially what he told Dr. Mapue, his family doctor, and Dr. Van Fleet, his surgeon. On July 9, 2010, he told Dr. Mapue that his symptoms were worse over the past two to three weeks. He told Dr. Van Fleet that he was never pain free following his initial accident in October. (PX 8 at 6) On July 13, he injured his back shoveling debris onto a conveyor belt. He heard a pop and his symptoms intensified. He reported it immediately, and was driven to the hospital by his plant manager.

Dr. Van Fleet testified that he found a disc fragment on a nerve root at L4-5 to the left. He opined that this fragment could have pushed through the annulus when the Petitioner was shoveling on the 13th. Even if the fragment were already present, as the Respondent argues, the event on July 13 could still be causally connected to the Petitioner's condition. His symptoms clearly increased dramatically that day.

While there may be other causes relating to the Petitioner's lumbar injuries, it is clear by his symptoms provided to his doctors, the chain of events set forth above, and Dr. Van Fleet's testimony, that these two accidents were also causative factors. As such, the resulting damages are the Respondent's responsibility.

All medical services provided by the following providers: (a) Jersey Community Hospital $1,194; (b) Radiologic Physicians $62; (c) Dr. Mapue $156; (d) Memorial Medical Center $3,238.20; (e) Clinical Radiologist $385.50; (f) Dr. Brain Russell $340; (g) Dr. Timothy Vanfleet $13,388; (h) Associate Anesthesia Springfield $1,395; and (i) Orthopedic Center of Illinois $8,857 were reasonable and necessary. All medical expenses have been paid by the Respondent's provided group health plan for which the Respondent should receive credit pursuant to Section 8(j). Respondent is further order to hold Petitioner harmless under Section 8(j) for medical bills paid by its group carriers.

Respondent shall pay Petitioner temporary total disability benefits of $540.13 a week for 18 4/7 weeks from 7/14/10 through 11/21/10 in the amount of $10,030.99, which is the period of temporary total disability for which compensation is payable. Respondent is allowed a credit of $7,371.43 under Section 8(j) of the Act for group, non-occupational disability benefits.

The Petitioner was released without restrictions by Dr. Van Fleet on November 22, 2010. He continues to perform his regular work for the Respondent, and has had no further medical treatment for his lumbar injury. He testified that his lower back is stiff and that occasionally at work when he stands or sits for long periods he notices pain down the left leg. The Arbitrator finds that the injuries have caused a loss of 20% Person As A Whole to the Petitioner.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nikea Venson,

Petitioner,

vs.

NO. 11 WC 36553

14IWCC0196

West Suburban Nursing & Rehab,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2013 is hereby affirmed and adopted.

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

14IWCC0196

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 1 2014
MPL/sj
o-01/22/2014
352

Michael P. Latz

Charles J. DeVriendt

Ruth W. White

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

VENSON, NIKEA
Employee/Petitioner

Case# **11WC036553**

WEST SUBURBAN NURSING & REHAB
Employer/Respondent

14IWCC0196

On 3/13/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0208 GALLIANI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST SUITE 1800
CHICAGO, IL 60602

14IWCC0196

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

Nikea Venson,
Employee/Petitioner

v.

West Suburban Nursing & Rehab,
Employer/Respondent

Case # **11** WC **36553**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The Arbitrator notes that this is a Wheaton case, but that by agreement of the parties the matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Chicago**, on **12/20/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6/21/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$16,761.16**; the average weekly wage was **$322.33**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **5** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $322.33 per week for 18-6/7 weeks, commencing 8/11/12 through 12/20/12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 6/22/11 through 12/20/12, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $272.00, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner is entitled to prospective medical treatment in the form of further NCV/EMG and/or PSSD testing to confirm/refute his diagnosis of post-traumatic neuritis or nerve compression/injury, a four week course of physical therapy concentrating in nerve desensitization, TENS, iontophoresis and strengthening of the left lower extremity, as well as medication and follow up visits to the Elmhurst Pain Clinic for pain management. Respondent shall pay the reasonable and necessary medical costs associated with said treatment, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

3/11/13
Date

ICArbDec19(b)

STATEMENT OF FACTS:

Petitioner, a 37 year old certified nurse's aide (CNA), testified that she began working for Respondent in August, 2010. She had no problems with her left foot when she began the job. The only injury she could recall to her left foot was cutting a toe on that foot when she was four years old. She indicated that she felt great before beginning work on June 21, 2011.

On June 21, 2011 she was injured when a bed pump fell on her left foot. The pump weights about 50 lbs. She had pain in her left foot from the top to her toes. She informed the charge nurse, Christine. She was sent to the office where she took a drug test and filled out an incident report. Petitioner was sent to CHD, an urgent care center. The records from that facility dated June 21, 2011 indicate a history of pain in the left foot after a bed pump had fallen upon it. Petitioner was diagnosed with a contusion to the 2nd and 3rd toes of the foot and released to perform light duty. Petitioner testified that she was given medication and a special shoe. She continued to follow up at CHD for five weeks and continued to work light duty. Petitioner testified that she mainly did desk duty and folded clothes.

Petitioner testified that the doctors at CHD referred her to Dr. Witkowski at Orthopaedics of DuPage. Petitioner testified that she was still on light duty and noticed pain and tingling in the foot that was worse if she stood or sat too long. Dr. Witkowski first saw Petitioner on August 1, 2011. He continued the light duty status. On September 12, 2011 he noted that Petitioner had improved but still had swelling in her foot at the end of the day when she was active. She was diagnosed with mononeuritis and told to continue physical therapy and medication. The doctor was considering making a referral for injections to the foot. On October 13, 2011 Dr. Witkowski referred Petitioner to the Elmhurst Pain Clinic for a crush injury to the left 2nd and 3rd toes with radiating pain, burning and numbness. He felt she likely had an early complex regional pain syndrome.

Respondent had Petitioner evaluated by Dr. George Holmes on November 16, 2011. Dr. Holmes felt that Petitioner may have a Lisfranc injury and some mild neuritis. He recommended an MRI, bone scan and EMG. The doctors at the Elmhurst Pain Clinic noted on January 4, 2012 that Petitioner had a bone scan that was normal in the left foot. They, too, recommended an EMG.

Dr. Holmes wrote an addendum report on February 23, 2012 after reviewing additional records. He did not perform an additional examination. Dr. Holmes reviewed an MRI of January 16, 2012 that was normal. He reviewed an EMG dated February 2, 2012 that indicated evidence of mild healing injury to the left superficial peroneal sensory nerve. Dr. Holmes wrote that this was consistent with the symptoms and the exam. He also reviewed a negative bone scan. Dr. Holmes felt that Petitioner could return to her normal work with some symptoms. He went on to write that it would be helpful to get a Functional Capacities Evaluation if Petitioner's work capacity could not be determined.

The doctors at Elmhurst Pain Clinic, aware of the same testing continued to authorize light duty. Petitioner was last seen on August 29, 2012 and told to continue light duty.

Petitioner testified that in August of 2012 she was no longer provided light duty by Respondent. She stated that the cessation of her light duty job at that time was not her choice and that she is still willing to work light duty if it were available. Petitioner also indicated that she has not received any benefits since she has been off work. She testified that she was still feeling the same shooting pain at she stopped working, and that if she did too much walking her foot would swell. In addition, she indicated that she would experience numbness, tingling and sweating of her foot. Likewise, Petitioner noted that walking up and down stairs results in increased pain in her foot. She also indicated that she currently wears Crocs or moccasins, like the ones she was wearing at

arbitration. She stated that she had tried wearing heels and gym shoes but that she experiences a sharp pain if the shoe goes over her foot.

In the fall of 2012 Petitioner saw a podiatrist, Dr. Dukarevich. The first visit was September 7, 2012. He was aware of Petitioner's care at Elmhurst. He diagnosed post traumatic neuritis and type 1 complex regional pain syndrome. He felt the symptoms were mostly neuralgic. He suspected damage to the intermediate dorsal cutaneous and peroneal nerve on the dorsum. He authorized Petitioner off of work. Petitioner had a follow up visit on December 8, 2011. He noted a positive tinel sign over the tibial nerve at the tarsal tunnel. He recommended a repeat EMG, physical therapy, TNS and follow up at the Elmhurst Pain Clinic.

Respondent obtained an additional opinion from Dr. Holmes on November 19, 2012. Dr. Holmes, who had not seen Petitioner for a year, reviewed records and did not see the patient at that time. Dr. Holmes felt that Petitioner did not have complex regional pain syndrome. He offered no opinion as regards Petitioner's nerve injury. He also offered no further opinion regarding Petitioner's ability to work.

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

Respondent does not dispute that Petitioner sustained accidental injuries arising out of and in the course of her employment on June 21, 2011 or that her current condition of ill-being is causally related to said accident. (See Arb.Ex.#1). Instead, Respondent disputes Petitioner's entitlement to medical expenses incurred at Elmhurst Pain Clinic totaling $272.00 (PX4), prospective medical treatment (issue "K", infra) and/or temporary total disability benefits (issue "L", infra). More to the point, Respondent relies on the opinion of it's §12 examining physician, Dr. George Holmes, to the effect that Petitioner had reached maximum medical improvement with respect to her injury and is not entitled to benefits subsequent to Dr. Holmes' report dated February 23, 2012.

Dr. Holmes examined Petitioner on one occasion. On that date, November 16, 2011, Dr. Holmes diagnosed a possible fracture of the metatarsal which he noted "could be the underlying cause of her continued pain. The patient may also have a Lisfranc injury and may have some mild neuritis over the dorsal aspect of the foot." (RX1). Dr. Holmes went on to note that "[a]t this point, I would recommend that she undergo an MRI scan, bone scan, and EMG to clearly delineate the presence or absence of nerve injury and/or the presence or absence of a contusion versus fracture versus Lisfranc fracture or dislocation." (RX1). Dr. Holmes estimated that he hoped that Petitioner would be at MMI in three to six months but noted that he would have a firmer idea along these lines once he had an opportunity to review the results of the aforementioned bone scan, MRI and EMG. (RX1). He also noted that Petitioner could continue to work light duty at that time. (RX1). Finally, Dr. Holmes opined that "[t]here does appear to be a causal connection between the work incident of 06/21/2011, and her current condition ongoing complaints." (RX1). Dr. Holmes also noted that he found "... no evidence of any malingering or prescription abuse ..." on that date. (RX1).

In a report dated February 23, 2012, Dr. Holmes noted that he had reviewed the requested test results, noting that the MRI of the left foot performed on January 16, 2012 revealed no obvious abnormality, that the EMG performed on February 2, 2012 was interpreted as evidencing a mild healing injury to the left superficial peroneal sensory nerve consistent with her symptoms and exam, and that the triple-phase bone scan failed to demonstrate any focal areas of increased uptake in relation to the bony structures of the

feet, and did not show any abnormality in the left midfoot area or any evidence of bone fracture healing. (RX2). Dr. Holmes noted that "[t]he studies, at this point, demonstrate no underlying structural damage to the foot per se. This EMG demonstrates some healing and involvement of the superficial peroneal nerve. This finding should have no significant functional impact on the patient other than her symptomatology as already outlined." (RX2). Dr. Holmes recommended continued use of "... the Lidoderm patch as well as desensitization techniques with regard to her ongoing symptoms. She may wish to continue her gabapentin as well." (RX2). Dr. Holmes went to opine that "[i]n terms of functionality, she should be able to probably return to many of her activities consistent with that of a CNA. She should not require any specific restrictions in terms of balancing or standing per se. Therefore, I think she should be able to return to her usual and customary duties, albeit with some underlying symptomatology." (RX2). Dr. Holmes concluded that if Petitioner was unwilling or unable to return to work as a CNA that "I think it would be helpful to get an FCE and have her return to some work in the medical field within the parameters of her FCE." (RX2). Finally, Dr. Holmes indicated that he believed Petitioner was "... functionally at an MMI status ..." and that "... subjectively, she will continue to improve over the ensuing months and should be subjectively at MMI status which should be consistent with her previous employment as a CNA at one year out from her injury of June 2011. Therefore, for clarification, I think she can return to her job as a CNA at this time, even though we will acknowledge that she does have some symptomatology still present. I do not believe she has any functional deficits at this time that would preclude her usual and customary duties." (RX2).

In his most recent report dated November 19, 2012, following his review of additional records, Dr. Holmes opined that Petitioner "... is not suffering from chronic regional pain syndrome. This opinion is based upon the EMG results, the triple phase bone scan results, the MRI results, my physical examination conducted on November 16, 2011, the pain clinic report of 05/11/2011, the pain center report of 06/19/2012, and the actual physical examination conducted by Igor Dukarevich, DPM on 09/07/2012. The objective findings and all of those records are inconsistent with chronic regional pain syndrome." (RX3).

For his part, podiatrist Dr. Dukarevich noted, in a report dated September 7, 2012, that in his opinion "... her symptoms appear mostly neurological. The mechanism of injury explains the damage to the intermediate dorsal cutaneous and deep peroneal n. on the dorsum of the left foot, with likely fibrosis and entrapment. The symptoms from the tibial n. and common peroneal n. are more difficult to explain and may be due to a secondary more proximal compression (i.e. radiculopathy) or CRPS type 1." (PX5). Dr. Dukarevich recommended another NCV/EMG study to determine the locations of the nerve compression. (PX5). Dr. Dukarevich went on to state that he believed that Petitioner would benefit from a four week course of physical therapy concentrating on nerve desensitization, and that she should continue to follow up with Elmhurst Pain Clinic for pain management. (PX5). Furthermore, in the event Petitioner failed to show improvement, Dr. Dukarevich opined that Ms. Venson would benefit from local nerve steroid injection blocks. (PX5). In addition, Dr. Dukarevich indicated that if further intervention was needed he would consider PSSD testing and nerve decompression. (PX5). Finally, Dr. Dukarevich noted that due to her constant pain and difficulty sleeping he gave Petitioner a release from work note and instructed Ms. Venson to follow up in one month. (PX5). Dr. Dukarevich's assessment was post-traumatic neuritis and CRPS type 1. (PX5).

In a subsequent report dated December 8, 2012, Dr. Dukarevich noted that Petitioner had not begun physical therapy as recommended and that "... [s]he relates no improvement in her symptoms since the last visit. She still [complains of] tingling and shooting pain in her left foot. She rates the pain at 5/10 at best, 10/10 at worst..." (PX5). Dr. Dukarevich indicated that "[a] s I was not able to evaluate previous

X-rays, MRI, EMG, and other test results, my opinion is based solely on the patient's description of her symptoms and my physical exam." (PX5). Dr. Dukarevich went on to state that while "[t]he patient's subjective complaints are certainly consistent with a diagnosis of CRPS" he was unable to confirm this diagnosis on physical exam. (PX5). Dr. Dukarevich did opine, however, that "the patient's objective symptoms are consistent with post-traumatic neuritis or nerve compression/injury to the above mentioned nerves. Further NCV/EMG testing or PSSD testing will be helpful in confirming the diagnosis." (PX5). Once again, Dr. Dukarevich recommended four weeks of physical therapy, follow up at Elmhurst Pain Clinic and continued medications. (PX5). Dr. Dukarevich also gave Petitioner an off work note on that date. (PX5).

Petitioner testified that she is uninsured and does not have any income to pay for physical therapy, and that the last therapy treatment she had was in late 2011. Petitioner also noted that she was last seen at Elmhurst Pain Clinic in August of 2012. She indicated that her condition has not changed in the past six months.

Based on the above, and the record taken as a whole, including the Arbitrator's observation of the Petitioner, the Arbitrator finds that Petitioner's current condition of ill-being and ongoing need for treatment with respect to her left foot is causally related to the undisputed accident on June 21, 2011. Along these lines, it would appear that Petitioner continues to experience legitimate complaints relative to her injury, and that her condition has not yet reached a point of maximum medical improvement. Along these lines, the Arbitrator chooses to rely on the opinion of Dr. Dukarevich to the effect that Petitioner current symptoms, which he noted were consistent with post-traumatic neuritis or nerve compression/injury, necessitated additional therapy and further testing – at least so as to rule out any differential diagnosis, given that both physicians do not appear to believe Petitioner is suffering from CRPS. With all due respect to Dr. Holmes, the Arbitrator finds that this recommendation is not all that unreasonable under the circumstances, particularly in light of Dr. Holmes' own pronouncement that he noted "… no evidence of any malingering or prescription abuse …" during the course of his one and only examination. (RX1).

Therefore, under the circumstances, the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses in the amount of $272.00 pursuant to §8(a) and subject to the fee schedule provisions of §8.2 of the Act.

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

As noted with respect to the issue of medical expenses (Issue "J", supra), the Arbitrator finds that Petitioner's current condition of ill-being and ongoing need for treatment with respect to her left foot is causally related to the undisputed accident on June 21, 2011. As such, the Arbitrator likewise finds Petitioner is entitled to prospective medical treatment in the form Dr. Dukarevich's recommendations – namely, further NCV/EMG and/or PSSD testing to confirm/refute his diagnosis of post-traumatic neuritis or nerve compression/injury, a four week course of physical therapy concentrating in nerve desensitization, TENS, iontophoresis and strengthening of the left lower extremity, as well as medication and follow up visits to the Elmhurst Pain Clinic for pain management – and that Respondent shall be liable for the reasonable and necessary medical expenses associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

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

Petitioner is requesting temporary total disability benefits from August 6, 2012 through December 20, 2012. (Arb.Ex.#1).

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 142, 337 Ill.Dec. 707, ___, 923 N.E.2d 266, 271 (2010). The fact that the employee is no longer receiving medical treatment or that he or she has the ability to do light work does not preclude a finding of temporary total disability. *Rambert*, 477 N.E.2d at 1370.

The record shows that Petitioner's last day of light duty work for Respondent was on August 10, 2012. (PX6).

The record also shows that Dr. Dukarevich took Petitioner completely off work following his examination on September 5, 2012 as well as on December 8, 2012. (PX5). And while Dr. Holmes expressed the opinion that Petitioner could return to work full duty, he also indicated that in the event Petitioner was unable or unwilling to return to work as a CNA that it "...would be helpful to get an FCE and have her return to some work in the medical field within the parameters of her FCE." (RX2). Petitioner has yet to be released to return to work by Dr. Dukarevich and has yet to undergo any such FCE.

Therefore, based on the above, and the record taken as a whole, including the Arbitrator's determination as to Petitioner's ongoing need for treatment (Issues "J" and "K", supra), the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from August 11, 2012 through the date of hearing, December 20. 2012, for a period of 18-6/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Boyle,

Petitioner,

vs. NO. 03 WC 59667

City of Chicago,

14IWCC0197

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent.

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

DATED: MAR 2 1 2014
SJM/sj
o-2/13/2014
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOYLE, JOHN
Employee/Petitioner

Case# **03WC059667**

14IWCC0194

CITY OF CHICAGO
Employer/Respondent

On 1/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2988 CUDA LAW OFFICES
ANTHONY CUDA
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

14IWCC0197

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Boyle
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **03** WC **59667**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **October 15, 2012 and November 5, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

14IWCC0197

On **April 7, 2003**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Certain of Petitioner's conditions of ill-being through October 14, 2003, are causally related to the accident.

In the year preceding the injury, Petitioner earned **$69,538.36**; the average weekly wage was **$1,337.28**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$24,325.76** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$24,325.46 (to be applied against permanency- see Decision)**.

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

ORDER

Based on the findings regarding causal connection, TTD and PPD contained in the Arbitrator's Decision, no benefits are awarded.

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

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

Signature of Arbitrator

1/3/13
Date

JAN 3 - 2013

FINDINGS OF FACT

Petitioner testified that he began working for the City of Chicago in 1997. His title was seasonal engineer. In 2003, Petitioner worked at the Reed Facility where he loaded and unloaded trucks. Petitioner testified that on 4/7/03, Petitioner was working with a loader when he fell off the high lift. Petitioner testified that he slipped and fell backward approximately 8 or 9 feet down to the pavement. Petitioner testified that while on the ground he noticed that he was shaking, gasping for air and that he had pain and numbness throughout his body. He further testified that he had pain in his lower back and both feet with more pain on the left side than on the right. He also testified that he had headaches, blurred vision and that he hyperventilated for over an hour. Petitioner denied any prior problems with his neck, vision, spinal cord, right shoulder or left elbow, or any numbness tingling in left arm or left leg.

Petitioner was transported to Resurrection Hospital. On 4/7/03, Petitioner reported falling 6 to 7 feet onto concrete, landing on his left side and experiencing numbness and a heavy feeling and tightening in his left leg, left arm and right arm weakness without loss of consciousness or head contusion. The admitting diagnosis was left sided weakness, spinal cord contusion. Petitioner was evaluated by a neurologist, Dr. Koveleski, who determined that Petitioner had a spinal cord contusion. Dr. Koveleski also noted a chronic visual deficit in the right eye but that Petitioner's visual fields were full and he demonstrated full ocular motion. PX 1.

Petitioner was admitted to the intensive care unit where he stayed for 4 days and was treated with steroids. PX 1. Petitioner was diagnosed with a spinal cord contusion, incomplete cervical myelopathy with associated left-sided weakness and hemisensory loss, soft tissue injuries involving the left neck and shoulder, right adductor muscles, and contusion to the left elbow. PX 1. Petitioner was recommended continued steroids, physical and occupational therapy. Petitioner Petitioner attended therapy through 4/15/03 and was then released as of 4/21/03 with a final diagnosis of incomplete myelopathy, cervical spinal cord contusion, left sided weakness 4/5, left hemi-sensory loss from C3 and distal, soft tissue injuries to the left neck, shoulder, right abductor muscle, contusion of the left elbow and resulting deficits in mobility and self care. PX 1.

Respondent began making TTD payments to Petitioner as of 4/8/03.

Petitioner followed up with Dr. Koveleski on 5/15/03 after completing physical therapy. Dr. Koveleski noted some improvement in Petitioner's gait, with continued neck discomfort and into the trapezial area although foraminal compression was negative. Petitioner demonstrated 4/5 weakness in the left upper extremity and significant improvement in the left lower extremity. Dr. Koveleski determined that Petitioner was not yet able to return to heavy labor and continued Petitioner off work. He continued therapy and eventual work hardening. As of August 7, 2003, Petitioner subjective complaints of residual heaviness in his left upper extremity and left lower extremity continued as did complaints of discomfort and heaviness in both hands. Petitioner's neurosurgeon, Dr. Gutierrez recommended work hardening and Dr. Koveleski noted that he expected Petitioner to show more improvement at the time of the visit given a lack of findings on objective testing. A subsequently ordered EMG on the left upper and lower extremities was normal. As of October 1, 2003, Dr. Koveleski recommended 30 more days of work hardening as Petitioner could not yet lift over 55 pounds.

As of his visit with Dr. Koveleski on 11/13/03, Petitioner complained of worsening headaches although an MRI was unremarkable. Petitioner also complained of "worsening difficulty with his right eye" and was sent to Dr. Stiles for an ophthalmological evaluation. Dr. Koveleski kept Petitioner off work. Petitioner's final visit with Dr. Koveleski was on 1/22/04. At that time, Petitioner complained of additional right eye problems in the form of a "spider" movement across his field of vision. HE also complained of difficulty with heavy lifting and cold weather effects to his ears as well as hearing loss since the accident. Cold weather also aggravated the tingling in Petitioner's left hand and left foot. A repeat MRI showed no evidence of any intracranial pathology to support an additional cause for Petitioner's headaches and no change from the brain MRI of 4/8/03. Petitioner was seen by ophthalmologist Dr. McClennan on 12/18/03 who determined that Petitioner demonstrated an afferent pupillary defect and mild optic atrophy on the right eye but did suggest in his report that these findings are not recent, although it is impossible to tell when they first appeared and that it was possible the fall could have led to these findings. PX 6. Petitioner reported that his right eye vision was always weaker than his left eye but that he noticed it more since failing a driver's exam vision test at that time.

Petitioner was treated by Dr. Karnezis for a left elbow sprain and a right hand middle finger small fracture at the PIP joint. Both injuries healed well as of May 7, 2003. PX 3.

As of July 31, 2003, Petitioner's neurosurgeon, Dr. Gutierrez opined that Petitioner start work hardening as he had no abnormalities on neurological exam and "entirely normal" MRI examination of the cervical spine. He also ordered the August 2003 EMG of the left upper and lower extremities and back which Dr. Koveleski performed with normal results. PX4. Dr. Sobczak performed an SSEP study on 9/17/03 which reflects the impression of sensory nerve conduction time within normal limits of both lower extremities after stimulation of the left and right posterior tibial nerves. He noted there was prolongation of the peripheral latencies bilaterally, more on the left, for which clinical correlation was suggested.

The Mercy Works records at PX 5 show that Petitioner was released to full duty as of 10/15/03 with a notation of "based on job description of 50 lb limit". Based on a review of Petitioner's medical records as well as the May 2003 FCE and final work hardening reports, the Concentra nurse case manager drafted a closing report indicating that Petitioner could return to work full duty for Respondent with a 50 pound weight limit "that still meets his job requirements to return to work." Respondent was able to accommodate the work restrictions within his job description. RX 3. Petitioner testified that he returned to work for a short period working with a helper. He was subsequently laid off based on seniority. Petitioner returned back to work as of April 1, 2004 when he was brought back from lay off.

RX 5 is a Grand Jury indictment against Petitioner (and other defendants) for his participation in the City's Hired Truck Program scandal specifically during the years 2000 into 2004. The indictment describes activities in which Petitioner was illegally collecting fees in connection with the Hired Truck Program. Petitioner testified that he continued these collection activities in 2003 but is not sure for how long he continued the activity.

Petitioner pled guilty to Counts Two and Twenty-two of the Indictment for mail fraud and filing a false 2002 tax return. RX 6. Petitioner served time in federal prison from September 27, 2005 through July 7, 2010 based on his participation in the Hired Truck Program scheme. While in prison in Minnesota, Petitioner sought and received medical care for his diabetic condition. Petitioner was also treated for

cholesterol issues. In December 2006, additional studies of the right wrist, right 5th finger and cervical spine were negative for any findings. PX 8. Petitioner testified that he was able to leave the minimum security prison accompanied by another inmate for medical visits.

On 10/14/08, Petitioner saw an Ophthalmologist for complaints of "very poor vision in the right eye since an injury in 2003." The doctor noted, "He fell off a lift at that time, and presumably had traumatic optic neuropathy. He has noted a decrease in his vision for the last few months where everything has become more blurry. There is nothing that makes this better or worse and he has no associated symptoms." Upon exam, the assessment was "1. Probable TON (traumatic optic neuropathy) with optic atrophy OD, 2. Traumatic cataract OD- PAM showed 20/100 in the right eye- pt would like to pursue CE- I did state that the definite outcome is unknown. 3. Cupping – OD probably due to trauma, but will take photos today to monitor for glaucoma." The doctor continues, "After examination cataract surgery was recommended for the right eye. … Risks… were explained and patient elected to proceed with cataract extraction." The records document a lack of vision in Petitioner's right eye. Prison administration denied Petitioner's request for surgery and ordered a new examination in April 2009 before the surgery could be performed. It was ultimately determined that Petitioner did not meet prison criteria for the surgery and it was not performed. PX 8.

On March 12, 2012, Respondent had Petitioner examined by ophthalmologist, Dr. Golden-Brenner. Dr. Golden-Brenner also reviewed pertinent medical records concerning Petitioner's eye complaints and treatment since the accident including the Minnesota Federal Prison records of care. Dr. Golden-Brenner concluded that Petitioner suffered no direct ocular or direct or indirect head trauma in the accident of 2003 based on the medical records indicating the same. Therefore, she opined that any conditions linked to direct ocular trauma are not related to the accident. Further she noted that Petitioner's cataract was not secondary to the accident.

Dr. Golden-Brenner also noted that Petitioner's right eye was always weaker than his left and that he had chronic visual deficit in the right eye as documented in the treating records. She determined that the "marked difference in refraction between the eyes with the right eye being significantly more myopic is consistent with anisometropic amblyopia… which develops when the prescription in one eye is significantly different from the other causing chronic blurred vision in that eye." She determined the condition was neither caused nor aggravated by the accident. Further Dr. Golden-Brenner opined that amblyopia does not cause optic atrophy. Optic atrophy may occur from direct ocular trauma or severe head trauma. Again, since Petitioner suffered neither trauma, Dr. Golden-Brenner opined that the optic atrophy was not secondary to the accident. RX 2.

On July 19, 2011, Respondent had Petitioner examined by Dr. Gleason. Dr. Gleason also reviewed prior diagnostic testing summarized above and Petitioner's treatment records. Dr. Gleason's diagnosis was "findings as reflected on the diagnostic studies and mild weakness of the right fifth digit adductor." Dr. Gleason determined that Petitioner was capable of full time regular work without restrictions. He encouraged a home exercise program and determined no need for further treatment. RX 1.

At trial, Petitioner testified that he currently experiences sensations in his left foot and his headaches worsen with cold weather. Petitioner complained of continued low back pain and occasional swelling of his hands. He has no vision in his right eye.

CONCLUSIONS OF LAW

C. Did an accident occur which arose out of and in the course of Petitioner's employment by Respondent? E. Was timely notice of the accident given Respondent?

Petitioner testified that he slipped from a high-lift and fell approximately eight to nine feet. The initial medical records as well as the following up treatment records contain consistent histories of Petitioner falling between six and seven feet from a high lift at work on 4/7/03. Petitioner asserts that his supervisor was present on the date of his accident and initial records indicate that Petitioner provided a consistent report to the Concentra nurse case manager while at the hospital. Accordingly, the Arbitrator finds that Petitioner did suffer an accident on April 7, 2003 and further finds that Petitioner provided timely notice regarding the same.

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

Petitioner alleges several conditions and offers several complaints in connection with this matter. It is noted that Petitioner was diagnosed with a spinal contusion while hospitalized in Resurrection Medical Center. The initial complaints refer to left-sided upper and lower extremity weakness and difficulty in connection with the same. Petitioner was also treated for a left elbow sprain and a right hand middle finger small fracture at the PIP joint. Petitioner is also blind in the right eye and has a right eye cataract.

Based on the records as summarized above, the Arbitrator finds causal connection for Petitioner's spinal contusion as reflected in the medical records and for his elbow sprain and right middle finger fracture. In so finding, the Arbitrator notes there is nothing in the record to suggest that Petitioner suffered left sided upper and lower extremity weakness and difficulty or any problems with his left elbow or right middle finger prior to this accident. After the accident, Petitioner's symptoms were immediate and acute. The Arbitrator further finds that Petitioner was treated for these conditions in the hospital and at follow up with his treating physicians through October 14, 2003. The Arbitrator finds casual connection for these conditions through October 14, 2003, the date before Petitioner's release to full duty work for Respondent. Petitioner's release to work followed normal findings on several objective tests as well as the successful completion of an FCE and work hardening. Finally, the Arbitrator notes that subsequent to October 15, 2003, the record is devoid of any objective evidence to support Petitioner's subjective continued complaints.

The Arbitrator further finds no causal connection between Petitioner's right eye conditions of cataract and blindness and the accident of 4/7/03. In so finding, the Arbitrator notes that Petitioner did not suffer acute head or eye trauma in the fall. Petitioner specifically denied any initial head injury and did not initially report complaints involving the right eye. When Petitioner did begin reporting symptoms with regard to the right eye, he noted that his right eye had always been weaker than the left. The Arbitrator's finding of no causal connection is further based on the more credible and thorough opinion of Dr. Golden-Brenner rather than on the speculative statements of Dr. McClennan or the prison examining doctor regarding the connection between Petitioner's fall and his right eye condition.

K. What temporary benefits are in dispute? TTD O. Does Respondent receive credit for overpayment of TTD benefits?

Petitioner requests temporary total disability for a period of 38-1/7 weeks commencing 4/8/03 through 3/31/04, the day before his return to full duty work from lay off. However, the Arbitrator notes the above finding of causal connection for Petitioner's spinal cord contusion injury through 10/14/03, the day of Petitioner's release to return to work by Mercy Works. Accordingly, the Arbitrator finds that Petitioner was not temporarily and totally disabled subsequent to 10/15/03.

With regard to the period of alleged TTD commencing 4/8/03 through 10/14/03, the Arbitrator notes Respondent paid TTD benefits to Petitioner commencing 4/8/03 through 10/14/03 totaling $24,325.76. ARB EX 1. However, the Arbitrator notes that the Federal Indictment clearly indicates that in 2003 Petitioner was engaged in ongoing income earning activities connected to his involvement with the City's Hired Truck Program. RX 5. The activity demonstrated that Petitioner was capable of, and in fact did, earn an income while he received TTD benefits. As such, the Arbitrator finds that Petitioner was not entitled to TTD benefits during this period and Respondent shall be provided a credit of $24,325.76 to be applied towards permanency. Utilizing Petitioner's PPD rate of $542.17, this would equate to 44.87 weeks of permanency.

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

The Arbitrator notes that Petitioner bears the burden of proving all elements of his claim by a preponderance of the credible evidence submitted. The Arbitrator found that Petitioner sustained a fall at work on 4/7/03 followed by medical treatment for the causally related spinal contusion, elbow and finger injuries. Following his discharge, Dr. Gutierrez noted that Petitioner's recovery was moving along well. The ongoing MRI scans and EMG tests performed revealed no objective basis for any ongoing complaints subsequent to July 2003. Petitioner was done treating for his elbow and wrist injuries as of May 2003. Petitioner had minimal complaints of any current problems at trial. Based upon the evidence as a whole, the Arbitrator finds that Petitioner fully recovered from the causally related injuries received in the fall of 4/7/03. Furthermore, any finding of minimal permanency for loss of use of a man as a whole would be negated by the application of Respondent's credit for overpayment of TTD benefits. As such, no award for permanency is made.

O. Other – the propriety of the prior Arbitrator's denial of Respondent's prior request to dismiss

Lastly, the Arbitrator notes Respondent preserved an issue at trial regarding the propriety of the Arbitrator's denial of its motion to dismiss this matter while Petitioner was in prison. The Arbitrator finds that issue to be moot in light of the foregoing findings.

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

Edith Herman Lopez,

Petitioner,

vs. NO: 12WC 31689

Metropolitan Bank Group,

14IWCC0198

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 28, 2013, is hereby affirmed and adopted.

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

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

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

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

DATED: MAR 2 4 2014

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CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

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

LOPEZ, EDITH HERMAN
Employee/Petitioner

Case# **12WC031689**

14IWCC0198

METROPOLITAN BANK GROUP
Employer/Respondent

On 2/28/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2662 LAW OFFICES OF JAMES J BURKE LTD
333 N MICHIGAN AVENUE
SUITE 1126
CHICAGO, IL 60601-3759

0766 HENNESSY & ROACH PC
GUY E DITURI
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

EDITH HERMAN LOPEZ
Employee/Petitioner

Case #12 WC 31689

v.

METROPOLITAN BANK GROUP
Employer/Respondent

14IWCC0198

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 15, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

J. ☐ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On May 30, 2012, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $73,782.80; the average weekly wage was $1,418.90.
- At the time of injury, the petitioner was 46 years of age, *married* with one child under 18.
- The parties agreed that the respondent paid $21,081.00 in temporary total disability benefits.
- The parties agreed that the respondent paid all the related medical services provided to the petitioner.

ORDER:

- The petitioner's request for benefits for a work injury to her cervical spine on May 30, 2012, is denied.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Robert E. Williams
Robert Williams

2/27/13
Date

FEB 28 2013

FINDINGS OF FACTS:

The petitioner, a manager of two bank branches, received physical therapy at Mercy Hospital and Medical Center on May 23, 2012, for left her low back and reported moving her branch and getting some spasms at night that was relieved with medications. She saw Dr. Slack on May 24, 2012, for treatment of her degenerative disc and facet disease. At the next therapy session for her low back on May 31st, she reported moderate-severe pain because of weather and lifting/carrying at work. She reported low back stiffness at therapy on June 7th and moderate back pain on the 8th. She reported pneumonia-like feeling to the therapist on June 13th and then sought care at the Mercy Hospital and Medical Center emergency department and reported left back and chest pain, left arm pain and heaviness and the inability to take deep breaths for one to two days that was exacerbated by exertion. It was noted that her neck was supple. At the therapy session on June 20th, she reported upper back symptoms she attributed to throwing grandkids into a pool.

Dr. Garcelon of Mercy Hospital and Medical Center saw the petitioner on June 22nd and noted that the petitioner reported searing left upper back pain starting two weeks earlier. Pursuant to a request from Dr. Garcelon, an MRI of her cervical spine on June 28th revealed mild spondylosis at C5-6 and C6-7 and osteophytes encroaching on the neural foramina. Dr. Slack saw the petitioner on July 19th and noted complaints of sharp, hot, searing, knife-like neck pain down into her left, medial scapula. The doctor noted a limited range of motion due to neck pain. On August 2nd, the petitioner reported to Dr. Slack that on May 30th she started having increasing symptoms. On September 6th, the petitioner reported some relief of burning-type pain from a cervical epidural injection but

persistent neck and pain across her shoulders. She started physical therapy and received two more cervical epidural injections. The petitioner reported continuing neck symptoms on February 1, 2013, and Dr. Slack recommended an evaluation by Dr. Ted Fisher.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that her current condition of ill-being with her cervical spine is causally related to a work injury on May 30, 2012. She had several physical therapy sessions from May 30, 2012, and only reported low back pain through June 20th. At that time, she reported upper back symptoms that she attributed to throwing her grandkids into a pool. And when the petitioner saw Dr. Garcelon on June 22nd, and she only reported upper back pain that began two weeks earlier. The evidence does not support any symptoms or complaints of neck pain contemporaneously with May 30, 2012. The petitioner is not credible or believable. The opinion of Dr. Slack is not consistent with the evidence and is conjecture. Her request for benefits for a work injury to her cervical spine on May 30, 2012, is denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that she is entitled to temporary total disability benefits.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner failed to prove that an evaluation by Dr. Fisher recommended by Dr. Slack is reasonable medical care necessary to relieve the effects of a work injury on May 30, 2012.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Shawn Heuer,

Petitioner,

vs. NO: 10 WC 23494

Menard Correctional Center,

Respondent,

14IWCC0199

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of 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 modifies the Arbitrator's award, reducing the loss of use of the left arm to 15%. All else is affirmed.

The Petitioner testified on July 22, 2013, that he had a lot of pain in his left elbow and that it was numb. He testified that Dr. Brown advised him on May 21, 2013, that eventually those symptoms would go away.

According to the notes of Dr. Brown on May 21, 2013, Petitioner indicated that the numbness and tingling in both hands is decreased. Petitioner noted a bump over the posterior aspect of his left elbow but the Doctor pointed out that that was the olecranon process and that there was a similar bump over the posterior aspect of his right elbow. "I explained to Shawn this is a normal anatomical structure. I see nothing here that is out of the ordinary." The Doctor indicated that Petitioner had done very well and that he had no specific recommendations at this time. Petitioner was released to full duty with no restrictions. (Petitioner Exhibit 1)

14IWCC0199

The Petitioner testified that the Doctor's statement, that the pain and numbness would eventually go away, was made 2 months before he testified at the Commission. This was not enough time for the Doctor's opinion to come to fruition.

The Commission finds that Petitioner has a 15% loss of use of the left arm as a result of this injury.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE that Respondent pay to Petitioner the sum of $612.92 per week for a period of 75.9 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 15% of the right arm and 15% of the left arm.

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

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

DATED: MAR 2 4 2014

CJD/hsf
022014
049

Charles J. DeVriendt

Stephen Mathis

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HEUER, SHAWN Case# **10WC023494**
Employee/Petitioner

SOI/MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0199

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

4852 FISHER KERHOVER & COFFEY
JASON E COFFEY
P O BOX 191
CHESTER, IL 62233

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

AUG 22 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0199

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Shawn Heuer
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # 10 WC 23494

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on July 22, 2013. By stipulation, the parties agree:

On the date of accident (manifestation), June 4, 2010, 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 $53,120.00, and the average weekly wage was $1,021.54.

At the time of injury, Petitioner was 39 years of age, single with 2 dependent child(ren).

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

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. The parties stipulated that all TTD had been paid.

After reviewing all of the evidence presented, the Arbitrator 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 $612.92 per week for 88.55 weeks because the injury sustained caused the 20% loss of use of the left arm and 15% loss of use of the right arm, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

Augusut 18. 2013
Date

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of June 4, 2010, and that Petitioner sustained repetitive stress/trauma to his right and left elbows. There was no dispute regarding compensability and the parties stipulated that temporary total disability benefits and medical had been paid by Respondent. Accordingly, the only disputed issue at trial was the nature and extent of disability.

Petitioner worked for Respondent as a Correctional Officer and, as a result of his job duties, sustained repetitive trauma injury to both arms/elbows. On June 2, 2010, Petitioner was seen by Dr. David Brown, an orthopedic surgeon. Dr. Brown examined Petitioner and opined that the symptoms and findings were consistent with ulnar neuropathy. Dr. Brown referred Petitioner to Dr. Dan Phillips who performed nerve conduction studies that same day which were positive for bilateral cubital tunnel syndrome. Dr. Brown opined that Petitioner's condition was related to his work as a Correctional Officer.

Dr. Brown initially attempted conservative treatment with elbow splints; however, Petitioner's condition did not improve. When Dr. Brown saw Petitioner on August 4, 2010, he recommended that Petitioner undergo surgeries on both elbows; however, he did authorize Petitioner to continue to work with no restrictions up until the time of surgery.

Petitioner changed jobs in March, 2011, and began working for Menard Farm Industries, where he was employed as a truck driver. Petitioner would still use Folger-Adams keys; however, he no longer was required to perform many of the job duties that he previously performed as a Correctional Officer such as bar rapping, opening/closing cell doors, crank operating, etc.

Dr. Brown did not see Petitioner again until January 21, 2013, and, at that time, he renewed his recommendation that Petitioner undergo elbow surgeries. Dr. Brown performed ulnar decompression and transposition surgeries on the right and left elbows on March 15 and April 5, 2013, respectively. Subsequent to the surgeries, Petitioner had physical therapy. When Dr. Brown saw Petitioner on May 21, 2013, Petitioner advised that the numbness/tingling had decreased in both hands but that he still noticed a "bump" over the posterior aspect of the left elbow. Dr. Brown's findings on examination were benign and he released Petitioner to return to work without restrictions.

At trial, Petitioner testified that he still has symptoms of pain and sensitivity in both elbows; however, he has substantially more complaints in regard to the left elbow. Petitioner described the pain in the left elbow as being "constant," that it frequently becomes numb and that he experiences what he describes as "Charlie horses" of the muscles in the left forearm. In regard to his right elbow, Petitioner's symptoms were considerably less and, on cross-examination, Petitioner admitted that on April 26, 2013, Petitioner informed the physical therapist that his right elbow felt "perfect" but that his left elbow continued to be sore and weak.

Conclusions of Law

The Arbitrator concludes that Petitioner sustained 20% loss of use of the left arm and 15% loss of use of the right arm.

In support of this conclusion the Arbitrator notes the following:

Petitioner was diagnosed with bilateral cubital tunnel syndrome and ulnar transposition surgeries were performed on both elbows. The Petitioner still has symptoms in regard to both elbows; however, Petitioner presently has more symptoms in respect to the left elbow than the right.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vance Farace,
Petitioner,
vs.
AT & T,
Respondent,

NO: 10 WC 16783

14IWCC0200

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of the nature and extent of Petitioner's permanent disability, 8(f) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 2, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAR 25 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:3/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FARACE, VANCE
Employee/Petitioner

Case# **10WC016783**

14IWCC0200

AT&T
Employer/Respondent

On 8/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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:

1767 TUTAJ, JAMES P
3416 W ELM ST
McHENRY, IL 60050

0766 HENNESSY & ROACH PC
TOM FLAHERTY
140 S DEARBORN SUITE 700
CHICAGO, IL 60603

14IWCC0200

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Vance Farace
Employee/Petitioner

v.

AT&T
Employer/Respondent

Case # 10 WC 16783

Consolidated cases: ___

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Waukegan** , on **June 20, 2013**. By stipulation, the parties agree:

On the date of accident, **January 29, 2010**, 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 **$69,405.96**, and the average weekly wage was **$1334.73**.

At the time of injury, Petitioner was **48** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of **$78,685.00** for TTD, **$n/a** for TPD, **$78,430.51** for maintenance, and **$n/a** for other benefits, for a total credit of **$157,115.51**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent and total disability benefits of $**889.73**/week for life, commencing **June 21, 2013**, 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 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.

Edward Lee — Signature of Arbitrator

7/31/13 — Date

AUG 2 - 2013

PETITIONER'S PROPOSED FINDINGS

In support of the Arbitrator's decision relating to the Nature and Extent of Petitioner's injuries, the Arbitrator finds as follows:

There is no dispute that Petitioner is unable to return to his former occupation as a cable splicer with Respondent. All of the medical and vocational evidence entered into evidence establishes that Petitioner's current condition and medical restrictions preclude him from returning to his former job with Respondent.

Respondent has not offered Petitioner employment within the restrictions imposed by Petitioner's treating physicians nor has Respondent provided Petitioner with vocational rehabilitation and job placement services as contemplated by Section 8(a) and Section 7110.10 of the Rule Governing Procedure before the Illinois Worker's Compensation Commission. Respondent did not respond to Petitioner's demand for Vocational assistance and Petitioner was not provided any assistance with his self-directed job search.

Petitioner's Exhibit 3 is the Functional Capacity Evaluation performed on October 11, 2011. The Functional Capacity Evaluation was performed upon the recommendation and request of Respondent's independent medical examiner, Dr. Mirkovic (P. Ex. 2, Pg 14).

In regard to Petitioner's functional capacities, Mr. Honcharuk reports:

> "The results of this evaluation are considered valid as Mr. Farace passed the clinical and subjective tools utilized by this evaluator. Mr. Farace exhibited signs of full physical effort to the extent that he could given his foot drop and AFO. Mr. Farace is not capable of performing physical demands of the target job of "cable splicer"... ***Mr. Vance Farace safely performed at the less than sedentary physical demand level.***" *[emphasis added]* during the course of this evaluation. He was unable to safely push, pull, carry and lift to match the functional job descriptions. (P. Ex. 3, Pg 1)

Mr. Honcharuk reports that Petitioner is significantly limited in his ability to stand, walk, sit, lift, carry, push, pull, climb, stoop, crouch, crawl and perform low level work. Specially, in an 8 hour work day, Petitioner can stand for a total of less than 2 hours with a single longest duration of approximately 47 minutes. His walking is limited up to 5 minutes at a time. He can sit for a total of approximately 3 hours with a longest single duration of 35 minutes. He is limited to carrying 10 lbs. He is unable to lift any weight from the floor to a height of 31 inches, he is limited to 35 lbs between his waste and shoulder level, and unable to safely lift any weight above shoulder level. (P. Ex. 3, Pgs 31-32).

On March 23, 2012, Petitioner's attending Physical Medicine and Rehabilitation physician, Dr. Mary Norek of Orthopedic Associates of DuPage reports:

> "It is my medical opinion that the Functional Capacity Evaluation prepared through Athletico Physical Therapy on October 11, 2011 consisting of 36 pages was thorough and accurate. * * * The examining therapist did indicate that the test was valid and that full effort was put forth. If it provides any help to those requesting the information from me, I have reviewed the FCE. The data of interest, I believe is provided in the first 3 pages. To briefly summarize this, he tolerates standing for a total duration of 1 hour 45 mins in an 8 hour day, longest duration 47 minutes continuously. He tolerates walking for 5 minutes at a time. He tolerates sitting for 35 minutes at a time, total duration 2 hours 51 minutes in an 8 hour day. The only lifting that he tolerated was when lifting from 31 inches off the floor to 61 inches

with a maximum lifting tolerance of 30 lbs in this range of height. Lifting at other heights was not tolerated. He does not tolerate carrying as he is to walk with a cane and his AFO. Pushing and pulling also were not tolerated because of the use of his cane and AFO. He doesn't tolerate any climbing, stooping, crouching, crawling or low level work. He does tolerate reaching forward in the 31-61 inch height. He fine dexterity was normal. Please refer to the 36 page report for additional details. (P. Ex. 4, Pg 2).

Petitioner testified that Dr. Norek has not released him to return to any type of employment. Petitioner further testified that Dr. Norek is unwilling to modify any of his physical restrictions. Petitioner is still under the care and treatment of Dr. Norek. He last saw Dr. Norek approximately three weeks prior to the arbitration hearing. He is next scheduled to see her in December 2013. Dr. Norek monitors the atrophy in his left lower extremity, his drop foot, and reviews and renews his prescription medications.

On September 28, 2012, Dr. Norek reports that Petitioner was seen for follow up following adaptions to his AFO to allow blisters on his left foot and ankle to heal. Dr. Norek reports that Mr. Farace's is not a candidate for a hinged AFO at the ankle due to persistent quad muscle weakness.

Her physical examination revealed that Mr. Farace was walking with a cane and wearing his left AFO. His calloused blisters over the left distal achilles tendon and medial malus were decreased in size with no open lesions. The Petitioner had positive straight leg raise on the left at 45 degrees, significantly decreased muscle strength in the left quad, left hip flexors, ankle, extensor hallucis longus, and ankle evertors. Dr. Norek noted atrophy in the left calf causing poor fitting of the AFO brace. Her assessment included drop foot, lumbar radiculitis, and blister of the ankle without infection. She recommended continued home stretches and exercise.

Dr. Norek's office note reflects Petitioner was taking Naprosyn, Ambien, Zoloft, Prilosec, Lyrica and Norco (P. Ex. 4, Pgs 4-5).

Petitioner testified that he is now taking the maximum allowable dosage of Lyrica.

Petitioner's Exhibit 8 is the report of Petitioner's vocational rehabilitation counselor, Mr. Edward Steffan. Mr. Steffan's report indicates he was retained to conduct an initial vocational evaluation, transferrable skills analysis and a labor market sampling. (P. Ex. 8, Pg1). Mr. Steffan notes that Petitioner graduated high school in 1979, is a certified automobile mechanic, and has worked as a mechanic and cable splicing technician for AT&T since May 1992. Following his graduation from high school in 1979, he worked as an auto mechanic at auto dealerships prior to joining AT&T.

In regard to his transferrable skills analysis, Mr. Steffan reports that he identified 171 job titles, which, in general, Petitioner would have transferrable skills to perform. (P. Ex. 8, Pg 8) Some of the job titles identified by Mr. Steffan include glass grinder, trouble locator, solderer, lock assembler, assembler, semi-conductor microelectronics processor, laminator 1 and bench hand. *Id.* Mr. Steffan notes however that his transferrable skills analysis ***"identifies positions with limited availability in Mr. Farace's labor market area."*** [emphasis added] In addition, Mr. Steffan concludes that given Petitioner's physical restrictions and the physical demands of the positions identified by his transferable analysis "it is not reasonable to be of the opinion Mr. Farace could perform the essential job tasks of these jobs ***even if he were able to induce a potential employer to hire him over job applicants."*** [emphasis added] (P. Ex. 8, Pg 8). Mr. Steffan also reported on the results of his telephonic labor market sampling. He reports that 6 employers had 22 positions which may be commensurate with Petitioner's rehabilitation variables. However, only one employer had one position open and available at the time he conducted his labor market sampling.

Based upon his vocational evaluation, his transferable skills analysis and his labor market survey, Mr. Steffan concludes that Petitioner is not a candidate for vocational rehabilitation and that there is no readily available stable labor market for Petitioner:

> "There would appear to be no readily available stable labor market for Mr. Farace given his need to alternate between sitting, standing and walking as noted in the Functional Evaluation, Dr. Norek utilized to identify Mr. Farace's available physical capacities for work;
>
> It appears given Mr. Norek's release Mr. Farace may not be released to perform an 8 hour work day;
>
> Given this information, we do not recommend Mr. Farace be provided assistance by a certified rehabilitation counselor providing vocational placement assistance ***as it is not probable he could induce a potential employer to hire him over employment candidates.***" (P. Ex. 8, Pg 8).

Respondent's Exhibit 1 is the report of vocational assessment performed by Respondent's vocational counselor, Eric Flanagan dated March 25, 2013. Mr. Flanagan notes the results of the FCE dated October 11, 2011 and Dr. Norek's restrictions as noted in her March 23, 2012 progress note. Mr. Flanagan reports that Petitioner has been looking for work for approximately one year and that his job search is ongoing. Petitioner explained that he looks for jobs in local newspapers, on the internet, using such sites as Monster and Craigslist and inquires in person or by making phone calls. Mr. Flanagan's conclusion was that ***"Mr. Farace has a valid FCE outlining his physical capabilities, which are below a sedentary level."*** *[emphasis added]*, with very restricted capacities in the area of sitting. Mr. Farace has no experience in sedentary-based positions and uses a cane extensively to both sit and ambulate.'

Mr. Flanagan expresses no opinion in his report as to whether Mr. Farace is a viable candidate for vocational rehabilitation, or whether a readily stable labor market is available to Mr. Farace given his age, education, training and his restrictions.

Respondent's Exhibit 2 is a labor market survey prepared by Respondent's vocational rehabilitation consultant Encore Unlimited, dated June 14, 2013. The report identifies 12 employers which provided information about current openings for positions identified as potential alternate employment for Petitioner.

The report however, does not identify the physical requirement of any of the positions identified nor is there any information or data provided from which it can be concluded that the physical requirements of the identified positions are within Petitioner's limitations as identified by the FCE and Dr. Norek's restrictions.

The report concludes that Petitioner should be able to obtain employment within his restrictions if he is able to obtain reasonable accommodations.

Petitioner testified that he experiences some level of low back pain on a daily basis. He stated that he has no feeling in his leg below his knee and requires the use of an AFO brace and cane to walk. He has difficulty walking without the brace and cane and has fallen when he attempted to walk with the cane and brace. He confirmed that his left leg is atrophied and smaller than his right leg. He testified that he has difficulty sleeping, requires the use of prescription medications Norco and Lyrica on a daily basis to control his pain, and finds it necessary to lay down during the course of the day due to his back pain and the sedative effects of his prescription medications. He is able to cook for himself and perform light housework. He is limited in his ability to perform virtually every other activity.

Petitioner testified that he began looking for work following completion of the FCE in October 2011. He has not received any requests for interviews much less any job offers. He further testified that he contacted the employers identified in the labor market surveys prepared by Ed Steffan and Encore Unlimited and that no positions were available within his restrictions.
Petitioner's exhibit 7 is a sample of the job contacts and applications he submitted as part of his on line job search. Petitioner also brought with him a year's worth of classifieds from his local daily newspaper that reviewed as part of his job search.

The arbitrator notes that Petitioner's testimony was credible and consistent with the medical records and reports prepared by the respective vocational counselors.

The Arbitrator has also reviewed Respondent's exhibit 3, the surveillance video conducted of Petitioner on September 27 and 28, 2012. The Arbitrator notes that Petitioner's activities as reflected in the surveillance video are consistent with Petitioner's testimony, and his limitations and restrictions noted in his medical records and the FCE.

In *Ceco Corp. vs. Industrial Commission*, 95 IL2d 278, 286-87 (1983) the Supreme Court held that:

> An employee is totally and permanently disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. The claimant need not, however, be reduced to total physical incapacity before permanent total disability award may be granted. Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonable stable market.

If a claimant's disability is not so limited in nature that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, to be entitled to permanent disability benefits under the Act, the claimant has a burden of establishing the unavailability of employment to a person in his circumstances; that is to say that he falls into the "odd/lot" category. *Valley Mold & Iron Co. vs. Industrial Commission*, 84 IL2d 538, 546-47(1981); *A.M.T.C. of Illinois Inc. vs. Industrial Commission*, 77 IL2d 42, 490 (1979).

A claimant can satisfy his burden of proving that he falls into the "odd/lot" category by showing diligent but unsuccessful attempts to find work or by showing that he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel vs. Industrial Commission*, 372IL3d 527, 544 (1st Dist. 2007).

In determining whether a claimant falls within an odd/lot category for purposes of an award of permanent disability benefits, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training, and capabilities. *A.M.T.C. of Illinois Inc. vs. Industrial Commission*, 77IL2d at 489.

The arbitrator finds that based upon the records of Petitioner's treating physician, Dr. Norek, the FCE dated October 11, 2011, the report of Petitioner's vocational counselor, Ed Steffan and Petitioner's credible testimony regarding his current condition and job search, Petitioner has met his burden of proving that he falls into the odd-lot category of permanent total disability. Petitioner has presented credible evidence that there is no reasonably stable labor market readily available to the Petitioner based upon his age, education, work experience, and most importantly his physical limitations and restrictions as identified by the FCE and Dr. Norek.

The findings of the FCE, Dr. Norek's restrictions and the results of her physical examinations, and Petitioner's testimony regarding his current condition and limitations, is uncontested and un-refuted. Of the reports of the two vocational consultants, the Arbitrator relies more heavily upon the report of Petitioner's vocational counselor, Ed Steffan. The Arbitrator notes that to a certain extent even the opinions set forth in Mr. Steffan's report are un-rebutted. The Respondent's vocational counselor never expresses the opinion that a stable labor market is readily available to Mr. Farace given his physical limitations and restrictions. Respondent's counselor acknowledges that Petitioner's physical restrictions place him at the less than sedentary physical demand level and he never identifies or credibly establishes that there is a reasonably stable labor market, much less any labor market, readily available for individuals who work at a less than sedentary physical demand level. Respondent's labor market survey identifies employment opportunities which match Petitioner's theoretical transferable skills, but there is no information or data which establishes, or from which the Arbitrator can reasonably infer, that the physical demands of the positions identified meet the Petitioner's restrictions, or correspond to a less than sedentary physical demand level. Respondent's opinion or contention that Petitioner is employable is conditioned upon an assumption that the employer will be willing to make reasonable accommodations for Petitioner. This is a far cry from concretely identifying employer who are willing to make reasonable accommodations and do have jobs readily available that Petitioner can safely perform.

Once a claimant initially establishes that he falls into the odd-lot category, the burden shifts to Respondent to show that some kind of suitable work is regularly and continuously available to the claimant. *Valley Mold & Iron Co.*, 84 IL2d at 547.

For the reasons noted above, the Arbitrator finds that Respondent has failed to establish, more probably true than not, that some kind of suitable work is regularly and continuously available to the Petitioner.

As noted, Respondent's vocational counselor does not dispute that Petitioner's restrictions place him at the less than sedentary physical demand level. Although their consultant identifies potential employment opportunities that match Petitioner's transferable skills, there is no indication that the duties of these potential jobs are within Petitioner's physical limitations. Moreover, Respondents vocational consultant never expressly states that a stable labor market is readily available to Petitioner given his less than sedentary job restrictions.

The Arbitrator finds Petitioner has met his burden for establishing an award for permanent total disability under the "odd-lot" theory. Therefore, the Arbitrator finds Petitioner to be permanently and totally disabled and awards him the sum of 889.73 per week for life as provided in Section 8(f) of the Illinois Workers Compensation Act. The Petitioner is entitled to receive such weekly benefits commencing June 21, 2013, the day after completion of the trial of this matter.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marilyn Matulis,
Petitioner,
vs.
State of Illinois-Department of Revenue,
Respondent,

NO: 12 WC 09234
14IWCC0201

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2013 is hereby affirmed and adopted.

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

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

No bond or summons for State of Illinois cases.

DATED: MAR 25 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:2/27/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MATULIS, MARILYN
Employee/Petitioner

Case# **12WC009234**

14IWCC0201

ST OF IL-DEPT OF REVENUE
Employer/Respondent

On 7/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0352 LaMARCA LAW OFFICE PC
WILLIAM LaMARCA
1118 S 6TH ST
SPRINGFIELD, IL 62703

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

1368 ASSISTANT ATTORNEY GENERAL
CHRISTINA SMITH
500 S SECOND ST
SPRINGFIELD, IL 62706

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

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

JUL 9 - 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0201

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARILYN MATULIS
Employee/Petitioner

v.

STATE OF ILLINOIS-Department of Revenue
Employer/Respondent

Case # **12** WC **09234**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **June 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Dismissal of duplicate filing-case number 12 WC 11645**

FINDINGS

On **January 17, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,976**; the average weekly wage was **$788**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

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

ORDER

At the request of Petitioner and with no objection by Respondent, the Arbitrator hereby dismisses with prejudice the duplicate filing of case number 12 WC 11645.

The Arbitrator concludes that Petitioner had not met her burden to prove that her left cubital tunnel syndrome arose out of or in the course of her employment and further the Arbitrator cannot conclude that the condition of ill-being is causally related to her work activities. No benefits are awarded.

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

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

D. Dan McCarthy
Signature of Arbitrator

July 5, 2013
Date

JUL 9 - 2013

MEMORANDUM OF DECISION OF ARBITRATOR

I. FINDINGS OF FACT

Petitioner worked for Respondent State of Illinois, Department of Revenue on January 17, 2012. Petitioner began working for Respondent in July 2000 and held several different positions. Petitioner testified that her first position was from 2000 to 2009 and was in check validation. This process entailed going through tubs of paperwork and separating the checks from the other paperwork, moving the checks to the left. Petitioner would perform this process in batches of 200 by removing the checks, using her validation stamp on the top of the paperwork and on the check and then moving the checks to her left with her left hand. Petitioner would do as many batches as she could in an hour which could be a couple hundred to a thousand an hour.

The actions performed with her left arm entailed movement of the paper to her left wherein she would pick up the papers and move them to the left by bending and straightening her left elbow. For two of the years from 2000-2009, Petitioner was a group leader and would supervisor other individuals performing the check validation process.

From 2009 to 2012, Petitioner was an Account Rep II where she would take checks that had been previously validated, take the documents out of the folder, take any staples out of the document with her right hand and separate out the checks and the documents. The movements required were that she would pick up the papers with her left hand and move them to the side by bending and straightening her left arm. Petitioner testified that she was performing these duties all day long for several days of the week. The rest of her time was spent encoding checks which would entail taking paperwork from a folder, removing the checks from the folder and putting them into the encoding machine by entering the amount of the check into the encoding machine with her right hand and then dropping the check with her left hand to run the checks through the machine and the machine would encode the bottom of the check with the amount so that it could be sent to the bank. This process required Petitioner to move her left arm by bending and straightening it. In a typical shift, Petitioner would perform this process a thousand or more times. Petitioner testified that the encoder depicted in Petitioner's Exhibit 8 was an accurate representation of the encoder that she used. Petitioner testified that the encoder machine has a divot on the left hand side where checks would sit while the amounts were entered with the right hand. Petitioner would pick up the checks individually with her left hand after the amounts were entered and place them at the top of the machine to be run through the machine. This process required Petitioner to fully extend her left arm.

On January 17, 2012, Petitioner was working on the encoding machine and noticed a pulling and burning in her left arm down to the last three fingers on her left hand. Her left hand swelled up and the last three fingers were touching. Petitioner reported this to her supervisor Mr. Perry.

Petitioner then treated with Dr. Michael Watson on January 24, 2012 who indicated his impression that Petitioner had left cubital tunnel syndrome and referred Petitioner for nerve conductions studies. Petitioner underwent an EMG on January 31, 2012 with Dr. Edward Trudeau. Dr. Trudeau's results are included in the record as Petitioner's Exhibit 2. Dr. Trudeau confirmed that Petitioner was suffering from ulnar neuropathy at the left elbow or left cubital tunnel syndrome that was moderately severe. Dr. Watson recommended Petitioner undergo cubital tunnel release surgery and Petitioner had the surgery on November 29, 2012. Petitioner remained under Dr. Watson's care until May 2013. Dr. Watson's medical records are included as Petitioner's Exhibit 1. Dr. Watson also provided an opinion letter regarding the causal connection between Petitioner's work and her job duties (Petitioner's Exhibit 3) and was deposed regarding those opinions. (Petitioner's Exhibit 5).

Petitioner also saw her primary care physician for her cubital tunnel complaints. These records are included as Petitioner's Exhibit 4.

Since the surgery, Petitioner has noticed that the tingling in her left fingertips and the pulling from the left elbow to the fingertips has gone away and the pain has gone away. Petitioner still has some pain that she reports is different than the pain prior to surgery and she refers to it as "healing" pain. Petitioner testified there are days that it does not bother her at all and some days it is sensitive and she sometimes gets pain when she tries to pick up her grandchildren. Petitioner treated in May 2013 for swelling on the left elbow because she was concerned that something was wrong however, Petitioner's doctor advised that it was part of the healing process.

Petitioner testified that her position title was an Account Clerk II and that Exhibit 9 was her performance review from September 2008 to September 2009. Petitioner testified that this document explained the expectations of her job and the number of completed documents and check verifications that she was expected to complete in a given time period and that she had the same job expectation in January 2012 as she had at the time of this performance review.

Petitioner testified that the pictures in Respondent's Exhibit 4 depict her workspace as of March 2012 and do not represent where she worked prior to the manifestation of her injury on January 17, 2012. In January 2012, Petitioner worked primarily at the encoding machine and also had a desk area that did not have a computer.

Petitioner did not experience any pain in her arm prior to January 17, 2012.

On cross examination, Petitioner stated that the majority of her time at work was not spent holding her elbow in a flexed position but moving it by extending it and flexing it for the whole time she was working. She also stated that she did not rest her elbow against any hard surface while she was working because she was always moving it in each of the different jobs that she was required to do.

Petitioner testified that she has not experienced any problems in performing her job as a result of her cubital tunnel syndrome and does not currently need to take any pain medication for her cubital tunnel syndrome.

Dr. Watson stated that it was his opinion that the tasks of holding documents with her left hand, flipping through documents with her left hand, and working at an encoding machine manually feeding checks with her left hand for up to seven hours a day "most likely either caused or contributed to the development of her left cubital tunnel syndrome and her need for surgery." (PX 3). Dr. Watson explained his causation opinion in his deposition stating that "ulnar neuropathy at the elbow begins with inflammation around the medial epicondyle. The medial epicondyle is the insertion point for a lot of the powerful wrist flexor tendons and the finger flexor tendons in the forearm and hand, and with overuse an inflammatory response is set up around the medial epicondyle and this then causes inflammation of the ulnar nerve as it passes posterior to the medial epicondyle and thus causing numbness and tingling. ***So, it's essentially the repetitive activity of gripping and using the wrist and fingers that can set up this response.***" (PX 5, p. 15).

Dr. Watson also discussed positioning of the elbow, along with putting direct pressure on it:

Q: And Doctor, you mentioned the activity of gripping as a factor in the development of the condition. What about the activity of flexion and extension of the elbow itself on a repetitive basis?

A: Well, most people believe that another contributing cause to cubital tunnel is working with the elbow in a flexed position for a long period of time. Although in reality, at least it's my opinion that most desk work and keyboarding work is all done with the elbow in a flexed position for a long period of time, and so then the other thing that can contribute it pressure directly on the elbow such as working at a desk where the ulnar nerve is up against a desk or chair or something

like this. ***So, it's probably not so much working with the elbow repetitively flexing and extending, but working for long periods of time with the elbow in a flexed position.***
(PX 5, p. 21).

Dr. Watson also stated that "sleeping with your elbows in a hyperflexed position, you more likely are going to cause symptoms at night also that can carry over into the day." (PX 5, p. 28). Dr. Watson stated that "it's not so much elbow flexion and extension as with constant elbow flexion or pressure on the ulnar nerve that can aggravate the cubital tunnel but more importantly it's the work of the wrist and finger flexors that can aggravate and inflame the area up around the medial epicondyle which sets this up." (PX 5, p. 37-38).

Dr. Watson based his opinion on his belief that Petitioner held her elbow in a fixed flexed position for a majority of her workday and used her wrist and fingers for gripping. Dr. Watson stated that, "[i]t appears to me that she's working with her elbow a good percentage of the time at 90 degree." (PX 5, p. 39). Dr. Watson stated his understanding that Petitioner's work "requires her to have her elbows in a bent position for around seven hours a day" and that "I'd say the more time that she spends with her elbows in a flexed position the more likely that that's a contributing factor in her cubital tunnel." (PX 5, p. 41).

Dr. Watson also testified that with "***power gripping and squeezing and also with repetitive finger flexing and repetitive wrist flexing*** you set up an inflammatory response at the medial epicondyle near the area of the ulnar nerve. So, unlike the elbow itself, I believe that it's the repetitive activity of the fingers and hand and the gripping activity that sets up the inflammation rather than just working with your wrists in a particular position.." (PX 5, p. 39).

Petitioner was sent for a Section 12 Independent Medical Examination by Dr. James Williams on May 30, 2012 and Dr. Williams issued a report dated the same day and an addendum report on August 19, 2012. (RX 2, Dep. Exh. 2) Dr. Williams is a board certified physician specializing in Orthopedic Surgery with an advanced certification in hand surgery. (RX2, Dep. Ex. 1).

On the date of his examination, Dr. Williams reviewed with Petitioner her health history and confirmed with Petitioner all of her job duties. Dr. Williams also reviewed the Demands of the Job form for Petitioner's job and the Position Description with Petitioner. Petitioner advised that she did not find any discrepancies. Dr. Williams also reviewed the Employee's Notice of Injury form and the Supervisor's Notice of Injury form. Dr. Williams also reviewed Petitioner's medical records and performed a physical examination.

Dr. Williams agreed with the diagnosis of left cubital tunnel syndrome and also agreed that Petitioner may require surgery. Dr. Williams summarized that Petitioner explained her job duties as "3-4 hours per day she would add documents; she said about 200 per batch. She would have to pull staples which she actually did with her right hand, not her left. She would drop checks into a machine for 3-4 hours per day which she did with her left hand; she only did that job for 3 years. She said that is when her symptoms began. I do not feel that cubital tunnel syndrome, of which she complained, would either have been aggravated and/or caused by that type of activity. ***I feel rather so as that activity is neither vibratory nor requires any reported forceful gripping as the forceful gripping of which she is doing is actually with the right hand when she is pulling staples; she is not doing that with the left hand. With the left hand, she is simply picking up checks and dropping them into an adding machine.*** She only did it for 3-4 hours per day for another 3-4 hours per day, she is not doing that activity with her left hand which should be adequate rest." (RX 2, Dep. Ex. 3, p. 4).

Dr. Williams agree with Dr. Watson that the "biggest issue is the elbow being bent, that it's been well shown that with the elbow flexed the stretch on the nerve is increased by 8mm to 1cm and thus increases the tension on the nerve and thus brings about changes in the nerve of which brings about cubital tunnel." (RX 2, p. 10).

Dr. Williams stated:

Q: Did you –by going over her job duties with her did you obtain the impression that she had consistent flexion with her job?

A: ***It did not appear as though she had consistent flexion with her job as she was changing her job activities it sounded like quite frequently.***"
(RX 2, p. 10)

Dr. Williams also stated the he did not believe that "repeated flexion or the extension of the fingers or wrists developed cubital tunnel. That's obviously a cause of carpal tunnel, but not of cubital tunnel, no." (RX 2, p.14).

In response to questions regarding whether or not the moving and flipping of documents could lead to cubital tunnel, Dr. Williams testified as follows:

Q: Did she also tell you that while removing the staples with her right hand she was gripping or holding the documents with her left hand?

A: That's correct, sir.

Q: And did she also tell you that in the process of that activity she was also flipping the documents over with her left hand?

A: Yes, I do—she did tell me that, sir.

Q: So I guess my question is Doctor, with respect to what I would call a palm up/palm down movement where you're twisting your arm repeatedly, is that the type of activity that may cause or contribute to the development of cubital tunnel syndrome?"

A: I do not believe so, sir. That involves--supination/pronation of the forearm is the activity you're describing where you're turning your hand from a palm down position to a palm up position. I don't believe that changes anything at the pressure within the cubital tunnel, sir.
(RX 2, p. 38).

In addition, Dr. Williams also advised that Petitioner had other risk factors including her posture while sleeping which she stated was holding her elbows in a flexed position and her smoking history of smoking 1 pack of cigarettes a day for 20+ years. (RX 2, Dep. Ex 2).

II. CONCLUSIONS OF LAW

Issue C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? *and* Issue F: Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner's job duties with Respondent did not cause or aggravate her cubital tunnel syndrome and that her current condition of ill-being was not caused by her work duties.

First of all, the Petitioner's job duties between 2000 and 2009 are not relevant to the above issues. She testified that her symptoms began In January 2012, three years after she stopped performing those job duties. Dr. Watson's opinions on causation are based upon her job duties as an account clerk, and there are no opinions dealing with any relationship between her check validation job and her condition.

Petitioner is alleging that her job duties of bending and straightening her elbow and flipping pages with her left hand were a cause of her cubital tunnel syndrome. Petitioner stated that while she was performing her job duties, she was constantly moving her left elbow to pick up documents and move them to the left side of her desk or picking up checks with her left hand to drop them into the encoding machine. Petitioner never stated

that she held her elbow in a flexed position for any extended period of time, an activity that both Petitioner's treating doctor, Dr. Watson and Respondent's IME doctor, Dr. Williams agree could contribute to cubital tunnel syndrome.

Petitioner's treating doctor, Dr. Watson, in his deposition stated that cubital tunnel syndrome ***is not caused*** by repetitively flexing and extending the elbow but rather by holding the elbow in a fixed extended position for long periods of time. Dr. Watson stated,

"***So, it's probably not so much working with the elbow repetitively flexing and extending, but working for long periods of time with the elbow in a flexed position.***" (PX 5, p. 21).

Dr. Watson based his opinion on his belief that Petitioner held her elbow in a fixed flexed position for a majority of her workday and used her wrist and fingers for gripping. Dr. Watson stated that, "[i]t appears to me that she's working with her elbow a good percentage of the time at 90 degree." (PX 5, p. 39).

Respondent's IME doctor, Dr. Williams, agreed with Dr. Watson that the "biggest issue is the elbow being bent, that it's been well shown that with the elbow flexed the stretch on the nerve is increased by 8mm to 1cm and thus increases the tension on the nerve and thus brings about changes in the nerve of which brings about cubital tunnel." (RX 2, p. 10). Dr. Williams explained this further by stating, "the increased pressure and stretching of that nerve occurs from that elbow being in a sustained bent position, which as people say occurs during sleep and that's something which can aggravate and/or bring about the symptoms of cubital tunnel, which is exactly what she describes." (RX 2, p. 31).

Petitioner never testified nor was any other evidence introduced that Petitioner held her elbow in a fixed flexed position for any extended period of time while working. Her treating doctor's causation opinion was based upon the understanding that Petitioner held her elbow in a fixed flexed position for a good percentage of her work day. However, this directly contracts Petitioner's own testimony that her elbow was never in a fixed position. Petitioner testified that her elbow was in constant motion and that she was flexing and extending it the whole shift and never holding it in a flexed position and never resting it on a hard surface.

Dr. Williams further testified:
Q: Did you –by going over her job duties with her did you obtain the impression that she had consistent flexion with her job?
A: ***It did not appear as though she had consistent flexion with her job as she was changing her job activities it sounded like quite frequently.***"
(RX 2, p. 10)

Although Petitioner did pick up the papers with her left hand, there is insufficient evidence that this action requires the type of forceful gripping or extensive flexing of the fingers that would lead to cubital tunnel syndrome. Petitioner's treating doctor, Dr. Watson, stated that "power gripping and squeezing" combined with "repetitive finger flexing and repetitive wrist flexing" could set up an inflammatory response. (PX 5, p. 39). Respondent's IME doctor, Dr. Williams, agreed that forceful gripping may relate to cubital tunnel but did not agree that "repeated flexion or the extension of the fingers or wrists developed cubital tunnel. That's obviously a cause of carpal tunnel, but not of cubital tunnel, no." (RX 2, p. 14.) Dr. Williams also stated that "repetitive forceful gripping is something that obviously entails a lot of effort in order to do it as opposed to simply you could say she's gripping paper. But to turn a paper doesn't involve a lot of force, it involves just holding onto something and turning it over, it think that's very different from as opposed to grabbing something with a significant amount of weigh and holding it." (RX 2, p. 43).

Petitioner did not testify to any forceful gripping with her left hand stating rather that she used her right hand for the repeated gripping and pinching activities of removing staples from the batches of documents. When asked further about gripping activities, Petitioner's treating doctor, Dr. Watson, could not explain why Petitioner's extensive gripping with her right hand would not have led to cubital tunnel stating, "I can't explain why it occurred on the left side rather than the right side in this particular case so I think it might be just a random phenomenon." (PX 5, p. 16).

Petitioner also indicated that her elbow hurt at night and she woke up with swelling around her elbow and the ulnar side of her hand. Petitioner's treated doctor, Dr. Watson indicated that, "if you're sleeping with your elbows in a hyperflexed position, you more likely are going to cause symptoms at night also that can carry over on into the day. (PX 5, p. 28).

Petitioner told Dr. Watson that she noticed her symptoms at work on January 17, 2012 after working a particularly busy day. She testified that she was encoding. Dr. Watson placed a lot of weight on the fact that her symptoms increased on that day. The Arbitrator does not believe that the fact that one notices symptoms while performing his or her job equates to the requisite proof of causation. Dr. Trudeau's studies done five days later show that the Petitioner had the condition for a long period of time, and that it was moderately severe. The Petitioner testified that her symptoms began that day, yet she told Dr. Watson that they had been present for several months. In all likelihood, the Petitioner noticed her symptoms by the date of her alleged accident doing any activities with her left arm.

The Arbitrator does not believe that the Petitioner's work activities of feeding checks into the encoder and separating documents by removing staples are causally related to her cubital tunnel. There was no forceful repetitive gripping, no work with the arm in a flexed position for an extended period of time and no direct pressure on the elbow.

Therefore, the Arbitrator concludes that Petitioner has not shown that her left cubital tunnel syndrome arose out of or in the course of her employment and further the Petitioner has not shown that her condition of ill-being is causally related to her work activities. Therefore all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
MADISON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL CARSON,

Petitioner,

vs.

NO: 11 WC 15593

14IWCC0202

MENARD CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator awarded Petitioner 10% loss of use of the right arm. We modify the Decision of the Arbitrator and award Petitioner 15% loss of use of the right arm.

Petitioner underwent cubital tunnel release surgery on his right arm and testified that the surgery was a success. Following the surgery, Petitioner participated in physical therapy. Petitioner then returned to work full duty and does not complain of continuing difficulties with respect to his right elbow. Based on the medical treatment, including the surgical intervention, we find that Petitioner suffered 15% loss of use of his right arm and increase the Arbitrator's award to reflect as such.

14IWCC0202

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $655.14 per week for a period of 68.7 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent partial disability to the extent of 15% of his right arm and 15% of his right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $16,911.63 for medical expenses per the medical fee schedule under §8(a) of the Act.

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

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

DATED: MAR 25 2014
TJT: kg
O: 1/27/14
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CARSON, DANIEL
Employee/Petitioner

Case# **11WC015593**

MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0202

On 2/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
MATT CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

FEB 20 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0202

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Carson
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # 11 WC 015593

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 **Ed Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **12-18-12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7-0210**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$56,778.00**; the average weekly wage was **$1,091.90**.

On the date of accident, Petitioner was **50** years of age, ***married*** with children under 18.

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

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

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

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

ORDER

1. Timely notice of the accident was given to Respondent. Petitioner had no treatment for his condition prior to June 28, 2010. On July 2, 2010, Petitioner underwent a NCV/EMG. The date of the EMG/NCV is routinely upheld as an appropriate date of accident for repetitive trauma injuries. *See, e.g., Middleton v. St. Anthony's Health Center*, 11 I.W.C.C. 1138, 2011 WL 6282300 (Nov. 18, 2011). On July 16, 2010, Petitioner received the results of the testing and discussed his work activities with Dr. Davis. On July 19, 2010, Petitioner reported his injury. After receiving this notice, Respondent later approved Petitioner's treatment and paid Petitioner TTD benefits.

2. Petitioner sustained an accident that arose out of and in the course of Petitioner's job, as evidenced by Petitioner's medical history, job activities, onset of symptoms while performing his work activities, sequence of events, Petitioner's testimony, the testimony of Dr. Davis, and the reports of Dr. Sudekum.

3. Petitioner's current condition of ill-being is causally related to his work activities, based on Petitioner's testimony, Dr. Davis's testimony, Dr. Sudekum's reports, and Dr. Sudekum's testimony. Petitioner's testimony regarding his job activities, onset of symptoms, and worsening of symptoms is unrebutted. Dr. Davis testified to a reasonable degree of medical certainty that Petitioner's job activities, including rapping bars and turning keys, contributed to Petitioner's condition, which is consistent with the operative findings and Petitioner's reports of symptoms while working. Dr. Sudekum acknowledged that rapping bars and opening doors at Menard can be factors in aggravating carpal tunnel and cubital tunnel syndromes. Dr. Sudekum admitted that pinch grip and vibratory activities can cause symptoms in persons with a constricted median nerve, like Petitioner. Dr. Sudekum admitted that he would find causation if a worker presented with symptoms during or very soon after performing the repetitive activities at Menard. Dr. Sudekum admitted that causation would also be clear if the worker had a nerve conduction study while performing the job of a housing unit officer at Menard. In this case, both situations apply. Petitioner's symptoms worsened while performing the job of a housing unit officer in 2010 when the facility was on lockdown and, further, when he was assigned to that job on June 28, 2010 – the first day he sought treatment from his family

doctor. Dr. Sudekum was not provided any information regarding Petitioner's re-assignments to the housing unit while the facility was on lockdown. Petitioner was still engaged in that job when his nerve conduction study was performed. Finally, Dr. Sudekum also acknowledged that turning keys approximately 300 times per shift, even at a more modern facility, could potentially aggravate carpal tunnel syndrome.

4. Respondent shall pay the following reasonable, necessary, and related medical bills, pursuant to the medical bill fee schedule:

Southern Illinois Orthopedic Surgery Center	$8,632.00
Brigham Anesthesia	$ 855.00
Southern Orthopedic Associates	$6,525.00
Healthlink	$ 864.63
Out-of-Pocket	$ 35.00

5. Respondent has paid all TTD benefits and did not dispute that Petitioner was owed these benefits.

6. Respondent shall pay the Petitioner the sum of $655.14/week for a period of 56.05 weeks as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to the extent of 15% of his right hand, and 10% of the right arm.

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.

Grant Lee — Signature of Arbitrator

2/16/13 — Date

FEB 20 2013

The Arbitrator hereby finds the following:

On July 2, 2010, Petitioner was employed as a correctional officer at Menard Correctional Center. Petitioner started working at Menard in 1991. Petitioner worked various assignments during his career, but was primarily assigned to housing units, also known as galleries. Using the timeline set forth in Respondent's Exhibit 6, Petitioner testified as to his various assignments with Menard.

From 1991 until January 1999, Petitioner worked in various housing units. There are 55 cells per housing unit. Petitioner worked eight hour shifts, with one half hour for a lunch break. Petitioner testified that when he worked in housing units he performed various repetitive hand activities. For example, Petitioner was required to rap the cell bars at the beginning of the shift. Each cell has seven rows of steel bars. Rapping bars is a procedure whereby a correctional officer uses a hand held metal baton, approximately one foot long, to check the integrity of the steel bars on each cell, by dragging the baton across the intact cell bars. Petitioner would perform this task at the beginning of his shift, striking and dragging his baton across each cell bar. When doing so, the metal baton would vibrate in Petitioner's hand. Petitioner, who is right hand dominant, would use his right hand to rap bars.

As a housing unit officer, Petitioner also would repetitively turn Folger Adams keys to allow for inmate movement. A Folger Adams key is larger than a standard door or car key. It is approximately four or five inches long. There are two keyholes per cell. Petitioner would insert the key into a keyhole and turn the key manually, using his right hand. The key is turned clockwise or counter clockwise. Petitioner explained that the Menard was constructed back in the 1800's. Accordingly, the keys and locks are very old. Petitioner would frequently have to use forceful manual twisting to get the locks to open. There are two keys per cell that have to be unlocked to open the cell door. Petitioner would unlock the cells on the entire housing unit in the morning. Petitioner would also have to unlock cells when running inmate movement to the yard, chow hall and commissary. Petitioner would also have to then lock the two locks per cell at the end of his shift. Petitioner explained that Menard does not have a control room with a push button to open the cell doors in a housing unit - everything is manually locked and unlocked. Petitioner testified he would turn Folger Adams keys approximately 300 to 500 times per shift.

When opening the cell doors, Petitioner would have to grip with his right hand and pull the cell doors from right to left. So, in addition to turning the keys, Petitioner would be exerting pinch grip manual force to grasp the door handle and pull the doors open. Some of the doors would be difficult to open.

As a housing unit officer, Petitioner would also have to pack trays. This is a task where a correctional officer takes 54 trays of food, weighing in excess of 100 pounds, and carries them, with his arm in a non-neutral position, up flights of stairs to the housing unit. This task is performed while the facility is on deadlock and the inmates are eating in their cells. Petitioner would also have to "pack ammo." Packing ammo involves putting ammo in a 40 lb. bag and carrying it with his arm at a 90 degree angle and his forearm upright with his hand bent backwards, carrying the bag over his shoulder. Petitioner would have to carry this bag approximately ¾ miles to the tower officer.

Menard, which is a maximum security facility, is frequently on deadlock. When on deadlock, there is little to no inmate movement. While on deadlock, a housing unit correctional officer would still have to rap bars, pack ammo and pack trays.

Correctional officers also have to carry various items throughout their shift. For example, Petitioner would have to carry laundry bags and property boxes. The laundry bags were huge. Petitioner would carry the bag in his right hand with the bag over his shoulder. While doing so, his wrist would be bent backward by the weight of the bag. Property boxes weighed over 100 pounds. Petitioner would sometimes have a correctional officer assist him carrying the rectangular box. But, most of the time, Petitioner would carry the box with his arms in a non-neutral position on either end of the property box.

Petitioner testified that in 1996 to 1997 he worked at the hospital front desk. In this position, Petitioner's repetitive hand activity would include opening and closing the doors to the hospital to allow for inmate and staff movement. The door used a Folger Adams key. Petitioner testified there are 200 passes a day. Accordingly, Petitioner would be locking and unlocking the door 400 times just for the inmate passes. In total, Petitioner estimated that he would turn keys in that position approximately 400 times per day.

In 1998, Petitioner worked as a construction officer. Petitioner testified that, as a construction officer, he would maintain security for the construction contractor performing work at the facility. Petitioner testified that there is minimal keying in this job. However, when construction was not going on or when the facility was on lockdown, he would be assigned to a housing unit. Petitioner is 6 feet 4 inches and 250 pounds. Whenever the facility was on lockdown, Petitioner would be primarily reassigned to a housing unit. Accordingly, even though he was staffed as a construction officer from 1998 to 2004, half of the time he was be staffed in a housing unit.

From 2004 through approximately 2007, Petitioner worked as a chapel officer. While a chapel officer, Petitioner still packed weapons and ammo. He also performed keying with regular house key size keys approximately 100 times per day. He did not rap bars in this job. However, as with construction officer, whenever the facility was on lockdown, inmates were not permitted to go to the chapel. Accordingly, Petitioner would be reassigned to a housing unit, where he would rap bars, turn Folger Adams keys, open and close doors, pack ammo and pack trays.

Petitioner was next assigned to a catwalk position where he would provide security from a raised position in the facility and monitor the inmates from above. In 2009, Petitioner was assigned to the east house housing unit, where he performed the housing unit tasks as described earlier.

Petitioner testified that Respondent's Exhibit #7, provides an accurate timeline of his job assignments from February 28, 2009 through the present. Petitioner was assigned to the chapel from February 28, 2009 through February 21, 2010. Petitioner was assigned to the healthcare unit from February 22, 2010 through June 28, 2010. In the healthcare unit, Petitioner would have to perform keying approximately 200 times per shift.

During this time period, February 2010 through June 2010, the facility was on lockdown 50% of the time. Accordingly, Petitioner was working as housing unit officer, performing housing unit repetitive tasks, for half of his time during this period. Petitioner also worked overtime and weekend hours in the housing unit during this period.

On June 28, 2010, Petitioner was assigned to the North 1, 3 Gallery, or housing unit, as his primary job. (RX7). He worked in the North house, performing the repetitive housing unit tasks as noted above, through mid-July, 2010, when he was reassigned to the medium security unit at Menard.

Petitioner testified that, during the course and scope of his employment, he developed symptoms in his right hand and right arm. Petitioner explained that he primarily had symptoms in his little and ring finger, but also had numbness and tingling in his middle finger, ring finger and thumb. Petitioner also had pain and numbness in his elbow. Petitioner explained that he first noticed his symptoms some time ago, but could not specifically recall when. Petitioner explained that this was gradual issue that continued to worsen until the early

summer of 2010. Prior to the summer of 2010, Petitioner's symptoms would come and go and were not causing him difficulty on the job. Petitioner explained that he first noticed his symptoms at work while performing the tasks of a housing unit officer. Petitioner explained that in the summer of 2010, when his symptoms worsened, he was performing housing unit tasks, including rapping bars, turning Folger Adams keys, and opening and closing doors. Petitioner explained that these activities would cause him symptoms while performing the tasks. Typically, the symptoms worsened about an hour or two into his shift. Petitioner's symptoms no longer came and went, but remained and worsened.

On June 28, 2010, (the first day he was assigned primarily to the North housing unit), Petitioner saw Dr. Kupferer, his family doctor. (PX1) This is the first medical record in the file reflecting any medical treatment for Petitioner's hand and arm symptoms. In that visit, Petitioner complained of numbness in his 4th and 5th fingers on his right hand. Consistent with his testimony at trial, Petitioner reported that his symptoms had increased over the last month. (PX1, at 2) Dr. Kupferer referred Petitioner for an EMG/Nerve Conduction Study, which was performed on July 2, 2010. (PX3) The EMG/NCV revealed moderate to severe right ulnar neuropathy at elbow (cubital tunnel syndrome) and mild right carpal tunnel syndrome. (PX3, at 2) Based on the results of the study, Dr. Kupferer referred Petitioner to Dr. J. Michael Davis. (PX1, at 1).

On July 16, 2010, Dr. Davis diagnosed Petitioner with ulnar neuritis, or cubital tunnel, and recommended surgery. (PX2, at 3) In an intake sheet, Petitioner listed hypertension as a medical condition. (PX2, at 6) Petitioner testified he was taking medication, which controlled his hypertension. Petitioner also testified he suffered from gout-related issues with his foot. Petitioner testified he never experienced any unusual swelling at his wrist or elbow. Petitioner explained that Dr. Davis asked him what his job duties were because repetitive activities could cause Petitioner's symptoms. Petitioner had a discussion with Dr. Davis regarding his job duties. It was during this discussion that Petitioner first connected his symptoms to his work activities.

On July 19, 2010, Petitioner filed an Employee's Notice of Injury with Respondent. (RX2) At the time he filled out this notice, Petitioner was working at the medium security facility. Petitioner explained he put "MSU" in the blank for where the injury occurred because that was where he working at the time he filled out the report. Respondent also prepared a Supervisor's Report of Injury or Illness, which was admitted as Respondent's Exhibit 3. In that report, it is noted that Petitioner was suffering from numbness to his right hand and elbow pain.

On September 2, 2010, Petitioner reported to Dr. Davis that he was continuing to have persistent difficulties, with numbness in his ring and little finger and also in the other digits. Petitioner's physical examination revealed a positive Tinels sign at the cubital tunnel and a mildly positive Tinels at the carpal tunnel. (PX2 at 9) Dr. Davis also noted diminished grip strength. Dr. Davis diagnosed Petitioner with right carpal and cubital tunnel syndrome. At this point, Dr. Davis again recommended surgery and attempted to get workers' compensation approval for an open carpal tunnel release and subcutaneous right ulnar nerve transposition. (PX2 at 9)

Respondent approved the procedures, which took place on October 12, 2010. During the surgery, Dr. Davis noted there was erythema and hour glass constriction of the median nerve. (PX5, at 2) Dr. Davis also noticed there was significant fibrosis and adhesions of the ulnar nerve especially in the cubital tunnel with erythema and evidence of constriction of the ulnar nerve in this area. (Id.) After surgery, Dr. Davis held Petitioner off of work. During this period, Respondent paid Petitioner temporary total disability benefits. Petitioner underwent physical therapy at Southern Orthopedic Associates. (PX6)

Petitioner had an uneventful recovery and was returned to work without restrictions on December 6, 2010. (PX2, at 25) On January 10, 2011, Petitioner reported transient numbness in the little finger. However, his strength and overall range of motion and his sensation was much improved. Petitioner reported he was working

full duty without difficulty. The medical note indicates that, although Petitioner was not yet at maximum medical improvement, he will likely see the residual symptoms continue to resolve over the next several months. (PX2, at 30).

Petitioner testified that the surgeries were a success. Petitioner noted what he perceives to be a lack of grip strength in his hand and arm, but did not know whether that was related to his repetitive trauma injuries or just the natural aging process. Petitioner explained he never had symptoms in his left hand or left arm.

Received into evidence as Petitioner's Exhibit 7 is a report from Dr. Anthony Sudekum dated March 30, 2011. In that report, Dr. Sudekum rendered opinions regarding the work relatedness of a Menard correctional officer's upper extremity complaints. Although the identity of the correctional officer has been redacted, the worker performed the duties of a housing unit officer, just as Petitioner did. Dr. Sudekum reviewed a DVD depicting correctional officers performing various job tasks and duties at Menard. Dr. Sudekum also reviewed a Job Analysis. In the DVD, Dr. Sudekum noted an officer is depicted attempting to turn a lock with a Folger Adams key, which would not initially turn until the officer had removed and reinserted different keys and applied forceful manual twisting to unlock the door. (PX7, at 2) Dr. Sudekum also viewed a depiction of correctional officers rapping bars. Dr. Sudekum's description of rapping bars is consistent with Petitioner's testimony at trial. (PX7, at 3) Dr. Sudekum also visited and toured the facility, spending approximately 4.5 hours at the facility, including the housing units. Dr. Sudekum also performed the bar rapping procedure himself. After reviewing the worker's medical history and discussing the work activities at Menard, Dr. Sudekum opined "that the work activities at Menard Correctional Center served to aggravate bilateral carpal tunnel syndrome and left ulnar neuropathy." (PX7, at 9)

Petitioner also submitted into evidence as Petitioner's Exhibit 8, a report from Dr. Sudekum dated April 29, 2011. In this report, Dr. Sudekum, at the request of Respondent, reviewed the position of correctional officer at Menard Correctional Center to render an opinion regarding the possible causative effect of these job duties on the development of repetitive trauma injuries. (PX8, at 1) Like with his prior report, Dr. Sudekum reviewed a Job Site Analysis, a position description, a statement indicating repetitive movements for a correctional officer, a DVD/video and personally toured the Menard Correctional Center. During his tour, Dr. Sudekum spoke to many correctional officers and performed many of the manual tasks performed by the correctional officers at Menard. (PX8, at 1) In that report, Dr. Sudekum concludes:

> "Based on my evaluation of the information which I have received including written job descriptions, the DVD/video of the job site, and my first hand evaluation of the facility and job activities, it is my opinion that the job activities of a correctional officer at Menard Correctional Center would not serve as a primary etiologic factor in the development of upper extremity "repetitive trauma injuries" however, I feel that these work activities could be a possible aggravating factor in the development and/or progression of these conditions." (PX8, at 14)

Dr. Michael Davis testified on behalf of Petitioner. (PX9) Dr. Davis is a Board Certified Orthopedic Surgeon, who performs upper extremity surgeries. (PX9, at 6) Dr. Davis testified that, based on the diagnostic testing, his preliminary diagnosis of Petitioner was cubital tunnel syndrome of the right elbow, as well as electrodiagnostically noted carpal tunnel syndrome. (PX9, at 8) Dr. Davis noted that on September 2, 2010, Petitioner had positive Tinels at the elbow and the carpal tunnel. Dr. Davis explained that a positive Tinels indicates hypersensitivity or irritation of the nerve. (PX9, at 9) When discussing surgery with Petitioner, Dr. Davis noted that although the majority of his symptoms were related to the ulnar nerve at the elbow, Petitioner did have carpal tunnel symptoms as well. (Id.) Dr. Davis explained that his office sought workers' compensation approval for surgery. (PX9 at 9,10) Dr. Davis testified that the finding of an hour glass constriction of the median nerve is indicative of prolonged compression of the median nerve within the carpal

tunnel region. (PX9, at 10) Dr. Davis explained that erythema is a redness or inflammation at the nerve. (Id.) Dr. Davis explained that the ulnar nerve at the elbow had findings consistent with compression or irritation of that nerve as well as fibrosis or scar tissue. (PX9, at 10) Dr. Davis explained that the intraoperative anatomical findings could be attributed to overuse. (PX9, at 11)

Consistent with Dr. Sudekum's reports, Dr. Davis opined to a reasonable degree of medical certainty, that Petitioner's work activities, including bar rapping and turning keys, contributed to Petitioner's carpal tunnel syndrome and cubital tunnel syndrome. (PX9, at 13) Dr. Davis explained that vibratory activities, such as rapping cell bars, could cause or aggravate these conditions. (PX9, at 14) Dr. Davis further testified a person with an hour glass constriction of the median nerve and significant fibrosis and constriction of the ulnar nerve could aggravate those conditions by performing vibratory activities such as bar rapping. (Id.) Those were also the type of conditions that could be aggravated by the use of pinch grip force, such as turning a key in a repetitive manner. (PX9, at 14) Dr. Davis testified that all of his treatment of Petitioner was reasonable and necessary to treat his condition. (PX9, at 14-15) Dr. Davis also explained that a worker who is exposed to vibratory activities for a long period of time, without getting symptoms, would be more susceptible to developing repetitive trauma injuries with much less frequency and duration as someone who did not have a long history of performing vibratory activities. (PX9, at 31).

Dr. Sudekum testified on behalf of Respondent. Dr. Sudekum did not examine Petitioner nor discuss his job assignments and activities with him. (RX13, 50). Dr. Sudekum also did not review Dr. Kupferer's medical chart. (RX13, 54) Dr. Sudekum's understanding was that Petitioner had worked at the Menard maximum security unit up until January, 2010. (RX13, at 27). Dr. Sudekum also assumed that Petitioner worked as a school officer at the medium security unit beginning in January 2010. (RX13, at 27) Dr. Sudekum testified that Petitioner had various risk factors for the development of carpal or cubital tunnel syndrome, including his age, arthritis in his right hand and shoulder, hypertension, obesity, gout and hobbies, including hunting, which depending on the level of activity, could also pose a risk. (RX13, 33-34). Dr. Sudekum felt that Dr. Davis could have considered conservative treatment prior to surgery, but admitted that Petitioner had a successful post-surgical outcome. Dr. Sudekum opined that he did not feel that Petitioner's employment activities at either the maximum security facility or the medium security facility caused or aggravated his carpal and cubital tunnel syndrome. (RX13, at 40)

Dr. Sudekum acknowledged that he had previously given an opinion that the job duties at Menard maximum security unit could cause or aggravate carpal or cubital tunnel syndrome, but, in this case, Dr. Sudekum testified that he had no indication in the records that Petitioner developed any symptoms during the time he was performing the job duties at the maximum security facility. (RX13, 42-43). Dr. Sudekum explained that the job activities that could potentially contribute to repetitive trauma conditions would be the bar rapping procedure and the opening and closing of heavy doors. (RX13, 43-44). Dr. Sudekum also assumed that Petitioner only worked at the housing unit in 2010 beginning on June 28th through July 10, 2010. (RX13, 44-45).

On cross-examination, Dr. Sudekum admitted the Respondent never consulted him when Respondent was first notified of Dr. Davis' treatment plan. (RX13, at 50,51) Dr. Sudekum agreed with Dr. Davis' diagnosis of cubital tunnel syndrome. (RX13, at 52) Dr. Sudekum also acknowledged that the EMG/NCV revealed mild right carpal tunnel syndrome. (RX13, 54) Dr. Sudekum also admitted that a clinical test for carpal tunnel syndrome would include a positive Tinels sign. (RX13, 54) Dr. Sudekum also admitted that erythema at the median nerve is associated with irritation of the nerve, which could be the result of an injury or nerve irritation. (RX13, at 55). Dr. Sudekum admitted that an hour glass deformity at the median nerve means that the nerve is literally pinched at that point and is swollen. (RX13, 55-56) Dr. Sudekum explained that this is a finding associated with relatively advanced carpal tunnel syndrome. (RX13, at 56) Dr. Sudekum admitted that someone with a constricted median nerve would experience symptoms with hand activity. (Id.) More

specifically, Dr. Sudekum admitted that a person with this condition would have symptoms with activities including pinching, gripping and grasping. (RX13, at 57) Dr. Sudekum admitted that vibratory activities could cause symptoms in a person with that finding. (RX13, at 58)

Dr. Sudekum admitted that, in his April 20, 2011 report, he did not qualify his opinion with respect to a duration or frequency of work activity that would be sufficient to cause or contribute to repetitive trauma injuries. (RX13, at 66, 67) Dr. Sudekum admitted that he knew, when he was preparing that report, that Respondent was going to use his opinion in evaluating pending repetitive trauma claims out of Menard. (RX13, 67) Dr. Sudekum agreed that the opinion he reached in his April 20, 2011 report was based on a review of a job description, individual job activities, a Job Analysis, as well as his personal observation. (RX13, at 67)

Dr. Sudekum further explained that with respect to the development of repetitive trauma conditions, he would need to see an onset of symptoms present during or very soon after the performance of the activities that he deemed potentially provocative. (RX13, at 68) Dr. Sudekum further opined that, "if you assume that the patient had symptoms during the time and had a nerve conduction performed during the time he was performing those activities ideally seen by a physician who made the diagnosis during the time, yes, then I would say that those could have been served as a potential aggravating factor as I opined in my note." (RX13, at 69,70) Dr. Sudekum admitted that he was not provided any information regarding Petitioner's job activities during a lockdown. Dr. Sudekum also admitted that he had previously testified that opening and closing 300 locks per shift at a more modern correctional facility in Centralia, Illinois would potentially aggravate carpal tunnel syndrome. (RX13, at 78,79) With respect to comorbid factors, Dr. Sudekum stated that he has not received sufficient information regarding Petitioner's hobbies or recreational activities, for example hunting or riding horses, for him to reach an opinion to reasonable degree of medical certainty that those indeed played any role in his symptomology. (RX14, at 88) As to gout and hypertension, Dr. Sudekum admitted that whether hypertension was controlled or whether the gout was limited to the foot, as opposed to the hand or wrist, would be a significant distinction. (RX14, 88-89).

Alex Jones also testified on behalf of Respondent. Mr. Jones is currently the Menard Medium Security Unit superintendent. He first arrived at the Menard medium security unit in November of 2012. Mr. Jones never worked with Petitioner. Mr. Jones testified that when he was assigned to different facilities within the State of Illinois, he would review documents and reports regarding the frequency that Menard maximum security facility was on lockdown. Mr. Jones testified that over a 20 year history, Menard would be on lockdown on average of 25 to 30% of the time. However, Mr. Jones could not refute Petitioner's testimony regarding Menard being on lockdown 50% of the time from January 2010 through July 2010. Mr. Jones, who – unlike Petitioner – could not testify from first hand knowledge, admitted that Respondent has at its disposal evidence relating to the exact frequency of lockdown at Menard maximum security, but did not provide any of those documents to Mr. Jones in this case.

The Arbitrator finds the following:

1. Timely notice of the accident was given to Respondent. Petitioner had no treatment for his condition prior to June 28, 2010. On July 2, 2010, Petitioner underwent a NCV/EMG. The date of the EMG/NCV is routinely upheld as an appropriate date of accident for repetitive trauma injuries. *See, e.g., Middleton v. St. Anthony's Health Center*, 11 I.W.C.C. 1138, 2011 WL 6282300 (Nov. 18, 2011). On July 16, 2010, Petitioner received the results of the testing and discussed his work activities with Dr. Davis. On July 19, 2010, Petitioner reported his injury. After receiving this notice, Respondent later approved Petitioner's treatment and paid Petitioner TTD benefits.

2. Petitioner sustained an accident that arose out of and in the course of Petitioner's job, as evidenced by Petitioner's medical history, job activities, onset of symptoms while performing his work activities, sequence of events, Petitioner's testimony, the testimony of Dr. Davis, and the reports of Dr. Sudekum.

3. Petitioner's current condition of ill-being is causally related to his work activities, based on Petitioner's testimony, Dr. Davis's testimony, Dr. Sudekum's reports, and Dr. Sudekum's testimony. Petitioner's testimony regarding his job activities, onset of symptoms, and worsening of symptoms is unrebutted. Dr. Davis testified to a reasonable degree of medical certainty that Petitioner's job activities, including rapping bars and turning keys, contributed to Petitioner's condition, which is consistent with the operative findings and Petitioner's reports of symptoms while working. Dr. Sudekum acknowledged that rapping bars and opening doors at Menard can be factors in aggravating carpal tunnel and cubital tunnel syndromes. Dr. Sudekum admitted that pinch grip and vibratory activities can cause symptoms in persons with a constricted median nerve, like Petitioner. Dr. Sudekum admitted that he would find causation if a worker presented with symptoms during or very soon after performing the repetitive activities at Menard. Dr. Sudekum admitted that causation would also be clear if the worker had a nerve conduction study while performing the job of a housing unit officer at Menard. In this case, both situations apply. Petitioner's symptoms worsened while performing the job of a housing unit officer in 2010 when the facility was on lockdown and, further, when he was assigned to that job on June 28, 2010 – the first day he sought treatment from his family doctor. Dr. Sudekum was not provided any information regarding Petitioner's re-assignments to the housing unit while the facility was on lockdown. Petitioner was still engaged in that job when his nerve conduction study was performed. Finally, Dr. Sudekum also acknowledged that turning keys approximately 300 times per shift, even at a more modern facility, could potentially aggravate carpal tunnel syndrome.

4. Respondent shall pay the following reasonable, necessary, and related medical bills, pursuant to the medical bill fee schedule:

Southern Illinois Orthopedic Surgery Center	$8,632.00
Brigham Anesthesia	$ 855.00
Southern Orthopedic Associates	$6,525.00
Healthlink	$ 864.63
Out-of-Pocket	$ 35.00

5. Respondent has paid all TTD benefits and did not dispute that Petitioner was owed these benefits.

6. Respondent shall pay the Petitioner the sum of $655.14/week for a period of 56.05 weeks as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to the extent of 15% of his right hand, and 10% of the right arm.

Date: 2/16/13

Honorable Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Lemons,

Petitioner,

14IWCC0203

vs.

NO: 11 WC 05490

Brockett Farms, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses/other-mileage-under §8(a) and nature & extent of permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 52 year old employee of Respondent, who described his job as a laborer. Petitioner has been working at Respondent for twelve years. Petitioner stated that he works on grain lays and tractors, shovels grain, moves and loads trucks; generally anything that you need to do; farm work. On the date of accident, February 2, 2010, Petitioner testified that they were unloading green beans. Respondent has a main auger that runs to a vertical auger. There are also individual grain bins that feed into the main auger. Petitioner testified that he just finished his work and one of the bins came out. Petitioner went over to start the other bin and the auger coming into the main auger was stopped up so he tried to work the belt to get it freed up. Petitioner stated his foot got down into the main auger that was running and it sucked him into it. Petitioner testified that he had a prior left foot injury in 1983 which required surgery (performed by Dr. John

Barrow) to his left Achilles. Petitioner testified that just prior to this 2012 injury he had not been having any difficulties with his left foot. His prior surgery had been successful. Petitioner testified that prior to February 2, 2010, he was taking pain medication-(Hydrocodone-500mg about 3 per day) for a left shoulder injury, prescribed by Dr. Ewell.

- Petitioner testified that after this left foot injury they took him to the emergency room at Harrisburg where they examined him and x-rayed his foot. Petitioner stated that they did not see any fractures but they did see a small straggle in the steel cable he had in his foot. Petitioner testified that he was referred to Dr. Steven Young in Herrin. Petitioner testified that Dr. Young provided him treatment for his left foot for several months and then referred him to Dr. David Wood, a foot specialist, in the same office. Dr. Wood referred Petitioner to Southern Illinois Pain Management in Marion. Petitioner received physical therapy for this injury at Strictly Rehab in Eldorado, Illinois. Petitioner testified that the doctors at Southern Illinois Pain Management provided him with a series of three injections. In January or February 2011, another doctor there tried three more injections. Petitioner testified that he was scheduled for a fourth injection and he did not undergo that. Petitioner stated that he had taken three injections scheduled a little apart and he took three together as they thought that would work better. Petitioner stated when it did no better; he did not see any reason in taking the fourth injection. Petitioner stated he thought the initial injections helped relieve his pain for maybe a day, but it had been only temporary relief.

- Petitioner agreed with the medical records making several references to him having constant pain in his left foot. Petitioner agreed he repeatedly stated his pain level remained at a 7/10 level. Petitioner testified that the doctors diagnosed him with Complex Regional Pain Syndrome (CRPS) Type II. Petitioner testified that he did not have any of these problems prior to this accident. Petitioner testified that he was currently taking Hydrocodone (dosage increased from 5 to now 10 since his accident). Petitioner stated that depending on the day, and the number of augers he has to work, he usually takes 6-7 Hydrocodone per day as prescribed by Dr. Ewell. Petitioner testified to taking other medication since this accident but did not recall the name of the medication. Petitioner stated that the medications were listed in the medical records and that he would not dispute what was listed as medication in the records. Petitioner's current treatment regimen involves seeing Dr. Ewell every 6-8 weeks. Petitioner indicated that Dr. Ewell gives him injections in the small of his back. Petitioner stated that those injections do not really provide relief for his left foot, but makes the rest of his body feel much better for 3-4 days. Petitioner testified that the problem with his foot has changed his mood and who he is. Petitioner stated that he is not the same person since this accident happened. Petitioner testified that since the accident he has been prescribed Cymbalta (the medication that he previously did not recall) as an anti-depression medication. Petitioner testified he noticed that does help: if he does not take it he is impossible to live with.

- Petitioner testified that prior to this accident he liked to go dance and run, walk and play basketball; he liked to engage in any kind of outdoor activity. Petitioner testified that since this accident, most of the time he does not even try anymore. Petitioner stated that

every once in a while he has to know if it is as bad as it was and he forces himself to do it; to walk, dance, play basketball, the things he always used to do, but the pain level is not worth it anymore. Petitioner stated that whatever he currently tries to do, including his present work duties, hurts all the time, constantly. Petitioner stated that going up and down the stairs, climbing over the tank, moving hoses back and forth all day, and pushing the clutch on the truck, causes unreal pain. Petitioner stated that he feels this pain a few hours into the day and that his pain increases during the day. Petitioner stated that if he does not keep up with the pain medication, he cannot handle the left foot pain.

- Petitioner and his wife had prepared a list of miles he traveled to and from the doctors and other medical providers as a result of his injury. Petitioner testified that he lives two miles east of Omaha, Illinois. He stated Strictly Rehabilitation is in Eldorado, Illinois as is Dr. Ewell. Dr. Young and Dr. Wood are both in Herrin, Illinois. Southern Illinois Pain Management is in Marion, Illinois and Harrisburg Medical Center is in Harrisburg, Illinois.

The Commission finds that Petitioner and his wife had prepared a list of miles (PX 7) he traveled to and from the doctors and other medical providers as a result of his injury. Petitioner testified that he lives two miles east of Omaha, Illinois (population 300). He stated Strictly Rehabilitation is in Eldorado, Illinois as is Dr. Ewell. Dr. Young and Dr. Wood are both in Herrin, Illinois. Southern Illinois Pain Management is in Marion, Illinois and Harrisburg Medical Center is in Harrisburg, Illinois. Petitioner agreed that someone who lives in Omaha, Illinois has to travel to Eldorado to get supplies, groceries, etc. Petitioner has been seeing Dr. Ewell, his family doctor, since before this accident. Petitioner agreed he traveled to Eldorado to see Dr. Ewell prior to the accident. Petitioner agreed that Eldorado is about 15 miles from where Petitioner lives. Petitioner lives in a rural area and clearly has to drive about 15 miles for normal supplies as well as to a good portion of his medical visits (February 2010-March 2011). There are, however, a number of medical visits in excess of 90 miles round trip. As noted by the Arbitrator, the majority of the visits were no further than normal driving for groceries. Petitioner had medical services generally available within a relatively short distance. The evidenced mileage for therapy, for example, of about 15 miles is not excessive. There is nothing unusual or excessive with many of the distances Petitioner traveled which would warrant the award of mileage for normal, relatively short trips. The cases cited by the Arbitrator clearly indicated that 'local' mileage is not considered as reasonable and necessary for reimbursement. For the most part, Petitioner's medical appointments, by that interpretation, are 'local' as most were in the normal course Petitioner would need to travel for normal staples of life. There is no testimony by Petitioner other than the number of miles traveled. Petitioner's testimony clearly implied that most visits, to the family doctor and for treatment, were of a 'local' nature. The Commission notes from Petitioner's exhibit that trips to Dr. Young and Dr. Wood were in excess of 100 miles round trip (10 trips for 1,032.90 miles); the Pain management visits were 96.8 mile round trips, (5 trips for 484 miles); and the Surgical Center trips for block injections were 91.2 mile round trips (7 trips for 638.40 miles). The Commission finds those visits in excess of 90 miles round trip as not local travel for medical care and therefore compensable under §8(a). The evidence and testimony finds that Petitioner meet the burden of proving entitlement to that mileage reimbursement as that mileage was of an unusual or excessive nature, and herein, modifies the

award for reimbursement of that mileage (2,155.3 miles) for those visits at .51 cents per mile; for a total mileage reimbursement of $1,099.20.

Petitioner agreed with the medical records making several references to him having constant pain in his left foot. Petitioner agreed he repeatedly stated his pain level remained at a 7/10 level. Petitioner testified that the doctors diagnosed him with Complex Regional Pain Syndrome (CRPS) Type II. Petitioner testified that he did not have any of these problems prior to this accident. Petitioner testified that he was currently taking Hydrocodone (dosage increased from 5 to now 10 since his accident). Petitioner stated that depending on the day, and the number of augers he has to work, he usually takes 6-7 Hydrocodone per day as prescribed by Dr. Ewell. Petitioner testified to taking other medication since this accident but did not recall the name of the medication. Petitioner stated that the medications were listed in the medical records and that he would not dispute what was listed as medication in the records. Petitioner's current treatment regimen involves seeing Dr. Ewell every 6-8 weeks. Petitioner indicated that Dr. Ewell gives him injections in the small of his back. Petitioner stated that those injections do not really provide relief for his left foot, but makes the rest of his body feel much better for 3-4 days. Petitioner testified that the problem with his foot has changed his mood and who he is. Petitioner stated that he is not the same person since this accident happened. Petitioner testified that since the accident he has been prescribed Cymbalta (the medication that he previously did not recall) as an anti-depression medication. Petitioner testified he noticed that does help; if he does not take it he is impossible to live with. Petitioner testified that prior to this accident he liked to go dance and run, walk and play basketball; he liked to engage in any kind of outdoor activity. Petitioner testified that since this accident, most of the time he does not even try anymore. Petitioner stated that every once in a while he has to know if it is as bad as it was and he forces himself to do it; to walk, dance, play basketball, the things he always used to do, but the pain level is not worth it anymore. Petitioner stated that whatever he currently tries to do, including his present work duties, hurts all the time, constantly. Petitioner stated that going up and down the stairs, climbing over the tank, moving hoses back and forth all day, and pushing the clutch on the truck, causes unreal pain. Petitioner stated that he feels this pain a few hours into the day and that his pain increases during the day. Petitioner stated that if he does not keep up with the pain medication, he cannot handle the left foot pain. The evidence supports Petitioner's testimony of ongoing complaints and also finds the diagnosis of CRPS/RSD resulting in chronic pain from this accident. Petitioner's testimony is unrebutted. Petitioner testified of the things he did prior to this accident that he no longer even attempts to try as he is aware of the consequences. The Commission finds the award of the Arbitrator to be lower than supported by the evidence and testimony. The Commission, therefore, finds that the evidence and testimony supports an award of 37.5% loss of the foot; that award being consistent with prior Commission decisions given Petitioner's ongoing pain complaints with the CRPS/RSD. The evidence and testimony finds Petitioner met the burden of proving entitlement to the increased award. The Commission finds the decision of the Arbitrator, while not totally contrary to the weight of the evidence, is insufficient under the facts and circumstances presented here, and herein, increases the award to 37.5% loss of use of Petitioner's left foot (62.625 weeks at $402.20 for total permanent partial disability award of $25,187.78).

14IWCC0203

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $402.20 per week for a period of 62.625 weeks, as provided in §8(e)(11) of the Act, for the reason that the injuries sustained caused the 37.5% loss of use of Petitioner's left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,099.20 for medical expenses-(for the excess mileage reimbursement) under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 5 2014
o-1/23/14
DLG/jsf
45

David L. Gore

Daniel R. Donohoo

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEMONS, MARK
Employee/Petitioner

Case# **11WC005490**

BROCKETT FARMS, INC
Employer/Respondent

14IWCC0203

On 7/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2546 FEIST LAW FIRM LLC
MICHAEL S FEIST
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

0693 FEIRICH MAGER GREEN & RYAN
R JAMES GIACONE II
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0203

Mark Lemons
Employee/Petitioner

v.

Brockett Farms, Inc.
Employer/Respondent

Case # 11 WC 05490

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Herrin**, on **March 21, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 14IWCC1203

On **February 2, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$34,857.68**; the average weekly wage was **$670.34**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$12,519.36** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

ORDER

Petitioner is found to have suffered a permanent injury pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$402.20**/week for **50.1** weeks, because the injuries sustained caused the **30%** loss of the use of the left foot, as provided in Section 8(e) of the Act.

The Petitioner's request for reimbursement for mileage is denied

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

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

Deborah L. Simpson
Signature of Arbitrator

July 1, 2013
Date

JUL - 2 2013

14IWCC0203

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Lemons,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 11 WC 05490**
	)	
Brockett Farms, Inc.,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on February 2, 2010 the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. On that date the Petitioner sustained an accidental injury or was last exposed to an occupational disease that arose out of and in the course of the employment. They further agree that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act and that the Petitioner's current condition of ill-being is causally connected to the accidental injury sustained.

At issue in this hearing is as follows: (1) the nature and extent of the injury; (2) Is Petitioner entitled to mileage for his travel for medical treatment.

STATEMENT OF FACTS

The Petitioner is employed by the Respondent as a laborer. The Petitioner's job duties include working on tractors, shoveling, loading and emptying grain bins and moving trucks. On February 2, 2010, the Petitioner was working with the main auger and the grain auger. Petitioner was standing on top of an auger guard, helping unplug a feeding auger when his foot went through an open hole on the top of the guard that is meant to be used to maintain and unplug the auger he was standing on. His foot went down to the auger and it drew him forward. It tore the large rubber boot he was wearing on his foot off and nicked the outside part of his lateral malleolus. He remained under there with the auger striking up against his foot and between his foot and the guard. He reported to the Respondent's Section 12 examining doctor that if the guard had been secured properly it probably would have done more damage to his foot. (R. Ex. 1) The auger was stopped after several minutes. Petitioner testified that it was painful.

Petitioner was taken to the emergency room at Harrisburg Medical Center shortly after the accident occurred. Although his foot was markedly swollen, the cut on the side of his ankle did not require stitches. The Petitioner testified that they x-rayed him and nothing was broken but they thought something was wrong with the steel cable in his foot. He was given a wrap for his foot and crutches and a boot. Petitioner had an Achilles tendon tear with orthopedic cables in place twenty-seven years before the current injury.

Medical records from Harrisburg Medical Center indicate that the Petitioner was brought to the emergency room complaining of an injury to his left foot which happened just prior to his arrival. It is noted that Petitioner described his pain as mild, a two or three on a scale of one through ten. The records indicate that there appears to be a superficial contusion on the top of the foot with some small abrasions. (P. Ex.5) X-rays were taken that afternoon which were negative for fracture or dislocation. They did reveal postoperative changes prior Achilles tendon repair and the orthopedic wire being fractured at the level of the calcaneal tuberosity and partially retracted superiorly. Additionally there were degenerative Osteoarthritic changes about the ankle and first metatarsal phalangeal articulation. (P. Ex. 5)

On February 3, 2010, Petitioner saw Dr. Steven Young, at the Southern Illinois Orthopedic Center. Medical records indicate that Petitioner stated that on February 2, while he was working on a farm he got his foot caught in an auger in a hole. He reported to the doctor that he had severe pain and was evaluated at the clinic and referred to Dr. Young. He gave his level of pain at the time as an 8 on a 10 point scale. Petitioner was placed in a walking boot and given crutches prior to seeing Dr. Young. (P. Ex. 2) X-rays of the foot were taken, weight bearing and non weight bearing. Dr. Young observed an area at the base of the second metatarsal that was questionable. Dr. Young ordered a CT scan, kept the Petitioner in the walking boot and non weight bearing status and explained to the Petitioner that he was concerned that Petitioner may have suffered a Lisfranc injury. (P. Ex. 2) Petitioner was taken off of work by Dr. Young. (P. Ex. 2)

On February 9, 2010, a CT scan was consistent with the x-ray. The radiologist noted no acute bone abnormality, osteoarthritis, status post Achilles tendon repair with orthopedic cables in place, the study was negative for fracture or dislocation. (P. Ex. 5)

On February 11, 2010, the Petitioner returned to Dr. Young after having the CT scan for follow-up. At that time Dr. Young reviewed the report, determined that the Petitioner did not have a Lisfranc fracture, but may have had a Lisfranc sprain. At the time Petitioner was still complaining of pain. He was kept in the fracture boot, non weight bearing and told to return in three weeks for further follow-up. He was kept off of work at that time. (P. Ex. 2)

On March 4, 2010, Petitioner returned to Dr. Young, still complaining of pain to the left foot. Dr. Young kept him off of the foot for an additional three to four weeks, ordering the Petitioner to begin therapy. He kept the Petitioner off of work at this time. (P. Ex. 2)

On May 6, 2010, the Petitioner returned to Dr. Young for follow-up. At that time he reported his midfoot feeling better, but he was still having pain in other parts of his foot. Petitioner told Dr. Young that he did not feel that he could return to work at that time. Dr. Young ordered the Petitioner to participate in work hardening for two weeks, five days per week,

with the plan being that the Petitioner return to Dr. Young in two weeks and he should be ready to be returned to work. (P. Ex. 2)

On May 20, 2010, Petitioner was complaining of pain, was given one week off of physical therapy, a Medrol dosepak and told to begin therapy again in one week and return for follow-up in two weeks. (P. Ex. 2)

On June 8, 2010, Dr. Young referred Petitioner to their foot and ankle specialist, Dr. David Wood. (P. Ex. 2) Dr. Wood saw the Petitioner on June 14, 2010, and ordered a bone scan of both feet and ankles. Petitioner was kept off of work at that time and in physical therapy. (P. Ex. 2)

On June 22, 2010, the Petitioner had a 3-Phase Bone Scan of the Feet. The test revealed that angiographic flow images were normal, blood pool sequences were also normal. There was delayed bone phase images which demonstrated mild increased uptake noted about the first metatarsophalangeal articulations and ankles bilaterally, all of which are most likely arthritic in nature. (P. Ex. 5)

On June 28, 2010, Dr. Wood referred the Petitioner to Dr. Paul Juergens, a pain management specialist. Dr. Juergens recommended injections, specifically a Left paravertebral lumbar sympathetic block. Petitioner had two injections, the first on August 2, 2010, which did not provide any relief. (P. Ex. 2) It was believed by the doctors at this time that the Petitioner may be suffering from Complex Regional Pain Syndrome as a result of his injury.

On August 17, 2010, the Petitioner was requesting to return to work. He was returned to work full duty by Dr. Wood. (P. Ex. 2)

On August 23, 2010, the Petitioner had a second injection by Dr. Paul Juergens which gave him relief for three to four weeks. (P. Ex. 2)

On October 25, 2010, the Petitioner had a third injection by Dr. Paul Juergens. When he returned to see Dr. Juergens on November 9, 2010, he reported that the injections had helped, but he ran across the floor earlier this month and he had an increase in pain. Dr. Juergens refilled the Petitioner's prescription for Lidoderm patches. He offered a fourth injection and told the Petitioner to return if he wants the fourth injection. (P. Ex. 2)

Petitioner testified that to date he has not had a fourth injection and he is not planning on having one.

The Respondent had the Petitioner examined pursuant to Section 12 of the Act, by Dr. Gary J. Schmidt, a board certified Orthopedic Surgeon on March 31, 2011. It is the opinion of Dr. Schmidt after taking a history from the Petitioner, doing a physical examination and reviewing the medical records and films that the Petitioner currently suffers from Complex Regional Pain Syndrome or Reflex Empathetic Dystrophy. It is also his opinion that the Petitioner's current condition is as result of the accident of February 2, 2010, and that the Petitioner had not yet reached MMI. He recommended further physical therapy to further increase his functionality. (R. Ex. 1)

The Petitioner testified that he currently sees his primary care physician, Dr. Ewell about every six to eight weeks. Dr. Ewell gives him injections in the small part of his back, they do not help with his foot but the rest of his body feels better.

Petitioner is currently working for the Respondent at the job that he had prior to his injury, having returned there in August of 2010, after requesting to be allowed to return to work. He stated that he has no restrictions because he asked the doctor not to give him any. He stated that no matter what he does his foot hurts, whether it is climbing stairs, walking across the tanks or where ever he has to walk. He states he cannot get through the day without pain medication.

Petitioner testified that prior to the injury he liked to dance, run, walk, play basketball and any other outdoor activity he could think of. He said he no longer pursues these activities because the pain level is so high it is not worth it anymore. He stated that the pain in his foot changed his mood, he takes Cymbalta now, and if he does not take it he is impossible to live with.

Petitioner testified that Petitioner's exhibit number 7 was prepared by him and his wife and is a record of the miles that he had to drive for his doctor appointments and his physical therapy. He testified that Omaha, the town he lives in, is a small town and he and his wife have to travel to Eldorado for groceries and his doctor. It is 15 miles away. His trips for Rehab were 29.11 miles round trip. The various doctors were about 50 miles away as he indicates that those were 100.72 miles round trip. One doctor appointment with Dr. Woods was apparently 126.42 miles roundtrip.

CONCLUSIONS OF LAW

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

Expenses for travel to the petitioner's own physician in excess of 100 miles each way were proper under Section 8(a) of the Act. *General Tire & Rubber Co. v. Industrial Commission*, 221 Ill.App.3d 641, 582 N.E.2d 744 (5th Dist. 1991) The Court said it was not unreasonable to travel from Mt. Vernon, Illinois to Evansville, Indiana for treatment by a specialist. However, it does not appear that local travel for treatment would be allowed.

What is the Nature and Extent of the Petitioner's Injury?

In this case, the credible evidence showed that Petitioner suffered a crush injury to his left foot on February 2, 2010. He was off work from February 2, 2010, until August 17, 2010, when he asked his doctor to return him to work, full duty. During the time the Petitioner was off of work, he attended physical therapy and work hardening. Had injections and assorted pain medications.

Petitioner testified that even though he has returned to work full duty with no restrictions and he does his job and is able to perform all the duties required of the job, it is not without pain. He testified that he takes pain medication daily. He no longer takes walks or runs, goes dancing or plays basketball or any of the other outdoor activities he enjoyed prior to the injury, the pain is just too much.

Given the nature of the injury the Petitioner suffered to his left foot following the February 2, 2010, incident, and the constant pain he reports, Petitioner is entitled to have and receive from the Respondent compensation for 30% loss of use of the left foot or 50.1 weeks at a weekly PPD rate of $402.20 / per week.

Is the Petitioner Entitled to be Reimbursed for Mileage?

Mileage expenses can be awarded under section 8(a) of the Act pursuant to a reasonableness standard, as discussed at length in *General Tire & Rubber Co. v. Industrial Commission*, 221 Ill.App.3d 641 (1991). There, the Appellate court held the respondent liable for long distance trip mileage of approximately 100 miles, each way, to and from the petitioner's treating physician. However, the Commission has repeatedly held that "the holding in *General Tire & Rubber Co.* is the exception to the rule and that local mileage is not normally deemed to be reasonable and necessary. . ." *Kosinski v Mobile Chemical Co.*, 99 IIC 794. Applying the *General Tire & Rubber Co.* standard to this matter,

The Petitioner testified that he normally has to travel 15 miles one way to go grocery shopping. The trips for physical therapy were slightly less than 15 miles one way. The furthest he travelled was 63 miles one way and that was a onetime occurrence on August 17, 2010, when he saw Dr. Wood at his office in Carbondale.

It is first notable that the overall mileage in this case is while it looks like a large number of miles to be travelling for medical care, it really is not excessive in its scope and range. The Petitioner calculated that he travelled 4826.73 miles for medical treatment for this injury. That is over the period of one year (February 2, 2010, through January 31, 2011). That breaks down to 402 miles per month or less than 95 miles per week. Since the distances that the Petitioner had to travel for his medical treatment do not approach the 100 miles one way the Petitioner is not entitled to reimbursement for his mileage. As Mileage is to be awarded only in unusual or excessive circumstances, the mileage expenses would not be appropriate in this instance.

ORDER OF THE ARBITRATOR

Petitioner is found to have suffered a permanent injury pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$402.20**/week for **50.1** weeks, because the injuries sustained caused the **30%** loss of the use of the left foot, as provided in Section 8(e) of the Act.

The Petitioner's request for reimbursement for mileage is denied.

Richard L. Simpson
Signature of Arbitrator

July 1, 2013
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ 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

Donald Swartz,

Petitioner,

14IWCC0204

vs.

NO: 12 WC 43270

Wright Tree Service,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, "constitutionality of Section 16," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

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

14IWCC0204

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 $16,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/vf
O-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

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

14IWCC0204

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043270**

12WC043271
12WC043272
12WC043273

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

19(B)

14IWCC0204

DONALD SWARTZ
Employee/Petitioner

v.

WRIGHT TREE SERVICE
Employer/Respondent

Case # **12** WC **43270**

Consolidated cases: **12 WC 43271; 12 WC 43272; 12 WC 43273**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **July 3, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0204

FINDINGS

On **March 16, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$841.95**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$3,929.00** for TTD and maintenance paid, and **$0.00** for other benefits, for a total credit of **$3,929.00**.

Respondent is entitled to a credit of $109.48 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule The medical to be paid is set forth in the Arbitrator's Conclusions Of Law..

Respondent shall pay Petitioner temporary total disability benefits of $561.30/week for 29 weeks, commencing December 13, 2012 through July 3, 2013 as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $109.48 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.

Penalties have been addressed in the companion case, 12 WC 43271. No additional penalties are awarded in this case.

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

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

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

D. Ryan McCarthy
Signature of Arbitrator

August 19, 2013
Date

AUG 26 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ,	)	**14IWCC0204**
Petitioner,	)	
v.	)	**12 WC 43270**
	)	Consolidated cases: 12 WC 43271
WRIGHT TREE SERVICE,	)	12 WC 43272
	)	12 WC 43273
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner's Testimony Regarding his Injury and Initial Treatment

Petitioner, Donald Swartz, testified that he began working for Respondent, Wright Tree Service, in January of 2011. (Transcript p. 45-46). He testified that Respondent is a tree trimming company and they normally trimmed trees out of power lines. (Id. at 45). He testified he was still employed by Respondent in March of 2012 and that his position at that time was journeyman tree trimmer. (Id.). He testified that when he was hired by the Respondent in January of 2011, his position was that of a T4 tree trimmer, which he explained is one step under a journeyman. (Id. at 46).

Petitioner testified that a journeyman tree trimmer should know everything about the job while a T4 trimmer is still learning some aspects of the job. (T. p. 47). As a journeyman tree trimmer, he testified his job duties included trimming trees out of power lines using chain saws, pole saws, hydraulic pole saws, hanger pullers, hand saws, pruners, and other various equipment. (Id.). Petitioner described in detail the different tools used within his trade. (Id. at 48-49; 56-63). Petitioner submitted two photographs depicting Petitioner holding one of the hydraulic stick saws he used for Respondent, which were admitted by the Arbitrator over Respondent's objection. (Id. at 49-52).

The parties stipulated that on March 16, 2012, Petitioner sustained an accident involving his right thumb that arose out of and in the scope of his employment. (Arb. X1). The only issues in dispute in this claim are causal connection, medical bills, temporary total disability, and penalties. (Id.).

Petitioner testified in March of 2012 he noticed a knot on his right thumb getting bigger and bigger. (T. p. 64). He testified he sought treatment for the first time on March 16, 2012 at Quincy Medical Group. (Id.). At that initial visit, the clinician of record, Nathan DeWitt, PA, diagnosed Petitioner with a ganglion mass on his right thumb and advised him it was large enough that surgical excision would be needed. (PX2 p. 20 of 43). Mr.

DeWitt advised Petitioner that he could be set up with Dr. Ethan Philpot for the ganglion surgery. (Id.). Petitioner testified he did not immediately undergo the recommended surgery because his insurance carrier would not pay for it and he did not have the money to pay for it. (T. p. 65).

Petitioner testified that he continued working for Respondent as a journeyman trimmer following his March 16, 2012 visit at Quincy Medical Group. (T. p. 65). He testified he continued doing this same work through November of 2012. (Id. at 66). He testified that as he continued working for Respondent, he noticed the knot on his right thumb was getting bigger and he was still having pain. (Id.).

Petitioner testified that on November 5, 2012, he returned to Quincy Medical Group due to his right thumb. (T. p. 66). Petitioner testified he spoke to the Physicians Assistant, Mr. DeWitt, regarding the type of work he did for Respondent. (Id. at 66-69). Mr. DeWitt noted Petitioner is a tree trimmer for Wright Tree Service and that the ganglion mass had increased in size since his prior visit in March, 2012. (PX2 p. 14 of 43). Mr. DeWitt further explained that the use of tree saws on a daily basis was the probable cause of the ganglion. (Id.). He referred Petitioner to Dr. Philpot for further treatment of his right thumb ganglion mass. (Id. at 39 of 43).

Petitioner continued to work for Respondent following his November 5, 2012 visit with Mr. DeWitt. (T. p. 70). He alleges two additional work-related accidents on November 14, 2012 and one additional accident on November 15, 2012. These three claims are discussed separately in their own Findings of Fact and Conclusions of Law.

Petitioner's Medical Treatment with Dr. Philpot and Return to Work

Pursuant to the referral of Mr. DeWitt, the Petitioner first treated with Dr. Philpot on November 14, 2012 at Quincy Medical Group. (PX2 p. 9 of 43). Dr. Philpot noted Petitioner was there that day due to a large ganglion cyst on his right thumb as well as for some other conditions that are not directly relevant in this claim but are dealt with separately in their own Findings of Fact and Conclusions of Law. Dr. Philpot recommended surgery for the right thumb. (PX2 p. 10 of 43). He advised Petitioner he could return to work in a light duty capacity. (Id. at 37 of 43).

Petitioner testified that he provided a copy of the November 14, 2012 work status note to his general foreman, Jason Bryant. (T. p. 71). He identified Mr. Bryant as the Respondent's representative in the courtroom at the time of this hearing. (Id. at 71-72). He testified that Mr. Bryant would not accept the work status note from him. (Id. at 72). Petitioner testified he returned to work for Respondent and was doing the same basic type of work that he previously described. (Id. at 72-73).

Petitioner testified that he sustained another accident on November 15, 2012 that is discussed separately in its own Findings of Fact and Conclusions of Law in case number 12 WC 43273 involving his right ankle. Because these two claims overlap in time, it is necessary for the Arbitrator to briefly discuss the November 15, 2012 accident. As a

result of his right ankle injury, Petitioner was also provided with work restrictions and was then provided a light duty position with the Respondent. (T. p. 76, 79-80).

Petitioner continued working in a light duty capacity for the Respondent through December 12, 2012. (T. p. 81-82). On that day, Petitioner testified he was advised by Jason Smott, another general foreman with Respondent, that they could no longer accommodate his work restrictions. (Id. at 82-83). Petitioner testified that he has not been asked to return to work for Respondent since he was sent home on December 12, 2012. (Id. at 88). He testified he is no longer employed by Respondent. (Id. at 89).

Petitioner returned to Dr. Philpot on December 17, 2012 for treatment related to his right thumb and other injuries related to separate claims. (PX2 p. 4 of 43). Petitioner was placed on the schedule, at least temporarily, for removal of his right thumb ganglion cyst, pending approval by Respondent. (Id. at 5 of 43). He was provided with work restrictions of no effort level over ten pounds. (Id. at 30 of 43).

Section 12 Examination by Dr. David Fletcher

At the request of Respondent, Petitioner underwent a Section 12 examination performed by Dr. David Fletcher on December 21, 2012. (RX1). Dr. Fletcher testified by way of evidence deposition on April 1, 2013. (RX2). He testified that Petitioner's right thumb condition was causally related to his work for Respondent. (RX2 p. 16-17). He testified the right thumb condition was related to Petitioner's holding the large vibrating tree saws and other various tree cutting devices. (Id. at 17, 39). He testified that he would recommend work restrictions of minimizing vibratory exposure due to Petitioner's right thumb mass until after surgery to remove the mass. (Id. at 23).

Testimony of Jason Bryant

Jason Bryant testified on behalf of Respondent. He testified he is employed by Respondent as a general foreman. (T. p. 157-158). He testified he knows Petitioner because he was his employee. (Id. at 158). He testified around August through October of 2012, there was a discussion amongst his crew about going to Canton, Illinois for a job the following year. (Id. at 158-159). He explained Canton is approximately two hours from Quincy. (Id. at 159). He testified he had a conversation with his employees, including Petitioner, regarding this work in Canton the following year. (Id.).

Mr. Bryant testified Petitioner told him, in response to the planned trip to Canton, that he did not want to go and would just file for workers' compensation. (T. p. 160). He testified that he took this statement from Petitioner as a joke. (Id.). He also testified that Petitioner said this during a morning safety meeting "in front of everyone" and "everybody just got a big joke, a big laugh out of it, but lo and behold." (Id.).

On cross examination, Mr. Bryant testified he and everyone else took Petitioner's statements that he was going to claim workers' compensation rather than go to Canton as a joke and everyone thought it was funny. (T. p. 165).

Testimony of Shaun Thompson

Shaun Thompson testified on behalf of Respondent. He testified he is employed by Respondent as a T3 trainee trimmer. (T. p. 175-176). He testified he never had a direct conversation with Petitioner about working in Canton, Illinois. (Id. at 176). He testified he was with a group of people when Petitioner made a comment about Canton. (Id. at 177). In regards to the comment, he testified, "It was just side bar conversation, a bunch of us just standing around, it was like, I'm not going to Canton - - or I ain't going to Canton, but you know - -". (Id.).

On cross examination, Mr. Thompson testified that whenever the topic of traveling to Canton for the job came up, no one wanted to go. (T. p. 179). He testified he heard Petitioner say he wasn't going to drive to Canton or that he was not going to go. (Id.). He testified, "We were just kind of all joking around, talking...I doubt really anyone wanted to drive (to Canton)." (Id.).

Right Thumb Surgery and Ongoing Treatment

Petitioner contacted Quincy Medical Group by telephone on April 2, 2013 in order to schedule his right thumb surgery. (PX4 p. 18 of 59). They advised him that he would be contacted once they obtained verification from Respondent. (Id.). Dr. Crickard provided a work ability report that date which indicated "no restrictions" but that Petitioner was in need of several surgeries, including excision of the cyst on his right thumb. (Id. at 50 of 59).

On April 23, 2013, Petitioner returned to Quincy Medical Group following approval from Respondent to proceed with surgery on his right thumb. (PX4 p. 9 of 59). At that visit, Dr. Crickard noted the next visit would be surgery. (Id.). He advised Petitioner to remain completely off work from April 26, 2013 through May 9, 2013. (Id. at 49 of 59).

Petitioner underwent surgery to his right thumb performed by Dr. Crickard on April 26, 2013. (PX8 p. 40). During this surgery, Dr. Crickard also operated on his right third and fourth trigger fingers, which are part of case number 12 WC 43271. His first post-surgical follow-up visit with Dr. Crickard was on May 9, 2013. (PX4 p. 3 of 59). Dr. Crickard noted Petitioner's thumb was feeling better and that he was in therapy. (Id.). Dr. Crickard provided Petitioner with work restrictions of no use of his right hand for two weeks. (Id. at 47 of 59).

On May 23, 2013, Petitioner had another follow-up visit with Dr. Crickard. (PX7 p. 12 of 19). He provided Petitioner with ongoing work restrictions of no lifting over five pounds with his right hand and no chainsaw use. (Id. at 19 of 19). Ongoing treatment with Dr. Crickard following that visit was focused on the right trigger fingers. (See PX7). As of June 18, 2013, Dr. Crickard had not yet placed Petitioner at maximum medical improvement for his right thumb injuries. (Id.).

Petitioner testified he notices that his right thumb is still numb on the side and the top and that it is hard to feel with it. (T. p. 86). He testified that he received his first temporary total disability check from Respondent five weeks after April 26, 2013 covering the time period of April 26 through May 23, 2013. (Id. at 92). He testified he received TTD benefits from Respondent through June 13, 2013. (Id. at 93). Petitioner testified he did not return to work anywhere as of June 14, 2013. (Id.).

II. CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's present condition of ill-being as it relates to his right thumb is causally related to his work accident of March 16, 2012.

The Parties stipulated to Petitioner's accident of March 16, 2012 involving his right thumb. The medical records immediately following his accident correlate with the right thumb injury from that date. Petitioner's medical providers, including Mr. DeWitt and Dr. Philpot, as well as Respondent's Section 12 examiner, all agreed that Petitioner's work for Respondent caused or aggravated his right thumb ganglion cyst. Petitioner's medical records and testimony are consistent as to his right thumb injuries and symptoms.

The Arbitrator finds that Petitioner testified credibly and his credibility was not reduced on cross-examination. His current complaints regarding his right thumb remained consistent with the contemporaneous medical records.

Therefore, the Arbitrator finds that Petitioner's right thumb injury is causally related to his work-related accident of March 16, 2012.

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

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Respondent stipulated on the record that the right thumb injury was accepted as a work-related injury. Respondent, as noted in the medical records and in the trial transcript, provided authorization for Petitioner's right thumb treatment, including the surgery of April 26, 2013.

Although Petitioner underwent right trigger finger surgeries on that same date, the Arbitrator notes those injuries were also stipulated to and approved by Respondent and are part of case number 10 WC 43271.

The Arbitrator finds that medical services provided to the Petitioner have been reasonable and necessary. The Respondent has not paid all appropriate charges. Many of the charges are enumerated as part of the decision in case number 12 WC 43271, as the Petitioner receive treatment for his thumb and trigger fingers at the same time. In addition, the Respondent is ordered to pay the following bill which pertains to the thumb.

FACILITY	DATE OF SERVICE	CPT	AMOUNT
Quincy Medical Group	April 26, 2013	26160	$1,962.90

For these reasons, Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule, of $1962.90 to Quincy Medical Group l, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator notes that these medical bills overlap with those submitted by Petitioner in case number 10 WC 43271, however, Respondent stipulated to both of these accidents and approved surgery and treatment for the related injuries. The Arbitrator shall award these bills in both claims but need only be paid one time by Respondent.

K. WHETHER PETITIONER IS DUE COMPENSATION FOR TEMPORARY TOTAL DISABILITY?

The Arbitrator finds that Petitioner's proposed TTD benefits on the Request for Hearing form are accurate and awards benefits in accordance with those dates.

The parties stipulated that TTD benefits were owed from April 26, 2013 through June 13, 2013. Respondent, however, disputed the periods from December 13, 2012 through April 25, 2013 and June 14, 2013 through July 3, 2013.

An employer's obligation to pay TTD benefits to an injured employee does not automatically cease because the employee has been discharged no matter what the cause of the termination. *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 146, 923 N.E.2d 266, 274 (2010). When an injured employee has been discharged by an employer, the determinative inquiry for deciding entitlement to TTD benefits remains whether the claimant's condition has stabilized. *Id.* If the injured employee has not reached maximum medical improvement, he or she is entitled to TTD benefits. *Id.* The dispositive question in a temporary total disability case is whether the claimant's condition has stabilized and whether physicians still recommend further treatment. See *Freeman v. United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170 (2000).

Here, Petitioner had not reached maximum medical improvement and had not been discharged from care when Respondent sent him home on December 12, 2012. To the

contrary, at the time of trial, Petitioner still had not been released at maximum medical improvement by Dr. Crickard in regards to his right thumb injury.

Therefore, the Arbitrator finds that Petitioner is entitled to $561.30/week for a total of 29 weeks of temporary total disability benefits for the time period of December 13, 2012 through July 3, 2013.

The Petitioner is entitled to a total of $16,277.70 in TTD for this time period. The Respondent is owed a credit of $3,929.00 for TTD benefits paid for a total outstanding owed amount to the Petitioner of $12,348.70.

Once again, the periods owed for TTD for the trigger finger injuries and the thumb overlap. Obviously, the Respondent is only responsible for payment of one TTD check for the weeks and parts enumerated.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPODNENT?

Penalties are addressed in the arbitration decision in 12 WC 43271, one of the companion cases tried by consolidation. No additional penalties are awarded in this case.

O. WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, is unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with the Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted.

For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the *Fencil-Tufo* case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ 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

Donald Swartz,

Petitioner,

14IWCC0205

vs.

NO: 12 WC 43273

Wright Tree Services,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
Kwl/VF
o-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

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

14IWCC0205

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043273**

12WC043271
12WC043272
12WC043270

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

19(B)

14IWCC0205

DONALD SWARTZ
Employee/Petitioner

v.

WRIGHT TREE SERVICE
Employer/Respondent

Case # **12** WC **43273**

Consolidated cases: **12 WC 43270; 12 WC 43271; 12 WC 43272**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **July 3, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$841.95**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule, of $439.00 for Blessing Physician Services as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

August 19, 2013
Date

AUG 26 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ, Petitioner, v. WRIGHT TREE SERVICE, Respondent.	)	**14IWCC0205**
	)	**12 WC 43273**
	)	Consolidated cases: 12 WC 43270
	)	12 WC 43271
	)	12 WC 43272

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner, Donald Swartz, testified that he began working for Respondent, Wright Tree Service, in January of 2011. (Transcript p. 45-46). He testified that Respondent is a tree trimming company and they normally trimmed trees out of power lines. (Id. at 45). He testified he was still employed for Respondent in November of 2012 and that his position at that time was journeyman tree trimmer. (Id.). He testified that when he was hired by Respondent in January of 2011, his position was that of a T4 tree trimmer, which he explained is one step under a journeyman. (Id. at 46).

Petitioner testified that a journeyman tree trimmer should know everything about the job while a T4 trimmer is still learning some aspects of the job. (T. p. 47). As a journeyman tree trimmer, he testified his job duties included trimming trees out of power lines using chain saws, pole saws, hydraulic pole saws, hanger pullers, hand saws, pruners, and other various equipment. (Id.). Petitioner described in detail the different tools used within his trade. (Id. at 48-49; 56-63).

The parties stipulated that on November 15, 2012, Petitioner sustained an accident involving his right ankle that arose out of and in the scope of his employment. (Arb. X4). The only issues in dispute in this claim are causal connection, medical bills, credit, penalties, and admissibility of exhibits. (Id.).

Petitioner testified he injured his right ankle on November 15, 2012 while dragging brush from the backyard to the front yard at a work site. (T. p. 76). He testified that as he stepped off from the driveway, he stepped into a hole or divot and twisted his right ankle. (Id.).

The following day, November 16, 2012, he sought treatment at McDonough District Hospital in Macomb, Illinois. (PX1). He was treated in the emergency room and noted to have pain and swelling in his right ankle after he twisted it at work the previous day.

(Id.). He was diagnosed with a soft tissue injury and discharged with instructions to follow up in two or three days. (Id.).

On November 20, 2012, Petitioner testified he sought treatment with Dr. Daniels with Blessing Physician Services. (T. p. 77). He testified he was accompanied by Jason Bryan, his general foreman, at this visit. (T. p. 71, 77). Dr. Daniels examined Petitioner's right ankle and noted he injured his ATF and possibly CF. (PX6). Dr. Daniels spoke to the Petitioner by telephone after the visit and provided him with certain work restrictions relative to his right ankle. (Id.).

At a follow up visit on December 7, 2012, Dr. Daniels advised Petitioner that for the next three months he needed to be careful while walking on uneven ground due to his right ankle injury. (PX6). He also advised Petitioner to begin a home therapy program and continue with his light duty work restrictions for his ankle until December 14, 2012. (Id.). He advised Petitioner that no follow up visit was necessary unless his symptoms worsened. (Id.).

Petitioner testified he notices that his right ankle still bothers him as of the date of trial. (T. p. 96). He testified it is his understanding that it will continue to bother him for the rest of his life. (Id. at 97).

Testimony of Jason Bryant

Jason Bryant testified on behalf of Respondent. He testified he is employed by Respondent as a general foreman. (T. p. 157-158). He testified he knows Petitioner because he was his employee. (Id. at 158). He testified around August through October of 2012, there was a discussion amongst his crew about going to Canton, Illinois for a job the following year. (Id. at 158-159). He explained Canton is approximately two hours from Quincy. (Id. at 159). He testified he had a conversation with his employees, including Petitioner, regarding this work in Canton the following year. (Id.).

Mr. Bryant testified Petitioner told him, in response to the planned trip to Canton, that he did not want to go and would just file for workers' compensation. (T. p. 160). He testified that he took this statement from Petitioner as a joke. (Id.). He also testified that Petitioner said this during a morning safety meeting "in front of everyone" and "everybody just got a big joke, a big laugh out of it, but lo and behold." (Id.).

On cross examination, Mr. Bryant testified he and everyone else took Petitioner's statements that he was going to claim workers' compensation rather than go to Canton as a joke and everyone thought it was funny. (T. p. 165).

Testimony of Shaun Thompson

Shaun Thompson testified on behalf of Respondent. He testified he is employed by Respondent as a T3 trainee trimmer. (T. p. 175-176). He testified he never had a direct conversation with Petitioner about working in Canton, Illinois. (Id. at 176). He testified

he was with a group of people when Petitioner made a comment about Canton. (Id. at 177). In regards to the comment, he testified, "It was just side bar conversation, a bunch of us just standing around, it was like, I'm not going to Canton - - or I ain't going to Canton, but you know - -". (Id.).

On cross examination, Mr. Thompson testified that whenever the topic of traveling to Canton for the job came up, no one wanted to go. (T. p. 179). He testified he heard Petitioner say he wasn't going to drive to Canton or that he was not going to go. (Id.). He testified, "We were just kind of all joking around, talking...I doubt really anyone wanted to drive (to Canton)." (Id.).

II. CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's present condition of ill-being as it relates to his right ankle is causally related to his work accident of November 15, 2012.

The parties stipulated to Petitioner's accident of November 15, 2012 involving his right ankle. The medical records immediately following his accident correlate with the injury from that date.

The Arbitrator finds that Petitioner testified credibly and his credibility was not reduced on cross-examination. His current complaints regarding his right ankle remained consistent with the contemporaneous medical records. He testified the ankle continues to bother him and that he had not sustained any other accidents involving that same ankle. Therefore, the Arbitrator finds that the Petitioner's right ankle injury is causally related to his work-related accident of November 15, 2012.

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

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Respondent stipulated that the right ankle injury was accepted as a work-related accident. Petitioner submitted a bill from Blessing Physician Services related to his treatment with Dr. Daniels on November 20, 2012 and December 7, 2012 in the amount of $439.00. The bills are broken down as follows:

FACILITY	DATE OF SERVICE	CPT	AMOUNT
Blessing Physician Services	November 20, 2012	99203	$306.00
Blessing Physician Services	December 7, 2012	99213	$133.00

For these reasons, Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule, of $439.00 to Blessing Physician Services, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator notes Respondent claimed an 8(j) credit of $604.95 but failed to present evidence supporting this claim. On the Request For Hearing, signed by both parties, the Petitioner disputed the Respondent's claim for credit, demanding strict proof thereof. No evidence was presenting showing payments by the Respondent for the bills in question. This credit is therefore denied.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPODNENT?

The Respondent has failed to show payment of the two bills referenced above, The Arbitrator finds that the Respondent's conduct in not paying the bills does not rise to the level needed for the imposition of penalties under Section 19(k) of the Act. Penalties are denied.

O. WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, was unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that the Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted. For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the Fencil-Tufo case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☐ 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

DONALD SWARTZ,

Petitioner,

14IWCC0206

vs.

NO: 12 WC 43271

WRIGHT TREE SERVICE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability benefits, penalties and fees, credit for temporary total disability and maintenance payments , "constitutionality of Section 16," "denial of 14th Amendment right to cross examine physician," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's award of $5,670.00 in Section 19(l) penalties as a penalty for Respondent's unreasonable delay in the payment of temporary total disability benefits during the period of December 27, 2012 through July 3, 2013, for a period of 189 days. However, based upon a review of the record as a whole, the Commission modifies the Arbitrator's award of Section 19(k) penalties and Section 16 attorney fees.

The Arbitrator's award of Section 19(k) penalties and Section 16 attorney fees included the $6,684.86 in medical bills of Quincy Medical Group, for dates of service of November 14, 2012, December 17, 2012, March 11, 2013, April 2, 2013, April 23, 2013, April 26, 2013, May 9, 2013, and May 23, 2013, and the $9,670.09 medical bills of Blessing Hospital, for a date of service of April 26, 2013. The Commission finds the Quincy Medical Group bills from March 11, 2013, April 2, 2013, April 23, 2013, April 26, 2013, May 9, 2013, and May 23, 2013, and the $9,670.09 medical bills of Blessing Hospital, were erroneously included in calculating the award of Section 19(k) penalties and Section 16 attorney fees.

The Arbitrator included the $6,684.86 in unpaid medical bills of Quincy Medical Group in calculating the award of penalties and fees, based upon the Arbitrator's finding that the bills were submitted to Respondent's workers compensation carrier in a "timely fashion," as evidenced in PX2. However, a review of PX2 fails to support the Arbitrator's conclusion. PX2 contains two "Account Charge Activity Detail" statements. The first statement, which is dated January 9, 2013 reflects $323.47 in outstanding charges, incurred from April 2009 through March 23, 2012, all of which have either been paid or are unrelated to Petitioner's workers compensation claims in issue. Also, significant is that this billing statement lists Petitioner as the "guarantor," and fails to support the Arbitrator's conclusion these bills were ever provided to Respondent, let alone in a "timely fashion."

The second billing statement contained in PX2, which is also dated January 9, 2013, lists $1,646.29 in outstanding charges incurred from November 14, 2012 through December 18, 2012, and lists Respondent as "guarantor." Given that the medical provider billed Respondent directly on January 9, 2013 with regard to the $1,646.29 in charges, all of which are related to his workers' compensation claim, and the fact these bills remain unpaid as of the date of the July 3, 2013 19(b) hearing, the Commission finds Section 19(k) penalties and Section 16 attorney fees are appropriate with regard to these charges, and finds Respondent shall pay Section 19(k) penalties in the amount of 50% of the medical fee schedule amount of the $1,646.29 in medical bills, and pay Section 16 attorney fees in the amount of 20% of the medical fee schedule amount of $1,646.29 in medical bills.

With regard to the additional outstanding and related medical expenses, the Commission notes PX6 contains the only other billing statement from Quincy Medical Group, titled "Account Charge Activity Detail." This billing statement covers the dates of service of January 1, 2013 through June 11, 2003, and includes $11,277.08 in outstanding charges, of which $3,857.61 pertains to Petitioner's unrelated hernia surgery. While Respondent is listed as the "guarantor," the statement itself is dated June 11, 2013. Given that the date of the 19(b) hearing in this matter was July 3, 2013, the Commission finds neither Section 19(k) penalties nor Section 16 attorney fees are appropriate. Section 8.2(d) of the Act provides that where the medical provider bills an employer directly, the employer shall make payment within 30 days of receipt of the bill, as long as it contains substantially of the required data necessary to adjudicate the bill. The Respondent

herein had 30 days from receipt of the bill within which to make payment, and given that it was issued on June 11, 2013, the Commission concludes that as of the date of the July 3, 2013 hearing Respondent was still within the 30 days period within which to make payment on the related charges contained within PX6.

The Arbitrator also included the $9,670.09 in unpaid medical bills of Blessing Hospital (PX9) in calculating the award of penalties and fees, based upon the presumption the bills were sent to Respondent's workers compensation carrier. However, as the Arbitrator noted, "the surgical bill from Blessing Hospital does not contain any information as to where it was sent." The Commission finds Petitioner tendered no credible evidence to support the Arbitrator's presumption that the bills were sent to Respondent's workers compensation carrier. Instead, the bill itself lists Petitioner as the "guarantor." In addition, the billing statement is dated July 1, 2013. Even assuming this billing statement was issued to Respondent on July 1, 2013, under Section 8.2(d) of the Act Respondent had 30 days from receipt of the bill within which to make payment. As of the date of the July 3, 2013 19(b) hearing, Respondent was still within the 30 day time period within which to make payment on the related charges contained within PX6.

Accordingly, the Commission affirms the Arbitrator's award of Section 16 attorney's fees in the amount of $2,469.74 for nonpayment of TTD($12,348.70 x 20%). The Commission modifies the award of Section 16 attorney's fees from 20% of the medical fee schedule amount of the total outstanding bills of $16,354.95, to 20% of the medical fee schedule amount of the $1,646.29 in medical bills listed in the second January 9, 2013 billing statement in PX2. Furthermore, the Commission modifies the Arbitrator's award of Section 19(k) penalties from 50% of the medical fee schedule amount of $16,354.95, to 50% of the medical fee schedule of $1,646.29 in medical bills listed in the second January 9, 2013 billing statement in PX2. Finally, the Commission affirms the Arbitrator's award of Section 19(l) penalties in the amount of $5,670.00 ($30.00 x 189 days) based upon Respondent's failure to pay TTD benefits without a reasonable basis for the period of December 13, 2012 through July 3, 2013 .

IT IS THEREFORE ORDERED BY THE COMMISISON that the Decision of the Arbitrator filed August 26, 2013, as modified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $561.30 per week for a period of 29 weeks, for the period of December 13, 2012 through July 3, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $16,354.95 for medical expenses under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of 50% of the medical fee schedule amount of the outstanding medical bills of $1,646.29, as provided in §19(k) of the Act,.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $5,670.00 as provided in §19(l) of the Act, based upon Respondent's unreasonable delay in the payment of temporary total disability benefits during the period of December 27, 2012 through July 3, 2013, for a period of 189 days.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of 20% of the medical fee schedule of $1,646.29 as provided in §16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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 $35,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/kmt
O-01/28/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

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

14IWCC0206

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043271**

12WC043270
12WC043272
12WC043273

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

19 (B)

14IWCC0206

DONALD SWARTZ
Employee/Petitioner

v.

Case # 12 WC 43271

Consolidated cases: 12 WC 43270; 12 WC 43272; 12 WC 43273

WRIGHT TREE SERVICE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **July 3, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 14, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$841.95**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$3,929.00** for TTD and maintenance paid, and **$0.00** for other benefits, for a total credit of **$3,929.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule, of $6,684.86 for Quincy Medical Group and $9,670.09 for Blessing Hospital as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $561.30/week for 29 weeks, commencing December 13, 2012 through July 3, 2013 as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner penalties and attorneys' fees as outlined in the Findings of Fact and Conclusions of Law and as provided in Sections 16, 19(k), 19(l) of the Act.

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

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

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

D. [illegible]
Signature of Arbitrator

August 19, 2013
Date

AUG 26 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ,	)	**14IWCC0206**
Petitioner,	)	
v.	)	**12 WC 43271**
	)	Consolidated cases: 12 WC 43270
WRIGHT TREE SERVICE,	)	12 WC 43272
	)	12 WC 43273
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner's Testimony Regarding his Injury and Initial Treatment

Petitioner, Donald Swartz, testified that he began working for Respondent, Wright Tree Service, in January of 2011. (Transcript p. 45-46). He testified that Respondent is a tree trimming company and they normally trimmed trees out of power lines. (Id. at 45). He testified he was still employed for Respondent in November of 2012 and that his position at that time was journeyman tree trimmer. (Id.). He testified that when he was hired by Respondent in January of 2011, his position was that of a T4 tree trimmer, which he explained is one step under a journeyman. (Id. at 46).

Petitioner testified that a journeyman tree trimmer should know everything about the job while a T4 trimmer is still learning some aspects of the job. (T. p. 47). As a journeyman tree trimmer, he testified his job duties included trimming trees out of power lines using chain saws, pole saws, hydraulic pole saws, hanger pullers, hand saws, pruners, and other various equipment. (Id.). Petitioner described in detail the different tools used within his trade. (Id. at 48-49; 56-63). Petitioner submitted two photographs depicting Petitioner holding one of the hydraulic stick saws he used for Respondent, which were admitted by the Arbitrator over the Respondent's objection. (Id. at 49-52).

The Parties stipulated that on November 14, 2012, Petitioner sustained an accident that arose out of and in the scope of his employment. (Arb. X2). However, Respondent only stipulated to the accident involving bilateral ring and middle trigger fingers. (Id. and T. p. 7). Respondent disputed any injury to the wrists or upper extremities. (Id.). The issues in dispute are accident except for the trigger fingers, notice, causal connection, medical, temporary total disability, penalties, and prospective medical. (T. p. 8).

Petitioner first treated with Dr. Philpot at Quincy Medical Group on November 14, 2012. (PX2 p. 9 of 43). Dr. Philpot noted Petitioner was there that day due to finger triggering, pain in both wrists, both elbows, and some pain in both shoulders. (Id.). Dr. Philpot also

noted a large ganglion cyst on Petitioner's right thumb, which is the subject of case number 12 WC 43270 and will not be dealt with directly in this claim. (Id.). Dr. Philpot also noted Petitioner works for a tree service. (Id.).

Dr. Philpot diagnosed Petitioner with bicipital tendinitis bilaterally, trapezium metacarpal arthritis bilaterally, a right thumb cystic mass, and bilateral trigger fingers. (PX2 p. 10 of 43). He recommended steroid shots for the trapeziometacarpal arthritis and therapy for the biciptal tendinitis. (Id.). Petitioner was provided with a work status report at that visit and testified he attempted to provide it to his general foreman, Mr. Bryant, but he would not accept it. (T. p. 71-72). He identified Mr. Bryant as the Respondent's representative in the courtroom at the time of this hearing. (Id. at 71-72). Petitioner, through his attorneys, filed an Application for Adjustment of Claim for this accident date at the Illinois Workers' Compensation Commission on December 17, 2012. (ArbX6).

Petitioner testified that he sustained another accident on November 15, 2012 that is discussed separately in its own Findings of Fact and Conclusions of Law in case number 12 WC 43273 involving his right ankle. Because these two claims overlap in time, it is necessary for the Arbitrator to briefly discuss the November 15, 2012 accident. As a result of his right ankle injury, Petitioner was also provided with work restrictions and was then provided a light duty position with the Respondent. (T. p. 76, 79-80).

Petitioner continued working in a light duty capacity for Respondent through December 12, 2012. (T. p. 81-82). On that day, Petitioner testified he was advised by Jason Smott, another general foreman with Respondent, that they could no longer accommodate his work restrictions. (Id. at 82-83). Petitioner testified that he has not been asked to return to work for Respondent since he was sent home on December 12, 2012. (Id. at 88). He testified he is no longer employed by Respondent. (Id. at 89).

Petitioner returned to Dr. Philpot on December 17, 2012 for treatment related to his bilateral fingers, hands, arms, and shoulder injuries. (PX2 p. 4 of 43). Dr. Philpot provided Petitioner with a physical examination and noted bilateral positive Tinel's and Phalen's at the median nerve at the carpal tunnels. (Id. at 5 of 43). He noted Petitioner had a number of issues including bilateral carpal tunnel syndrome, bilateral bicipital tendinitis, and right thumb ganglion. (Id. at 4 of 43). He placed Petitioner, at least temporarily, on the schedule for carpal tunnel surgery and removal of the right thumb mass. (Id. at 5 of 43). Petitioner was also provided with work restrictions of no effort level over ten pounds. (Id. at 30 of 43).

Section 12 Examination by Dr. David Fletcher

At the request of the Respondent, the Petitioner underwent a Section 12 examination performed by Dr. David Fletcher on December 21, 2012. (RX1). Dr. Fletcher testified by way of evidence deposition on April 1, 2013. (RX2).

Dr. Fletcher testified that he performed a "very thorough examination of the upper extremities and cervical spine" of Petitioner. (RX2 p. 17). He testified the physical

examination was basically normal in the upper extremities except Petitioner had trigger finger in both hands and the right thumb mass. (Id. at 18). He testified the neurological examination for such conditions as carpal tunnel syndrome was negative. (Id. at 18). Dr. Fletcher testified he performed the Tinel's and Phalen's test and both were negative. (Id.).

Dr. Fletcher testified Petitioner was positive for triggering of the third and fourth fingers bilaterally based upon his physical examination. (RX2 p. 18). He testified that the trigger fingers were causally connected to his employment by Respondent. (Id. at 19-20). He explained that vibration exposure from the saws and constant pressure can cause trigger finger. (Id.).

During his deposition, a letter dated December 14, 2012 and signed by Respondent's attorney addressed to Dr. Fletcher was admitted as an exhibit without objection by Respondent. (RX2 PetDepX6). The letter indicated, "Mr. Swart (sic) is employed by Wright Tree Service. He has identified four injuries which were not timely reported and are questionable to say the least." (Id.). The letter also indicated a claimed accident date of December 7, 2012 for cumulative wrist pain. (Id.).

On cross examination, Dr. Fletcher agreed that the use of the same type of chain saws used by Petitioner in his work with Respondent can cause or aggravate carpal tunnel syndrome. (Id. at 44-45). He testified that hypothetically, someone working in Petitioner's job could contract carpal tunnel syndrome. (Id. at 66). He testified, however, that he did not believe Petitioner had carpal tunnel syndrome when he examined him. (Id. at 45). He did agree, however, that two physicians can reach different conclusions when examining the same patient. (Id.).

Testimony of Jason Bryant

Jason Bryant testified on behalf of Respondent. He testified he is employed by Respondent as a general foreman. (T. p. 157-158). He testified he knows Petitioner because he was his employee. (Id. at 158). He testified around August through October of 2012, there was a discussion amongst his crew about going to Canton, Illinois for a job the following year. (Id. at 158-159). He explained Canton is approximately two hours from Quincy. (Id. at 159). He testified he had a conversation with his employees, including Petitioner, regarding this work in Canton the following year. (Id.).

Mr. Bryant testified Petitioner told him, in response to the planned trip to Canton, that he did not want to go and would just file for workers' compensation. (T. p. 160). He testified that he took this statement from Petitioner as a joke. (Id.). He also testified that Petitioner said this during a morning safety meeting "in front of everyone" and "everybody just got a big joke, a big laugh out of it, but lo and behold." (Id.).

On cross examination, Mr. Bryant testified he and everyone else took Petitioner's statements that he was going to claim workers' compensation rather than go to Canton as a joke and everyone thought it was funny. (T. p. 165).

Testimony of Shaun Thompson

Shaun Thompson testified on behalf of Respondent. He testified he is employed by Respondent as a T3 trainee trimmer. (T. p. 175-176). He testified he never had a direct conversation with Petitioner about working in Canton, Illinois. (Id. at 176). He testified he was with a group of people when Petitioner made a comment about Canton. (Id. at 177). In regards to the comment, he testified, "It was just side bar conversation, a bunch of us just standing around, it was like, I'm not going to Canton - - or I ain't going to Canton, but you know - -". (Id.).

On cross examination, Mr. Thompson testified that whenever the topic of traveling to Canton for the job came up, no one wanted to go. (T. p. 179). He testified he heard Petitioner say he wasn't going to drive to Canton or that he was not going to go. (Id.). He testified, "We were just kind of all joking around, talking…I doubt really anyone wanted to drive (to Canton)." (Id.).

Ongoing Treatment Following Section 12 Examination

Following the Section 12 examination by Dr. Fletcher, Petitioner continued treating for the injuries related to this claim as well as for injuries related to the other three consolidated claims. On February 25, 2013, he underwent a hernia surgery, which is the subject of case number 12 WC 43272. As discussed above, he underwent an EMG test performed by Dr. Douglas Sullivant at Quincy Medical Group pursuant to the referral of Drs. Philpot and Crickard. (PX4 p. 53 of 59). Dr. Sullivant noted the test revealed "evidence of bilateral upper extremity median nerve compression neuropathy at the wrist (Carpal Tunnel Syndrome)." (Id. at 55 of 59).

Petitioner returned to Dr. Crickard on April 2, 2013. (PX4 p. 20 of 59). Dr. Crickard reviewed and noted the March 26, 2013 EMG test and noted it showed moderate carpal tunnel on both sides. (Id.). He further noted the bilateral triggering in both ring and long fingers of Petitioner. (Id.). Dr. Crickard recommended bilateral carpal tunnel release surgery and bilateral ring and long trigger finger releases. (Id. at 20 and 50 of 59).

On April 23, 2013, Petitioner returned to Quincy Medical Group following approval from Respondent to proceed with surgery on his right thumb and right trigger fingers. (PX4 p. 9 of 59). At that visit, Dr. Crickard noted the next visit would be surgery. (Id.). He advised the Petitioner to remain completely off work from April 26, 2013 through May 9, 2013. (Id. at 49 of 59).

Dr. Crickard performed surgery on Petitioner's right thumb and right third and fourth trigger fingers on April 26, 2013. (PX8 p. 40). Petitioner followed up with Dr. Crickard on May 9, 2013. (PX4 p. 3 of 59). Dr. Crickard noted Petitioner's right middle finger continued to stick down on occasion. (Id.). He further noted Petitioner may need further release if it did not work its way out over time. (Id.).

At his next visit on May 23, 2013, Dr. Crickard provided Petitioner with a right middle trigger finger injection due to continued triggering following surgery. (PX7 p. 12 of 19). He also provided Petitioner with an updated work status note indicating no lifting over five pounds with his right hand and no chainsaw use. (Id. at 19 of 19).

On June 6, 2013, Dr. Crickard recommended a further release of the right middle trigger finger due to continued triggering. (PX7 p. 7 of 19). He provided Petitioner with a work ability report indicating no use of his right hand and that they needed approval for the second right middle trigger finger release. (Id. at 18 of 19).

Petitioner testified he notices that his right and left hands still continue to bother him and hurt. (T. p. 95). He testified when he wakes up in the morning, his fingers are still locking down and that his arms hurt. (Id.). He testified his right middle finger still triggers since his surgery and the right ring finger is still stiff. (T. p. 86). He testified he wants to undergo the second surgery on his right middle finger as recommended by Dr. Crickard. (T. p. 88 and PX7 p. 7 of 19).

Petitioner testified he received his first temporary total disability check from the Respondent five weeks after April 26, 2013 covering the time period of April 26 through May 23, 2013. (Id. at 92). He testified he received TTD benefits from Respondent through June 13, 2013. (Id. at 93). Petitioner testified he did not return to work anywhere as of June 14, 2013. (Id.).

II. CONCLUSIONS OF LAW

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT ON NOVEMBER 14, 2012?

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent on November 14, 2012 involving his bilateral ring and middle trigger fingers.

The parties stipulated to Petitioner's accident of November 14, 2012 but only as it pertained to his bilateral middle and ring trigger fingers. Respondent disputed Petitioner's accident as it pertains to his bilateral carpal tunnel syndrome.

Petitioner testified in great detail to the type of work he performed at Wright Tree Service as a journeyman tree trimmer working eight to ten hours per day, four or five days per week, depending on the season.

He testified that he used a number of tools on the job as is indicated above. He said that he used the tools when he worked up in the bucket, which he did on every other tree. When not in the bucket, he would assist his co-worker in that position by providing him tools. He also would clean up the area on the ground, removing the branches which had fallen.

He did not quantify his use of the chain saw. He did say that the tool he used the most, 80 to 85% of the time, was the hydraulic stick saw, depicted in Petitioner's exhibits 11 and 12. There was no testimony whether there was any vibration or positioning of the wrists in an awkward position the hydraulic saw. Pet. Exhibit 11 is a photo of the Petitioner using the saw. It shows his arms outstretched while holding the saw with both hands. His wrists do not appear to be in a flexed position.

No medical evidence was offered on the issue of whether the Petitioner's work was causally related to carpal tunnel syndrome. Dr. Fletcher did testify on cross exam that vibration could be a cause of the condition, but, as stated above, there was no evidence that the Petitioner was exposed to vibration other than when he used the chain saw for unspecified periods of time.

Under the circumstances, the Arbitrator holds that the Petitioner has failed to prove an accident arising out of his employment causally related to carpal tunnel syndrome, and his claim for benefits for that condition is denied. The Arbitrator finds an accidental injury arising out of the Petitioner's employment involving the middle and ring fingers, bilaterally.

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

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Respondent stipulated on the record that the bilateral middle and ring trigger fingers were accepted as work-related injuries. Respondent, as noted in the medical records and in the trial transcript, provided authorization for Petitioner's right trigger fingers treatment, including the surgery of April 26, 2013. The Arbitrator finds that all related trigger finger treatment shall be paid by Respondent, including the surgeries of April 26, 2013.

Although Petitioner underwent right thumb surgery on that same date, the Arbitrator notes that injury was also stipulated to and approved by Respondent and is part of case number 10 WC 43270.

The Respondent is not responsible for charges related to the Petitioner's carpal tunnel syndrome.

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. The Respondent has not paid all appropriate charges. The awarded bills are broken down as follows:

FACILITY	DATE OF SERVICE	CPT	AMOUNT

Quincy Medical Group	November 14, 2012	85025	$46.78
Quincy Medical Group	November 14, 2012	80053	$77.42
Quincy Medical Group	November 14, 2012	36415	$18.65
Quincy Medical Group	November 14, 2013	99243	$331.63
Quincy Medical Group	December 17, 2012	76881	$330.44
Quincy Medical Group	December 17, 2012	80053	$77.42
Quincy Medical Group	December 17, 2012	36415	$18.65
Quincy Medical Group	December 17, 2013	85025	$46.78
Quincy Medical Group	December 17, 2012	73130	$119.52
Quincy Medical Group	December 17, 2012	99213	$161.00
Quincy Medical Group	March 11, 2013	99212	$99.84
Quincy Medical Group	April 2, 2013	99202	$171.60
Quincy Medical Group	April 23, 2013	99213	$0.00
Quincy Medical Group	April 23, 2013	85025	$48.66
Quincy Medical Group	April 23, 2013	36415	$19.40
Quincy Medical Group	April 26, 2013	26055	$2,127.34
Quincy Medical Group	April 26, 2013	26055	$2,127.34
Blessing Hospital	April 26, 2013	Multiple	$9,670.09
Quincy Medical Group	May 9, 2013	99024	$0.00
Quincy Medical Group	May 23, 2013	99024	$0.00
Quincy Medical Group	May 23, 2013	J1030	$9.61
Quincy Medical Group	May 23, 2013	20550	$202.98

For these reasons, Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule as outlined above, to said medical providers, as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator notes that these medical bills overlap with those submitted by Petitioner in case number 10 WC 43270, however, Respondent stipulated to both of these accidents and approved surgery and treatment for the related injuries. The Arbitrator shall award these bills in both claims but need only be paid one time by Respondent.

K. WHETHER PETITIONER IS DUE COMPENSATION FOR TEMPORARY TOTAL DISABILITY PAYMENTS?

The Arbitrator finds that Petitioner's proposed TTD benefits on the Request for Hearing form are accurate and awards benefits in accordance with those dates.

The parties stipulated that TTD benefits were owed from April 26, 2013 through June 13, 2013. Respondent, however, disputed the periods from December 13, 2012 through April 25, 2013 and June 14, 2013 through July 3, 2013.

An employer's obligation to pay TTD benefits to an injured employee does not automatically cease because the employee has been discharged no matter what the cause of the termination. *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 146, 923 N.E.2d 266, 274 (2010). When an injured employee has been discharged by an employer, the determinative inquiry for deciding entitlement to TTD

benefits remains whether the claimant's condition has stabilized. *Id.* If the injured employee has not reached maximum medical improvement, he or she is entitled to TTD benefits. *Id.* The dispositive question in a temporary total disability case is whether the claimant's condition has stabilized and whether physicians still recommend further treatment. See *Freeman v. United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170 (2000).

Here, Petitioner had not reached maximum medical improvement and had not been discharged from care when Respondent sent him home on December 12, 2012. To the contrary, at the time of trial, Petitioner still had not been released at maximum medical improvement by Dr. Crickard in regards to his bilateral middle and ring trigger fingers or his bilateral carpal tunnel syndrome.

Therefore, the Arbitrator finds that the Petitioner is entitled to $561.30/week for a total of 29 weeks of temporary total disability benefits for the time period of December 13, 2012 through July 3, 2013.

Petitioner is entitled to a total of $16,277.70 in TTD for this time period. Respondent is owed a credit of $3,929.00 for TTD benefits paid for a total outstanding owed amount to Petitioner of $12,348.70.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPODNENT?

The Arbitrator finds that penalties and fees shall be imposed upon Respondent pursuant to Sections 16, 19(k), and 19(l) of the Act.

As discussed above, it is well settled that an employer's obligation to pay TTD benefits to an injured employee continues until the Petitioner has reached maximum medical improvement. Here, it is undisputed that Petitioner was in need of treatment for his bilateral trigger fingers syndrome when he was sent home by Respondent on December 12, 2012. Respondent arbitrarily decided to withhold TTD benefits until Petitioner's surgery date of April 26, 2013. It must also be stated that the delay in surgery was due to Respondent determining whether or not they would provide the necessary authorization. Further, even though Respondent agreed to pay TTD as of April 26, 2013, Petitioner did not receive his first check until five weeks after his surgery date.

The Respondent offers no legitimate explanation as to why benefits were not paid. Their examining physician, Dr. Fletcher, opined that the Petitioner's finger conditions required surgery and that work restrictions were needed. As stated above, Dr. Phillpot had made the same recommendations. The fact that the Petitioner also had restrictions for a hernia, which the Arbitrator has ruled is not compensable, does not provide the Respondent an excuse for non- payment of benefits.

The Arbitrator also awards penalties and fees associated with the unpaid medical bills of Quincy Medical Group and Blessing Hospital. The Respondent argues that it did not

receive the bills until the matter was arbitrated. The evidence shows that the bills were submitted to WC by the Quincy Medical Group in a timely fashion. (PX 2) While the surgical bill from Blessing Hospital does not contain any information as to where it was sent, the Arbitrator logically presumes that they were also directed to send the bill to WC.

For these reasons, the Arbitrator finds Petitioner has proven by a preponderance of the evidence entitlement to penalties under Sections 19(k) and 19(l) and attorneys' fees under Section 16. Respondent should pay penalties and fees as outlined below:

Section 16 attorney's fees in the amount of 20% of the medical fee schedule amount of the total outstanding bills of $16,354.95 and Section 16 in the amount of $2,469.74 for nonpayment of TTD benefits ($12,348.70 x 20%).

Section 19(k) in the amount of 50% of the medical fee schedule amount of the total outstanding bills of $16,354.95; and

Section 19(l) in the amount of $5,670.00 ($30.00 x 189 days between December 27, 2012 and the date of hearing July 3, 2013, which began to accrue 14 days after the Respondent failed to issue TTD benefits without a reasonable basis as of December 13, 2012.).

O. WHETHER RESPONDENT SHALL AUTHORIZE BILATERAL CARPAL TUNNEL RELEASE SURGERIES, RIGHT MIDDLE TRIGGER FINGER RELEASE SURGERY, AND LEFT MIDDLE AND RING TRIGGER FINGER RELEASE SURGERIES?

The Arbitrator finds that Respondent need not authorize the recommended carpal tunnel release surgeries, as they were not shown to be causally related to the Petitioner's work. The Respondent is to authorize the left middle and ring trigger finger release surgeries, and right middle finger release surgery.

Petitioner's current treating physician, Dr. George Crickard, and Respondents' Section 12 Examiner, Dr. David Fletcher, both agree that Petitioner is in need of trigger finger surgeries. Although Dr. Fletcher testified Petitioner does not have bilateral carpal tunnel syndrome, two treating surgeons and an objective EMG test disagree.

Therefore, the Arbitrator finds that Respondent shall authorize the surgeries for left middle and ring trigger finger releases, and right middle trigger finger release.

P. WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, was unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that the Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted. For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the Fencil-Tufo case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ 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

14IWCC0207

Donald Swartzz,
Petitioner,

vs.

NO: 12 WC 43272

Wright Tree Service,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

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

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

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: MAR 27 2014
KWL/vf
O-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

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

14IWCC0207

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043272**

12WC043271
12WC043270
12WC043273

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0207

Donald Swartz
Employee/Petitioner

v.

Wright Tree Service
Employer/Respondent

Case # 12 WC 43272

Consolidated cases: 12 WC 43270, 12 WC 73271, 12 WC 73273

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Douglas McCarthy, Arbitrator of the Commission, in the city of Quincy, on July 3, 2013 After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Whether Section 16 of the Act is unconstitutional based on denial of Respondent's right to cross examine treating doctors.**

14IWCC0207

FINDINGS

On the date of accident, November 14, 2012, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident N/A given to Respondent.

Petitioner's current condition of ill-being N/A causally related to the accident.

In the year preceding the injury, Petitioner earned $43,781.40; the average weekly wage was $841.95.

On the date of accident, Petitioner was 44 years of age, married with one dependent child.

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

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

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

ORDER

The petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment.

Petitioner's exhibits 3 through 9 and Respondent's exhibits 4 through 11 are admitted into evidence.

All claims for compensation or penalties are denied.

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

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

Signature of Arbitrator

Aug 19, 2013
Date

ICArbDec19(b)

AUG 26 2013

DONALD SWARTZ V. WRIGHT TREE SERVICES
12 WC 43272

As to the issue of **whether an accident occurred that arose out of and in the course of the petitioner's employment by the Respondent,** the Arbitrator finds the following:

The petitioner, in 2009, underwent a hernia repair by Dr. Petty.

The petitioner testified that on November 14, 2012, he was moving wood that his foreman told him to move when he felt pain in his stomach. He testified that he reported it to his foreman on that date, a Mr. Nathan Davis. He testified that he had a sharp pain in his stomach, thinking that he pulled a muscle or something. He testified that his foreman told him to sit down for a while, take a break, see what happens, walk it off and see if it hurt anymore.

The petitioner testified that he went to Quincy Medical Group that day for his fingers, thumbs and hands and that he told the doctor about his stomach pain.

The petitioner did call Nathan Davis as a witness at the Arbitration Hearing. Nathan Davis testified that he last worked for Wright Tree Services as a Foreman on November 25, 2012. He testified that he was working with Mr. Swartz on November 14, 2012. He testified that on that day they were stacking wood for an elder gentleman that owned the property and Don went down to his knee and started complaining about his belly hurting. He testified that he reported the incident to his immediate supervisor, Kevin Cranberg, and that he told Don to "hang out, not to lift anything." On cross examination, it was established that Mr. Davis was a client of the petitioner's attorney's lawfirm, and that he had a pending workers' compensation case against Wright Tree Services. It was established that he was asked to testify in the matter the day before the hearing. On cross examination, he was asked why he did not come forward sooner, filing an Affidavit on Mr. Swartz's behalf if he had an injury and he testified that he assumed that the Company had a record of the injury. He was asked whether or not he had a copy of the accident report that he prepared and he did not. When asked on cross examination if Mr. Swartz on the date in question went for medical care, he indicated "no." When he was confronted with the records from Quincy Medical Center for services on November 14, 2012 regarding his visit after work for his fingers and hands, he then changed his testimony to indicate that the petitioner did get medical care but he did not go in with the petitioner. He was asked the address of the medical provider that he drove the petitioner to, and he was unable to give same. The Respondent called the petitioner's direct supervisor, Jason Bryant; who testified that the petitioner never reported the incident of "moving wood" indicating

that he thought the petitioner complained of his stomach pain after the ankle injury of November 15, 2012. He testified that the petitioner never told him the stomach pain was related to the ankle injury, but he recalled the petitioner complaining about his stomach at or about that time.

The petitioner was seen by Dr. Philpott on November 14, 2012. The petitioner did fill out a New Patient form on that date, indicating that the problems that brought him to see the doctor were a large ganglion on the right thumb, pain in both wrists and elbows, and some pain in both shoulders. Contrary to the petitioner's testimony, there was no mention of him sustaining an injury on that date to his stomach.

In reviewing the records from Dr. Philpott, the petitioner's complaints were of a very large ganglion cyst on the thumb and trigger fingers as well as pain in the wrists, elbows and shoulders. There was a prior history of a umbilical herniorrhaphy being performed by Dr. Todd Petty. There were no complaints by the petitioner of any stomach pain or findings of same. The petitioner was released to light duty.

The petitioner was seen at McDonough District Hospital Emergency Services on November 16, 2012. His complaints were to the right ankle. There were no complaints of stomach pain and no history of the alleged injury to his stomach (hernia) on November 14, 2012.

The petitioner saw Dr. Daniels on December 7, 2012. Dr. Daniels released him to return to work, full duty, for the ankle injury effective December 14, 2012. The doctor's records indicate that on his way out of the examining room, the petitioner asked about an area on his abdomen that was repaired by Dr. Petty. The records indicate that the examiner did not really see anything today, indicating that he was not sure if that issue is work related or not, but would refer him back to his surgeon who worked on that.

The petitioner on December 7, 2012, also saw Dr. Travis Moore. On that date, the petitioner gave a history of on November 14, 2012, reported pain above and into the right of his umbilicus. The indication was that the doctor did check for an indirect hernia as well as a direct on the right groin area and could not palpate anything but the petitioner should be evaluated by his surgeon to see if he had an indirect hernia. He indicated that pending the appointment with Dr. Petty, the petitioner was given work restrictions for lifting and climbing so that the hernias do not get any worse.

The petitioner testified that he was accommodated at work by his employer through December 12, 2012 which would be the date that he was released to full duty for the ankle injury.

The petitioner was seen by Dr. Petty on December 18, 2012. The petitioner gave a history of lifting a log at work when he noticed discomfort through the mid abdomen, also had discomfort that radiates into his groin, towards the scrotum, especially on the right side. Dr. Petty noted that he did do an umbilic hernia repair in 2009, with a 4 cm piece of composite mesh. The history was of gaining weight, says he gained at least 30 to 40 pounds in the last two years. The doctor felt that the petitioner had reducible tissue off towards the right, and he suspected he formed a new hernia lateral to the mesh.

The petitioner was examined by Dr. David Fletcher at the request of the Respondent on December 21, 2012. In his report, Dr. Fletcher disputed the causal connection between the petitioner's current hernia and the alleged work injury. At the time of Dr. Fletcher's deposition, he was asked the question "did you formulate an opinion based upon a reasonable degree of medical and surgical certainty as to whether or not that hernia was either caused or aggravated by his employment" and the doctor's opinion was there was no causal connection. He was asked the basis of that opinion and his testimony was "this was a pre-existing condition. He had surgical intervention, he gained weight, which is a risk factor. There was no description in any of the medical records or history given to the physician that it was related to his work activities." He indicated that it was "not uncommon, especially when a patient has a weight gain over time, and if they had a mesh put in, that sometime they can develop defects lateral to the sight of the mesh."

The petitioner on February 6, 2013, called Dr. Petty's office indicating that the work comp doctor said the reason he had hernias is because Dr. Petty did not fix it right the first time, with the patient saying work comp won't pay for the repair, asking Dr. Petty to pay for the repair. He was advised of the office note of December 18, 2012, trying to explain the patient's weight gain, continued heavy lifting, and with any hernia repairs, a chance of recurrence. The suggestion was for the patient to make an appointment to come in and discuss.

The petitioner did come to Dr. Petty on February 14, 2013. The doctor went over the proposed surgery to include a larger piece of mesh to cover this. The doctor indicated that nowhere in his prior notes did he specify etiology for his hernia. He indicated that he mentioned some weight gain. He indicated that he does a lot of heavy lifting at work. The doctor indicated that it is not under his expertise to attribute etiology, simply provide diagnosis and treatment.

On February 15, 2013, the petitioner called the doctor's office asking that the doctor change the history of weight gain, 30 to 40 pounds in the past two years. The petitioner alleged that he only gained 15 pounds.

The petitioner did undergo hernia repair, ventral with mesh, by Dr. Petty on February 25, 2013. That surgery was paid by Public Aid.

The petitioner returned to Dr. Petty on March 14, 2013. The petitioner was still tender, the incisions were well healed. The indication was that he would continue to improve with time. It was noted that he was not currently working and he needed to avoid any heavy lifting for another month, so he was given a slip for that.

The petitioner called Dr. Petty on March 26, 2013 to complain that the area around the belly button is numb.

The petitioner returned to Dr. Petty on May 30, 2013, still having some severe pain in the area where the stitches are when he bends over. The petitioner was not released to return to work at this time.

The petitioner was seen by Dr. Petty on June 13, 2013. He complained of pain with position changes or laying on his right side. Examination revealed completely non tender except the left mid abdominal tendon where the surgical scar was. There was no palpable hernia or palpable abnormalities. The doctor advised the petitioner that he was having pain from closing the muscle. He indicated that to make him more comfortable, he could give him a steroid Marcan injection. There was no release to return to work at this time.

When the petitioner testified on Arbitration, he testified that Dr. Petty has not released him to work. He testified that he wanted the injection.

The petitioner's account of the occurrence on November 14, 2012, was inconsistent with his witnesses' testimony as to what occurred on that date, with the petitioner testifying he told Dr. Philpott on November 14, 2012, of his stomach injury and of his witness initially testifying prior to being confronted with documentation that the petitioner did not get medical care on that date. The Arbitrator notes that the petitioner alleges that he told Dr. Philpott about the incident on November 14, 2012, with the questionnaire filled out by the petitioner being inconsistent with same, and with the records of Dr.

Philpott also being inconsistent with same. The Arbitrator would note that when the petitioner's witness testified as to the incident of November 14, 2012, the pain in the petitioner's stomach was so severe that he was crouched down to the ground, putting further in question in the Arbitrator's mind if the pain was "so severe" why didn't he mention it to Dr. Philpott on November 14, 2012, or to McDonough District Medical Center Emergency Center on November 16, 2012. The Arbitrator would note that the first mention of the alleged incident in question on November 14, 2012, was after he was walking out of Dr. Daniels' office on December 7, 2012, for his complaints to his fingers and thumbs, asking the doctor to look at the hernia.

WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, was unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that the Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is

only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted.

For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the Fencil-Tufo case. *Fencil-Tufo Chevrolet v. Industrial Commission*, 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

In light of the Arbitrator's findings on whether an accident occurred as alleged, the other issues become moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DUCKETT,

Petitioner,

14IWCC0208

vs.

NO: 11 WC 41993

SAUK TRAIL TAXI,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of employer-employee relationship, medical expenses, average weekly wage, benefit rate, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

With regard to Petitioner's Motion to Strike Respondent's Reply Brief, the Commission denies said motion, finding there is nothing in the Act or Rules that allows for striking a brief.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 11, 2012 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion to Strike Respondent's Reply Brief is hereby denied.

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

14IWCC0208

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

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

DATED: MAR 27 2014
KWL/kmt
O-02/11/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0208

DUCKETT, MICHAEL
Employee/Petitioner

Case# 11WC041993

SAUK TRAIL TAXI
Employer/Respondent

On 12/11/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0850 CIFELLI SCREMENTI & DORE
DAVID CIFELLI
423 ASHLAND AVE
CHICAGO HTS, IL 60411

0286 SMITH AMUNDSEN LLC
LES JOHNSON
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0208

Michael Duckett
Employee/Petitioner

v.

Sauk Trail Taxi
Employer/Respondent

Case # 11 WC 41993

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **October 26, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **8(a) medical services requested, specifically pain management and physical therapy**

FINDINGS

On the date of accident, **October 19, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

As causal connection has been resolved against Petitioner, no findings are made with regard to Petitioner's earnings or average weekly wage in the year preceding the injury as explained *infra*.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

As explained more fully in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner's claimed current condition of ill-being is not causally related to the accident sustained at work on October 19, 2011. By extension, all other issues are rendered moot, no further findings are made by the Arbitrator, and all requested compensation and benefits are denied.

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

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

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

Signature of Arbitrator

December 11, 2012
Date

DEC 11 2012

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

14IWCC0208

Michael Duckett
Employee/Petitioner

v.

Sauk Trail Taxi
Employer/Respondent

Case # 11 WC 41993

Consolidated cases: N/A

FINDINGS OF FACT

The issues in dispute include employer/employee relationship, accident, causal connection, Petitioner's wages, certain medical bills, a period of temporary total disability, and Petitioner's entitlement to prospective medical care. Arbitrator's Exhibit ("AX") 1. Michael Duckett ("Petitioner") testified at trial and no other witnesses were called by either party.

Petitioner testified that on October 19, 2011, he was driving a cab that broke down and he was then rear-ended by another car. Before this date of injury, Petitioner testified that he had not injured his back before. Petitioner did have a car accident two months prior, in August, for which he treated with Dr. McGarry. Petitioner testified that he saw him for a couple of weeks, got stitches to forehead and he recovered fully. Petitioner also testified that he has not had any other injury that would have aggravated his back between October 19, 2011 and the date of trial.

Medical Treatment

On October 21, 2011, Petitioner underwent cervical and lumbar spine x-rays. PX3(u-v). The interpreting radiologist noted mild degenerative changes to Petitioner's mid to lower cervical spine after a "[m]otor vehicle accident two months ago with upper back pain." *Id.* She further noted Petitioner's presentation with a "[h]istory of MVA with low back pain" and found mild levoscoliosis of the lumbar spine with facet arthritic changes at L4-S1 levels. *Id.*

On October 24, 2011, Petitioner saw James McGarry, M.D. ("Dr. McGarry") at WellGroup Health Partners ("Well Group"). PX3(f). Petitioner reported that he was out of pain medication and was in a lot of pain in the lumbosacral area because he had another motor vehicle accident. *Id.* Upon examination, Dr. McGarry noted inflammatory nodules along the lumbosacral area of the sacral iliac junction, bilateral right more than left, great discomfort and minimally precipitated pain with straight leg raises, and hip rotation more so abduction than adduction. *Id.* Dr. McGarry diagnosed Petitioner with low back pain with possibly underlying pathology. *Id.* He prescribed Ultram, Diclofenac, Myoflex cream and wet heat. *Id.*

On November 1, 2011, Petitioner saw William Payne, M.D. ("Dr. Payne") at WellGroup. PX3(g). Petitioner reported continued low back pain over the previous month after two motor vehicle accidents. *Id.* The record reflects Petitioner's report that "he was okay and was feeling pretty good after the first accident [in August 2011] and when the second accident [in October 2011] occurred." *Id.* Petitioner reported left pain in the buttocks down his left leg, numbness and tingling from his leg, and weakness in standing which is worsened all day when standing for extended periods of time. *Id.* Petitioner also reported pain with sneezing, coughing, and walking at

a level of 9/10. *Id.* Petitioner reported that the Tramadol and Voltaren and prescribed by Dr. McGarry were not working well for him.

Upon examination, Dr. Payne noted thyroid nodules in the neck, tenderness in the ribs on the right side, no CVA tenderness, "some lumbosacral tenderness with wincing to palpation[, and] left leg weakness in his EHL extensors, dorsiflexors." *Id.* Dr. Payne ordered a lumbar MRI and limited CT scan at L5 only to rule out pars defect, a cervical spine MRI, and physical therapy for his cervical and lumbar spine as well as weakness in the left leg. *Id.* Dr. Payne discontinued Petitioner's other pain medicines and prescribed Norco, Naproxen 500, and Lidoderm patches. *Id.*

On November 10, 2011, Petitioner underwent a lumbar spine MRI to evaluate for a pars fracture, which the interpreting radiologist noted showed no evidence of acute fracture or subluxation and was otherwise unremarkable limited CT of the lower lumbar spine. PX3(x-y). A cervical spine MRI of the same date revealed degenerative changes of the cervical spine most notably at C5-C6 and facet arthropathy causing mild bilateral neural foraminal narrowing. PX3(z-aa). A November 14, 2011 lumbar spine MRI revealed mild left paracentral disc protrusion at L5-S1 with no significant central canal stenosis or neural foraminal narrowing. PX3(bb-cc).

On November 29, 2011, Petitioner returned to Dr. Payne with complaints of severe back pain and lower back pain that was on and off. PX3(j-k). Petitioner also reported that he was unable to go to physical therapy due to his insurance and that he was out of pain medicine. *Id.* Petitioner's lumbar spine MRI showed an L5-S1 disc bulge and herniation and the cervical spine MRI showed a C5-6 disc herniation. *Id.* Dr. Payne diagnosed Petitioner with L5-S1 disc bulge and spondylolisthesis. *Id.* He also ordered an epidural injection and physical therapy, and for his cervical spine Dr. Payne ordered an epidural and physical therapy to see how Petitioner did.

On December 6, 2011, Dr. Payne restricted Petitioner from the following activities at work beginning December 12, 2011: climbing, working above ground level, working around high-speed or moving machinery, operating mobile equipment, lifting/pushing/pulling over 10 pounds, repetitive bending at the waist, kneeling, crawling, squatting, and driving work vehicles. PX3(m).

On February 7, 2012, Petitioner returned to Dr. Payne and reported that his lower back pain had been getting worse since his last visit and now traveled down his legs bilaterally. PX3(n-p). Petitioner also reported tingling in the low back, pain that woke him up at night, and he rated his pain level at this visit at 8/10. *Id.* Dr. Payne diagnosed Petitioner with cervicalgia and ordered an epidural steroid injection at C5-C6, physical therapy, Norco, Mobic and patches. *Id.* Dr. Payne also ordered a lumbar spine MRI in flexion and extension, an epidural injection and physical therapy. *Id.* He further noted that "[t]his is a work-related issue." *Id.*

On February 10, 2011 Petitioner underwent another lumbar spine MRI that revealed stable degenerative disc disease of the lumbar spine as compared to November 14, 2011. PX3(dd-ee).

On March 6, 2012, Petitioner reported continued severe low back pain that was causing him left leg pain and left buttock pain. PX3(q-r). Upon examination, Dr. Payne noted that Petitioner's EHL and tibialis anterior had weakness on the left as compared to the right. *Id.* Dr. Payne diagnosed Petitioner with herniated discs at C5-C6 and L5-S1. *Id.* He provided Petitioner with an AxiaLIF pamphlet on the lumbar spine, ordered an epidural for the cervical spine, and prescribed additional Mobic. *Id.*

On April 17, 2012, Petitioner reported pain in the lower left side of his neck which sometimes traveled down his left arm at a level of 7/10 that converged with his back pain at a level of 9/10 that traveled down the right hip and leg along with numbness and tingling. PX3(s-t). Dr. Payne's diagnoses remained the same. *Id.* He also refilled Petitioner's Norco, Mobic and Lidoderm patch prescriptions, ordered physical therapy and pain management, and referred Petitioner to Dr. Roland. *Id.*

Petitioner and Respondent's Relationship

Petitioner testified that he began working for Respondent on April 15, 2010. He signed a "membership agreement" on the same day and testified that he did not really read it before he signed it. Petitioner also testified that none of the conditions contained in the agreement were enforced.

The membership agreement states that Petitioner agreed to pay $85 monthly as membership dues payable on the first of every month. Petitioner's Exhibit ("PX") 1. Petitioner testified that he never paid this fee. The membership agreement further states that Sauk Trail Taxi Association and Petitioner "mutually agreed that the relationship between them shall be that of an independent contractor, and that nothing herein, should be construed to create the relationship of employee and employer, respectively. [Petitioner] shall be free to exercise, in his/her best judgment, the manner and method by which they operate their cab." PX1.

Sauk Trail Taxi Association also agreed to provide Petitioner with public liability insurance and noted that it would not provide workman's compensation insurance coverage. PX1. Petitioner testified that he did not maintain his own insurance. In addition, Petitioner "waiv[ed] all rights to make claims against [Sauk Trail Taxi Association] for any injuries sustained in the course of [Petitioner] conducting the business of driving a cab, or otherwise operating a taxicab business." PX1.

Petitioner testified that the only skills involved in his job were being able to drive a car and read a map. He did not own or lease the cab that he drove. He could not allow someone else to drive the cab given to him, sublease the cab, or provide a temporary driver. Petitioner testified that he had no financial interest in the cabs whatsoever.

Petitioner also testified that he had no right to control the manner in which he did his job and that Respondent had the absolute right to discharge him with or without cause. On cross examination, Petitioner testified that Respondent has fired other drivers in the past for customer complaints, not coming to work, or personal reasons. He further testified that Respondent would then try to hire someone else.

Petitioner went to work every morning at 5:00 a.m. and testified that he had no right to control his shift from 5:00 a.m. to 5:00 p.m. six days per week; Petitioner testified that he could be fired by Respondent for doing so. *See also* PX1. Petitioner testified that Respondent would call him on the radio and he would pick up passengers where he was told to go by the dispatcher. Petitioner testified that his job was controlled by radio calls and that he was not allowed to pick up fares on his own. Petitioner would call Respondent to get permission before picking up a potential passenger that needed a fare, Respondent set the fee for rides by zone and Petitioner's cab did not have a meter. On cross examination Petitioner testified that he did not have any arrangements with any customers for repeat business; that Respondent arranged for that and would generally assign the closest cab driver to the customer. Petitioner testified that Respondent had only 2-4 cab drivers.

Petitioner also testified did not maintain the cab other than putting fuel in it for which he paid and that he would buy from the cheapest station and that Respondent did not have fuel pumps. Respondent has more than one cab

and they all look alike with Respondent's name on side and its phone number. Petitioner did not have the right to a cab in the morning when he arrived at work and he testified that he was refused a cab on occasion when one was inoperable. On cross examination, Petitioner testified that he was not guaranteed a certain vehicle and that he would get whichever one they had; on the days that he was late he did get a cab, but there was more than one occasion when his cab broke down and he would not drive or get paid on those days.

Petitioner testified that he was not responsible for any repair work and that Respondent would fix the cabs and that the owner's son would fix the cabs if they needed repairs. Respondent was responsible to get inoperable vehicles off the road and tow them if necessary. Petitioner could not make any repairs to the cab without prior approval and he testified that the cabs were always kept at Respondent's property; he could not take one home.

Regarding his wages, Petitioner testified that he was paid weekly, in cash, for half of the fares that he collected each day minus the cost of fuel. Petitioner received weekly slips that reflect that he earned. *See* PX2. Petitioner testified that he is missing approximately nine of these slips or so. On cross examination, Petitioner testified that Respondent's owner, Teresa, would write at the bottom of the weekly reconciliations and note the amount earned each week. *See* PX2. The Arbitrator notes that none of the slips submitted in Petitioner's Exhibit 2 reflect the year for each week's wages. Petitioner further testified that no taxes or FICA was withheld from these earnings; he would receive a "1099." The Arbitrator notes that no 1099 forms were submitted into evidence.

On cross examination Petitioner also testified that he would return to work for Respondent after he recovered from briefly being sick, which only happened 1-2 times. He further testified that if he had a personal matter to which to attend, he would tell the owner beforehand and he would get someone to cover and take his shift. The Arbitrator notes that Petitioner's Exhibit 2 reflects that Petitioner was absent more than 1-2 times over the approximately 15 months of weekly slips that were submitted into evidence, but that the year for these absences cannot be determined from the slips.

Additional Information

Regarding his current condition, Petitioner testified that his back, neck and lower back are killing him. He also testified that he has not looked for other work because he has not yet been released to work.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above, and the Arbitrator's and parties' exhibits (AX1, PX1-PX4) are hereby made a part of the Commission file. After hearing the parties' testimony, reviewing the evidence, and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (A) and (B), whether Respondent was operating under and subject to the Illinois Workers' Compensation Act ("Act") and whether there an employee-employer relationship, the Arbitrator finds the following:

The Arbitrator finds that an employer-employee relationship existed on Petitioner's claimed date of accident. In so finding, the Arbitrator notes that the parties do not dispute whether Respondent was an employer under the Illinois Workers' Compensation Act ("Act"). Petitioner argues that Respondent was an employer under the Act by citing "evidence" not submitted at trial. Respondent, however, does not argue that Respondent is not an employer subject to the Act; rather, it argues that no employer-employee relationship existed at the time of Petitioner's claimed injury at work. As such, the Arbitrator finds that Respondent has waived any such argument and infers that Respondent had evidence within its control establishing that it was an employer under the Act. Thus, the Arbitrator finds that Respondent was an employer as defined by the Act.

Next, the Arbitrator finds that Petitioner was Respondent's employee pursuant to the Act and notes that Petitioner's testimony on this issue is uncontroverted. "There is no rigid rule of law for determining whether an employer-employee relationship exists, rather such a determination depends upon the particular facts of the case." *West Cab Co. v. Industrial Comm.*, 376 Ill.App.3d 396, 404, 876 N.E.2d 53 (1st Dist. 2007). Various factors must be considered including "the right to control the manner in which the work is done, the method of payment, the right of discharge, the skill required in the work to be done, and who provides tools, materials, or equipment." *West Cab*, 376 Ill.App.3d at 404 (*citation omitted*). The court expounded that "the right to control the manner in which the work is done is the paramount factor in determining the relationship." *Id.* Moreover, in taxicab cases, the Court noted that "particular weight should be given to the following factors in determining the issue of control of the manner in which the work is done: 1) whether the driver accepted radio calls from the company; 2) whether the driver had his radio and cab repaired by the company; 3) whether the vehicles were painted alike with the name of the company and its phone number on the vehicle; 4) whether the company could refuse the driver a cab; 5) whether the company has control over work shifts and assignments; 6) whether the company requires that gasoline be purchased from the company; 7) whether repair and tow service is supplied by the company; 8) whether the company has the right to discharge the driver or cancel the lease without cause; and 9) whether the lease contains a prohibition against subleasing the taxicab." *West Cab*, 376 Ill.App.3d at 405 (*citation omitted*).

In this case, Petitioner testified that there was little skill involved in his position, other than knowing how to drive a car and read a map, and that he did not own or lease the cab that he drove for Respondent. Petitioner did not pay for his own insurance while driving for Respondent. Petitioner took all of his assignments from Respondent through dispatch, unless a potential passenger's fare was set by Respondent after Petitioner's request for permission and the appropriate fare rate. Respondent also set the fares for all of Petitioner's cab passengers. Respondent performed all repairs and towing necessary for inoperable or damaged cabs. Respondent's cabs all looked alike and had Respondent's name and phone number. Respondent could refuse to provide Petitioner with a cab and had done so on some occasions. Respondent arranged for Petitioner's 12-hour shift from 5:00 a.m. to 5:00 p.m. and could terminate Petitioner for failing to work these hours. Respondent

could also terminate Petitioner's employment at will and had done so with other cab drivers in the past. Petitioner also purchased all of the fuel for the cab, which was deducted from Petitioner's half of the fares and paid to him by Respondent in cash.

In addition, Petitioner had no ownership interest in any cab that he drove for Respondent. While Respondent provided a copy of its "membership agreement" with Petitioner, this is not dispositive on the issue of employer-employee relationship, particularly in light of the record as a whole. *See Wenholdt v. Industrial Comm.*, 95 Ill. 2d 76, 80, 447 N.E.2d 404 (1983). There is no evidence that Petitioner paid the monthly $85 fee as required under the contract and no evidence was submitted to establish that Petitioner had any financial interest in any vehicle, permit or medallion for any cab driven for Respondent.

Based upon all of the foregoing, the Arbitrator finds that an employer-employee relationship existed on Petitioner's claimed date of accident.

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

The Arbitrator finds that an accident occurred that arose out of and in the course of Petitioner's employment with Respondent. In so finding, the Arbitrator notes that Respondent did not put forth any argument on the issue of accident other than asserting that the issue was moot because no employer-employee relationship existed. As explained above, that issue has been resolved in Petitioner's favor. Notwithstanding, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment as claimed.

Petitioner testified that he was rear-ended by another car while waiting in Respondent's inoperable cab for Respondent to come and tow the cab. Petitioner's testimony is corroborated by his reports in contemporaneous medical records. The Arbitrator notes that some of Petitioner's treating medical records reflect that he reported the accident as occurring on October 20, 2011, however, this discrepancy is minor given that Respondent does not dispute notice of Petitioner's claimed accident and that additional medical records reflect an October 19, 2011 accident date which is consistent with Petitioner's testimony at trial. Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed injury arose out of and was sustained in the course of his employment with Respondent.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being is not causally related to the injury that he sustained at work on October 19, 2011. In so finding, the Arbitrator again notes that Respondent did not make any arguments regarding the issue of causal connection and, instead, relied solely on its assertion that no employer-employee relationship existed rendering all other issues moot. Notwithstanding, the Arbitrator finds that Petitioner's testimony at trial on this issue was not credible, is contradicted by the medical records, and the sequence of events as reported by Petitioner is inconsistent with other record evidence.

Petitioner testified that he had not injured his back before his claimed injury on October 19, 2011. However, the very first medical record submitted into evidence reflects that Petitioner underwent a cervical spine MRI on October 21, 2011 at which time Petitioner reported a "[m]otor vehicle accident two months ago with upper back pain." PX3(u-v). This latter-referenced accident corresponds with Petitioner's report at trial of an August of 2011 accident which Petitioner testified only required a few stitches and from which he fully recovered before

his October 19, 2011 accident. Thereafter, on November 1, 2011, Petitioner reported continued low back pain over the previous month after both motor vehicle accidents. PX3(g). These contemporaneous medical records contradict Petitioner's testimony at trial about the claimed sequence of events and that he was completely asymptomatic with regard to his back at the time of the second accident on October 19, 2011 after the purportedly minor accident two months prior which required only a few stiches.

In addition, while the Arbitrator notes that the only causal connection opinion presented at trial is from Dr. Payne, Petitioner's treating physician, none of the medical records from the accident in August of 2011 were submitted at trial to substantiate Petitioner's testimony at trial that he was asymptomatic in the back prior to his accident on October 19, 2011. The burden is on Petitioner to prove the compensability of his claim by a preponderance of credible evidence and, while an independent medical evaluation or Section 12 examination report from Respondent may have clarified certain matters in this case, Petitioner has failed to meet his burden. *See Caterpillar Tractor Co. v. Industrial Comm.*, 83 Ill. 2d 213, 216-17, 414 N.E. 2d 740 (1980) (claimant must prove by a preponderance of competent evidence each essential element of his claim and even undisputed evidence that would sustain a finding for the claimant may be insufficient in consideration of the record as a whole) (*citations omitted*).

Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed current condition of ill-being is not causally related to the accident sustained at work on October 19, 2011. By extension, all other issues are rendered moot, no further findings are made by the Arbitrator, and all requested compensation and benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF HENRY)

☒ 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

14IWCC0209

Roy Kimble,
Petitioner,
vs.

NO: 11 WC 14369

Poly One Corp.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2013 is hereby affirmed and adopted.

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

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

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

DATED: MAR 27 2014
KWL/vf
O-3/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0209

KIMBLE, ROY A
Employee/Petitioner

Case# **11WC014369**

POLY ONE CORP
Employer/Respondent

On 5/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1337 KNELL & KELLY LLC
STEPHEN P KELLY ESQ
504 FAYETTE ST
PEORIA, IL 61603

4866 KNELL & O'CONNOR PC
ROBERT M HARRIS
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

STATE OF ILLINOIS)
)SS.
COUNTY OF HENRY)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0209

ROY A. KIMBLE
Employee/Petitioner

v.

POLY ONE CORP.
Employer/Respondent

Case # 11 WC 14369

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Kewanee**, on **December 10, 2012.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0209

FINDINGS

On the date of accident, **August 27, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the alleged injury, Petitioner earned **$58,760.00**; the average weekly wage was **$1,130.00**.

On the date of alleged accident, Petitioner was **60** years of age, ***single*** with **no** dependent children.

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

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

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

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

ORDER

Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment by Respondent on August 27, 2009.

Petitioner further failed to prove that the current condition of ill-being is causally related to any employment on behalf of this Respondent.

All claims for compensation in this matter are thus hereby denied.

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

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

Signature of Arbitrator JOANN M. FRATIANNI

May 10, 2013
Date

ICArbDec19(b)

MAY 17 2013

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

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

Petitioner works for Respondent as a boiler operator. He began working for them 45 years ago and for the last 26 years has worked as a senior boiler operator. As an "inside" and "outside" boiler operator, he was require to work with an auger, remove ash using a dustpan and dump it into a bucket, run and use a hose to clean out boilers, use metal piping to chip away ice on cooling towers during winter, crank curtains, use a coal auger, dump coal into buckets using a shovel, turn various valves, carry and climb ladders up and down as many as seven flights of stairs, lift bags of wet coal, pull chains, use certain impact vibrating tools, use an end loader and forklift, use cranks, eyedroppers, beakers and tubes in a lab, and use computers and a mouse daily to monitor boiler activity. These tasks would vary from day to day and from job to job based upon his assignments. Petitioner would constantly use both hands in performing such work.

Petitioner testified the "outside" boiler work was more physical and outside and inside work would rotate every other day. The "inside" work is less physical and involves computers, inspections, readings and taking of samples.

Petitioner testified he worked a rotating shift. He would work 12 hour days and some 400 hours of overtime annually. The shifts were designed to allow time off of work for several days. Petitioner at times could have up to six days off in a schedule.

Respondent produced videotape that it claims depicts Petitioner's job duties. Petitioner testified the videotape does not depict all of the work activities he performed as a boiler operator.

Mr. George Lester, Jr. was called to testify by Respondent. Mr. Lester testified he is Petitioner's supervisor and Respondent's B-shift supervisor. Mr. Lester testified that during the 12 hour workday, boiler operators work two hours and then take a half hour break, unless there is a problem. Petitioner was assigned a work schedule of four midnight shifts, three days off, then three day shifts and one day off, then three midnight shifts and three days off, and then four day shifts, and seven days off.

Mr. Lester further testified an "inside" boiler operator monitors boilers and answers alarms. The "outside" operators take care of auxiliary equipment. The outside job is more strenuous and requires more manual labor. Workers are outside one day and inside the next. Mr. Lester testified that 60% of a boiler operator's time is spent inside working on the computer, with lab work taking maybe two hours of a shift. Boiler operators would turn valves when boilers are down, and that occurs 3-4 times a year. Mr. Lester testified that he was not aware of a jackhammer ever being used during his time as a supervisor.

Mr. Jim Dewalt was called to testify by Respondent. Mr. Dewalt testified he is a process engineer and has worked for Respondent for 40 years. Mr. Dewalt testified he worked with Petitioner in the boiler house from 2001-2010 and in other areas of the plant. Mr. Dewalt testified he is familiar with the type of work performed by a boiler operator and the shift schedules. Mr. Dewalt confirmed the differences between working inside and outside as a boiler operator. Mr. Dewalt testified an outside boiler operator would use air impact tools 6-8 times a year. Mr. Dewalt only saw jackhammers when they were used by outside contractors in 2008-2009.

Mr. Dewalt viewed a written job description (Rx10) and agreed with the contents. Mr. Dewalt testified the written job description did not contain every conceivable task a boiler operator performs.

Mr. Rod LeQuia was called to testify by Respondent. Mr. LeQuia testified he is Petitioner's co-worker and a fellow boiler operator and they worked together since 2006. Mr. LeQuia testified that an inside boiler operator spends most of his time monitoring with a computer, or 10 hours or 85% of the time while inside. Inside and outside work is split every other day. Outside work is typically harder. Mr. LeQuia testified the frequency of various jobs he performs as a boiler operator varies.

Petitioner testified that during the six months prior to August of 2009, he began to experience symptoms with his right and left wrists and hands that included pain and stiffness, which gradually worsened. Petitioner first sought treatment on August 20, 2009 with a visit to the company nurse and Dr. Faber, the company physician.

Dr. Faber testified by evidence deposition. (Px10) Dr. Faber testified that he is general practitioner with no particular specialty. He saw Petitioner on August 20, 2009 and recorded a history that his symptoms were getting worse. When seen on January 31, 2011, Petitioner told him his symptoms "started several months ago", which would indicate sometime in the year 2010. Petitioner during his testimony agreed with the history so recorded by Dr. Faber on that date.

Dr. Faber testified that he eventually referred Petitioner to see Dr. James Williams, an orthopedic surgeon. Dr. Faber testified that he had no specific knowledge of Petitioner's job duties and was unable to describe the work he performed. Dr. Faber testified that he did not know what type of impact and vibrating tools Petitioner may have used, if any, and how frequently he used them. Dr. Faber testified he never reviewed Petitioner's job description or reviewed Petitioner's job duties with him.

Petitioner saw Dr. James Williams on May 12, 2012. Dr. Williams testified by evidence deposition (Px9) that he is a board certified orthopedic surgeon. Dr. Williams recorded a history of injury. This included a job description. Dr. Williams testified that Petitioner informed him that as a boiler operator, his job involved turning wrenches, using impact tools and using jackhammers. Dr. Williams testified that Petitioner's job consisted of repetitive forceful gripping and turning of valves as well as using jackhammers and wrenches and that this job would be an aggravating or contributing factor to what he diagnosed. Dr. Williams diagnosed recurrent bilateral carpal tunnel syndrome and new onset of bilateral cubital tunnel syndrome.

Dr. Williams' testimony as to the work performed by Petitioner was clearly contradicted by the testimony of Mr. Lester, Mr. Dewalt and Mr. LeQuia. In addition, Dr. Williams testified that he never viewed a written job description or video of the work performed.

Petitioner saw Dr. Michael Vender, an orthopedic surgeon, on February 24, 2012. This examination occurred at the request of Respondent. Dr. Vender reviewed certain medical records, a written job description and the video of the work prepared by Respondent and ultimately authored three reports. Dr. Vender concluded that both the written job description and video depiction revealed a significant time walking and observing, and only intermittent utilization of the hands and upper extremities. Dr. Vender felt there was no repetitive use of the upper extremities nor significant exposure to forceful activities to the elbows, wrists or hands. Dr. Vender concluded that the activities depicted in the video and written job description would not be considered contributory to ulnar neuropathy of the elbows or carpal tunnel syndrome.

Petitioner then sought treatment with Dr. James Williams, an orthopedic surgeon, on May 12, 2012. Dr. Williams has prescribed bilateral carpal tunnel and cubital tunnel surgical releases.

Petitioner previously suffered bilateral carpal tunnel syndrome injuries some 30 years ago that were surgically corrected. Petitioner testified that following the surgeries, he experienced no symptoms to his hands until 2009.

Based upon the above, the Arbitrator finds that Petitioner failed to prove he sustained accidental injuries that arose out of and in the course of his employment with Respondent on August 27, 2009, either through a single specific incident or through repetitive use of his hands and arms. The Arbitrator further finds that Petitioner failed to prove that a condition of ill-being manifested itself on August 27, 2009. Petitioner during his testimony has admitted nothing particular occurred on that day. In addition, Petitioner has failed to prove that his activities were such as to cause repetitive trauma to both hands and arms. The Arbitrator remains unsure of which activities were claimed to be repetitive and for what duration by Petitioner in this case.

Based further upon the above, the Arbitrator further finds the conditions of ill-being as diagnosed are not causally related to any work activities performed on behalf of Respondent.

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?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims for medical expenses and bills made by Petitioner in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims made for prospective medical care and treatment of the diagnosed conditions in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☐ 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

EILEEN FARINA,

Petitioner,

14IWCC0210

vs.

NO: 11 WC 01858

STATE FARM MUTUAL INSURANCE CO.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Decision of the Arbitrator only to the extent that it finds it more appropriate to award permanent disability benefits under Section 8(d)2 of the Act rather than Section 8(e) of the Act. Though the evidentiary record indicates Petitioner did complain of pain to her right biceps, the Commission finds that Petitioner's complaints and subsequent treatment for the same are more accurately recorded as involving her right shoulder. Accordingly, the Commission finds Petitioner entitled to permanent partial disability benefits representing the 12.65% loss of use of the person as a whole.

All other findings and orders contained in the July 22, 2013, 19(b) Arbitration Decision are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $380.77 per week for a period of 63.25 weeks, as provided in §8(b)2 of the Act, for the reason that the injuries sustained caused the 12.65% loss of use of the person as a

14IWCC0210

whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $36,200.00 for medical expenses under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
KWL: mav MAR 27 2014
O: 1/27/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0210

FARINA, EILEEN
Employee/Petitioner

Case# 11WC001858

STATE FARM MUTUAL INS CO
Employer/Respondent

On 7/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0210

Eileen Farina
Employee/Petitioner

v.

State Farm Mutual Ins. Co.
Employer/Respondent

Case # 11 WC 01858

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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **5-16-13**. 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 _____

FINDINGS

On **7-1-10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$33,000.24**; the average weekly wage was **$634.62**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

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

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

Respondent is entitled to a credit of **$38,958.60** 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 $1824.29 to OSF Medical Group and $34,254.90 to Orthopedic and Sports Medicine, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $38,958.60 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent is ordered to reimburse Petitioner in the amount of $5,470.58, for amounts paid out of pocket.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $380.77/week for 63.25 weeks, because the injuries sustained caused the 25% loss of the right arm, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

7-15-13
Date

JUL 22 2013

C. DID AN ACCIDENTAL INJURY OCCUR THAT AROSE OUT AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner testified that she had been employed by Respondent, State Farm Mutual Auto Insurance Company, since March of 2009. Petitioner testified that her job title was as a claims processor.

Petitioner testified that on and before 7-1-10, she spent 7.75 hours a day using the keyboard on her computer at work and that she used the mouse with her right dominant hand most of the work day.

Petitioner testified that on and before 7-1-10, she worked in a cubicle and that her computer was located in the corner where two desks met at a right angle. Petitioner said that her keyboard rested on a "surf" board which was placed diagonally at the corner of the two desks. Petitioner said that on and before 7-1-10, her keyboard was placed level with her standard-sized desk and that she did not use the pull out tray which would have lowered the keyboard. Petitioner said that her work chair was adjustable and that she had lowered her chair. Petitioner said she lowered her chair so she could keep her arms out straight in front of her to avoid resting her wrists. Petitioner said that she thought this would prevent her from developing carpal tunnel.

Petitioner testified that with her chair lowered, she could view the computer screen and she could keep her hands directly in front of her. Petitioner said that on and before 7-1-10, she used her mouse with her right hand. Petitioner said that she had to fully extend her arm away from her body to use the mouse. Petitioner said that when she used the mouse, she did not rest her wrist. Petitioner said that when she used the mouse she would reach in front of her with her arm at approximately chest level close to a 90 degree angle.

Petitioner testified that on approximately July 1, 2010, she began to notice pain in her right biceps when she was reaching and using her mouse. In the weeks following July 1, 2010, she noticed that her right shoulder pain increased after a week of work and that it became better after a weekend off.

Petitioner testified that within two weeks after 7-1-10, when she noticed the relationship between the pain in her right shoulder and the use of her mouse and computer, she decided to change her work site. Petitioner said that she asked Respondent's maintenance department to pull out the tray so that she could place her keyboard lower and closer to her body. Petitioner testified that she moved the computer and mouse closer to her body.

Petitioner testified that the change that she made in her work site did not improve her right shoulder pain. Petitioner said that she then requested an ergonomic assessment from Respondent on 8-30-10 which was performed on 8-31-10.

Respondent's witness, Misty Albert, testified that she was a loss prevention technician for Respondent. Ms. Albert testified that she was a high school graduate and that all of her training in loss prevention was through Respondent.

Ms. Albert testified that on 8-31-10 Petitioner's work site was at a medium risk for injury. Ms. Albert testified that Petitioner's tray for her keyboard was lower than her desk by approximately 4 inches and that her mouse was located on the tray. Ms. Albert testified that she removed Petitioner's wrist rest. Ms. Albert testified that she moved Petitioner's keyboard closer to Petitioner, that she recommended that Petitioner avoid an extended reach, that she use her left hand for mousing to avoid injury, and that she take regular breaks from computer work. Ms. Albert's testimony is supported by the ergonomic assessment detail (PX 4).

The Arbitrator finds that Petitioner's work both before and after she changed her work site in mid July 2010 placed her at greater risk than the general public. The Arbitrator therefore finds "accident."

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Petitioner testified that she began noticing right arm and shoulder pain while she was keyboarding and mousing on approximately 7-1-10.

Petitioner testified that within a few weeks after this date, she asked Respondent's maintenance department to unlock the tray to her keyboard so that she could lower the keyboard. Petitioner said that she told her team manager, Jay Sparks, that she was lowering the keyboard and changing her work site to accommodate her injury.

Petitioner testified that Respondent initially treated her injury as work related and that it stopped paying medical after Dr. Li suggested surgery in November, 2010.

The Arbitrator notes that the purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident, *Seiber v Industrial Commission*, 82 Ill.2d 87 (1980). A claim is barred only if no notice whatsoever has been given, *Silica Sand Transport Inc. v Industrial Commission*, 197 Ill.App.3d 640. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced, *Ganno Electric Contracting v Industrial Commission*, 260 Ill.App.3d 92.

In this case, Petitioner gave Respondent some notice within 45 days, although it may have been imperfect/constructive notice.

Respondent did not introduce any evidence that it may have been prejudiced by any imperfect notice.

The Arbitrator therefore finds that Petitioner gave notice within the 45 days allowed by the Workers' Compensation Act.

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

Petitioner treated with her family doctor, Dr. Sheppard, on 9-30-10. Dr. Sheppard took a history that Petitioner had right shoulder and deltoid pain for several months and that it had been worse for the last two months. Dr. Sheppard's record states that Petitioner related her pain to working on the computer. Dr. Sheppard diagnosed Petitioner with right shoulder pain and right elbow pain and ordered an EMG (PX 2, PX 10).

Petitioner underwent an EMG with Dr. Jhee on 10-19-10 which was read as normal without definite electrodiagnostic findings of right carpal tunnel syndrome. Dr. Jhee noted that Petitioner had significant symptoms and signs of right shoulder tendinitis (contained in PX 11).

Dr. Sheppard referred Petitioner to Dr. Li, an orthopedic surgeon, on 11-1-10. Dr. Li's record states that Petitioner had a four month history of right shoulder pain which she believed was related to using her right upper extremity at work on a computer (PX 11). Dr. Li ordered an MRI of Petitioner's right shoulder on 11-1-10 which showed diffuse rotator cuff tendinosis with moderate peritendinobursitis and a thin partial thickness

undersurface tear of the subscapularis measuring 2.3 cm in medial to lateral dimension, glenohumeral and AC joint arthrosis, moderate joint effusion, and biceps tendinosis and tenosynovitis (PX 5).

Dr. Li performed surgery on Petitioner on 11-30-10 consisting of a right shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, biceps tenotomy and debridement of Type I anterior-superior labral tear. Dr. Li's post-operative diagnosis was right shoulder rotator cuff tear, impingement syndrome, biceps tendon tear, and anterior and superior Type I labral tear (PX 6).

Petitioner testified that after surgery, she noticed pain during physical therapy. Dr. Li's 1-11-11 record states that Petitioner had a significant amount of tenderness over the distal third of her clavicle, that she had restricted range of motion, and adhesive capsulitis. Dr. Li took an x-ray on 1-11-11 which showed some bony periosteal reaction in the same area of impingement which he removed some undersurface of the clavicle during surgery. On 2-9-11 Dr. Li took another x-ray which showed significant periosteal healing (PX 11). Dr. Li testified by deposition on 11-12-12 that Petitioner may have sustained a hairline fracture of her clavicle from the surgery (PX 1, p. 9).

Dr. Li ordered an MRI on 6-23-11 which showed no evidence of rotator cuff re-tear, supraspinatus tendinosis without focal macrotear, status post biceps tenotomy with no evidence of biceps tendon re-tear, capsulosynovitis with small joint effusion and no evidence of loose body, marked AC joint arthrosis and capsular sprain with widening of the joint space consistent with AC ligament sprain representing either an overuse syndrome or post traumatic injury, and subdeltoid-subacromial bursal inflammation without evidence of rotator cuff re-tear (PX 8).

Dr. Li's record of 6-27-11 states that Petitioner has an inflammation of the AC joint which is corroborated by her symptoms and the MRI. Dr. Li's record states that Petitioner has an option of either tolerating the discomfort or undergo surgery (PX 11).

Petitioner testified at arbitration that initially after speaking to Dr. Li on 6-27-11, she did not want to undergo another surgery and that she tried to live with her shoulder pain. Petitioner said that when the condition did not improve, she made an appointment with Dr. Nicholson at Rush for a second opinion.

On 10-28-11, Dr. Nicholson took an x-ray of Petitioner's shoulder and stated that she had recurrent subacromial bursitis and that there may be some scarring. Dr. Nicholson stated that Petitioner had a sloped AC joint and it was degenerative. Dr. Nicholson recommended surgery (PX 12).

Petitioner underwent surgery with Dr. Nicholson on 2-22-12 consisting of a right shoulder arthroscopy with extensive debridement and revision of subacromial decompression including extensive adhesiolysis and revision subacromioplasty as well as a revision arthroscopic distal clavicle resection. Dr. Nicholson's post-operative diagnosis was right recurrent subacromial impingement syndrome, status post acromioplasty and arthroscopic rotator cuff repair and recurrent acromioclavicular joint arthralgia, status post-arthroscopic AC joint resection (PX 9).

Respondent's Section 12 doctor, Dr. Herrin, evaluated Petitioner at Respondent's request on 4-21-11. Dr. Herrin testified by deposition taken 11-15-12, that he took a history from Petitioner that while she was doing her work, her right arm was essentially in a forward flexed and slightly abducted position. Dr. Herrin opined that, based on the history that Petitioner provided, it was his opinion that Petitioner's work activities contributed to her shoulder symptoms or problems related to her rotator cuff (RX 1, p.p. 10, 11). Dr. Herrin stated that when he wrote his initial report giving a causal relationship, it was his understanding that Petitioner's wrists were not supported while she used the computer (RX 1, p.p. 11, 12). Dr. Herrin clarified that, initially, he did not think that Petitioner's work activity caused the rotator cuff tear, but that it aggravated it or irritated it (RX 1,

p.p. 12, 13). Dr. Herrin opined that the position that Petitioner held her arms would make the symptoms worse but would not cause the tear (RX 1, p. 14).

Dr. Herrin testified that Respondent asked him to do an addendum report based on an ergonomic assessment which Respondent provided to him. Dr. Herrin testified that after he reviewed the ergonomic assessment, it was his opinion that if Petitioner was resting her wrists to do her work activities, then there would be no stress on her shoulder or rotator cuff and he would therefore think that the work did not contribute to her right shoulder problem. Dr. Herrin stated, "my opinion really boils down to the fact that if she was resting her arms and wrists and doing her work activities, that should not stress the rotator cuff. If she was reaching away repetitively for prolonged periods of time, I think that could irritate the rotator cuff. I don't think it would cause a tear," (RX 1, p. 16). On cross examination, Dr. Herrin stated that he had not been provided an operative report (RX 1, p.p. 24, 25). On cross, Dr. Herrin testified that he re-drafted a report after reading Respondent's counsel's letter which included the ergonomic assessment of 8-30-10 (RX 1, p.p. 25, 26).

Dr. Li testified by deposition dated 11-12-12. Dr. Li testified that he was board certified in orthopedic surgery and had been practicing in the field since 1991 (PX 1, p.p. 4, 5).

Dr. Li testified that he reviewed Dr. Nicholson's operative report and opined that the surgical findings, including the removal of the scar tissue and decompression of the AC joint, was related to the 11-30-11 surgery (PX 1, p. 12). Dr. Li reviewed the ergonomics study of 8-30-10 and stated that the recommendation that Respondent pull Petitioner's keyboard closer to the edge of the work surface to eliminate any extended reach, and to use both hands with the mouse, were consistent with his understanding of Petitioner's work activities. Dr. Li stated that Petitioner had made complaints to him that her right shoulder pain developed with her extended reach and working with her hands away from her body to grab things (PX 1, p. 13).

Dr. Li opined that based on his history and the ergonomics study, Petitioner's work with Respondent contributed to the development of her right shoulder rotator cuff tear, biceps tendonitis, and impingement syndrome. Dr. Li stated that the work contributed to the symptoms, as well as further aggravated whatever her underlying problem was. Dr. Li stated that if Petitioner extended her arm away from her body to work, this would be a contributing factor to her right shoulder symptoms. Dr. Li opined that any reaching Petitioner did above the horizontal line and far out from the body could aggravate the symptoms and underlying condition (PX 1, p. 15). Dr. Li opined that Petitioner's second surgery with Dr. Nicholson was necessitated because of the first surgery and therefore related to her work (PX 1, p. 15). Dr. Li stated that Petitioner's use of her keyboard when it was set higher could have also contributed to her symptomatology requiring care (PX 1, p. 17).

On cross examination, Dr. Li stated that if a person rests his/her hands, it is less stressful on the arms when the arms are outstretched. On cross, Dr. Li stated that if a person extended their arms in front of their body without active reaching, it could make the symptoms worse but not make the tear worse. Dr. Li said that active reaching beyond the normal extension of the arm can cause a tear (PX 1, p. 19). On cross, Dr. Li stated that swinging a golf club and shoveling could cause a rotator cuff tear. Dr. Li stated that he did not think that sewing would cause a rotator cuff problem (PX 1, p.p. 22, 23).

Petitioner testified that prior to working for Respondent in March of 2009, she did not have any right shoulder pain or symptoms. This is consistent with Dr. Sheppard's records which date back to January of 2006 (PX 10). Petitioner said that she experienced right shoulder and biceps pain while extending her right arm reaching for her mouse on and prior to 7-1-10.

Petitioner testified on cross examination that during the summer months, she would golf at a nine hole golf course approximately 2 to 3 times a month with her husband and that she participated in gardening at her home.

Petitioner testified at arbitration that she provided an accurate description of her job duties to Dr. Herrin when she met with him on 4-21-11 for her job on and before 7-1-10. Petitioner testified that she had altered her job site in mid July 2010 when she asked Respondent's maintenance department to unlock and pull out her tray so she could lower her computer keyboard four inches. Petitioner said that she also moved her mouse closer to her. Respondent further changed Petitioner's work station on 8-31-10 by moving the mouse closer and having Petitioner use her left hand.

The Arbitrator finds that based on Petitioner's testimony, the opinions of Dr. Li and the opinions of Dr. Herrin, Petitioner's work activities contributed to the development of her right shoulder symptoms requiring surgery on 11-30-10 and 2-20-12. The Arbitrator finds that, as a result of the initial surgery, and the removal of the inferior aspect of the clavicle, Petitioner may have sustained a hairline fracture of her clavicle.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work accident.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? WHAT ARE THE MEDICAL BILLS OWED?

For reasons stated in (C) and (F) above, Respondent is ordered to pay the following reasonable and necessary medical bills under the fee schedule:

OSF Medical Group	$1,824.29
Orthopedic and Sports Medicine	$34,254.90
Total:	$36,079.19.

In addition, Respondent is ordered to hold Petitioner harmless under Section 8(j) of the Workers' Compensation Act for the amount of $38,958.60 for amounts paid by BlueCross BlueShield, Respondent's group insurance carrier. Additionally, Respondent is ordered to reimburse Petitioner in the amount of $5,470.58 for amounts paid out of pocket consistent with Petitioner's Exhibit 14.

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

The Arbitrator finds that Petitioner's work accident contributed to, or caused, the need for Petitioner's 11-30-10 surgery consisting of a right shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, biceps tenotomy and debridement of Type I anterior-superior labral tear. The Arbitrator finds that, as a result of this surgery, Petitioner may have sustained a clavicle fracture and that she required a second surgery on 2-22-12 which consisted of arthroscopic extensive debridement and revision of subacromial decompression including removal of scar tissue.

At the time of arbitration, Petitioner testified that she had ongoing pain and symptoms in her right shoulder. Petitioner testified that she experienced pain and discomfort when lifting and reaching.

The Arbitrator therefore finds permanency.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rhea Allard,

Petitioner,

14IWCC0211

vs.

NO: 12 WC 27692

Horace Mann Companies,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 1, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
KWL/vf
O-3/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0211

ALLARD, RHEA
Employee/Petitioner

Case# **12WC027692**

HORACE MANN COMPANIES
Employer/Respondent

On 8/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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:

2217 SHAY & ASSOC LAW FIRM LLC
TIMOTHY M SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0211

RHEA ALLARD
Employee/Petitioner

v.

HORACE MANN COMPANIES
Employer/Respondent

Case # 12 WC 27692

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 18, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

14IWCC0211

On the date of accident, May 23, 2011, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $73,156.34; the average weekly wage was $1,524.09.

On the date of accident, Petitioner was 58 years of age, *married* with 0 dependent children.

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

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

Respondent is entitled to a credit of $3,584.90 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner's medical expenses, as set forth in Petitioner's Exhibit 5, directly to the providers, as provided in Section 8(a) of the Act and subject to the medical fee schedule, Section 8.2 of the Act. Respondent shall receive a credit of $3,584.90, as noted above, for medical bills paid by Healthlink, and shall indemnify and hold Petitioner harmless against any claims asserted by Healthlink with regard to bills in which Respondent has received said credit. Respondent shall also reimburse Petitioner for out-of-pocket medical expenses she paid, as set forth in Petitioner's Exhibit 5.

Respondent shall authorize and pay for the surgery recommended by Dr. Mark Greatting, as provided in Section 8(a) of the Act and subject to the medical fee schedule, Section 8.2 of the Act.

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

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

07/23/2013
Date

ICArbDec19(b)

AUG 1 - 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RHEA ALLARD
Employee/Petitioner

14IWCC0211

v.

Case # 12 WC 27692

HORACE MANN COMPANIES
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Rhea Allard, testified that she has been employed by Respondent, Horace Mann Companies (an insurance company), for thirty four and one-half years. She started as a programmer and later became a database administrator. However, Petitioner testified that her duties as a programmer and database administrator were basically the same. She stated that she has worked on computers for her entire career and that she received her own computer at least fifteen years ago.

Petitioner testified that her job duties involve administering a database of corporate clients, including performing recoveries, backups, and programing. She testified that these activities all involve entering data into a computer. Petitioner testified that she works ten hours per day, four days per week.

Petitioner testified that she spends at least seven hours per day at her desk and that she spends at least between five and six hours per day performing keyboarding activities. Petitioner also testified that she generally has lunch at her work station, taking approximately a half hour to forty five minute break, and that although she is given both a morning and afternoon break, she generally does not take them. Petitioner testified that she types with both hands and uses her mouse with her right hand.

Petitioner explained that her current work station is at a cubicle. Two photographs of Petitioner's current work station were entered into evidence as Petitioner's Exhibit (PX) 2. The second photograph depicts a desk with a monitor on top of the desk and a keyboard and mouse on a tray underneath the desk. (PX 2).

Petitioner further testified that, as depicted in the first photograph of Petitioner's Exhibit 2, she used to have a work station where the keyboard and mouse were on the desktop. (PX 2). She testified that she had that type of work station for approximately two years. She testified that the change from a work station with the keyboard and mouse on the desktop to a work station with the keyboard and mouse on a sliding tray occurred approximately three years ago. She testified that that during the time her keyboard and mouse were on her desktop, the top of her desk reached just under her chest, or slightly above that. She testified that having the keyboard on top of the desk required her to lift her hands, wrists, and shoulders higher. She testified that lifting her hands, wrists, and shoulders required her to bend or flex her wrists while she was performing her job.

Petitioner testified that before she worked at the station depicted in the first photograph of Petitioner's Exhibit 2, she also had a work station with the keyboard on the desktop. She testified that the desk was slightly higher than the desk depicted in Petitioner's Exhibit 2. She testified that this work station also required flexion of her wrists and raising of her arms.

Petitioner testified that prior to her current claimed date of accident for her right hand, she treated with Dr. Mark Greatting for an injury to her left wrist. Her left wrist injury required surgical intervention in 2010, and is not the subject of the instant claim.

Petitioner testified that she began to notice issues regarding her right hand at least two years ago. She testified that she presented to her primary care physician, Dr. Steven Bowers at Koke Mill Medical Associates, who subsequently referred her to Dr. Greatting.

Petitioner testified that she spoke with Matt Kietzman, her immediate supervisor's supervisor, around the time of her first visit to Dr. Greatting regarding her right wrist. She testified that she told him that she was going to see Dr. Greatting about her right wrist and that her right wrist was beginning to bother her like her left wrist had done in the past. Petitioner testified that it was known that her left wrist injury was a workers' compensation injury that had settled. The Arbitrator takes judicial notice of this settlement between Petitioner and Respondent which occurred on November 1, 2010, and represented 15% loss of use of the left hand. (See Case Number 10 WC 43991).

Petitioner presented to Dr. Greatting on May 23, 2011, for treatment of her right wrist. Dr. Greatting also testified via his evidence deposition, taken on April 22, 2013, entered into evidence as Petitioner's Exhibit 1. Dr. Greatting testified that he is a board certified orthopedic surgeon and that more than 90% of his practice is limited to upper extremity problems. (PX 1, pp. 5-6). Dr. Greating also testified that he has a certificate of added qualification in hand surgery through the American Board of Orthopedic Surgery. (PX 1, p. 6).

Dr. Greatting testified that he had treated Petitioner prior to May 23, 2011, for a torn triangular fibril cartilage in her left wrist. (PX 1, p. 7). He testified that the triangular fibril cartilage is a stabilizing structure in the wrist. (PX 1, p. 7). Dr. Greatting testified that Petitioner had surgery to correct the issue, and had a positive result. (PX 1, p. 7).

Upon presentation to Dr. Greatting on May 23, 2011, Petitioner complained of chronic right wrist pain. She did not report any injury or trauma. She had no complaints of numbness or tingling. Physical examination revealed tenderness over the right scaphotrapezio trapeziod joint and minimal tenderness over the carpometacarpal joint of the thumb. Dr. Greatting ordered x-rays of Petitioner's right wrist, which were performed in office. The x-rays were unremarkable. (PX 3). Dr. Greatting testified that an x-ray does not show ligaments. (PX 1, p. 9). Dr. Greatting indicated Petitioner may have some early right wrist scaphotrapezio trapeziod osteoarthritis. He prescribed meloxicam and directed Petitioner to return in six weeks for re-evaluation. (PX 3).

Petitioner returned to Dr. Greatting on July 13, 2011. She continued to complain of persistent right wrist pain. Dr. Greatting noted in his office note, as Petitioner testified, that the meloxicam did not help alleviate Petitioner's pain. On physical examination, the doctor noted tenderness over the volar and radial side of the wrist at the scaphotrapezio trapeziod joint. However, Dr. Greatting indicated Petitioner was no longer tender over the carpometacarpal joint. Dr. Greatting performed a corticosteroid injection the right wrist scaphotrapezial trapezoid joint. (PX 3). Dr. Greatting testified that he elected to perform the injection because the prior medication had not helped. He further testified that the injection served a therapeutic as well as diagnostic purpose. He testified that if the injection lowers the pain in the area, it helps identify the source of the pain. (PX 1, p. 10).

Petitioner returned to Dr. Greatting on August 24, 2011. Petitioner indicated that the injection had not helped her pain. On physical examination, Dr. Greatting noted Petitioner was very tender over the volar aspect of the scaphotrapezio trapezoid joint. He also noted there was an area of fullness to palpation just proximal to the scaphotrapezio trapezoid joint which was tender. He was concerned Petitioner may have a ganglion cyst in that area. Dr. Greatting ordered MRI studies of Petitioner's right wrist and hand to rule out a ganglion cyst. (PX 3).

Petitioner underwent the MRI of her right wrist on September 7, 2011, the report of which is entered into evidence as Petitioner's Exhibit 4. The MRI revealed a tear of the triangular fibrocartilage complex, partial tear of the scapholunate ligament, some degenerative changes in the wrist, and possibly a small ganglion cyst. (PX 4). Dr. Greatting testified that the triangular fibrocartilage complex was located on the opposite side of the wrist from Petitioner's symptoms and was therefore an incidental finding. He testified that the ganglion cyst was located on the volar side of the wrist, in the area he had noted on examination. (PX 1, p. 13).

Dr. Greatting indicated that the scapholunate tear was located in the area of Petitioner's pain. Dr. Greatting further testified within a reasonable degree of medical certainty that Petitioner's pain was more likely caused by the scapholunate tear than the ganglion cyst. (PX 1, p. 14). He indicated that the ganglion cyst shown on the MRI was "tiny" and that it did not appear to be significant enough to cause the symptoms of which Petitioner was complaining. (PX 1, p. 15).

Petitioner returned to Dr. Greatting on September 22, 2011. Examination indicated tenderness over the volar radial wrist and mild tenderness over the first dorsal compartment. Dr. Greatting performed a second injection to the radiocarpal joint. (PX 3).

On November 3, 2011, Petitioner returned to Dr. Greatting, indicating the injection to the radial carpal joint did not help. She still exhibited tenderness volarly over the area of the scaphotrapezial joint and the flexor carpi radialis tendon. Dr. Greatting elected to perform an injection to the flexor carpi radialis tendon sheath. (PX 3). Dr. Greatting testified that he performed this injection for diagnostic purposes. (PX 1, p. 16).

Petitioner returned to Dr. Greatting on December 15, 2011. She indicated that she was still having significant pain on the radial side of her right wrist and that the injection to the flexor carpi radialis tendon did not help. Physical examination continued to show significant tenderness over the volar area of the wrist and significant tenderness dorsally over the scapholunate area. A scaphoid shift test caused pain, but the scaphoid felt stable. At that time, Dr. Greatting recommended right wrist arthroscopy and debridement of the partial scapholunate tear, as well as partial synovectomy. (PX 3). Dr. Greatting testified that arthroscopy serves a diagnostic as well as therapeutic purpose. He testified that it provides a clearer view of the pathology than a MRI. (PX 1, p. 18).

Dr. Greatting testified within a reasonable degree of medical certainty that surgery is reasonable and necessary given Petitioner's exam findings, the review of her MRI, and her response to the three injections. (PX 1, p. 18). Petitioner testified that she reported Dr. Greatting's surgical recommendation to Mr. Kietzman.

Petitioner requested approval from Respondent for her surgery. She also had additional follow-up visits with Dr. Greatting on February 1, 2012, April 5, 2012, and September 6, 2012. Dr. Greating testified that he continued to see Petitioner to re-examine her wrist and discuss treatment. (PX 1, pp. 31-32). In his office note of April 5, 2012, Dr. Greatting reported: "Her symptoms are significantly aggravated doing her work activities. She basically does keyboarding the majority of her time at work and with her positioning of her wrist and motion of her wrist with her keyboarding activities, she gets significantly increased pain." (PX 3).

Dr. Greatting testified that he believes Petitioner's scapholunate tear stems from a degenerative process. (PX 1, pp. 20-21). However, he indicated that the way Petitioner positions her wrist while keyboarding and moves her

wrist repeatedly throughout the day increases her symptoms. (PX 1, p. 21). He further testified that he believed within a reasonable degree of medical certainty that Petitioner's keyboarding activities aggravated her degenerative scapholunate tear to render it symptomatic. (PX 1, pp. 22-23). Dr. Greatting testified that, in his opinion, there was a causal relationship between the aggravation from Petitioner's keyboarding activities and her symptoms. (PX 1, p. 23). Dr. Greatting testified that a scapholunate ligament tear can be asymptomatic, and that keyboarding activities, especially those involving hyperflexed wrists, can aggravate an asymptomatic condition to render it symptomatic. (PX 1, p. 23). Dr. Greatting testified that Petitioner's symptoms are worse when she is keyboarding and lessened when she is away from keyboarding. (PX 1, p. 24). He further testified that the lessening of symptoms when away from keyboarding indicated that the keyboarding activity was aggravating her symptoms. (PX 1, p. 24).

On June 25, 2012, at the request of Respondent, Petitioner presented to Dr. Mitchell Rotman for an examination pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). Dr. Rotman's evidence deposition, taken March 12, 2013, was entered into evidence as Respondent's Exhibit 1. Dr. Rotman testified that he is a board certified orthopedic surgeon with a subspecialty in upper extremity surgery. (RX 1, p. 6).

Dr. Rotman testified that he performed a physical examination of Petitioner and reviewed her related medical records and diagnostic studies. (RX 1, pp. 9-10). He testified that at most, he spent fifteen minutes with Petitioner. (RX 1, p. 16). He testified that his understanding of Petitioner's job duties was that she performed secretarial-type work with a keyboard, mouse and computer. (RX 1, p. 11). Dr. Rotman diagnosed Petitioner with a small occult volar radial ganglion cyst in the right wrist that was causing her symptoms. (RX 1, p. 11). He further testified that it was his opinion, within a reasonable degree of medical certainty, that Petitioner's work with Respondent was not an aggravating factor for her right wrist pain coming from an occult volar radial ganglion cyst. (RX 1, pp. 11-12). He testified that, in his opinion, the ganglion cyst was idiopathic in nature. (RX 1, p. 12).

Dr. Rotman testified that in his review of the MRI film, he did not appreciate any major abnormalities to the scapholunate ligament. (RX 1, p. 14). He further testified that he did not disagree with the radiologist's interpretation of the MRI; he simply testified that he did not see a tear himself. (RX 1, p. 15). Further, Dr. Rotman testified that he did not note tenderness over the scapholunate ligament. (RX 1, p. 15). Dr. Rotman further opined that typing and use of a mouse for seven to nine hours per day would not aggravate a scapholunate ligament tear. (RX 1, p. 19). He testified that a scapholuate tear would be aggravated by extremes of motion to the wrist. (RX 1, p. 19). Dr. Rotman testified that he did not have an opportunity to review Petitioner's work station. (RX 1, p. 19).

As of the date of trial, Petitioner has not undergone the surgery recommended by Dr. Greatting. Petitioner testified that since December 15, 2011, when surgery was first recommended, her condition has worsened. She testified that the right side of her hand hurts underneath the wrist, near the thumb. She described the pain as a dull ache. She testified that it hurts every day. Petitioner testified that while she is performing keyboarding activities at work, she notices that her right wrist aches more. She also testified that stirring motions cause additional pain. Petitioner testified that she also experiences pain on the outer portion of her wrist. She said that it aches similar to the pain under her thumb. She also indicated that she was beginning to have more pain on the palmar side of her right wrist.

Petitioner offered into evidence a series of medical invoices she claims she received in the course of treatment concerning her claimed work injury to her right wrist. The outstanding invoices total $160.00. (PX 5). The vast majority of Petitioner's medical invoices were paid through Respondent's group insurance plan for which Respondent is allowed credit pursuant to Section 8(j) of the Act. (See Arbitrator's Exhibit 1).

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; and

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner sustained a repetitive trauma accident arising out of and in the course of her employment with Respondent with a manifestation date of May 23, 2011. It is uncontested that Petitioner suffers from a scapholunate ligament tear in her right wrist. Dr. Greatting diagnosed Petitioner with a scapholunate ligament tear after reading Petitioner's October 7, 2011 MRI. (PX 3). Furthermore, Dr. Rotman, Respondent's examiner pursuant to Section 12 of the Act, testified that he did not disagree with the radiologist's report that indicated a scapholuate ligament tear, but indicated that he did not see the tear on the films himself. (RX 1, p. 14).

Dr. Greatting testified that it was his opinion, within a reasonable degree of medical certainty, that Petitioner's symptoms were caused by the scapholunate tear opposed to the ganglion cyst. (PX 1, p. 14). He based this opinion on the fact that he did not believe that the ganglion cyst was large enough to cause Petitioner's symptoms. (PX 1, p. 15). Furthermore, although Dr. Rotman testified that he believed that the ganglion cyst was causing Petitioner's symptoms, he made this determination without knowledge of the existence of a scapholunate tear. (RX 1, p. 11). Furthermore, Dr. Rotman's physical examination did not indicate tenderness over the capholunate ligament (RX 1, p. 15), whereas Dr. Greatting testified that the scapholunate tear was in the area of Petitioner's symptoms. (PX 1, p. 14).

Furthermore, Dr. Greatting testified, within a reasonable degree of medical certainty, that although Petitioner's scapholunate tear is degenerative in nature, her work related activities of keyboarding aggravated the condition of the tear so as to render it symptomatic and that there is a causal relationship between the aggravation from Petitioner's keyboarding and her symptoms. (PX 1, pp. 22-23). Dr. Greatting further testified that the fact that Petitioner's symptoms lessened when she was not keyboarding indicated that keyboarding was aggravating her symptoms. (PX 1, p. 24).

Dr. Rotman opined that typing and mouse use for seven to nine hours per day would not aggravate a scapholunate ligament tear. (RX 1, p. 19). However, he did testify that a scapholunate tear would be aggravated by "extremes of motion to the wrist." (RX 1, p. 19). Petitioner testified that, until approximately three years prior to the date of trial, she had worked in work stations for Respondent that had the keyboard and mouse on the top of the desk, which required her to type with raised hands, writs, and shoulders. She further testified that the ergonomics of her work station required her to type with bent or flexed writs.

The Arbitrator finds the opinions of Dr. Greatting to be more persuasive than those of Dr. Rotman. Dr. Greatting treated Petitioner for slightly less than one year for her current injury, and has previously treated her for an injury to her left hand. On the other hand, Dr. Rotman testified that, at most, he spent fifteen minutes talking to and examining Petitioner.

After reviewing the totality of the evidence, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of her employment with Respondent with a manifestation date of May 23, 2011, and that her current condition of ill-being is causally connected to her work related accident.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner testified that she spoke with Matt Kietzman about the injury to her right wrist around the time of her first appointment with Dr. Greatting regarding her right wrist. Mr. Kietzman is Petitioner's immediate supervisor's supervisor. Petitioner testified that she told Mr. Kietzman that she was seeing Dr. Greatting regarding her right wrist, and that her right wrist had been bothering her like her left wrist had in the past. Given her left wrist injury led to a workers' compensation claim and resulting settlement, it was her belief Respondent knew she was alluding to a work injury with her right wrist. The Arbitrator finds Petitioner's belief in this regard reasonable given the circumstances of Petitioner's prior settled claim and her un-rebutted testimony.

Respondent has provided no evidence contesting Petitioner's testimony. Mr. Kietzman was not called to rebut Petitioner's testimony concerning notice. The Arbitrator finds the testimony of the Petitioner to be reliable. Furthermore, the Arbitrator finds that Mr. Kietzman, as a supervisor, was an appropriate person to whom Petitioner could report her work injury. Therefore, the Arbitrator finds that Petitioner provided proper notice to Respondent within forty-five days of the manifestation of her injury.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that all medical services received by Petitioner with regard to treatment for her right wrist pain have been reasonable and necessary. Dr. Greatting testified that he initially prescribed Petitioner meloxicam in an attempt to treat a possible osteoarthritic condition to her right wrist. Further, Petitioner has received three corticosteroid injections to different parts of her wrist. Dr. Greatting testified that these injections were both therapeutic and diagnostic in nature in that the injections could provide relief, and depending on whether the injection provider relief, would help indicate whether the source of Petitioner's pain was from the area injected.

Petitioner also underwent MRI testing. Dr. Greatting testified that he ordered the MRI in order to determine if Petitioner had a ganglion cyst that could be causing her pain. Petitioner did have a ganglion cyst, however, Dr. Greatting testified that the cyst was not large enough to cause symptoms. Furthermore, the MRI revealed the scapholunate tear that Dr. Greatting has testified is causing Petitioner's pain.

Finally, Petitioner has had three follow-up visits with Dr. Greatting after the date he recommended surgery. No treatment or diagnostic testing was recommended during these office visits. However, Dr. Greatting testified that he has scheduled these visits to monitor Petitioner's condition, recheck her condition, and discuss further treatment. (PX 1, pp. 30-31).

Therefore, the Arbitrator finds that all of the treatment Petitioner has received with regard to the injuries to her right hand has been reasonable and necessary. Respondent has paid for the vast majority of Petitioner's medical expenses, but there are still outstanding bills which are owed. As such, Respondent is ordered to pay Petitioner's medical bills as set forth in Petitioner's Exhibit 5, directly to the providers, according to the medical fee schedule, Section 8.2 of the Act. Respondent shall receive a credit of $3,584.90 for medical bills paid for by Healthlink, Respondent's group insurance carrier, and shall indemnify and hold harmless Petitioner against any claims asserted by Healthlink with regard to bills in which Respondent has received said credit. Respondent shall also reimburse Petitioner for any medical expenses that Petitioner paid out-of-pocket, as set forth in Petitioner's Exhibit 5.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Greatting has recommended Petitioner undergo a right wrist arthroscopy and debridement of the partial scapholunate tear and a partial synovectomy. (PX 3). Dr. Greatting testified that within a reasonable degree of medical certainty, the recommended surgery is reasonable and necessary given her exam findings, her MRI, and her response to the three corticosteroid injections. (PX 1, p. 18).

Considering Dr. Greatting's testimony and the Arbitrator's findings with regard to causal connection, the Arbitrator finds that Petitioner is entitled to undergo the recommended arthroscopy and debridement of the partial scapholunate tear and partial synovectomy. As such, Respondent shall authorize and pay for said surgery, subject to the medical fee schedule, Section 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☒ 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

Geraldine Mangalavite,
Petitioner,
vs.

14IWCC0212

NO: 13 WC 00039

State of Illinois, Lincoln Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 17, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
KWL/vf
O-3/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0212

MANGALAVITE, GERALDINE Case# **13WC000039**
Employee/Petitioner

SOI LINCOLN CORRECTIONAL CENTER
Employer/Respondent

On 10/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% 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:

2217 SHAY ASSOCIATES LAW FIRM
KATHERINE WOOD
1030 S DURKIN DR
SPRINGFIELD, IL 62704

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
500 S. SECOND
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

OCT 17 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0212

GERALDINE MANGALAVITE
Employee/Petitioner

v.

STATE OF ILLINOIS, LINCOLN CORRECTIONAL CENTER
Employer/Respondent

Case # 13 WC 00039

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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **August 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0212

FINDINGS

On **November 28, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$67,788.00**; the average weekly wage was **$1,303.62**.

On the date of accident, Petitioner was **35** years of age, *married* with **2** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$3,724.72** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay Petitioner's outstanding medical bills, as set forth in Petitioner's Exhibit 4, Except for those bills showed as paid in Respondent's Exhibit 2, directly to the providers, according to the fee schedule adopted.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for 15 weeks, because the injuries sustained caused the 3%loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for an additional 4.175 weeks, because the injuries sustained caused the 2.5% loss of the left foot, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

S J Mathis

Signature of Arbitrator

10-11-2013

Date

OCT 17 2013

14IWCC0212

ADDENDUM

With respect to issue (C), accident, the Arbitrator finds the following facts:

Petitioner testified that she is currently, and was at the time of the alleged accident that is the subject of this matter, a correctional lieutenant for Respondent at the Lincoln Correctional Center located in Lincoln Illinois. Petitioner testified that she has worked for the Respondent in some capacity since February of 1999. She began working at the Lincoln Correctional Center in 2004. Previously, she has worked at the Stateville Correctional Center and the Decatur Correctional Center.

Petitioner testified that her job duties as a lieutenant at the Lincoln Correctional Center include performing inspections in any area open during her shift. She testified that these areas would include towers, housing units, healthcare, dietary, and warehouse. She testified that part of perform in inspections requires her to go up and down flights of stairs. She further testified that she is responsible for ensuring sergeants and officers perform their job duties.

At the time of the alleged accident, Petitioner's normal shift was the night shift. She testified that she worked from 11:00 p.m. until 7:00 a.m.

Petitioner testified that on November 28, 2012, she was performing inspections of tower two. She testified that as she was coming down the second flight of stairs in tower two, she slipped off the edge of the stop. She fell down, hit her back and fell down approximately six to seven steps. She testified that she caught herself with her left ankle. The incident occurred at approximately 1:00 a.m.

Petitioner testified that the steps in tower two are approximately six inches wide and that she wears a size eleven shoe. She further testified that on the night of the accident the stairs were not clean and that they are usually covered in a light film of dust and debris.

Petitioner testified that immediately after the occurrence, she noticed pain in her back and her left ankle. She testified that she did not finish her shift and that she immediately sought medical treatment. She testified that she was taken by ambulance to Abraham Lincoln Memorial Hospital. Upon arriving at the emergency room, Petitioner complained of mid to lower back pain and left lateral ankle pain. She reported to the treating physician that she slipped down a few steps. PX 2. She was given Toradol and Norflex intravenously and underwent x-rays of her left ankle and lumbar spine. PX 2. The treating physician noted Petitioner was having difficulty walking and exhibited pain with movement and range of motion testing. PX 2. He further noted limited range of motion and muscle spasm in the lower back. PX 2. Petitioner's left ankle was placed in an air cast and she was instructed to use crutches. PX 2. Petitioner was diagnosed with a lumbar spine sprain and left ankle sprain. PX 2. Petitioner was subsequently discharged on the same day. PX 2.

Petitioner testified that immediately after leaving the emergency room, she returned to the Lincoln Correctional Facility to report her accident. She testified that she reported the accident to Major Christine, the daytime shift commander. She testified that she later reported the accident Major Morgan, her shift commander, and filled out a workman's comp packet that was given to Jackie McCray.

Two incident reports were presented at Arbitration: the , entered as Petitioner's Exhibit 1, signed by Petitioner on November 28, 2012 at 12:36 p.m., and the Workers' Compensation Employee's Notice of Injury, entered as Respondent's Exhibit 1, also signed by Petitioner on November 28, 2012. Both reports indicate that

Petitioner was walking down a flight of stairs, slipped and fell, hitting her back and catching herself with her left ankle. (PX 1, RX 1).

On cross-examination, Petitioner was asked if she told Major Morgan that she had not used the railing when exiting the tower. Petitioner testified that she made no such comment to Major Morgan.

On December 3, 2012, Petitioner presented to her primary care physician, Dr. Maria Laya at the Family Medical Center of Lincoln. PX 3. Petitioner testified that she was scheduled to work between November 28, 2012 and December 3, 2012, when she presented to Dr. Laya; however, she was unable to work during that time because she was on crutches and her back was still hurting. Upon presentation, Petitioner reported that she had slipped off the stairs and fell, straining her lower back and left ankle. PX 3. Petitioner indicated that she was "feeling a lot better" but that she continued to have lower back pain. PX 3.

Upon physical examination, Dr. Laya noted spasm and tenderness to palpation in the lumbar spine and a stooped gait. Dr. Laya further noted mild swelling on the left lateral ankle but full range of motion. RX 3. Dr. Laya prescribed Naproxen and Cyclobenzaprine. She also placed Petitioner on a light duty restriction of no bending and no heavy lifting above 25 pounds.

Petitioner testified that Respondent did not provide work within her restrictions; however she testified that she did received temporary total disability payments for the time she missed from work. The temporary total disability payments made by Respondent are set forth in Respondent's Exhibit 2.

Petitioner returned to Dr. Laya on December 11, 2012. Petitioner reported that she was "not better yet" but that her "pain is not worse." PX 3. Dr. Laya noted petitioner appeared to be in moderate pain in her right lumbar area. On physical examination she noted continued spasm and tenderness to palpation. Dr. Laya also noted Petitioner's gait was slightly stooped and slow. PX 3. Dr. Laya ordered physical therapy and recommended Petitioner return in one week. PX 3. She further continued Petitioner's work restrictions. PX 3.

Petitioner returned to Dr. Laya on December 17, 2012. Petitioner reported continued limited movement of the lower back and that she was scheduled to begin physical therapy the following week. PX 3. Dr. Laya noted a continued spasm in the lumbar spine and that Petitioner's gait was slightly stooped. PX 3. Dr. Laya continued Petitioner's light duty restrictions and instructed her to follow-up in two weeks. PX 3.

Petitioner presented to Abraham Lincoln Memorial Hospital for physical therapy on January 2, 2013. She continued to receive physical therapy at Abraham Lincoln Memorial Hospital until January 18, 2013, at which time she was discharged. PX 2. However, at her last physical therapy appointment of January 18, 2013, the physical therapist noted minimal stiffness with bending over to tie shoes, and noted that Petitioner was unable to run at work and continued to take approximately 20 minute rest breaks with work activities when working long shifts. PX 2.

On January 3, 2013, Petitioner returned to Dr. Laya for follow-up. Petitioner advised Dr. Laya that she was ready to go back to work anytime. PX 3. Petitioner testified that, at the she told Dr. Laya that she was ready to go back to work, she was still experiencing pain in her low back and left ankle, but that she had not been compensated for her time off at that time and needed to return so she could pay her bills. Dr. Laya returned Petitioner to work as of January 4, 2013, and instructed Petitioner to continue physical therapy. PX 3.

Petitioner testified that she did return to work after she was released to full duty. She testified that she continued to have a lot of stiffness and pain in her lower back and swelling in her left ankle at that time.

Upon cross examination, Petitioner testified that she did have an Employee Review Board Hearing schedule for the date of her accident. She testified that this hearing was with regards to a possible suspension. On re-direct examination, Petitioner testified that she did not recall the reason for the hearing, but that it was with regards to some allegations made by her former supervisor from her previous time on day shift. She testified that the issue was later dropped. Petitioner testified that she was suspended for one day at some point subsequent to her fall, but she did not remember if it was with regards to the issue subject to the review board hearing.

After a review of the totality of the evidence, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of her employment with Respondent. The Petitioner has testified that she slipped and fell down approximately six to seven steps during the course of her inspections as a lieutenant with Respondent, and that she fell on her lower back and caught herself with her left foot in the process. The Petitioner further testified that she felt immediate pain in her left ankle and lower back. The Arbitrator specifically finds Petitioner's testimony to be credible, and substantiated by the evidence.

Two different accident reports, made immediately after Petitioner was released from the emergency room at Abraham Lincoln Memorial Hospital confirm Petitioner's testimony. Both reports indicate that Petitioner fell down several stairs, injuring her lower back and left ankle. PX 1, RX 1. Notably, one of these reports was in fact presented into evidence by the Respondent. No evidence presented contradicts Petitioner's testimony.

Furthermore, the medical evidence confirms Petitioner sustained an injury to her ankle and lower back. Petitioner was diagnosed with a left ankle sprain and lumbar strain at Abraham Lincoln Memorial Hospital. PX 2. Her treating physician placed her left ankle in an air cast and placed her on crutches. PX 2. Furthermore, upon her presentation to Dr. Laya, Petitioner was found to have spasms in her lower back and tenderness to palpation.

Although Respondent has introduced some evidence, via Petitioner's testimony on cross-examination, that Petitioner had a review board hearing later on the date of her accident, the Arbitrator finds this to me merely coincidental. Petitioner does not recall the specific allegations made against her and the evidence presented suggests that, at most, Petitioner was suspended for one day. It simply does not stand to reason that Petitioner would purposely cause an injury to herself preventing her from working for a period of several weeks in order to postpone a hearing so minor that Petitioner was only suspended for one day, if at all. Furthermore, Respondent has not provided any evidence other than Petitioner's testimony regarding the review board hearing. Respondent is in the best position to present this evidence and substantiate its allegations as Respondent is likely in possession of records and controls employee witnesses that would provide further insight into this matter.

With respect to issue (J), medical bills, the Arbitrator finds the following facts:

Respondent has agreed to pay all medical bills causally related to this accident. Plaintiff's medical bills for the care and treatment set forth above are set forth in Petitioner's Exhibit 4. Respondent's Exhibit 2 shows a log of the medical bills paid by Respondent and those in line for payment.

The Arbitrator orders Respondent to pay Petitioner's outstanding medical bills as set forth in Petitioner's Exhibit 4, except for those bills showed as paid in Respondent's Exhibit 2, directly to the providers, according to the fee schedule adopted, as reasonable and necessary medical expenses arising out of Petitioner's November 28, 2012 accident.

With respect to issue (L), nature and extent, the Arbitrator finds the following facts:

In addition to those facts stated above, Petitioner testified that, at the time of the arbitration hearing, she continues to experience occasional swelling in her left ankle. She testified that the swelling depends on how much she works. She testified that she normally works 37 ½ hours per week, and if she works more than that her ankle will swell. She further testified that she continues to experience symptoms to her lower back on a daily basis. She testified that she has "pain and a lot of stiffness" in her back. She further testified that prior to her fall, she had no lower back pain. She testified that she was experiencing pain and stiffness at the arbitration hearing. She further testified that her pain is associated with activity and she rated her lower back pain at approximately a 3 or 4 out of 10 on a pain scale.

Petitioner further testified that the range of motion in her lower back is very limited. She testified that prior to her fall, she had full range of motion. She testified that some days it is difficult of her to put on socks. She testified that she can no longer work the amount of overtime that she used to. She testified that the year prior to her accident she had worked over 700 hours in overtime. She testified that she sleeps with a heating pad daily and has pain with lifting and bending.

No impairment rating was performed with regards to this matter. Therefore, the Arbitrator disregards and gives no weight to this factor.

The Arbitrator does give significant weight to the nature of Petitioner's employment. Petitioner has indicated through her testimony and through the medical records that her position as a lieutenant with Respondent requires her to be on her feet a significant part of her day, performing inspections. He physical therapy records indicate that she has been required to take breaks at work because of her injuries. PX 2.

The Petitioner was 35 years old at the time of her accident. The Arbitrator notes that Petitioner likely has many working years ahead of her prior to retirement. The Arbitrator finds this factor both relevant and of reasonably significant weight.

The Arbitrator further finds that Petitioner has sustained a decreased earning capacity as a result of her accident. Petitioner testified that she worked 700 hours of overtime in the year prior to the accident and that she is unable to work much overtime after her accident because it causes her ankle to swell and causes increased symptoms to her lower back. The Arbitrator finds this factor relevant and of significant weight.

Finally, Petitioner's disability is corroborated by treating medical records, namely Petitioner's physical therapy records that indicate that she was still experiencing stiffness in her lower back at the time she was released from treatment. PX 2. The Arbitrator finds this factor relevant and reasonably significant weight.

Therefore, the Arbitrator finds that the Petitioner has sustained a 3% loss of the person as a whole and a 2.5% loss of the use of the left foot. The Arbitrator orders Respondent to pay Petitioner $712.55, the maximum rate, per week for a period of 15 weeks representing a 3% loss of the person as a whole and $712.55 per week for an additional period of 4.175 weeks representing a 2. 5% loss of the use of the left foot, as provided in Section 8(d) of the Act.

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

PATRICIA MCKINLEY,

Petitioner,

14IWCC0213

vs.

NO: 11 WC 34863

UNIVERSITY OF CHICAGO MEDICAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability benefits, medical expenses, permanent disability, and credit, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

With regard to the issue of temporary total disability benefits, the Commission notes the Arbitrator awarded temporary total disability benefits for a period of 19-6/7 weeks, from August 31, 2011 through January 17, 2012. However, the Commission finds Petitioner failed to prove she did not work that entire time period. The parties stipulated Respondent paid temporary total disability benefits in the amount of $1,379.08, covering a period of 3-3/7 weeks, from August 31, 2011 through September 14, 2011, and from September 23, 2011 through October 1, 2011. (ARB EX1, RX5). Other than the stipulation by the parties, the Commission finds nothing in the record, medical records or testimony, establishing Petitioner lost any time from work as a result of her work-related injury. Petitioner admitted that her lost time benefits were suspended on September 14, 2011, at which time she returned to work for Respondent in a light duty capacity, and performed office filing for a cardiac doctor. (T.23, T69-70). Petitioner also testified that after her September 29, 2011 evaluation with Dr. Lelyveld at the University of Chicago Occupational Clinic, she returned to work light duty. (T25, T70). The record indicates that on October 20, 2011, Dr. Lelyveld released Petitioner to return to work full duty. (PX2, RX6).

Petitioner admitted that on October 20, 2011, Dr. Lelyveld released her to return to work full duty, and released her from his care. (T79). Petitioner was seen by Dr. Prospero on October 29, 2011. (PX1). Petitioner testified Dr. Prospero issued light duty work restrictions on October 29, 2011, and that she presented those restrictions to her employer, but that she was not permitted to return to work light duty at that point. (T33). Dr. Prospero's October 29, 2011 office note itself fails to reveal any recommendation Petitioner return to work light duty. However, an October 29, 2011 UNUM Short Term Disability Form completed by Dr. Prospero indicates Petitioner was capable of light duty work, but that it was "unknown" whether or not Petitioner's condition was work-related. (RX9). On November 1, 2011, Petitioner began treating with Dr. Robinson and was issued light duty work restrictions of sedentary work with maximum lift of 10 pounds, occasional carry, occasional walking, and no repetitive use of the left hand. Dr. Robinson continued to issue light duty work restrictions until January 17, 2012, at which time Petitioner was released to return to work without restrictions. (PX3). Despite the light duty work restrictions issued by Dr. Robinson, the record contains no testimony establishing Petitioner presented her light duty work restrictions to Respondent, or that Respondent refused to accommodate those light duty restrictions. Furthermore, Petitioner admitted that while she was absent from her "physical job" from August 30, 2011 through January 17, 2012, she was working light duty during that time period. (T68).

In order for a Petitioner to be awarded temporary total disability benefits, she must show not only that she did not work, but also that she was unable to work. Shafer v. Illinois Workers' Compensation Commission, 976 N.E.2d 1 (2011). The record contains medical documentation recommending light duty work restrictions, but does not contain any testimony to support Petitioner's allegation that she is entitled to temporary total disability benefits, that Respondent refused to authorize Petitioner's work restrictions, or that Petitioner remained off work throughout the period of August 31, 2011 through January 17, 2012. The Commission finds the Arbitrator erred in awarding temporary total disability benefits for the entire time period of August 31, 2011 through January 17, 2012. Accordingly, the Commission modifies the award of temporary total disability benefits from August 31, 2011 through January 17, 2012, a period of 19-6/7 weeks, to August 31, 2011 through September 14, 2011, and September 23, 2011 through October 1, 2011, a period of 3-3/7 weeks.

With regard to the issue of medical expenses, Respondent argues the Arbitrator's order that Respondent pay those medical services identified in Petitioner's Exhibit 9, and the Arbitrator's order that Respondent hold Petitioner harmless from any claim for reimbursement pursued by BlueCross BlueShield, could lead to double recovery for Petitioner or the medical provider based upon evidence of payment of some of the medical bills, contained in Petitioner's Exhibit 8, the BlueCross/BlueShield payout data. The Commission acknowledges that Petitioner's Exhibit 8 reflects that some of the medical charges identified in Petitioner's Exhibit 9 have already been satisfied by BlueCross/BlueShield, and that the Arbitrator's medical award requires clarification. Accordingly, the Commission clarifies the Section 8(a) medical award to reflect that Respondent shall pay the reasonable, necessary, related and unsatisfied medical charges identified in Petitioner's Exhibit 9, and that Respondent shall further provide Petitioner with a hold harmless with regard to medical charges paid by BlueCross BlueShield, the group carrier, for which Respondent is receiving 8(j) credit.

14IWCC0213

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2013 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 402.24 per week for a period of 3-3/7 weeks, from August 31, 2011 through September 14, 2011, and September 23, 2011 through October 1, 2011, 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 $ 362.02 per week for a period of 32.05 weeks, for the reason that the injuries sustained caused 1% loss of use of the left hand under §8(e), 5% loss of use of the man as a whole under §8(d)2 with regard to Petitioner's left shoulder/arm injury, and 1% loss of use of the man as a whole under§8(d)2 with regard to Petitioner's cervical injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for all reasonable, necessary, related, and unsatisfied medical charges identified in Petitioner's Exhibit 9, pursuant to the Medical Fee Schedule as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall hold Petitioner harmless with regard to the $4,777.73 in medical charges paid by BlueCross BlueShield, the group carrier, for which Respondent is receiving 8(j) credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
KWL/kmt
O-03/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0213

McKINLEY, PATRICIA
Employee/Petitioner

Case# 11WC034863

UNIVERSITY OF CHICAGO MEDICAL CENTER
Employer/Respondent

On 6/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0412 RIDGE & DOWNES
CAROLEANN GALLAGHER
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
WILLIAM A LOWRY ESQ
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0213

Patricia McKinley
Employee/Petitioner

v.

The University of Chicago Medical Center
Employer/Respondent

Case # 11WC 034863

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the City of Chicago, on April 30, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Should Respondent pay the Blue Cross Blue Shield Lien?

14IWCC0213

FINDINGS:

On **8/30/2011,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$31,374.72**; the average weekly wage was **$603.36**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **2** children under 18.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$1,379.08** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,379.08**.

Respondent is entitled to a credit of **$4,777.73** under Section 8(j) of the Act.

ORDER:

Respondent shall pay Petitioner Total Temporary Benefits of $402.24 per week for 19 and 6/7th weeks, from August 31, 2011 through January 17, 2012 as provided in Section 8 (b) of the Act. Respondent shall have a credit of $1,379.08 for benefits paid.

Respondent shall pay Petitioner permanent partial disability benefits of $362.02 per week for a period of 25 weeks, as provided in Section 8 (d) 2 of the Act, because the injuries caused to the Petitioner's left arm caused a 5% loss of use of the person as whole;

Respondent shall pay Petitioner permanent partial disability benefits of $362.02 per week for a period of 2.05 weeks, as provided in Section 8(e)9 of the Act, because the injuries sustained caused a 1% loss of use of the Petitioner's left hand;

Respondent shall pay Petitioner permanent partial disability benefits of $362.02 per week for period of 5 weeks, as provided in Section 8(d)2 of the Act, because the neck injuries sustained caused a 1% loss of use of the person as a whole;

Respondent shall pay for all reasonable and necessary medical services pursuant to the Fee Schedule as provided in Sections 8 (a) and 8.2 of the Act, and as detailed in Petitioner's Exhibit # 9.

Respondent shall hold Petitioner harmless regarding the Blue Cross Blue Shield Lien in the amount of $4,777.73 and received a credit pursuant to Section 8(j) of the Act..

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

14IWCC0213

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.

L. Thompson-Smith
Signature of Arbitrator

June 14, 2013

JUN 14 2013

14IWCC0213

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection regarding the carpal tunnel diagnosis; 2) treatment for the left shoulder after October 20, 2011; 3) medical bills after October 20, 2011; temporary total disability; 4) blue cross blue shield lien; 5) is Respondent due a credit; and 60) nature and extent.

Patricia McKinley, ("Petitioner") has been employed by the University of Chicago Medical Center, ("Respondent") as a nursing support assistant, for over seven (7) years. Her primary duties are to assist and aid patients who need help with everyday tasks such as washing and grooming, sitting up, standing, walking and feeding. The patients she works with are typically geriatric patients and her job is very physical in nature, as she is required to lift, carry and help patients who are typically unable to assist themselves.

On August 30, 2011, the Petitioner was working the 7 a.m. to 3:30 p.m. shift at the Medical Center. On this day, she had been assigned to sit with and support a neurosurgery patient, who had been having seizures. The patient was not allowed to be alone as he had a history of falling and the petitioner was instructed to sit in his room and monitor him, to ensure he was safe at all times. About one and half hours into her shift, at approximately 8.30 a.m., the patient used the bathroom and Mrs. McKinley was observing him to ensure he was safe and did not fall. The patient was attached to an IV drip and had to walk with the IV pole.

As the patient came out of the bathroom, the petitioner testified that it was clear that he was very agitated and upset. He accused her of holding him hostage in his room and he became very angry and aggressive. As Petitioner tried to calm him down, the patient suddenly grabbed her by the left arm and started tugging at her arm and screaming at her. This particular patient was twenty-two years old and a large, strong man and the petitioner could not free herself from him grip. The patient became so agitated and enraged that he threw the Petitioner against the wall; the left side of her body hit the wall with great force. He then threw the IV pole at her. The patient then ran out of the room screaming and attacked a doctor as he tried to get out of the hospital.

Mrs. McKinley testified that she was very upset and shocked by what had just happened. A number of other staff members on the floor came to her assistance. She testified that she felt immediate pain in her left arm and shoulder and she asked to leave the room to seek medical attention. Her supervisor refused to allow her to do so and the patient was returned to the room, sedated; and Petitioner had to stay with him for the remainder of the day, until her shift ended at 3.30 pm.

While petitioner sat in the room from approximately 9 a.m. to 3.30 p.m., she began to feel severe pain in her left arm and shoulder and her neck became stiff. She was upset and feared that the patient would wake up and attack her again. The nurses on duty gave her ice and hot pads to place on her left shoulder, as well as pain medication. When her shift ended, she presented to the University of Chicago Center of Occupational Medicine ("UCOM") at approximately 4:00 p.m. Her chief complaints were pain in the left side of her neck and shoulder area; with intermittent tingling in her fingertips. Upon examination, she was tender to palpation over the AC joint, subacromial bursa and upper trapezius. She had active abduction to 60 degrees and passive abduction to 90 degrees. She had pain with right rotation and was diagnosed with left shoulder strain. She was prescribed pain medication and advised to ice her left arm and use a sling. She was released to return to work, in a modified capacity; and told to return to UCOM on September 2, 2011. *See,* PX2 & RX6.

On September 2, 2011, the petitioner continued to have a limited range of motion of her left arm and shoulder and intermittent numbness and tingling in the index and middle fingertips of the left hand. She was wearing a sling on her left arm. She was doing home exercises and taking pain medication. She reported that she did not return to work because her employer could not accommodate her light duty restrictions, prescribed at her initial appointment. On examination, she continued to be tender to palpation over the left cervical paraspinous and upper trapezius areas. She was also tender over the AC joint and supraspinatus. She had a positive impingement sign and it was noted that her neck pain had not significantly improved. She was referred for physical therapy and advised to continue with ice treatment, range of motion exercises and the use of pain medication. She was continued on modified/light duty and was advised to follow up at UCOM on September 14, 2011. There was also the impression of symptom magnification. *See,* PX1 & RX6.

On September 14, 2011, the Petitioner indicated that she noted improvement in her condition because of her physical therapy, which started on September 7, 2011. She reported that she continued to have a burning sensation along the left deltoid; and remained off work, as her modified duty had not been accommodated. Upon examination, she remained tender over the proximal deltoid and was advised to complete her physical therapy routine, continue with home exercises; and her modified/light duty status was continued. She was instructed to follow up at UCOM on September 22, 2011.

On September 22, 2011, the Petitioner stated that she was feeling better but had been to see her primary care physician, who had ordered an MRI of her neck and left shoulder; due to the petitioner's complaints of a constant burning sensation in her lower upper arm. Upon examination, she had pain with palpation of the left trapezius and the subacromial bursa. She was returned to work, with restrictions and prescribed continued physical therapy twice a week; and return for re-evaluation on September 29, 2011. At this point, her light duty status had been accommodated and she was working for Respondent filing papers and performing other office duties. *See,* PX1 & RX6.

September 29, 2011, was the first time Petitioner was seen by a doctor, i.e., Dr. Lelyveld. Prior to this date, she had only been seen by nurse practitioners. She presented with ongoing complaints of persistent burning in the lateral aspect of her left upper arm and numbness in her left thumb, index and long finger. She was waiting for her MRI and EMG results. Upon examination, she had pain with palpation of the left trapezius. She was continued on modified work duties; advised not to lift, push, pull or carry over 15 pounds; prescribed physical therapy twice a week; and was to return to UCOM to discuss the findings of her diagnostic tests on October 11, 2011.

The petitioner underwent an MRI of her upper left arm ad cervical spine on October 6, 2011 at Ingalls Memorial Hospital. Her primary care doctor, i.e., Bela Prospero, had ordered the aforementioned tests. The MRI of Petitioner's left arm revealed no evidence of a rotator cuff tear and there are mild changes of chronic tendinosis in the later aspect of the supraspinatus. The petitioner also had undergone an EMG of the left wrist and the results were: the distal motor and sensory peak latencies of the let median nerve were prolonged and focal slowing of sensory nerve conduction velocity across the wrist segment was identified; the left median nerve had a low amplitude sensory nerve action potential; the left radial and ulnar nerves were normal. There was electrodiagnostic evidence of a

moderate left median neuropathy localizable to the wrist, which can be seen in patients with carpal tunnel syndrome. Clinical correlation was suggested.

On October 18, 2011, petitioner's physical therapy note indicated that her subjective complaints had improved, in that she explained that her shoulder blade pain was gone and that she was no longer having numbness or tingling or burning into her hands and fingers. The assessment was that the petitioner had put forth moderate effort in physical therapy and that she had been directed to discontinue physical therapy services and return to work in a full duty capacity. The petitioner was discharged at the direction of the referring physician. *See,* RX6.

Petitioner returned to Dr. Lelyveld at UCOM on October 20, 2011, indicating that she had been referred, by her primary care doctor, to an orthopedist for an injection in the left shoulder. Dr. Lelyveld noted the positive EMG findings of carpal tunnel syndrome and mild chronic tendinosis of the supraspinatus. Dr. Lelyveld indicated that he felt that Petitioners symptoms had resolved and he therefore released her to return to work, in a full duty capacity, and she was discharged from care at UCOM.

Petitioner did not agree with Dr. Lelyveld that her symptoms had resolved as she continued to have significant pain and discomfort in her left shoulder and neck area. The physical therapy had helped but her symptoms had not resolved to the point where she felt that she was fit to return to full duty work. Mrs. McKinley testified that her job is very physical. She has to lift, carry and aid patients that are unable to help themselves. She testified that she did not feel that it would be safe for either herself or her patients if she returned to her position, in a full duty capacity; when she still had significant symptoms.

Mrs. McKinley had begun seeing her own primary care doctor, Dr. Bela Prospero, during the time that she was treating at UCOM. She first saw Dr. Prospero on September 23, 2011, which date was between her third and her fourth visit with UCOM. On that date, she complained of burning in her left arm and tingling in her left arm into her fingers. Dr. Prospero ordered an MRI of the petitioner's cervical spine and left shoulder and EMG as referred above. Dr. Prospero indicated that Petitioner should rest for one week and that she would then like her to return. *See,* PX1.

On October 13, 2011, the petitioner presented to Dr. Prospero with continued complaints of pain in her left shoulder and neck. Her EMG was positive for findings of carpal tunnel syndrome. The primary diagnosis was left shoulder pain/tendinosis; the secondary diagnosis was neck pain/muscle spasms. Due to her ongoing complaints, Dr. Prospero referred the petitioner to Dr. Howard Robinson, for pain management and instructed her to continue with physical therapy. Dr. Prospero also noted that the petitioner should continue her light duty status at work until she had completed her physical therapy and pain management.

On October 29, 2011, the Petitioner returned to see Dr. Prospero. She had not yet seen Dr. Robinson as prescribed. By this time, she had been released by Dr. Lelyveld at UCOM. She complained to Dr. Prospero of neck spasms and pain in cervical region. She continued to have signs of carpal tunnel syndrome and Dr. Prospero indicated that she should continue with physical therapy and see the pain management doctor. She asked that the petitioner return to her in two to three (2-3) weeks and indicated that she should remain on light duty. Dr. Prospero filled out an application for short-term disability for the petitioner and noted that the respondent had cancelled Petitioner's physical therapy. Dr. Prospero indicated that the petitioner could only work light duty and restricted her from work involving lifting, pulling and/or pushing. Dr. Prospero indicated a diagnosis of severe tendinosis in the left shoulder, with neck pain and muscle spasms. Regarding her treatment plan, she indicated that the petitioner should see Dr. Robinson for pain management and that she should continue with physical therapy. Dr. Prospero further indicated that the petitioner's expected return to work date was not certain, pending her appointment with Dr. Robinson. *See,* PX1.

The petitioner presented to Dr. Howard Robinson at NorthShore University, Chicago Institute of Neurosurgery, ("NorthShore University") on November 1, 2011. She complained of left shoulder pain, left arm paresthesias and left hand numbness and tingling. She described the pain as burning. Dr. Robinson diagnosed the petitioner as having cervicalgia, carpal tunnel syndrome as seen on the EMG and pain in the joint with mild tendonosis.

Upon examination of her left shoulder, petitioner had painful arc with AROM and a positive impingement sign. She had give-way weakness with supraspinatus testing and scapulothoracic motion symmetric with scapula slide. Dr. Robinson recommended a further course of physical

therapy, a splint for her carpal tunnel and requested that the petitioner follow up with him in three weeks. Concerning her employment, Dr. Robinson indicated that Petitioner could only work light/sedentary work with a lifting ability of 10 pounds maximum; and no repetitive use of the left hand. A certain amount of walking and standing was considered acceptable on an occasional basis.

Petitioner returned to see Dr. Prospero on November 3, 2011 with continued complains of neck and left shoulder pain. Dr. Prospero noted that she continued to do physical therapy and had seen Dr. Robinson; and she noted that Dr. Robinson had given the petitioner work restrictions and that she was currently under his care.

Dr. Prospero completed paper work on this occasion for Petitioner regarding a disability plan and indicated that the petitioner could only work light duty and that this status was valid from her initial visit date of September 23, 2011 through the present date. She indicated that Petitioner should only do sedentary work with no pushing/pulling, no bending/stooping, no climbing; and no repetitive work. Dr. Prospero indicted that her return to work was not certain and that the petitioner had not reached maximum medical improvement ("MMI"). She remained under the care of Dr. Robinson. *See*, PX1.

Petitioner returned to see Dr. Robinson on November 29, 2011, with continued complaints of neck and shoulder pain; and continued tingling and numbness in her left hand. Dr. Robinson ordered Petitioner to continue physical therapy; and prescribed pain medication and the splint that he had previously recommended for her left hand symptoms. He indicated that he would like to see her for follow up in three weeks. Regarding her job, Dr. Robinson continued the Petitioner on a light duty status as before with lifting of 10 pounds maximum and no repetitive use of the left hand.

The Petitioner saw Dr. Robinson again on December 20, 2011, with ongoing complaints of neck and left shoulder pain. She had a feeling of weakness in the shoulder and upon examination, the left shoulder revealed positive impingement syndrome and a painful arc of motion. Dr. Robinson then prescribed an injection for Petitioner's left shoulder. She continued on light duty status and the doctor asked her to follow up with him in one week. The Petitioner presented for her injection on January 3, 2012, and her left shoulder was injected with 1 ml of Kenalog and 4 ml of 1% lidocaine. She

was instructed to ice the area for 48-72 hours after the injection; and advised to return to see Dr. Robinson in two weeks.

The petitioner returned to Dr. Robinson on January 17, 2012, indicating that she had noted significant improvement in her left shoulder following the injection. She had minimal shoulder pain at this visit but continued to have pain on the left side of her neck, which was worsening and continued to have numbness and tingling in her left hand. Dr. Robinson indicated that Petitioner should continue with physical therapy for her neck and he prescribed Zanaflex, to take at night. Dr. Robinson returned Petitioner to work, in a full duty capacity, on January 18, 2011

The petitioner returned to see Dr. Robinson on April 3, 2012. She had ongoing complaint of left shoulder pain. Her pain had been severe the week before this visit. Upon examination, she had painful arc of motion of the left shoulder. Dr. Robinson performed a left shoulder injection on this occasion; and Dr. Robinson instructed the petitioner to follow up with him in one month.

The petitioner testified at trial that she talked to Dr. Robinson on the telephone on this occasion and that he prescribed the injection over the phone. The Petitioner was apparently confused regarding this issue as the medical records indicated that Dr. Robinson notes an examination of the petitioner at the doctor's office. *See,* PX3.

The petitioner was initially permitted to return to work doing light duty, while she was on a light duty status from UCOM. When Petitioner obtained a light duty status from firstly Dr. Prospero, her primary care doctor and thereafter from Dr. Robinson, her employer refused to accommodate it.

The petitioner worked light duty from September 14, 2011 through September 23, 2011. Dr. Prospero took her off work for one week on September 23, 2011 and she was paid temporary total disability through October 1, 2011. She testified that she returned to work doing light duty on October 7, 2011 and worked light duty until she returned to Dr. Lelyveld on October 20, 2011. Dr. Lelyveld then returned the petitioner to full duty work on this date but the petitioner continued on a light duty status as prescribed by Dr. Prospero, which her employer refused to accommodate same.

When the petitioner returned to work on January 18, 2012, she testified that she was still having difficulties with her left shoulder and left hand and she still had neck pain. She had improved with both physical therapy and the shoulder injections but she continued to have ongoing complaints. She had difficulties at work as she could not lift patients without assistance and had to continuously ask for help.

At trial, Petitioner continued to complain of pain and weakness in her left arm and continues to have numbness and tingling in her left hand. She testified that her neck is still stiff and painful and that she has pain, on a daily basis, with the pain in her shoulder being the worst. She ices her shoulder every night and continues to take pain medication every day. She takes muscle relaxers once a month and that she performs exercises that she was taught while in physical therapy, at home. And that she continues to have limitations with strength in her left arm.

Outstanding Bills:

The outstanding bills are as follows:

1. **North Shore University Health System/Skokie Hospital:**
   Dates of Service: 11/1/2011, 11/14/2011, 11/29/2011, 12/1/2011, 12/20/2011, 1/3/2012, 1/17/2012.
   Amount Due: $6,671.0
   Amount Due pursuant to Fee Schedule: $3,147.39

2. **Radiology Imaging Consultants:**
   Dates of Service: 10/6/2011 & 10/8/2011
   Amount Due: $457.00
   Amount Due pursuant to Fee Schedule: $451.19
3. **Neurology Associates Ltd:**
   Dates of Service: 1/6/2011
   Amount Due: $890.00
   Amount Due pursuant to Fee Schedule: $512.98

4. **Dr. Bela Prospero:**

   Dates of Service: 9/23/2011, 10/13/2011, 10/299/2011, 1/3/2011 & 12/3/2011

   Amount Due: $360.00

   Amount Due Pursuant to Fee Schedule: $190.84. *See,* PXs 5, 6,7 & 9.

Temporary Total Disability (TTD):

The respondent submitted a print out of the TTD paid to Petitioner in their Exhibit 5 and the Arbitrator relies on this as evidence of the actual TTD paid to the petitioner and relies upon same for the dates that Petitioner was in fact paid TTD. Accordingly, TTD was paid to Petitioner for three weeks and three days from August 31, 2011 through September 14, 2011 and from September 23, 2011 through October 1, 2011. The petitioner worked light duty from October 7, 2011 through October 20, 2011, and after that date, light duty status was not accommodated. Petitioner did not return to work in a full duty capacity until January 18, 2012. TTD is owed to Petitioner for a period of 19 weeks and 6 days.

Blue Cross Blue Shield Lien:

The petitioner has health insurance through a group policy with Blue Cross Blue Shield of Illinois ("BCBS"). The respondent contributes to this group health policy as part of the petitioner's salary package; consistent with her employment. Given the fact that the respondent refused to pay for medical treatment for the Petitioner beyond October 20, 2011, the Petitioner submitted her bills to BCBS of Illinois for payment.

BCBS of Illinois paid a total sum of $4,777.73 on the Petitioner's behalf to the following providers: Skokie Hospital (Dates of Service: 11/14/2011, 12/1/2011, 1/3/2011) and NorthShore University (Dates of Service: 11/29/2011, 12/20/2011, 1/3/2012, 1/17/2012, 4/3/2012 & 5/30/2012). These dates of service primarily relate to physical therapy as ordered by Dr. Robinson. While this lien is not a bill for services, it is indicative of a reasonable payment of Petitioner's medical bills.

CONCLUSIONS OF LAW

F. Is Petitioners current condition of ill being causally related to the injury?

The Arbitrator finds that the Petitioner's condition of ill being regarding her left shoulder/arm, left wrist and neck are causally related to her accident, which occurred on August 30, 2011, during the course of Petitioner's employment with the respondent. The medical records and reports of Petitioner's treating physicians clearly support a finding of causal relationship between the Petitioner's left shoulder/arm, neck and left hand conditions and her work related accident.

The Arbitrator notes that Petitioner's initial history of her symptoms, at the Occupational Center of University of Chicago (UCOM), with Drs. Prospero and Robinson, are entirely consistent with her testimony. The Arbitrator accepts the Petitioner's testimony of how the accident happened as credible and unrebutted and finds that the medical records support it. Therefore, the Arbitrator finds that the petitioner has proven, by a preponderance of the evidence, a causal connection in the mechanism of the injury sustained, and her subsequent left shoulder, neck and left hand complaints.

At trial, the respondent referred to the UCOM questionnaire that Petitioner filled out on the day of her accident and pointed out that said form referred only to injuries to Petitioner's left shoulder. No mention is made of an injury to her neck, which is in fact the case. The Petitioner however credibly testified that she was very upset by the time she was examined at the UCOM clinic and had been forced to attend to a patient for eight (8) hours, who had attacked her. She was not permitted to leave and seek medical assistance for her injuries and she was not thinking clearly. The absence of a reference to a complaint of neck pain on this initial questionnaire is not a factor that the Arbitrator gives much weight. Upon examination at the UCOM clinic, on the day of her accident, the petitioner did complain of left shoulder pain and pain on the left side of her neck with intermitted tingling in her fingertips. At all visits thereafter, the petitioner consistently had complaints of neck pain and when she returned to UCOM, three days post-accident, the petitioner's complaint of neck pain was noted. When she saw Dr. Prospero for her initial appointment, on September 23, 2011, it was noted that one of her chief current complaints was neck pain. The petitioner's history of complaints is consistent and

noted by all of her medical providers therefore; the Arbitrator finds that the condition of ill-being regarding her neck is causally connected to her work accident.

Regarding the issue of the petitioner's diagnosis of left-handed carpal tunnel syndrome, the Arbitrator finds that this condition is also causally connected to the petitioner's accident. When examined at the UCOM clinic, on the day of the accident, the petitioner complained of tingling in her fingertips. She was consistent in her complaints regarding the numbness and tingling in her left hand throughout the duration of her medical treatment. An EMG performed on October 6, 2011, showed positive findings of carpal tunnel syndrome. The petitioner had no issue with tingling or numbness in her hand prior to this traumatic event and had immediate complaints thereafter. In addition, there was no evidence presented to show that she had sought treatment or had diagnostic testing for this condition, prior to this event. However, on October 18, 2011, petitioner's physical therapy note indicated that her subjective complaints had improved in that she explained that her shoulder blade pain was gone and that she was no longer having numbness or tingling or burning into her hands and fingers.

Dr. Lelyveld indicated, in his October 20, 2011 note, that the findings on Petitioner's EMG could not be explained by the mechanism of the petitioner's injury. However, Dr. Lelyveld does not state how such findings can be explained, in the absence of any symptoms before this accident. The Arbitrator finds that the opinion of Dr. Lelyveld is not persuasive and not supported by a credible explanation of what could have caused the carpal tunnel condition in Petitioner's left hand. The Arbitrator notes Dr. Lelyveld's comment that the petitioner "has exceeded the normal time frame for healing for similar injuries to other workers" and finds the generality of this comment to be telling. The Arbitrator does not accept that all workers heal at the same rate and in the same manner and Dr. Lelyveld's opinion therefore lacks credibility. *See,* RX6.

The Arbitrator has reviewed the medical records of Drs. Prospero and Robinson and agrees with the recommendations and findings therein; and finds them more persuasive than the opinion of Dr. Lelyveld. On October 20, 2011, when Dr. Lelyveld returned the Petitioner to work in a full duty capacity, she was continuing to have significant issues with her left shoulder, neck and left hand. Given the positive findings on Petitioner's left arm MRI and her left hand EMG, not ordering further treatment or following up with additional diagnostic tests, for the petitioner, is questionable. The

Arbitrator notes that Dr. Lelyveld examined the petitioner on two occasions and that the majority of her examinations at UCOM, were by a nurse practitioner. The Arbitrator further notes that a competent method of determining causation is comparing the condition of a claimant, prior to an accident, with her condition thereafter. Proof of the state of health of a claimant prior to the time of the injury; and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. *See, Kress Corp v Industrial Commission, 190 Ill. App. 3d 72 (1989).*

The petitioner testified credibly and in an unrebutted manner, that she had no medical problems with her left shoulder/arm, neck or left hand prior, to August 30, 2011. Furthermore, there is no indication in the record that Petitioner experienced any problems in performing her job for the respondent, at any time prior to August 30, 2011. Given the severity of petitioner's symptoms immediately following the injury as well as her continued need for medical treatment and restrictions from full duty work, the Arbitrator finds that the petitioner's impaired condition was due to the attack, injuring her left arm/shoulder, neck and left hand on August 30, 2011; during the course of her employment with the respondent. The symptoms the petitioner experienced pursuant to the accident, caused her to be unable to perform her job, in a full duty capacity as a nursing assistant, from August 30, 2011 through January 17, 2012. Based on the above, the Arbitrator finds that Petitioner has met her burden of proof, that her condition of ill being regarding her left arm/shoulder, neck and left hard are causally related to her accident on August 30, 2011.

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?

Given that the Arbitrator has found that the petitioner's injuries to her left shoulder/arm, left hand and neck, were causally related to her work accident, the Arbitrator finds that the Petitioner is entitled to necessary, causally related medical expenses, necessary to relieve the effects of her injuries. The Petitioner underwent treatment with Dr. Robinson at NorthShore University between November 1, 2011 and May 30, 2012, for injuries sustained by her in the subject accident and a bill, to that facility, for $6,671.00, remains outstanding. The Arbitrator finds that said treatment was necessary to relieve

the petitioner's ill effects of this accident and therefore Respondent shall pay this bill in accordance with the medical fee schedule.

The petitioner underwent an MRI of her cervical spine and left upper extremity on October 6, 2011 and a total of $457.00 remains outstanding to Radiology Imaging Consultants in Harvey, Illinois. The Arbitrator finds that said treatment was necessary to relieve the petitioner's ill effects of this accident and therefore the respondent shall pay this bill, in accordance with the fee schedule.

The petitioner underwent an EMG test at Neurology Associates Ltd., on October 6, 2011, on her left hand and a total of $890.00 remains outstanding to this facility. The Arbitrator finds that said treatment was necessary to relieve the petitioner's ill effects of the subject accident and therefore the respondent shall pay this bill, in accordance with the fee schedule.

The petitioner underwent treatment with Dr. Bela Prospero between September 23, 2011 and December 3, 2011, for the injuries sustained by her in this accident and a total sum of $390.00 remains outstanding. The Arbitrator finds that said treatment was necessary to relieve the petitioner's ill effects of the accident and therefore the respondent shall pay this bill in accordance with the fee schedule. The petitioner's attorney has reduced all bills to the fee schedule and submitted same as Exhibit 9.

BCBS Lien:

Section 8 (j) of the Workers Compensation Act states as follows:-

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee for any such group health plan as shall be consistent with and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation for temporary total incapacity for work or any medical surgical or hospital benefits made or to be made under this Act.

> Any employer receiving such credit shall keep such employee safe and harmless from any and all claims of liabilities that may be made against him by reason of having received such payments only to the extent of such credit.

The Arbitrator finds that the medical treatment undergone by the petitioner at NorthShore University and at Skokie Hospital was reasonable and medically necessary to cure the petitioner of the ill effects of her injury, which injuries were caused by her work related accident, on August 30, 2011. The bills submitted and paid by Blue Cross and Blue Shield should have been paid by the respondent herein, therefore, Respondent is entitled to a credit for same pursuant to Section 8 (j) as detailed above and shall hold Petitioner harmless for the amount paid by Blue Cross and Blue Shield.

K. What temporary benefits are in dispute?

It is clear that Petitioner was paid TTD for three weeks and three days, i.e., from August 31, 2011 through September 14, 2011 as detailed in Respondent's Exhibit 5. The petitioner's light duty prescription was accommodated from September 14, 2011 through September 23, 2011. Dr. Prospero saw the petitioner on September 23, 2011 and advised her to rest for one week; and the petitioner was thereafter paid TTD from September 23, 2011 through October 1, 2011. The respondent, despite the fact that she remained on light duty status, suspended petitioner's TTD benefits on October 1, 2011. Her light duty status was accommodated from October 7, 2011 through October 20, 2011, when she was released by Dr. Lelyveld to return to full duty work. Thereafter her light duty prescriptions from Drs. Prospero and Robinson was not accommodated

Dr. Prospero took the petitioner off work on September 23, 2011 and an EMG and MRI were ordered. Those tests were performed on October 6, 2011; and Petitioner returned to see Dr. Prospero on October 13, 2011 and again on October 29, 2011. Dr. Prospero advised her to work light duty only, on both occasions and Dr. Prospero filled out disability forms for the petitioner on November 3, 2011; wherein she indicated that she was on light duty status. Dr. Robinson continued the petitioner's light duty status when he saw her for his initial visit, on November 1, 2011; and that same status was continued until Dr. Robinson released the Petitioner, on January 17, 2012. She returned to work on January 18, 2012 Therefore, the Arbitrator finds that the petitioner was disabled from performing the full duties of her job from August 31, 2011 through January 17, 2012 a period of 19 and 6/7th weeks.

On the respondent's exhibit, the petitioner was paid TTD for three weeks and three days. Based on the above, the Arbitrator concludes that the respondent shall pay Petitioner temporary total disability benefits from August 31, 2011 through January 17, 2012 being a period of 19 and 6/7th weeks; and confirms that the respondent is entitled to a credit for TTD, paid in the amount of $1,379.08.

L. What is the nature and extent of the injury?

The petitioner sustained injuries to her left arm/shoulder, and her neck area and her left hand, in the form of carpal tunnel syndrome. She was diagnosed with cervicalgia, carpal tunnel syndrome as seen on the EMG and pain in the left joint and mild tendonosis. The petitioner had a positive finding on her EMG for carpal tunnel syndrome and a finding of "mild changes of chronic tendinosis in the later aspect of the supraspinatus" on her left shoulder MRI. She underwent several months of physical therapy and two steroid injections into her left shoulder. She was prescribed pain medication, muscle relaxers, an arm sling, a wrist splint; and ice and heat therapy.

The petitioner testified, in a credible manner, that she continues to have ongoing pain in her left shoulder and arm. She testified that the pain in her shoulder is her biggest complaint and that she takes pain medication on a daily basis and takes muscle relaxers up to once per month. She ices her shoulder every night and continues to have tingling and numbness in her left hand. She continues to have pain and stiffness in her neck area and does exercises at home to aid the pain for both her neck and her shoulder/arm. She feels more pain in the winter and colder months and describes the pain as "aching" during those times.

Petitioner testified, in a credible and unrebutted manner, that she has difficulty doing her very physical job; and that she is in pain while at work. She had extreme difficulty when she returned to work in January of 2012, but she felt as if she had no choice but to work through the pain, as she had no income at that time. She testified that her injury slows her down and that nursing assistants are required to lift patients by themselves. She can no longer do this and has to have assistance. She cannot work as quickly as she used to and that she has not been able to work overtime since the accident and she did prior.

The petitioner also testified that she has difficulties at home because of her injuries. She loves to cook and used to cater parties for friends and that she has not been able to do this since the accident. She has difficulty lifting heavy cookware and explained that her left arm gives out alot. She cannot lift laundry baskets and requires her sons to help her as much as possible. Her injuries also have affected the care of her two sons as she used to be their baseball catcher. She has not done that since the accident. She is very cautious when they are playing with her and is constantly guarding her left arm and neck area. She works to the best of her ability but not without difficulty or the reliance on pain medication.

The Arbitrator finds that the petitioner is entitled to a 5% loss of use of the person as a whole for injuries sustained to her left arm/shoulder, a 1% loss of use of the left hand regarding the carpal tunnel issue and a 1% loss of use of the person as a whole regarding the neck injury. The Arbitrator relies on the facts outlined above, the credible and unrebutted testimony of the petitioner, the medical evidence submitted at trial, the severity of the injuries sustained by the petitioner; as well as the continuing issues that Petitioner continues to experience with regard to her left arm, left hand and neck.

N. Is Respondent due any credit?

The Respondent is entitled to a credit for TTD paid for 3 and 3/7th weeks in the sum of $1,379.08 and is entitled to a credit pursuant to Section 8 (j) of the Act for payments made by BCBS of Illinois; the petitioner's group health provider, in the amount of $4,777.73.

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

ALPHONSO NICHOLSON,

Petitioner,

14IWCC0214

vs.

NO: 09 WC 14342

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, permanent disability, and credit, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

After considering the entire record, the Commission modifies the Decision of the Arbitrator as to the wage differential award, from $ 612.00 per week to $ 553.84, based upon a finding that the difference between the "average amount" Petitioner would be able to earn in the full performance of his duties in his prior job is $1,311.60 (40 hrs x $ 32.79 pr hr), and the "average amount" he is earning or is able to earn in some suitable employment after his injury is $480.00 (40 hrs x $ 12.00 per hr). Subtracting $ 480.00 from $ 1,311.60 is $831.60, and 66-2/3 of $ 831.60 is $ 553.84 per week.

The Commission finds the Arbitrator incorrectly assumed a current average weekly wage of $393.60, based upon Petitioner's 32.8 average hours per week at $12.00 per hour, for his janitorial work at Kids Academy. The Commission takes note of Petitioner's admission his wife owns Kids Academy, and his admission that his wife set his salary. The Commission further notes Petitioner has no restrictions from any medical provider with regard to the number of hours he is capable of working per day, or per week. The Commission finds nothing within the record

to indicate the "32.8 hour" work week is standard in the industry, and instead finds more likely than not that Petitioner may have limited his work hours in order to inflate the 8(d)(1) wage differential award, based upon the lack of evidence of a diligent job search, Petitioner's self-limiting job search efforts, and his less-than genuine participation in the vocational placement efforts of MedVoc. No job search records were tendered into evidence, and although Petitioner attended his initial vocational assessment meeting on December 18, 2011, the additional reports from MedVoc Rehabilitation records indicate Petitioner refused to attend either of the two subsequent meetings, and instead on January 9, 2012 obtained a janitorial position working six to eight hours a day, earning approximately $12.0 per hour. (RX5, PX6)

In Albrecht v. Industrial Commission, 271 Ill.App.3d 756(1995), the court reiterated that "section 8(d)1 provides that awards thereunder are to be based on the difference between the 'average amount' the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of injury and the 'average amount' he is earning or is able to earn in some suitable employment after his injury." In determining reduction of earning capacity "the test is the capacity to earn, not necessarily the amount actually earned." Franklin County Coal v. Industrial Commission, 398 Ill. 528(1948). "Choice," as determinative of earnings, has been rejected as a basis for 8(d)(1) benefits. Durfee v. Industrial Commission, 195 Ill.App.3d 886(1990). The Commission concludes Petitioner's earnings upon his return to work were self-limited, based upon his obtainment of employment with his wife's daycare for an average of 32.8 hours a week. There is no documentary evidence in the record, or credible testimony from Petitioner, to indicate that Petitioner engaged in an actual job search, that he looked for other work in the janitorial industry, or the other industries in which he previously worked -cooking industry or loss prevention industry - to support a finding that he was limited to 32.8 hour work week. Instead, the VocMed vocational records indicate Petitioner immediately obtained a job without submitting any job search records and failed to appear at any vocational rehabilitation meetings after his initial vocational meeting on December 18, 2011.

In Durfee,195 Ill.App.3d 886(1990) the Commission denied a wage loss award and the Appellate Court affirmed, noting that Petitioner did not attempt to return to work, but elected to remain in a job which he enjoyed and which coincided with his clerical interests. Similarly, in the present matter, it appears Petitioner was "fixated" on obtaining a job with a day care facility owned by his wife, despite the suitability of numerous other positions as identified in the labor market survey. (RX5).

In Esposito v. Fleetwood Systems, 00 IIC 441, the Commission denied a Section 8(d)1 award, finding: (1) that claimant engaged in a less-than-diligent job search; (2) that claimant's self-limiting job search was similar to that in the Durfee case; (3) that claimant had only demonstrated what he is capable of earning in a part-time capacity; (4) that claimant was comparing the wages of his current part-time job with his former full-time job; and, (5) that claimant's part-time job was not a true measure of his employability and earning capacity.

The Commission finds the 32.8 hours of employment with Petitioner's wife's daycare company is not a true measure of his earning capacity. Based upon the above, the Commission finds the "average amount" Petitioner is able to earn in his present suitable employment is $480.00 per week, based upon an hourly rate of $12.00 per hour, and assuming a 40 hour work week. Accordingly, the Commission modifies the wage differential award to $553.84 per week.

14IWCC0214

The Commission otherwise affirms and adopts the January 30, 2013 Decision of the Arbitrator, a copy of which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $770.20 per week for a period of 77-6/7 weeks, for the period of December 19, 2008 through June 15, 2010, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISISON that Respondent pay to Petitioner the sum of $770.20 per week in maintenance benefits for a period of 81-5/7 weeks, for the period of June 16, 2010 through January 8, 2012, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $553.84 per week from January 9, 2012 through the duration of Petitioner's disability, as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused Petitioner to become partially incapacitated from pursuing his usual and customary line of employment and an impairment of earnings.

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: MAR 27 2014
KWL/kmt
O-03/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0214

NICHOLSON, ALPHONSO
Employee/Petitioner

Case# 09WC014342

CITY OF CHICAGO A MUNICIPAL CORPORATION
Employer/Respondent

On 1/30/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1922 SALK, STEVEN B & ASSOC LTD
150 N WACKER DR
SUITE 2570
CHICAGO, IL 60606

0113 CITY OF CHICAGO
STEPHANIE LIPMAN
30 N LASALLE ST ROOM 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0214

ALPHONSO NICHOLSON,
Employee/Petitioner

v.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Employer/Respondent

Case # 09 WC 14342

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Chicago**, on **May 24, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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: _____

14IWCC0214

FINDINGS

On **December 18, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$60,076.12**; the average weekly wage was **$1,155.31**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **one** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$59,845.32** for TTD, **$0.00** for TPD, **$63,480.71** for maintenance, and **$10,723.02** for other benefits, for a total credit of **$134,049.05**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$770.20**/week for **77-6/7** weeks, commencing **December 19, 2008** through **June 15, 2010**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary maintenance disability benefits of **$770.20**/week for **81-5/7** weeks, commencing **June 16, 2010** through **January 8, 2012**, as provided in Section 8(b) of the Act.

Commencing **January 9, 2012**, the respondent shall pay the petitioner the sum of **$612.00**/week for the duration of his disability, as provided in Section **8(d)1** of the Act, because the injuries sustained caused **a loss of earnings rendering him to become permanently partially incapacitated from pursuing his usual and customary employment**.

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 JOANN M. FRATIANNI

January 28, 2013
Date

JAN 30 2013

F. Is Petitioner's current condition of ill-being causally related to the injury?

L. What is the nature and extent of the injury?

Petitioner was working for Respondent as a laborer. He drove a pick up truck and would empty garbage cans located in the downtown Chicago area. His duties included removing and emptying liners from wire garbage containers that weighed up to 100 pounds. Other duties included street sweeping and cleaning up after motor vehicle accidents. Petitioner testified that this was full time work 5 days a week, 8 hours a day and 40 hours a week.

On December 18, 2008, Petitioner was lifting a liner from a wire garbage basket that he estimated weighed between 130-140 pounds when he experienced a sudden onset of pain in his right shoulder. Petitioner testified that prior to this episode he experienced no right shoulder injury, but later on cross-examination admitted to injuring that shoulder while moving sandbags a year earlier.

Subsequent to this injury, Petitioner was sent for treatment to MercyWorks where he was seen later that day. A history of injury consistent with Petitioner's testimony was recorded at that facility and Petitioner complained of right shoulder pain. Petitioner was initially diagnosed with a right shoulder strain and placed on restricted duty. Petitioner never returned to work for Respondent after that date.

Petitioner was then prescribed an MRI by MercyWorks. The MRI was performed on January 2, 2009 and revealed a right shoulder partial rotator cuff tear. Following the MRI, Petitioner was referred to see Dr. William Heller, an orthopedic surgeon. Dr. Heller reviewed the MRI and felt it was consistent with a rotator cuff tendinopathy with partial thickness tearing. Dr. Heller injected the shoulder with cortisone, prescribed physical therapy, and restricted Petitioner to light duty work with no lifting of the right arm.

Petitioner after a period of physical therapy did not respond to treatment. Dr. Heller then prescribed surgery. On March 18, 2009, Dr. Heller performed surgery for repair of a full thickness tear along the interior aspect of the anterior superspinatus and posterior subscapularis tendon.

Post surgery, Petitioner remained under the care of Dr. Heller, who prescribed physical therapy, and who noted that he had sustained a large tear that was difficult to repair and was not completely repaired anatomically. On September 11, 2008, Dr. Heller noted that he was not surprised that Petitioner was experiencing difficulty with overhead strength and felt that he may never be 100%. Dr. Heller continued the light duty work restrictions with no lifting above chest level with the right arm.

On October 23, 2009, Dr. Heller noted normal motion of the right arm by weakness above chest level with grinding. Dr. Heller again felt that at the time of surgery the rotator cuff was not fully repairable, that Petitioner did not have normal overhead strength, and felt that he was at maximum medical improvement with permanent work restrictions. The restrictions were not lifting the right arm above chest level for work and to return as needed.

Following the release by Dr. Heller, Petitioner then remained under the care of MercyWorks.

Petitioner was examined on December 14, 2009, by Dr. Nikhil Verma, an orthopedic surgeon. This examination was at the request of Respondent. Dr. Verma felt that x-rays revealed a Type I acromion and metallic hardware present within the right shoulder consistent with a prior rotator cuff repair. Dr. Verma felt that a causal relationship existed between the patient's work injury of December 18, 2008 and the current shoulder condition post surgery.

Dr. Verma further indicated that further surgery may be necessary. Dr. Verma indicated work restrictions of 5 pounds lifting with no overhead activity.

Dr. Verma later reviewed the MRI arthrogram of January 2, 2010, and felt that Petitioner had a recurrent tear or persistent defect of the rotator cuff. Dr. Verma recommended a repeat arthroscopy with revision of the rotator cuff repair in a report dated May 26, 2010. Dr. Verma also reviewed the job description of Petitioner which included climbing, reaching above shoulder level, constant carrying, pushing, pulling, walking and lifting up to 50 pounds. Dr. Verma also reviewed a functional capacity evaluation dated March 29, 2010. The FCE revealed Petitioner functioning at a light level with maximum floor to waist lifting of zero pounds with carrying of 31 pounds. Dr. Verma agreed that absent further surgery, Petitioner was at maximum medical improvement. Dr. Verma further felt that the increased pain with overhead activity would be consistent with his diagnosis of recurrent rotator cuff tear.

When seen at MercyWorks on April 7, 2010, Petitioner was determined to be at maximum medical improvement and discharged with permanent restrictions of exerting up to 20 pounds of force occasionally and 10 pounds frequently. Petitioner was last seen at MercyWorks on May 26, 2011 and those same restrictions were continued. Petitioner was discharged on that date.

Petitioner testified that he continues to experience pain and discomfort to his right arm and shoulder, and feels a pop and grinding when he lifts it above chest level. Petitioner testified that he notices a difference in pain and weakness depending upon what level he lifts. Up to chest level, Petitioner testified that he has minor difficulty. Above chest level, he experiences more pain.

Petitioner testified that he is now unable to perform many activities that he once engaged in prior to the accident. He is now unable to use his right arm and shoulder while throwing a ball or during family activities such as picking up his daughter. He engages in shopping and other such activities.

Petitioner testified that he graduated from high school. Following graduation, he joined the United States Navy and was trained as a cook. Following military service, he worked for Best Buy and Joslyn Manufacturing. Petitioner testified that he is unable to work as a cook due to the physical requirements and is unable to return to work as a sanitation laborer for Respondent. Respondent has not offered alternative employment within his medical restrictions.

Petitioner engaged the services of MedVoc Rehabilitation at the request of Respondent. These services were for vocational rehabilitation. Petitioner had an appointment with Diamond Warren, a case manager, on December 11, 2011. Ms. Warren authored a report dated December 18, 2011, in which she summarized Petitioner's education and work history, his interests and medical information. Ms. Warren provided job leads and counseled Petitioner on how to secure his own job leads. (Px5)

On January 6, 2012, Petitioner notified Ms. Warren that he found work with Mother's Touch Child Care Services performing light custodial work, and that he would start the following Monday. Petitioner began such work on January 9, 2012 and earned $12.00 per hour. After the pay period ending January 22, 2012, Petitioner began working with Kids Academy in Chicago, performing light custodial work. Petitioner testified that this work is less strenuous than at Mother's Touch Child Care Services. Petitioner performs light cleaning and repair work including shopping at a local grocery story and Home Depot. He earns $12.00 an hour. Petitioner testified that he switched positions to work more hours at a less demanding position. He now works 32-35 hours a week, and has averaged 32.8 hours a week, or $393.60 per week.

Respondent introduced surveillance videos of Petitioner's activities. Petitioner is depicted lifting but it does not appear that he is lifting in excess of his medically imposed restrictions. In addition, a labor market survey from GenEx dated May 8, 2012 reflects potential earnings of $11.11 per hour in the Chicago region, or a figure less than what he is currently earning on an hourly basis.

Petitioner claims he is entitled to receive a wage differential award pursuant to Section 8(d)1.

The Arbitrator find that Petitioner has met his burden of proof that he is entitled to an award pursuant to Section 8(d)1, and that he is not capable of returning to his usual and customary work for Respondent. Petitioner was earning $1,155.31 per week for Respondent at the time of his injury and the current union rate of pay for his former job is $32.79 per hour, or $1,311.60. Based upon the average wages of $393.60 per week he is currently earning, this results in a wage differential of $612.00 per week.

Based further upon the above, the Arbitrator finds that the condition of ill-being as noted above is causally related to the accidental injury sustained on December 18, 2008, and adopts the opinions of Dr. Heller and Dr. Verma that concur with this finding.

N. Is Respondent due any credit?

Respondent is found to have paid $59,845.32 in temporary total disability benefits, $63,480.71 in maintenance benefits, and $10,723.02 in other benefits, for a total of $134,049.05, for which they are entitled to receive a credit against any claim for permanency.

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

DOUGLAS MOORE,

Petitioner,

14IWCC0215

vs.

NO: 09 WC 00034

FELMLEY DICKERSON CO.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of TTD and medical expenses and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner sustained an injury to his low back on September 2, 2008, working as a general laborer performing general demolition work. His injury was subsequently treated through a lumbar fusion at the L4-L5 level on May 9, 2011, and postoperative care with Dr. Stroink, the operating physician, and then Dr. Jhee, the succeeding treating physician.

On September 15, 2011, Dr. Jhee caused Petitioner to undergo a functional capacity evaluation, one that resulted in a finding that Petitioner was capable of medium-heavy physical demand work. Petitioner was subsequently ordered into a work conditioning program and participated in the same from September 20, 2011, through November 3, 2011. Petitioner, in May 2012, was found to be at MMI by Dr. Stroink and, in September 2012, released to work with restrictions by Dr. Jhee. The restrictions Petitioner was ordered to work under were no lifting of over 70 pounds, no overhead lifting of over 50 pounds and no frequent bending or twisting at the waistline.

14IWCC0215

Between Petitioner being found to be at MMI by Dr. Stroink in May 2012 and being released to work with restrictions by Dr. Jhee in September 2012, Petitioner was made the subject of video surveillance on July 30, 2012, and July 31, 2012, and was examined, pursuant to Section 16 of the Act, by Dr, Hauter on August 16, 2012. The video surveillance recorded Petitioner actively participating in the laying of a concrete, engaged in the prohibited activity of frequently bending and twisting at the waist and, more impressively, using a hammer to drive stakes into the ground. The Commission takes notice of Petitioner's testimony that he was a concrete finisher before commencing working as a general laborer. The video surveillance indicates Petitioner, at least temporally, resumed this career.

The activities depicted in the video surveillance support the conclusion Dr. Hauter drew after examining Petitioner on August 16, 2012, specifically, that Petitioner could return to work his regular work as a laborer and also that Petitioner was at MMI.

Petitioner, at his January 15, 2013, arbitration hearing acknowledged that he was in the video surveillance footage and that he was performing a flat-work concrete job for his uncle. He acknowledged further that he helped by building forms, using 2 x 4s and a hammer and nails and floated the concrete. He explained that his presence there was to demonstrate to his uncle's workers how to finish concrete and that he wasn't compensated for doing so. The Commission does not concern itself with whether Petitioner was compensated but concerns itself with Petitioner showing that he was capable of working. To be entitled to TTD, "a claimant must show not only that he did not work but also that he was unable to work." Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App.3d 710, 716, 182 Ill. Dec. 241, 609 N.E.2d 775 (1993). In the instant matter, Petitioner clearly demonstrated he was able to work.

On the basis of the video surveillance and Dr. Hauter's assertion that Petitioner can resume his career as a general laborer, the Commission concludes Petitioner was shown to have achieved MMI effective August 16, 2012, the date of Dr. Hauter's independent medical evaluation. Accordingly, the August 2, 2013, 19(b) Arbitration Decision is modified only to the extent that TTD benefits are awarded through August 16, 2012.

All other findings and orders contained in the August 2, 2013, 19(b) Arbitration Decision are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the August 2, 2013, 19(b) Arbitration Decision is modified to extend the period of temporary total disability through August 16, 2012.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $678.52 per week for a period of 203-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $35,456.15 for medical expenses under §8(a) of the Act.

14IWCC0215

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/mav
O: 1/28/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0215

MOORE, DOUGLAS
Employee/Petitioner

Case# 09WC000034

FELMLEY DICKERSON COMPANY
Employer/Respondent

On 8/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0252 HARVEY & STUCKEL
DAVID STUCKEL
101 S W ADAMS ST SUITE 600
PEORIA, IL 61602

0522 THOMAS MAMER & HAUGHEY LLP
BRUCE E WARREN
30 MAIN ST SUITE 500
CHAMPAIGN, IL 61820

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0215

DOUGLAS MOORE,
Employee/Petitioner

v.

FELMLEY DICKERSON COMPANY,
Employer/Respondent

Case # 09 WC 00034

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 15, 2013.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On the date of accident, **September 2, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$52,924.00**; the average weekly wage was **$1,017.78**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **no** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has in part* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$139,290.36** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of **$139,290.36**.

Respondent is entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

That heretofore on to-wit: **August 11, 2010,** a decision of the Arbitrator was entered and filed with the Commission under the provisions of paragraph (b) of Section 19, for the reason that the disabling condition of said Petitioner, as result of the accident sustained on **September 2, 2008.** Petitioner was awarded **90-2/7** of temporary total disability benefits and **$35,456.15** in medical expenses.

That the Decision of the Arbitrator on review was affirmed and adopted by the Commission by order dated **March 30, 2011,** and was paid by Respondent pursuant to said Decision.

After hearing additional testimony, the Arbitrator finds that the disabling condition of said Petitioner as a result of the accident sustained on **September 2, 2008,** has reached a permanent condition, and the following award shall be in addition to the compensation hereinbefore awarded.

Respondent shall pay Petitioner temporary total disability benefits of **$678.52**/week for **200-4/7** weeks, commencing **September 24, 2008** through **July 29, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from September 24, 2008 through January 15, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $139,290.36 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$335.00,** as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

ORDER (CONTINUED)

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 JOANN M. FRATIANNI

July 29, 2013
Date

ICArbDec19(b)

AUG 2 - 2013

L. What temporary benefits are in dispute?

Petitioner testified he sustained an injury to his lower back on September 2, 2008. This matter proceeded to trial on a Section 19(b) Petition before Arbitrator White on June 18, 2010. A decision was filed on August 11, 2010, awarding 90-2/7 weeks of temporary total disability benefits for the period commencing September 24, 2008 through June 18, 2010, and $35,456.15 in medical expenses were also awarded to Petitioner. Petitioner was awarded certain prospective medical care.

The decision of Arbitrator White was affirmed and adopted by the Commission following a review by order dated March 30, 2011. The matter was remanded for further hearings on Arbitration consistent with those decisions.

Following his testimony before Arbitrator White, Petitioner underwent surgery on May 9, 2011 with Dr. Stroink, in the form of a fusion at L4-L5. (Px6) Post-operatively, Petitioner continued under the care of Dr. Stroink, who later released him and referred him to see Dr. Jhee.

Petitioner first saw Dr. Jhee on July 5, 2011. Dr. Jhee prescribed a functional capacity evaluation. (Px5) This was performed on September 15, 2011 and demonstrated a medium-heavy category of work which indicated two handed occasional lifting and carrying of 75 pounds from 6 inches to waist level and a two-handed frequent lift 43 pounds from 6 inches to waist level. The Jhee following the FCE prescribed a work-conditioning program. Petitioner underwent work-conditioning from September 20, 2011 through November 3, 2011.

Petitioner then saw Dr. Stroink on May 1, 2012 and found to be at maximum medical improvement. Dr. Jhee then released Petitioner with work restrictions effective September 25, 2012, of no lifting over 70 pounds, no overhead lifting of 50 pounds and no frequent bending or twisting at the waistline.

Dr. Jhee testified by evidence deposition that he agreed with the results of the FCE and prescribed restrictions consistent with that examination. Dr. Jhee declined to testify that these restrictions were permanent and felt they would depend partly on how Petitioner did while working under such restrictions. Dr. Jhee testified that he was unaware if Petitioner was working and had no plans to continue treatment. Petitioner last saw Dr. Jhee on September 25, 2012, who noted his examination findings and restrictions were unchanged.

Petitioner was examined by Dr. Hauter at the request of Respondent. Petitioner saw Dr. Hauter on August 16, 2012. Dr. Hauter testified by evidence deposition that Petitioner could be returned to his regular work in construction as a laborer and was at maximum medical improvement. Dr. Hauter felt that Petitioner was magnifying his symptoms to justify the restrictions under the FCE.

Respondent also introduced surveillance from July 30, 2012 through July 31, 2012. (Rx3) Petitioner at that time was observed participating in a concrete project at a private residence, and was filmed bending and twisting at the waist with no apparent difficulty. Petitioner was filmed squatting repeatedly, carried various items and reached overhead. He used a hammer, pulled out stakes and carried lumber. The film does not seem to depict any difficulty in performing these tasks or any physical discomfort. In addition, Petitioner was filmed shopping and carrying his children, and placing one in a car seat.

Petitioner testified the video (Rx3) accurately depicted him working as a concrete finisher. He described that work as being heavy. The job on the video was described as "flat work" and he was invited to work there by his uncle. Petitioner testified he assembled the wood form for the concrete pour, using 2 x 4" lumbar. Stakes were driven into the ground to hold the lumber in place. Petitioner testified he used a sledgehammer for this task. He also used a "float" weighing 20 pounds including the handle to smooth the concrete. This involved bending and twisting at the waist. He also used an edger while on his knees, and participated in breaking up the form using a sledgehammer.

Petitioner testified that at the end of each day after performing these tasks, he was sore, but he was able to finish all work. The driveway he was working on was 70 feet long.

Dr. Hauter testified that he viewed the DVD surveillance and it confirmed his opinion that Petitioner could return to regular work and was at maximum medical improvement.

Based upon the above, the Arbitrator finds that Petitioner was at maximum medical improvement effective September 25, 2012, the last visit with Dr. Jhee, when he was discharged from further care and was capable of full duty work as early as July 30, 2012, based on the surveillance evidence.

Based further upon the above, the Arbitrator finds that Petitioner was temporarily and totally disabled from work commencing September 24, 2008 through July 29, 2012, and was capable of full duty work on July 30, 2012.

All other periods of time claimed for temporary total disability benefits by Petitioner in this matter are denied for the reasons cited above.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner introduced into evidence certain medical charges that were incurred after this accidental injury:

Diagnostic NeuroTechnologies	$ 203.00
Bloomington Rehab Associates	$ 132.00

These charges total $335.00.

See findings of this Arbitrator in "J" above.

These charges represent reasonable and necessary medical care and treatment designed to cure or relieve the condition of ill-being that was causally related to this accidental injury. The Arbitrator finds Respondent to be liable for same to Petitioner, subject to the provisions of the medical fee schedule created by Section 8.2 the Act.

In addition to the above, a lien from the Department of Public Aid in the amount of $1,466.07 was filed. Respondent is to hold Petitioner harmless from the lien.

All other medical charges not listed above that were incurred after September 25, 2012 are hereby denied, for the reasons cited above.

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

LIBORIO OROZCO,

Petitioner,

14IWCC0216

vs.

NO: 12 WC 07850

INNOPHOS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue of PPD and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner was involved in a crushing incident to his right hand, on June 15, 2010, that resulted in a right distal radius fracture. Petitioner subsequently underwent an open reduction of the fracture and internal fixation on June 24, 2010, and then physical therapy from July 20, 2010, through September 8, 2010. Two days prior to the conclusion of his physical therapy, on September 6, 2010, Petitioner was released to return to full duty work without restrictions. Petitioner returned to his pre-injury job activities for Respondent.

On February 1, 2013, the arbitration hearing to address Petitioner's claim was conducted with the only contested issue being the nature and extent of Petitioner's permanent disability. At that time, Petitioner testified to experiencing continued pain, diminished strength and sensitivity, and being weather-sensitive in his right hand. He also testified further that, since the accident, he sometimes has to ask for assistance at work in order to perform his job. Based on Petitioner's testimony, the presiding Arbitrator found Petitioner had sustained a 40% loss of his right hand. Respondent took a timely appeal of the Arbitrator's decision.

14IWCC0216

In reviewing the testimony both of Petitioner and Respondent's witness, Steve Battig, the Commission concludes the extent of Petitioner's injuries were not as great as found by the presiding Arbitrator. The Commission notes, despite Petitioner's lingering complaints of pain, weakness and diminished sensitivity, no recent attempt was taken to address these complaints and finds the last time Petitioner was seen for his right wrist and hand was on October 13, 2010. The Commission notes further Petitioner acknowledged, on that date, that he did not tell Dr. Dilella, his treating physician, about any pain that he was experiencing to his right hand despite, as he claimed, it being painful at that time. Batting, Respondent's operations manager, testified that he witnessed no diminution in Petitioner's job performance following his injury and specifically noted Petitioner was able to perform his job with same manual dexterity after his injury as he did before the injury. Batting also testified that he never witnessed Petitioner seeking assistance from a co-worker.

The Commission finds it difficult to conceive that Petitioner, who sustained an uncontested work injury, would abstain from further treatment if his right wrist and hand was as symptomatic as he claimed it to be. Accordingly, the Commission finds it necessary to reduce the amount of the benefits awarded under Section 8(e) of the Act, finding 30% loss of use of the right hand to be an appropriate compensation for Petitioner's residual condition.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $555.82 per week for a period of 60½ weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 30% loss of use of Petitioner's right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/mav
O: 2/10/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0216

OROZCO, LIBORIO
Employee/Petitioner

Case# 12WC007850

INNOPHOS
Employer/Respondent

On 4/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0704 SANDMAN LEVY & PETRICH
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
KIMBERLY VAUGHN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0216

Liborio Orozco
Employee/Petitioner

Case # 12 WC 7850

v.

Consolidated cases:

Innophos
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on 2/1/13. 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 _____

14IWCC0216

FINDINGS

On 06-15-10, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $48,171.24; the average weekly wage was $926.37.

On the date of accident, Petitioner was 66 years of age, married, with 0 children under 18.

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 $7,234.37 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $7,234.37.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay petitioner permanent partial disability benefits for $555.82 per week for 82 weeks, because the injury sustained caused the 40% loss of use of the right hand, as provided in Section 8(e) of the Act.

Respondent shall be given a credit of $7,234.37 for temporary total disability benefits paid pursuant to section 8(b) of the Act.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 10, 2013

APR 10 2013

FINDINGS OF FACT

Petitioner Liborio Orozco (hereafter "Petitioner") was employed as an operator for Innophos (hereafter "Respondent") on June 15, 2010. Petitioner testified that he began working for respondent in September 1983.

On June 15, 2010, petitioner was cleaning a machine when a mop became stuck in the mechanism. Petitioner attempted to remove it and was injured when one of the wheels of the machine came down on his right wrist.

Petitioner came under the care of Dr. Carl Dilella, an orthopedic surgeon with Bone & Joint Physicians. Petitioner was seen for care on June 16, 2010 and was diagnosed with a right distal radius fracture. Dr. Dilella recommended that petitioner undergo surgery to repair the fracture. Dr. Dilella ordered that petitioner could return to work in a light duty capacity so long as he did not use his right hand but remained off work, as this type of light duty was not available.

Petitioner eventually underwent surgery performed by Dr. Dilella on June 24, 2010. The procedure was open reduction of the fracture and internal fixation. The fracture was repaired by placing a plate and six screws. Petitioner testified that this hardware has been retained and is still present in his wrist as of the date of trial.

Petitioner underwent physical therapy from July 20, 2010 through September 8, 2010. Petitioner was released by Dr. Dilella to return to full duty work as of September 6, 2010. Petitioner returned to his pre-injury job as an operator at that time.

Petitioner was seen by Dr. Dilella on October 13, 2010. This was three and a half months post-surgery. Petitioner reported no new complaints and that he had been working full duty with no restrictions. During that appointment petitioner reported that he was completely pain-free. Upon physical examination, Dr. Dilella found that petitioner had no palpable tenderness and no erythema, ecchymosis, or effusion present. Petitioner demonstrated full motion of the wrist in both volar and dorsiflexion as well as radial and ulnar deviation. Strength testing was normal. Petitioner was able to make a full fist with no pain and had full range of motion of all digits. X-rays taken that day showed a healing fracture with well-positioned hardware. Petitioner was declared to be at maximum medical improvement ("MMI") and was discharged from care; being advised that he could return if needed. Dr. Dilella's records were admitted into evidence at Petitioner's Exhibit 1.

Petitioner was off work from June 16, 2010 through September 5, 2010. Petitioner testified that he was paid temporary total disability ("TTD") benefits for that period. The parties stipulated that all of petitioner's reasonable, necessary, and related medical bills were paid by respondent. Petitioner testified that he has not missed any work, except for two weeks disciplinary action, since returning from his work injury. He has not experienced any loss or modification of his work income.

Petitioner testified that he has not returned to care since being discharged by Dr. Dilella though he testified that understands that he had the right to return to care if he thought it necessary. Petitioner testified that he still takes prescription pain medication for his wrist but that it is prescribed by his primary care physician. No medical records were admitted into evidence to support this contention by petitioner.

Admitted as Respondent's Exhibit 1 was petitioner's job description. Petitioner works as a Metaphos Operator at Innophos' Waterway plant location. Petitioner's job requires operation of the Meta furnace, using physical effort to clear obstructions from the machine wheels, and visiting the furnace to control the furnace environment for approximately five minutes per hour but up to 30 minutes per hour in upset conditions. Petitioner's job requires frequent sitting and temperature changes. It also requires occasional lifting of on average 15 pounds with a maximum lift of 50 pounds. On rare occasions petitioner must perform reaching activities.

Petitioner returned to his job as an operator for respondent. Petitioner testified that he sometimes needs help lifting heavy objects since he has returned to work but did not need this help before his accident. He testified that he sometimes must seek out other employees to help him. He testified that when he cannot find another employee to help, he performs the task anyway.

Respondent called Steve Battig, operations manager at Innophos, to testify. Mr. Battig was working as site manager at the times relevant to petitioner's workers' compensation claims. Mr. Battig was one of petitioner's supervisors both prior to his work accident and after his work accident and was promoted to operations manager in January 2013.

Mr. Battig testified that he witnessed petitioner in his abilities to perform his job both before and after his work injury. He testified that Petitioner has been able to perform all of his job tasks since returning to work on September 6, 2010. Mr. Battig testified that petitioner's job requires substantial manual dexterity and petitioner has been able to perform the manual dexterity tasks, including use of a computer, without any difficulty. Mr. Battig testified that he has never seen petitioner ask any other employee for assistance in performing his job and has not observed any pain behaviors. He also testified that petitioner has not complained of pain or inability to perform his job and has not requested to return for medical treatment. He testified that petitioner has not missed any time from work related to his work injury since petitioner's return on September 6, 2010.

CONCLUSIONS OF LAW

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified that he was injured while cleaning a machine at work on June 15, 2010. No contrary evidence was presented to suggest that Petitioner was not injured at work. Therefore, the Arbitrator concludes that Petitioner's condition of ill-being is causally related to his June 15, 2010 work accident.

L. What is the nature and extent of the injury?

The Arbitrator concludes that petitioner has suffered a permanent partial disability equal to 40% loss of use of the right hand. This is equal to $45,577.24 (82 weeks PPD at $555.82 PPD rate).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WASFI ALSARAJ,

Petitioner,

14IWCC0217

vs.

NO: 12 WC 41848

TAXI AFFILIATION SERVICES, INC., LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of the admissibility of evidence, accident, notice, causal connection, wage rate, medical expenses, prospective medical care, temporary total disability and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner has been a Cab Driver for 9-10 years. He cannot operate a cab in Chicago without a medallion, which is a license provided by the City. He entered into a lease agreement with the owner of a medallion in order to operate a cab. He leased a 2011

Ford Escape. The first time he leased this vehicle was in April of 2012. He would pick up the vehicle from the Elston garage.

2. On September 4, 2012, Petitioner picked up a fare at the airport. While lifting the passenger's luggage, something popped in his back. The luggage was filled with books. Petitioner had pain in his left leg and back.

3. Petitioner did not immediately seek treatment, thinking it was just a muscle problem that would subside. He worked through the following week, and just so happened to be on an antibiotic and Vicodin due to an unrelated tooth infection. He was taking 6-10 pills per day in total. However, he was unable to carry anything, found it difficult to sit, and walked with a limp.

4. On September 11, 2012 Petitioner underwent a root canal. He took Vicodin that day and the morning of September 12th. Afterwards he discontinued use. He then began noticing an increase in his back and leg pain. He was unable to operate the cab. On September 15th Petitioner met with the garage owner. He told the owner that he had hurt his back lifting luggage, but that he wanted to discuss keeping the leased car despite the fact that he was not working. The owner gave Petitioner 30 days to get healthy.

5. On October 22, 2012, after chiropractic treatment and Vicodin failed to reduce his pain, Petitioner was taken off of work by Dr. Abu-Shanab until March 8, 2013. During this time period, the acupuncture and Galvanic stimulation eased Petitioner's pain.

6. Eventually, a February 18, 2013 injection by Dr. Bartfield did relieve Petitioner's pain. Petitioner also believed that his treatment with Dr. Abu Shanab was helping. He returned to work on March 4, 2013 with restrictions. He testified that he has back and left leg pain every 30 minutes. He was even forced to stand during his arbitration hearing.

7. Prior to this accident, Petitioner did not know that workers' compensation covered an injury at work. He has never filed a workers' compensation claim prior to the one in question. On November 25, 2012, Petitioner informed a friend of his injury. The friend subsequently informed him of workers' compensation. 2 days later Petitioner completed an accident report.

8. Robert Anderson is the General Manager of the Elston garage for Taxi Medallion Management. He testified that Petitioner did inform him that he injured his back.

9. Petitioner submitted into evidence a 1099 form for the year 2012 which showed his earnings for the year. This was used by the Arbitrator to calculate an average weekly wage of $447.79.

14IWCC0217

The Commission affirms the Arbitrator's rulings on accident, notice, average weekly wage, temporary total disability and medical expenses.

The Commission, however, modifies the Arbitrator's ruling on the admissibility of evidence. The Arbitrator admitted an Independent Medical Examination (IME) Report from Dr. Coe over Respondent's objection. The report was admitted under the assertion that it was not admitted for the opinion offered within, but to support the Penalties and Fees Petition. The Arbitrator also drew an inference that, since Respondent failed to admit the report of its own physician, the findings in said report must have been contrary to Respondent's position.

The Commission finds that the IME Report is inadmissible hearsay, since Dr. Coe was not made available either at trial or via a deposition. In order for the report to support Petitioner's Petition, the report (despite its hearsay characterization) would have to be admitted for the truth of the matter asserted. This would be improper. Accordingly, the Commission finds that the report is not admissible in the case at bar.

However, the fact that the report itself is inadmissible hearsay has no bearing on the Arbitrator's (or the Commission's) ability to draw an inference from the absence of the report in evidence. The fact that Respondent had access to an IME report from their own physician and chose not to present it at trial allows for an inference that the report would not have been favorable for Respondent. Thus, while the IME report is inadmissible hearsay, the inference drawn from Respondent's failure to admit the report in evidence should stand.

The Commission also modifies the Arbitrator's ruling on penalties and fees. Respondent was served with a §19(b) Petition on December 31, 2012, in which Petitioner was seeking payment of medical expenses. However, Respondent did not pay any medical expenses and it was stipulated that Respondent paid TTD in the amount of $3,230.78, purporting to be TTD from November 30, 2012 through March 3, 2013. Contrary to Commission rules, Respondent never issued a written explanation for the basis of its failure or refusal to pay benefits sought by Petitioner.

Moreover, when Respondent did pay some compensation to Petitioner, it was paid on March 19, 2013, more than 10 weeks after the beginning of the disability period it purports to cover. Further, the payment paid at the minimum TTD rate for a single individual with no children, despite the fact that Respondent stipulated Petitioner was married with three dependents.

Respondent stated that Chicago cab drivers are governed by the City of Chicago Bureau of Consumer Affairs, which regulates cab drivers, including their wages. The Bureau indicates that the annual wage for a cab driver is $12,000.00. Respondent stated that this amount should be used to calculate Petitioner's average weekly wage, which would correspond to an average weekly wage of $230.77.

With respect to the TTD rate paid, it appears that Respondent was simply paying TTD in amounts equal to Petitioner's average weekly wage (based on Respondent's own calculation), rather than paying the minimum statutory amount for a single adult with no dependents. Although Respondent's average weekly wage calculation was wrong, it was based on City regulations. Thus Respondent's calculation and payment of benefits was not unreasonable or vexatious.

Based on the evidence, the Commission finds that Respondent should be liable for §19(L) penalties, as it failed to set forth in writing the reason for its delay in payment of benefits. However, the award for §19(K) penalties and §16 fees is vacated, as Respondent's defenses, while wrong, were nonetheless made in good faith.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses, prospective medical expenses prescribed by Dr. Lorenz and temporary total disability benefits related to his work-related low back conditions under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the IME report of Dr. Coe is denied as inadmissible hearsay, although the inference drawn from Respondent's failure to admit the report in evidence should stand.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is solely entitled to §19(L) penalties in the amount of $3,210.00; §19(K) penalties and §16 fees are vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC0217

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
O: 2/13/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

ALSARAJ, WASFI
Employee/Petitioner

Case# 12WC041848

14IWCC0217

TAXI AFFILIATION SERVICES LLC
Employer/Respondent

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

4788 HETHERINGTON KARPEL BOBBER ET AL
ALAN KARPEL
161 N CLARK ST SUITE 2080
CHICAGO, IL 60601

4866 KNELL & O'CONNOR
MICHAEL DANIELEWICZ
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Wasfi Alsaraj
Employee/Petitioner

v.

Taxi Affiliation Services LLC
Employer/Respondent

Case # **12** WC **41848**

Consolidated cases: _____

14IWCC0217

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **04/24/2013 and 05/07/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0217

FINDINGS

On the date of accident, **09/04/2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$16,376.00**; the average weekly wage was **$447.79**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$3,230.78** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$3,230.78**.

Respondent is entitled to a credit of **$-0-** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$330.00**/week for **19** weeks, commencing **10/22/2012** through **03/03/2013**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$3,230.78** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$3,230.78**.

Respondent shall pay reasonable and necessary medical services of **$12,600.08**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay prospective medical care recommended by Dr. Lorenz in his 01/17/2013 progress note including a left L5-S1 microdiskectomy, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner penalties of **$5,333.79**, as provided in Section 16 of the Act; **$7,819.65**, as provided in Section 19(k) of the Act; and **$3,210.00**, as provided in Section 19(l) of the Act. Respondent shall also pay to Petitioner additional penalties as provided in Section 16 of the Act and Section 19(k) of the Act in an amount to be determined after the prospective medical care awarded in this decision is rendered and billed.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

L. Thompson Smith

Signature of Arbitrator

July 15, 2013

ICArbDec19(b)

JUL 15 2013

14IWCC0217

FINDINGS OF FACT

The disputed issued on this matter are: 1) accident; 2) notice; 3) causal connection: 4) average weekly wage ("AWW"); 5) past medical care; 6) prospective medical care, 7) temporary total disability ("TTD"); and 8) penalties and fees.

Petitioner ("Wasfi Alsaraj") has been employed as a taxicab driver for nine or ten years. For the past approximately six years he has been driving for Taxi Affiliation Services, LLC/Yellow Cabs, hereafter referred to as ("Respondent").

Petitioner leases the cabs for a week at a time. The terms of the lease are contained in a uniform lease agreement that is drafted by the City of Chicago, pursuant to ordinance. Under the terms of the lease, Petitioner pays $31.50 a week for his own workers' compensation insurance. *See,* PX1.

In April of 2012, Petitioner began leasing taxicab number 386. It is a 2011 Ford Escape that runs on compressed natural gas (CNG). He chose that vehicle because the City of Chicago has a pilot program for CNG taxicabs that allowed him to pick up passengers at the airports without waiting in line for two and a half to three hours. Petitioner leased the cab from the Elston garage and Mr. Bob Anderson was the manager of the Elston garage on September 4, 2012.

Respondent is one of Yellow Cab's companies and issues Petitioner's 1099 forms. The parties have stipulated that Respondent was Petitioner's employer on the date of the alleged accident.

Petitioner was in good health on September 4, 2012. He had never injured his back, sought treatment from a healthcare provider for a back or leg condition, been injured in a taxi cab collision, or filed a claim for or received workers' compensation benefits in the United States or elsewhere before his claimed accident.

On September 4, 2012, Petitioner was operating Yellow Cab number 386. At approximately 10:00 a.m., he picked up a female passenger at the airport and when he attempted to pick up her luggage, he felt something pop in his back. He put the luggage down and asked the starter to help the woman with her luggage because something happened to his back.

Petitioner experienced pain in his back and left leg after the accident. He did not seek medical attention because he thought it was a muscle sprain that would get better without treatment.

Petitioner was taking Vicodin at the time of the accident as it had been prescribed by his dentist for an infection and swollen tooth. The dentist had prescribed two Vicodin pills a day and Petitioner began taking six to ten pills a day to compensate for his back pain.

Petitioner testified that it was difficult for him to sit after the accident and he had to adjust the way that he sat in order to operate the taxicab. It was also difficult for him to carry anything, so he did not. In addition, he testified that he had a limp after the accident.

Petitioner underwent a root canal on September 11, 2012. He did not take Vicodin the following day because he no longer had pain in his mouth. His back and leg pain began to increase and he could not sit for long periods, so he stopped driving the cab.

On September 15, 2012, Petitioner went to the Elston garage to see Bob Anderson. He had already paid his lease for the week but was not driving the cab. He wanted to find out whether Mr. Anderson would continue to lease the cab to him if he stopped driving. During the conversation, he told Mr. Anderson that he hurt his back, lifting luggage. Mr. Anderson did not tell him he needed to fill out an accident report.

On September 19, 2012, Petitioner saw Dr. Yehya, a chiropractor at Health First Center in Bridgeview. He told the doctor that he had hurt his while back lifting luggage and Dr. Yehya administered chiropractic treatment over four visits. The treatment consisted of massages, electrical stimulation, and stretching on a decompression machine. The

decompression machine made Petitioner's pain worse and Dr. Yehya referred Petitioner to Dr. Khudeira, a medical doctor.

Petitioner saw Dr. Khudeira on October 1, 2012. The progress note of the visit includes a history of Petitioner lifting heavy luggage about a month earlier, after which he developed pain in his left knee radiating to his left lower back. The doctor found a positive straight leg raise on the left at 40 degrees and a moderate decrease in lumbar range of motion. He diagnosed low back pain with left-sided sciatica and left knee pain. He prescribed Vicodin and ordered an MRI of the lumbar spine and an x-ray of the left knee. The left knee x-ray was normal however, the lumbar spine MRI revealed a left-sided disc bulge abutting the thecal sac at the L4-5 level, which caused mild left foraminal stenosis. A posterior annular tear of the L4-5 disc was also appreciated. The radiologist also noted a moderate-sized bulge at the L5-S1 level that caused mild compression of the cauda equina leading to mild canal stenosis. According to the radiologist, the L5-S1 disc caused mild to moderate compression of the left S1 nerve root.

Petitioner returned to Dr. Khudeira on October 11, 2012, who again noted a positive straight leg raise on the left and diminished deep tendon reflexes. After reviewing the MRI, he diagnosed a herniated disc causing sciatica in the left leg. He prescribed more Vicodin and a Medrol dose pack. *See,* PX5.

Petitioner saw Dr. Rashid Abu-Shanab at Bridgeview Chiropractic Center on October 22, 2012. The history of the accident notes that Petitioner's symptoms started on September 4, 2012 when he lifted a customer's baggage while working as a taxi driver. Treatment to date, had not been effective. He was unable to drive and Petitioner's symptoms had become "unbearable". He was experiencing sharp pain radiating to his left buttock, calf and hip. Dr. Shanab diagnosed displaced lumbar discs, lumbosacral neuritis/radiculitis, muscle trigger points, and left sciatica. The prognosis was poor and he took Petitioner off work. Over the following month, Dr. Abu-Shanab administered chiropractic therapy to Petitioner and while his symptoms improved moderately, he was still experiencing low back pain radiating to his left calf. *See,* PX6.

On November 24, 2012, Petitioner saw Anas Alzoobi, M.D., on the referral of Dr. Abu-Shanab. Dr. Alzoobi prescribed Gabapentin and recommended a neurosurgical consult for L5-S1 left neuroforaminal stenosis. Dr. Abu-Shanab then referred Petitioner to Steven Bardfield, M.D. at Hinsdale Orthopaedics, whom he saw on December 12, 2012. The doctor noted the history of the accident and Petitioner's treatment, to date. He conducted a physical examination of Petitioner and reviewed his MRI images. He diagnosed Petitioner as having lumbar radiculopathy with a left-sided disc herniation, secondary to the work-related injury. He recommended that Petitioner continue therapy and scheduled an epidural injection at L5-S1. He also kept Petitioner off work. *See,* PX7.

Dr. Bardfield performed the first epidural injection at Salt Creek Surgical Center on December 17, 2012. Petitioner testified that it helped, but not much. On January 10, 2013, Dr. Bardfield referred Petitioner to Mark Lorenz, M.D. for a surgical consult. *See,* PX7 & PX8.

Petitioner saw Dr. Lorenz on January 17, 2013, who noted the history of the accident and the treatment, to date. He reviewed the MRI and conducted a physical examination and found 1) decreased sensation, 2) a positive straight leg raise; and 3) diminished reflexes in the left leg. He noted that Petitioner's left S1 reflex, which was only slightly present upon Dr. Bardfield's examination, was now absent altogether. Dr. Lorenz diagnosed an acute left L5-S1 disk herniation with left leg radiculopathy and advancing neurological deficits. He recommended a left L5-S1 micro-diskectomy and opined that Petitioner's September 4, 2012 accident had caused his condition and the resulting disability. Petitioner continued to receive chiropractic therapy after seeing Dr. Lorenz.

On February 18, 2013, he received another epidural injection from Dr. Bardfield. The second injection helped more than the first. He asked his doctors to release him to work so he could "put food on the table". Petitioner testified that he resumed driving a cab on March 4, 2013. *See*, PX8.

On March 8, 2013, Dr. Abu-Shanab wrote a note allowing Petitioner to return to work in a light duty capacity, as a cab driver. He advised him to take breaks between passengers

to get out of the cab to stretch, walk, and not lift more than fifteen (15) pounds. *See,* PX6.

On March 12, 2013, Petitioner was examined by Dr. Jeffrey Coe, at the request of Respondent. As Respondent declined to offer Dr. Coe's report into evidence, Petitioner sought to introduce the report but Respondent objected to its admission on hearsay grounds. That initial objection was sustained however, the report was ultimately admitted for the limited purpose of supporting Petitioner's claim for penalties and attorney's fees. *See,* PX9.

At the time of trial Petitioner testified that if he sits for half an hour, he will get a stinging sensation in his back. The pain starts in his left leg behind the knee and under the calf. It goes up his thigh and into his back. Any activity, including walking, makes the pain worse. When Petitioner stands up, it releases the pain in his calf. If he stands too long, however, the pain recurs. He has to alternate between standing and sitting and the harder the surface he sits on, the faster the pain will occur. It hurts when he walks too much or sits too much. The best position for him is to lay down on a hard surface. The pain is better now than when the injury first occurred. Petitioner testified that he wants to have the surgery recommended by Dr. Lorenz.

Petitioner testified that at the time of his accident he was not aware of the procedure that cab drivers were supposed to follow when they had a work-related injury. He did not know that workers' compensation insurance applied to his accident. He testified that he thought that workers' compensation only covered motor vehicle accidents. In late November 2012, another cab driver by the name of Zaharan told him that workers' compensation applies to all work-related injuries, whether or not they involve a motor vehicle accident.

On November 27, 2012, after speaking with Zaharan, Petitioner went to Yellow Cab's corporate offices to file an accident report. He spoke with Clifford Lindsey who handles insurance matters. Mr. Lindsey interviewed Petitioner at his desk and typed the report on his computer. *See,* RX1. Petitioner told Mr. Lindsey that he hurt his back lifting luggage at the airport on September 4, 2012 at about 10:00 a.m. Petitioner was not sure

which airport the accident occurred because he was working both airports at the time of the accident. Mr. Lindsey demanded that Petitioner choose an airport and Petitioner chose O'Hare because, to the best of his recollection, that where the accident occurred. At trial Petitioner was fairly certain that the accident occurred at O'Hare, but conceded that it may have been at Midway.

Petitioner reviewed and signed the accident report prepared by Mr. Lindsey. He did not see it again until Respondent's counsel presented it to him during his cross-examination on April 24, 2013. Petitioner testified that the words used in the accident report were Mr. Lindsey's, but they fairly and accurately summarized what Petitioner told Mr. Lindsey about the accident. That is why he signed the accident report.

Petitioner surrendered his chauffeur's license to the City of Chicago Department of Transportation on November 30, 2012 on the advice of counsel. *See,* RX2.

CONCLUSIONS OF LAW 14IWCC0217

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Under the provisions of the Illinois Workers' Compensation Act, the Petitioner has the burden of proving by a preponderance of credible evidence that the accidental injury both arose out of and occurred in the course of employment. *Horath v. Industrial Commission*, 96 Ill. 2d 349, 449 N.E. 2d 1345 (1983). An injury "arises out of" the Petitioner's employment if its origin is in the risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *See, Warren v. Industrial Commission*, 61 Ill. 2d 373, 335 N.E. 2d 488 (1975). *See, Hannibal, Inc. v. Industrial Commission*, 38 Ill. 2d 473, 231 N.E. 2d 409, 410 (1967). It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n, 203 Ill. App. 3d 809, 815-16* (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

The hearing on this Petition for Immediate Hearing was continued several times and then bifurcated to give Respondent every opportunity to investigate Petitioner's claim and to obtain evidence to refute it, if warranted. Despite these extensions of time, Respondent did not present any evidence at trial that refuted Petitioner's claim. On the initial trial date, Respondent was granted an extension of time to obtain an independent medical examination ("IME") under Section 12 of the Workers' Compensation Act (the "Act"). Petitioner testified that he was examined by Dr. Jeffrey Coe on March 12, 2012 at the request of the workers' compensation insurer however, Respondent did not offer Dr. Coe's report into evidence, and objected on hearsay grounds when Petitioner sought to admit the report. The failure to offer Dr. Coe's report into evidence gives rise to an inference that Dr. Coe's testimony was adverse to Respondent. *See, Dugan v. Weber*, 175 Ill. App. 3d. 1088, 1096, 530 N.E.2d 1007, 1012 (1988).

On the next trial date, Respondent was granted another extension of time to obtain global positioning system ("GPS") data from the taxicab Petitioner was operating at the time of the alleged accident because Respondent's counsel claimed the data would show that Petitioner was not where he claimed to be at the time of the alleged accident. During his cross-examination of Petitioner, Respondent's counsel established that the taxicab Petitioner was leasing was equipped with a GPS device that was operating on the date of accident, yet Respondent did not seek to introduce any GPS data into evidence. Once again, the failure to offer this evidence leads the Arbitrator to infer that it was adverse to Respondent and supportive of Petitioner's claim.

At the conclusion of Petitioner's testimony Respondent sought another continuance to locate Bob Anderson, the manager of the Elston garage, in order to corroborate Petitioner's testimony that he told him, in a timely manner to satisfy the Act's notice requirement, he injured his back while lifting luggage. The Arbitrator granted Respondent's request and bifurcated the trial so that Mr. Anderson could testify. Mr. Anderson testified at the next hearing and corroborated Petitioner's testimony regarding their conversation and the date that it occurred.

At the conclusion of testimony, Respondent introduced the accident report prepared by its insurance representative, Clifford Lindsey, into evidence. The report, which includes a two page "Confidential Drivers Statement" drafted by Mr. Lindsey, and a "Driver Accident Report" filled out by Petitioner, supports Petitioner's testimony regarding the accident and his injuries. The only question raised by the report concerns the accuracy of Mr. Lindsey's typing because he records the time of the accident as 10:00 a.m., consistent with Petitioner's testimony. However, on the top of the report and on the "First Notice of Loss" he records the time of accident as 10:00 p.m., which is apparently a typographical error as the "Driver Accident Report" filled out by Petitioner states the accident happened at 10:00 a.m. The Arbitrator finds that the Petitioner has proven, by a preponderance of the evidence, that he had an accident that arose out of and in the course of his employment.

E. Was timely notice of the accident given to respondent?

The Arbitrator finds that Petitioner satisfied the notice requirements of the Act on September 15, 2012 when he told Bob Anderson, the manager of the Elston garage, that he injured his back while lifting luggage. The Arbitrator is not persuaded by Respondent's argument that notice was defective because it lacked detail. Mr. Anderson acknowledged that on September 15, 2012, Petitioner told him he injured his back while lifting luggage. When Respondent's counsel inquired as to whether Petitioner asked him during that conversation "about reporting the work injury," Anderson could not recall but conceded that he "knew about that injury." In *Westin Hotel v. Industrial Commission*, 372 Ill. App. 3d. 527, 541, 865 N.E.2d 342, 355-6 (2007) the court held that a claimant's oral statement to a secretary that he was injured and needed to see a doctor was sufficient notice, especially where, as here, the respondent failed to show how it was prejudiced by the alleged defect.

Respondent's argument that Bob Anderson was not its agent for the purpose of notice is also unpersuasive. Mr. Anderson testified that he was employed by Taxi Medallion Management and that one of his duties was to oversee the leasing of Yellow Cabs. When Respondent's counsel asked if his job also entailed working for Taxi Affiliation Services, he neither admitted nor denied this fact; he merely responded, "my check comes from Taxi Medallion Management." Upon cross-examination, Mr. Anderson admitted that Taxi Affiliation Services is a parent organization to Yellow Cab and that it had the same corporate officers as Taxi Medallion Management.

The relationship between all of these companies is not clear in the record. What is clear, however, is that the City of Chicago has mandated that taxicab drivers pay for their own workers' compensation insurance and that Petitioner leased his Yellow Cab from the Respondent's Elston garage. Petitioner knew that Bob Anderson managed the garage. The petitioner had never had a previous workers' compensation claim and was not familiar with Respondent's procedure for reporting such a claim. He thought the workers' compensation insurance he was paying for only covered injuries from a motor vehicle accident and under these circumstances, the Arbitrator finds that it was reasonable for Petitioner to give notice of his injury to Bob Anderson and as such, notice was given to Respondent.

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner's condition of ill-being is causally related to his work-related accident of September 4, 2012. There is substantial evidence in the record supporting this conclusion including, but not limited to, Dr. Lorenz' explicit statement that Petitioner's September 4, 2012 accident caused his condition and the resulting disability.

G. What were Petitioner's earnings?

The Arbitrator finds that Petitioner's AWW is $447.79. This would yield a TTD rate of $298.53, which is below the minimum rate of $330.00 for a married worker with three children under the age of 18. Therefore, the minimum rate will apply to Petitioner's claim, pursuant to the Act.

Petitioner introduced the Schedule C portions of his 2011 and 2012 tax returns in support of his AWW claim, i.e., PX2 and PX3, respectively. He had net earnings of $23,591.00 in 2011 and $16,376.00 in 2012. He testified that all of his income was derived from driving a Yellow Cab. He also testified that September 12, 2012 was the last day he drove a taxicab after the accident; and that he did not resume driving a cab until March 4, 2013. Therefore, his 2012 net earnings reflect his income from January 1, 2012 through September 12, 2012, a total of 36 4/7 weeks. Dividing Petitioner's net earnings for 2012 by the number of weeks he worked in that year yields an AWW of $447.79. As this computation includes eight days of earnings after the date of accident, it does not entirely comport with Section 10 of the Act. Since Petitioner does not receive a weekly paycheck, however, it is the most accurate way to determine his AWW. The accuracy of this determination is borne out by reference to Petitioner's 2011 net earnings of $23,591.00, which yields a comparable AWW of $453.67 ($23,591.00÷52) for that year.

14IWCC0217

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical expenses Petitioner has incurred to date and which have been admitted into evidence, are reasonable, necessary and causally related to Petitioner's September 4, 2012 work accident. The Arbitrator further notes that Petitioner is seeking payment of the medical expenses to the extent allowed by the medical fee schedule and as such, Petitioner is awarded $12,600.08 in medical expenses as set out in PX10.

K. Prospective Medical Care

The Arbitrator orders Respondent to pay for the medical care recommended by Dr. Lorenz in his January 17, 2013 progress note, including a left L5-S1 micro-diskectomy and any rehabilitative treatment that is reasonable and necessary.

L. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner was temporarily, totally disabled from October 22, 2012 through March 3, 2013, a period of 19 weeks. Although Petitioner stopped working on September 12, 2012, because his back and leg pain prevented him from sitting in a taxicab; a physician did not take him off work until October 22, 2012, when Dr. Abu-Shanab instructed him not to work. On March 8, 2013, Dr. Abu-Shanab issued a note permitting Petitioner to resume working with restrictions. Petitioner testified that he actually returned to driving a taxicab on March 4, 2013 so he could "put food on the table."

The Arbitrator rejects Respondent's argument that Petitioner cannot be awarded TTD until November 30, 2012, because he did not surrender his chauffeur's license until that date. Respondent's argument is premised on Chicago Municipal Code § 9-112-330(a)(2)(ii) which states:

> Any public chauffeur upon filing a claim for temporary total disability with the Illinois Industrial Commission shall

> immediately surrender his public chauffeur license to the department. Such public chauffeur license shall remain surrendered for any period for which the chauffeur claims or receives benefits. Any public chauffeur whose claim for benefits with the Illinois Industrial Commission is determined to be fraudulent, not credible, or otherwise not filed in good faith may have his public chauffeur license revoked.

According to the plain language of the ordinance, Petitioner was required to surrender his chauffeur's license "upon filing a claim for temporary total disability with the Illinois Industrial Commission...." Petitioner filed his Application for Adjustment of Claim in this case on December 4, 2012, five days after he surrendered his chauffeur's license. Therefore, Petitioner has complied with the ordinance.

M. Should penalties or Attorney's Fees be imposed upon Respondent?

The Arbitrator finds that Respondent is exhibited unreasonable and vexatious delay in the payment of medical expenses to Petitioner under Section 8(a) of the Act and compensation to Petitioner under Section 8(b) of the Act. The Arbitrator also finds that Respondent underpaid compensation to Petitioner under Section 8(b) of the Act. In addition, the Arbitrator finds that Respondent has engaged in frivolous defenses, which do not present a real controversy. As such, the Arbitrator awards Petitioner penalties under Sections 19(k) and 19(l) of the Act, and attorney's fees under Section 16 of the Act.

On December 31, 2012, Petitioner served Respondent's counsel with his Petition for an Immediate Hearing under Section 19(b) of the Act seeking payment of compensation and medical expenses for his claimed injury. PX4. Respondent did not pay any medical expenses and only issued one check to Petitioner in the amount of $3,230.78, purporting to be payment of TTD from November 30, 2012 to March 12, 2013, a period of 14 5/7 weeks. Respondent issued that check in consideration for the granting of a continuance of the hearing of this matter. Contrary to the rules of the Commission, Respondent never issued a written explanation of the basis of its failure and/or refusal

to pay the benefits sought by Petitioner in his Section 19(b) petition. Moreover, as noted previously in this decision, Respondent sought and was granted, over Petitioner's objection, continuances to investigate Petitioner's claim and gather evidence to refute it. Notwithstanding these continuances, which resulted in delay in the hearing and disposition of Petitioner's claim, Respondent never presented any evidence to support a defense to the claim or to justify its failure and/or refusal to pay Petitioner benefits under the Act.

In support of his penalties petition, Petitioner introduced the March 12, 2013 report of Jeffery Coe, M.D., Respondent's independent medical examiner. After examining Petitioner and reviewing his medical records, Dr. Coe concluded that Petitioner:

> suffered an injury to his lower back while lifting a heavy case of books for a client on September 4, 2012. The injury caused the onset of left-sided lower back pain with left leg radiating symptoms consistent with left lumbar radiculopathy. His ability to work full time has been limited due to ongoing lower back and left leg pain. In my opinion, lumbar surgery is reasonable and appropriate at this time and would be anticipated to cause resolution of (Petitioner's) ongoing left lumbar radiculopathy symptoms. *See,* PX9.

Petitioner explained at trial that he was introducing Dr. Coe's report to refute any suggestion that Respondent had a reasonable basis on which it relied to deny payment of benefits to Petitioner. This report along with Respondent's failure to introduce GPS data it claimed would undermine Petitioner's claim, and the testimony of its witness, Bob Anderson, who corroborated Petitioner's testimony regarding notice, leads the Arbitrator to conclude that Respondent's denial of Petitioner's claim was unreasonable and vexatious, and that it engaged in frivolous defenses, which do not present a real controversy.

The Arbitrator also notes that although Respondent paid some compensation to Petitioner, the payment was not issued until March 19, 2013, more than 10 weeks after

the beginning of the disability period it purports to cover; and it was paid in consideration of the Arbitrator granting another continuance. This payment paid Petitioner at the minimum TTD rate for a single individual with no children, even though Respondent stipulated at trial that Petitioner was married with three dependent children; facts that were alleged on his Application for Adjustment of Claim.

For these reasons and others previously referenced in this decision; the Arbitrator awards $7,819.65 in penalties under Section 19(k) of the Act (50% of TTD and medical awarded); $3,210.00 in penalties under Section 19(l) of the Act ($30 x 107 days of delayed compensation [beginning January 21, 2013, more than 14 days after Respondent's receipt of Petitioner's 19(b) petition, and ending on May 7, 2013, the date proofs were closed]); and $5,333.79 in attorney's fees under Section 16 of the Act (representing 20% of the amounts due for compensation, medical expenses, and penalties). The Arbitrator also awards penalties under Section 19(k) of the Act and attorney's fees under Section 16 of the Act on the amounts due under the fee schedule for the prospective medical care awarded in this decision. Said awards to be determined at a later date; after Petitioner has received the prospective medical care and bills have been generated which would enable the Commission to determine the amount of the awards.

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

NICHOLAS CRAVEN,

Petitioner,

vs.

14IWCC0218

NO: 04 WC 58266

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO SECTIONS 19(h) & 8(a)

Timely Petition under §19(h)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of decreased permanent partial disability (claimed improvement in condition) and being advised of the facts and law, denies Respondent's motion as stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was an Asphalt Helper who was initially injured on August 17, 2004, when he was attempting to open the back gate on the dump truck and heard a pop in his back while pulling the gate.

2. Petitioner proceeded to an arbitration hearing on his accident on February 22, 2012. At that time he was on permanent 50 pound lifting restrictions on orders of a Dr. Goldberg. He was also allowed to lift 35 pounds frequently, but was restricted from repetitive stooping, twisting, shoveling, kneeling, crouching, balancing, climbing and reaching. Petitioner was seeking permanent and total disability benefits, as he was unable to return

to his pre-accident job. Instead, in July of 2012, he was awarded a 30% loss of use of his person as a whole. He is currently still receiving payments from this award.

3. After receiving the award, Petitioner, on his own volition, scheduled and underwent a Functional Capacity Evaluation (FCE) at ATI Physical Therapy on November 27, 2012. The FCE indicated that he was able to lift over 100 pounds. Subsequently he requested that Respondent reinstate him. Based on the FCE, Dr. Imlach opined that Petitioner was capable of returning to work full duty.

4. In March of 2013, Petitioner returned to his normal department, but is not actually performing Asphalt Helper duties. He requested a less strenuous position within his *Asphalt Helper* title. He now simply posts signs. However, he is earning the same amount as he did pre-accident.

5. Petitioner testified that he still has constant back pain, with feelings of compression and a shooting pain down his right leg. He is taking Ibuprofen 800 prescribed by Dr. Imlach.

The Commission hereby denies Respondent's §19(H)/(8(A) petition seeking to decrease Petitioner's permanent partial disability award. Despite the FCE Report, there has essentially been no change in Petitioner's inability to perform his normal full job duties. Although his title remains Asphalt Helper, in practice, his duties are simply to post signs. He testified that he still has constant back pain, with feelings of compression and a shooting pain down his right leg. He is also taking Ibuprofen 800 prescribed by Dr. Imlach. Accordingly, due to the fact that Petitioner is still unable to work full duty, it cannot be said that there has been a material change in his disability. Thus, the Commission denies Respondent's §19H/8A Petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's §19(h)/8(a) petition is hereby denied and dismissed.

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.

14IWCC0218

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
O:2/6/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ 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

Steven Wilhelm,
Petitioner,
vs.

14IWCC0219

NO: 11 WC 39139

Northern Illinois University,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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: MAR 27 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0219

WILHELM, STEVEN
Employee/Petitioner

Case# **11WC039139**

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

1228 KINNALLY FLAHERTY KRENTZ & LORAN PC
JOSEPH C LORAN
2114 DEERPATH RD
AURORA, IL 60506

5120 ASSISTANT ATTORNEY GENERAL
DAVID PEAK
100 W RADNOLPH ST 13TH FL
CHICAGO, IL 60601

0904 STATE UNIVERSITY RETIREMENT SYS
PO BOX 2710 STATION A*
CHAMPAIGN, IL 61825

0499 DEPT OF CENTRAL MGMT SERVICES
WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

AUG 26 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0219

STEVEN WILHELM
Employee/Petitioner

v.

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

Case # 11 WC 39139

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **ANDROS**, Arbitrator of the Commission, in the city of **GENEVA**, on **JUNE 18, 2013**. By stipulation, the parties agree:

On the date of accident, **05/09/2011**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $**46,302.36**, and the average weekly wage was $**890.43**.

At the time of injury, Petitioner was **54** years of age, ***married*** with **NO** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$534.26**/week for a further period of **20** weeks, as provided in Section **8d(2)** of the Act, because the injuries sustained caused **loss of use of man as a whole to the extent of 4% thereof**.

Respondent shall pay Petitioner compensation that has accrued from **05/10/2011** through **06/18/2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $0.00 for medical services, as provided in Section 8a of the Act.

The attached Findings of Fact are incorporated herein by reference. The material finding of fact is the cervical injury has resulted in permanent right-sided neck pain with restricted range of motion. The condition was present immediately and consistently following the collision in which Petitioner was injured on May 9, 2011 as reflected in the medical records from Kishwaukee Community Hospital (Petitioner's Exhibit 1), Dr. Roger Haab (Petitioner's Exhibit 2), Midwest Orthopaedic Institute (Petitioner's Exhibit 3). The testimony of the Petitioner that the pain and restricted movement of his neck has persisted is unrebutted. It is deemed credible and adopted after correlating the same to the doctors' records and the Petitioner undergoing an inciteful cross examination.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

August 15, 2013
Date

FINDINGS OF FACT 11 WC 39139

Petitioner, a 25 year employee, supervises those maintaining the Respondent buildings. On May 9, 2011 he was operating a Kubota 4-wheel Respondent-owned vehicle traveling from his office to one of the buildings under his supervision. While westbound on Lucinda, the main drag at Annie Glidden Road on campus, he was rear-ended by a semi-tractor truck loaded with gravel. The impact was significant.

Per the hospital records Px 1 his diagnosis was right-sided neck pain, upper abdominal discomfort and a chest wall contusion stemming from his upper abdomen slamming into the steering wheel as a result of the impact. He was prescribed pain medication and was told to follow-up with his primary care physician, Dr. Haab. He did so, treating with Dr. Haab from May 11, 2011 through July 21, 2011 (Petitioner's Exhibit 2). During the course of his treatment, Dr. Haab had kept him off work and on restricted work at various times. Dr. Haab had also prescribed physical therapy which was rendered to Petitioner at Midwest Orthopaedic Institute (Petitioner's Exhibit 3) from June 20, 2011 through July 14, 2011. The physical therapy was directed towards the cervical complaints of Petitioner as his neck was the primary source of his pain and restricted activity level.

Petitioner's neck complaints improved through a combination of the modified work and the therapy he performed. Upon his discharge from therapy and resumption of regular duty work following his discharge by Dr. Haab, the neck complaints intensified.

It is undisputed that since the resumption of his full-time work and discharge from physical therapy, Petitioner has had daily neck pain and stiffness with decreased range of motion and frequent headaches. Petitioner has and continues to take over-the-counter pain medication consisting of 3 Aleves each morning to help him function at work. The Petitioner has not sought any treatment specifically for his neck since being released by Dr. Haab in July of 2011 for his cervical complaints. It is Petitioner's understanding that there are no effective treatment options available to him for his cervical condition.

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

Jose Flores,
Petitioner,

vs.

14IWCC0220

NO: 09 WC 14891

Sysco Chicago, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0220

FLORES, JOSE
Employee/Petitioner

Case# 09WC014891

SYSCO CHICAGO INC
Employer/Respondent

On 3/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0465 SCHEELE CORNELIUS & HARRISON PC
DAVID C HARRISON
7223 S ROUTE 83 PMB 228
WILLOWBROOK, IL 60527

2337 INMAN & FITZGIBBONS
JACK SHABAHAN
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0220

Jose Flores
Employee/Petitioner

v.

Sysco Chicago, Inc.
Employer/Respondent

Case # **09** WC **14891**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **12/3/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0220

FINDINGS

On the date of accident, **4/14/08**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**67,253.68**; the average weekly wage was $**1293.34**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**576.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove, by preponderance of the evidence, that he sustained an accident or aggravation to his right hand and wrist, on the alleged date of accident, therefore no benefits are awarded, pursuant to the Act.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 1, 2013

MAR 1 - 2013

ICArbDec19(b)

14IWCC0220

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical services; and 4) prospective medical services. *See,* AX1.

Petitioner was a delivery driver for respondent for sixteen (16) years prior to April 14, 2008. Along the way, Petitioner has had prior injuries for which he has filed Worker's Compensation claims; including falls and other injuries involving his right hand in 2005 and 2007. Those claims were still pending when petitioner claimed that on April 14, 2008, he was attempting to lift a box containing thirty (30) cartons of eggs to deliver to a customer; when the box stuck to the floor because of broken eggs. Petitioner testified that he had to jerk the box from the floor and in so doing sustained an injury to his right hand. *See,* PX5 & 6.

Petitioner testified that he reported the accident to his supervisor, but was unable to get treatment for the injury approved by the respondent's worker's compensation adjuster. During his direct examination, Petitioner testified that approval for treatment did not occur until December, 2008.

The Arbitrator notes that on cross-examination, however, petitioner agreed that he saw what he described as his personal physician on April 22, 2008, for what was diagnosed as a right upper extremity strain. Petitioner testified that Dr. Drugas was his family physician whom he was seeing for diabetes, although the report notes that this was a first visit for petitioner; who provided a history of a right upper extremity strain. There was no mention of diabetes for the visit. Petitioner was allowed to continue to work in a full duty capacity, by Dr. Drugas. *See,* RX7.

Petitioner also testified, on cross-examination, that he had been seeing various doctors for his prior injuries, throughout 2008, including Dr. Koutsky for his neck injury. He agreed that he saw Dr. Koutsky on August 22, 2008 and raised complaints concerning his neck and left shoulder, but said nothing about his right hand. Petitioner testified that Dr. Koutsky was only seeing him for his neck problems. *See,* RX2.

In December 2008, when Petitioner initially presented to Dr. Rawal of Elmhurst Orthopedic, who is in practice with Dr. Koutsky, petitioner provided a history of a March 14, 2008 injury, but no specific details of the occurrence. Petitioner testified that

Dr. Rawal referred him to Dr. Nikoleit, also of Elmhurst Orthopedics. Instead, Petitioner sought treatment with Dr. Berkson, beginning in January of 2009.

Petitioner testified that Respondent refused to authorize treatment with Dr. Nikoleit despite the fact that respondent was authorizing treatment with Elmhurst Orthopedics for his prior injuries throughout 2008. In addition, the Arbitrator notes that on the patient history form completed by petitioner for Dr. Berkson on January 12, 2009, it states that the reason for that date's visit was for a second opinion. *See,* PX1.

Petitioner reported that the injury was from using a 2-wheeler and lifting a product and that he had had the condition for approximately one year. There is a handwritten note in the bottom corner of the patient history form indicating that on March 7, 2005 petitioner fell off a ramp, injuring his right knee and right arm and that on March 12, 2007, he had a right hand and neck injury. *See,* PX1.

Petitioner apparently provided none of the details of the accident that he subsequently testified to at trial, in the patient history form to Dr. Berkson, nor verbally to Dr. Berkson, based on the history contained in the doctor's examination note of January 12, 2009. The note simply indicates that petitioner injured his right hand on April 14, 2008, "from using a 2 wheeler and lifting product." *See,* PX1.

Following his examination and review of an MRI of Petitioner's right wrist, performed on December 17, 2008, Dr. Berkson diagnosed a chronic non-union of the right carpal navicular, with arm pain. In the course of his recommendation for surgery, Dr. Berkson states, "clearly he had a work related injury associated with his work activity. Whether it occurred in March of 05, March of 07 or April of 08 is indeterminate but clearly it occurred on the job and clearly is well documented by the patient."

On January 12, 2009, Petitioner was examined by Dr. Pomerance, by request of Respondent. Dr. Pomerance confirmed the diagnosis on the MRI films of a chronic non-union of the carpal navicular bone. He stated, however, that the medical literature would suggest that this fracture had occurred three (3) to five (5) years previous to the 2008 MRI. He further agreed that surgery as a treatment option, though disagreed with Dr. Berkson as to the exact surgery. He opined, however, that the reported accident of April 14, 2008, did not cause the fracture, nor did any of petitioner's work activities aggravate or create the need for medical treatment. *See,* RX1.

Depositions were taken of Drs. Berkson and Pomerance which served to confirm the doctors' opinions as stated in their medical reports. The Arbitrator notes that Dr. Berkson considers himself an advocate for his patients and that he felt the surgery should not be done until worker's compensation, as opposed to any other insurance, approved it. Dr. Pomerance noted that the condition of the bone would continue to degenerate and that surgery should be undertaken, in a timely manner, to try to resolve petitioner's complaints. *See,* PX2 & RX5.

Following a pre-trial before Arbitrator Black, the Arbitrator suggested that petitioner obtain a new opinion from a hand surgeon, which Dr. Berkson was not. Petitioner subsequently obtained an evaluation and opinion from Dr. Sagerman, who opined that the activity of picking up an egg carton that was stuck to the truck floor was sufficient to aggravate what Dr. Sagerman otherwise agreed was a pre-existing fracture of the carpal navicular. He also proposed surgery consisting of an excision of the navicular bone, possibly also with a carpectomy or fusion. *See,* PX8.

Dr. Pomerance reviewed Dr. Sagerman's report and concluded in October 2012 that even with the new details of petitioner struggling to pick up a carton of eggs off the truck floor, the fracture long pre-existed April 14, 2008, and the need for surgery on it was once again not related to petitioner's work activities but rather to the degenerative process begun the with the initial fracture of the bone three (3) to five (5) years earlier. *See,* RX1.

Based on all the above, and the Arbitrator's review of the medical records and deposition testimony, the Arbitrator finds that petitioner failed to prove that he sustained anything more than a right forearm strain on April 14, 2008, and failed to prove a causal connection between the claimed accident of April 14, 2008; and the need for treatment to the wrist; including the proposed surgeries.

All doctors agree that the fracture did not occur on April 14, 2008. Petitioner's treating physician, Dr. Berkson, specifically stated that such a fracture could not occur from lifting items and further that it was "indeterminate" as to whether the fracture occurred in 2005, 2007 or 2008. *See,* PX1 & 2.

Petitioner has the burden of proving, by a preponderance of credible evidence, that the alleged injury of April 14, 2008, arose out of and in the course of his employment. The Arbitrator notes that petitioner had four prior claims against Sysco for various work injuries, including two involving falls or other injuries to his right hand; one in 2005

and one in 2007 These accident dates, particularly the 2005 date, coincide with Dr. Pomerance's opinion that the non-union of the navicular was at least three years old according to the 2008 MRI findings. *See,* PX5 & 6; RX1 & 5.

Having established that the fracture occurred years before April 14, 2008, petitioner then has the burden of establishing, by a preponderance of the credible evidence, that he aggravated the underlying condition on April 14, 2008, such that it became symptomatic and required treatment.

On this second point, petitioner's credibility comes into play. Petitioner identified a supervisor's report of injury dated April 14, 2008, summarizing the injury petitioner reported to his supervisor on that date. That document states that petitioner reported that upon lifting the fourth case of eggs he felt pain in his back. He also reported that his right forearm was bothering him as well, stating that he lays a 2-wheeler on his forearm when he opens doors. *See,* RX6.

While this statement supports petitioner's subsequent account of lifting cases of eggs, it does not contain the history of having to jerk a case that was stuck to the floor or an immediate onset of right wrist pain. Petitioner complained of pain in his back, which he testified is one of the areas of his body he had previously injured and filed a claim for, at the Worker's Compensation Commission (the "Commission").

In addition, Petitioner testified that he sought no treatment after April 14, 2008 until December of 2008 because Respondent would not authorize it. The medical report shows that petitioner went to Dr. Drugas eight days later, on April 22, 2008. While petitioner testified that she was his personal physician whom he saw for diabetes, the record notes that this was a first visit, and his only complaint was concerning his right forearm. The diagnosis was a right upper extremity strain, not a hand or wrist injury, and petitioner was allowed to continue working in a full duty capacity. *See,* RX7.

Consequently, there is no documentation or medical records substantiating Petitioner's testimony regarding the mechanism of injury, the extent of any increase or change in the condition of his right wrist, or even a complaint or diagnosis involving the right hand or wrist, until December of 2008.

Further impacting petitioner's credibility, as to any injury he sustained on April 14, 2008, is the absence of any other medical records until four months later, when the petitioner saw Dr. Koutsky at Elmhurst Orthopedics. Petitioner agreed that he had seen

Dr. Koutsky throughout 2008 because of his prior work injuries, without mentioning a problem with his right wrist. The Arbitrator notes that petitioner raised no history or complaints of a right hand injury to Dr. Koutsky in August of 2008 and only noted that his neck and left shoulder were bothering him.

The Arbitrator finds it incredible that petitioner injured himself in the manner in which he claims at trial, with the condition of his hand and wrist becoming dramatically worse after April 14, 2008; and he would not have mentioned this to Dr. Koutsky, during his August 2008 examination. Petitioner testified that Dr. Koutsky was his neck doctor, although he managed to note his complaints of left shoulder pain to him on August 22, 2008 This is the second doctor that the petitioner testified that he presented to after April 14, 2008; to whom he did not report a right wrist injury, or provide any of the details of the accident to which he testified at trial. *See,* RX2.

The Arbitrator further finds it not credible that Respondent did not address treatment for Petitioner's reported April 14, 2008 occurrence during the same time period that they were obviously authorizing treatment for his other work injuries; as petitioner admitted at trial. It also strains credibility that the respondent would authorize petitioner's visit to Dr. Rawal at Elmhurst Orthopedics in December of 2008, but then deny the referral to Dr. Nikoleit. Dr. Berkson's records establish that petitioner went to Dr. Berkson on his own, for a second opinion after seeing Dr. Rawal (PX 1).

There is no documented evidence, in the contemporaneous report to Petitioner's supervisor, on April 14, 2008, of an injury to his right wrist; no documented evidence of a complaint of wrist problems when he sees Dr. Drugas eight days later; no documented evidence of the history of the injury or even complaints to his right wrist or forearm when he sees Dr. Koutsky in August, 2008; and no corroboration of the details of the occurrence that he subsequently testified to at trial in 2012 in his histories to Dr. Rawal and Dr. Berkson in December 2008 and January 2009, respectively See PX1 7 4; RX2, 6 & 7.

Petitioner's exhibits 5 and 6 establish that he was fully capable of reporting injuries to his right hand and wrist in occurrences in 2005 and 2007. As for the claim of an aggravation of the prior injury on April 14, 2008, only petitioner's trial testimony, and his statements to Dr. Sagerman four years after the fact, supports a traumatic event that may have aggravated the injury. The contemporaneous records do not.

C. Did an accident occur that arose out of and in the course of petitioner's employment?

In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *See, O'Dette v. Industrial Commission,* 79 Ill. 2d 249,253. Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission. *See, Certi- Serve, Inc. v. Industrial Comm'n,* 101 Ill. 2d 236, 244, 461 N.E.2d 954 (1984). Also to be resolved by the Commission is the extent of his disability; *See, Oscar Mayer & Co. v. Industrial Comm'n,* 79 Ill. 2d 254, 256, 402 N.E.2d 607 (1980), 18 No. 1-08-3666WC and the reasonableness and necessity of medical expenses *(F & B Manufacturing Co. V. Industrial Comm'n,* 325 Ill. App. 3d 527, 534, 758 N.E.2d 18 (2001)). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses and to resolve conflicting medical evidence. *See, O'Dette,* 79 Ill. 2d at 253.

The Arbitrator finds that Petitioner has not proven, by a preponderance of the evidence, that an accident arose out of and in the course of his employment. Therefore, no benefits are awarded, pursuant to the Act. As the issue of accident has not been proven, all other issues are moot and will not be addressed.

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

Cynthia Henson,
Petitioner,

vs.

Chicago Transit Authority,
Respondent.

14IWCC0221

NO: 11 WC 10117

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 21, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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: MAR 27 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0221

WALTON-FAIR, JAYNE
Employee/Petitioner

Case# 12WC039249

PREMIUM RETAIL SERVICES
Employer/Respondent

On 7/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
CHRISTINE VARGHESE
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

0532 HOLECEK & ASSOCIATES
LINDSAY RENIER
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0221

Jayne Fair-Walton
Employee/Petitioner

Case # 12 WC 39249

v.

Consolidated cases: _____

Premium Retail Services
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **May 31, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Credibility**

FINDINGS

On **9/21/12**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment. In light of this finding, the Arbitrator views the remaining disputed issues as moot.

In the year preceding the injury, Petitioner earned $-- ; the average weekly wage was $**785.11**.

On the date of accident, Petitioner was **50** years of age, *single* with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER:

THE ARBITRATOR FINDS THAT PETITIONER WAS NOT CREDIBLE AND FAILED TO PROVE SHE SUSTAINED ACCIDENTAL INJURIES ON SEPTEMBER 21, 2012 ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT. THE ARBITRATOR VIEWS THE REMAINING DISPUTED ISSUES AS MOOT

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mosa
Signature of Arbitrator

6/28/13
Date

JUL -1 2013

Jayne Fair-Walton v. Premium Retail Services
12 WC 39249

Arbitrator's Findings of Fact

Petitioner claims a lifting-related work injury of September 21, 2012. Petitioner testified she worked as a sales assistant for Respondent as of that date. Her job required her to visit various stores such as Wal-Mart to train the employees of those stores how to use Respondent's products. T. 14-15. During the store visits, Petitioner would also unload training-related supplies. T. 15.

Petitioner testified she felt "fine" on the morning of September 21, 2012. T. 15. She went to the photo lab inside the WalMart store in Orland Park, Illinois that day in order to conduct "canvas wood" training (T. 32) and unload "HP supplies." T. 16, 29. Petitioner testified her injury occurred at around 1:00 or 2:00 PM, when she lifted an unexpectedly heavy box during the unloading process. T. 29-30. She described the injury as follows:

> "I actually was in the process of loading off some of the supplies off the cart and didn't realize the box was as heavy as it was and I kind of hollered because I didn't realize it was heavy and I went down with it. I hollered because I felt something weird pull on the left side – 'oh, my God, it's heavy,' and after that, I just kind of looked to say, what is it? We kind of opened up the box to check it out to see what was in it. That's when I realized it was a desk laminator inside that box."

T. 17, 33. Petitioner testified she was unloading the supplies by herself before the accident. T. 32-33. A WalMart associate was nearby when she performed the unloading, as was a male "stocker." These two individuals were within about six or seven feet of Petitioner when the injury occurred. T. 31. Some customers were also in the area. T. 33.

Petitioner testified that, after she lifted the box and "hollered out," a male employee of Respondent walked up to her. Petitioner testified she told this employee the box was "too heavy." The employee, who is named Shawn Wheeler, then attempted to lift the box. T. 34-35. Petitioner testified she has known Wheeler "through [the] years." She and Wheeler worked on a Respondent project together. They also worked together on a project for another employer. T. 35.

Petitioner testified the male stocker, a WalMart employee, came over to help following her accident. Petitioner testified she does not know the stocker's name. T. 35.

Petitioner testified she felt tingling in her left side, from her shoulder to her elbow, after she picked up the box. T. 17. A few minutes later, she pulled her jacket sleeve down in order to

look at her arm and noticed the arm was "kind of puffy." T. 21. Petitioner denied having any left shoulder problems prior to lifting the box. T. 17-18. After the accident, Petitioner started packing up her things and "ended up being able to leave." T. 21.

Petitioner testified she notified her regional manager, Troy Harnett, of her injury via telephone the evening of September 21, 2012. She left Harnett a voice mail message. The next morning, she sent Harnett a follow-up E-mail. She identified a document in subpoenaed documents marked as PX 1 as the E-mail she sent on September 22, 2012. T. 19. In the E-mail, she "re-capped" her workday, per Respondent's rules, and stated: "Supplie [sic] box with canvas materials are very heavy to carry or pull out onto floor. I have already had a hard time with it, I think I pulled a muscle trying to carry out the supplies." T. 20-21. PX 1. Several subsequent E-mails sent by Petitioner contain no mention of an injury. On October 10, 2012, Petitioner sent an E-mail to Tina Palermo and Harnett in which she discussed work-related issues and stated: "I pulled a muscle on my left side and I have some swelling. This is the second time this has happen [sic] after I pulled the hp supplies out . . . So I have given up on pulling supplies out at the store." [Respondent raised hearsay and other objections to PX 1 at the hearing. The Arbitrator overruled the hearsay objection as to the E-mails Petitioner authored and sent. The Arbitrator reserved ruling on the other objections. The Arbitrator overrules Respondent's various objections as to the Petitioner-authored E-mails that are in PX 1. The Arbitrator rejects and gives no consideration to the remaining E-mails in PX 1.]

Petitioner testified she last worked for Respondent on October 12, 2012. She left Respondent on that date because she felt "forced to resign." As of that time period, Respondent was "coercing" her into going out of town. She also was "questioning why no one [had] spoken with [her] about [her] injury." T. 28-29.

Petitioner testified she first sought treatment for her injury from "Dr. Goldstein" at "Advanced Physician" on October 22, 2012. T. 22. Records in PX 2 reflect that Petitioner saw Dr. Goldvekht at Advanced Physical Medicine on October 22, 2012. The doctor's history reflects that Petitioner was training staff and pulling supplies at a Wal-Mart store on September 21, 2012 when she "pulled her left shoulder due to the heavy load." Petitioner testified she explained and physically demonstrated the mechanism of injury to the doctor. T. 22. The doctor's history also reflects that Petitioner notified her regional manager of the injury but continued to work. Petitioner complained of pain radiating from her neck to her shoulder and down the left arm. Petitioner also complained of pain in her right mid-back.

On examination, Dr. Goldvekht noted a reduced range of cervical and thoracic spine motion, with spasms at end range. He also noted a markedly decreased range of left shoulder motion and multiple trigger points. He diagnosed sprains/strains of the cervical spine, thoracic spine and left shoulder. He took Petitioner off work through November 26, 2012. He prescribed Flexeril and a course of physical therapy. PX 2.

Petitioner underwent an initial physical therapy evaluation at Advanced Physical Medicine on October 24, 2012. The evaluating therapist noted that Petitioner was injured

while pulling supplies at work on September 4, 2012. PX 2. Petitioner attended therapy on a regular basis thereafter.

Petitioner returned to Dr. Goldvekht on November 19, 2012 and reported no improvement. She rated her pain level at 7/10. Dr. Goldvekht diagnosed "persistent left shoulder pain secondary to rotator cuff sprain and tendonitis." He injected Petitioner's left shoulder joint with Kenalog and Lidocaine. T. 25. He instructed Petitioner to continue taking Flexeril and attending therapy. He directed Petitioner to stay off work through December 17, 2012. PX 2.

On February 4, 2013, Petitioner returned to Dr. Goldvekht and reported improvement. She indicated she was no longer experiencing radiating pain. She complained of left shoulder aching with repetitive reaching and overhead activity. Dr. Goldvekht prescribed a three-week course of work conditioning. He kept Petitioner off work and prescribed Flexeril, Zatac and Mobic, to be taken as needed. PX 2.

Petitioner underwent work conditioning at Advanced Physical Medicine Centers on February 11 and 18, 2013. PX 2. T. 25-26.

On February 25, 2013, Dr. Goldvekht found Petitioner to have reached maximum medical improvement. He noted Petitioner was still experiencing intermittent left shoulder stiffness with repetitive activities. He released Petitioner to full duty and told her she could continue taking the previously prescribed medication on a PRN basis. PX 2.

Petitioner testified that, when she last saw Dr. Goldvekht, she told him she was feeling much better and no longer experiencing much swelling. T. 27.

Petitioner testified she received no workers' compensation benefits during the time that Dr. Goldvekht had her off work. T. 27-28.

Petitioner testified she still experiences a little tingling and swelling in her shoulder area from time to time. He injury has "very little" effect on her daily activities. If she uses her arm a lot to move things around, the arm starts feeling irritated. T. 28.

Petitioner testified her pain did not go away between the accident and her first visit to Dr. Goldvekht. T. 37.

Under cross-examination, Petitioner reiterated she resigned on October 12, 2012 and first saw Dr. Goldvekht on October 22, 2012. T. 37. Petitioner then clarified that she saw her personal physician, Dr. Bhan, before she saw Dr. Goldvekht. She told Dr. Bhan about the accident and her shoulder. T. 38-39. Dr. Bhan told her she could not treat the shoulder. Dr. Bhan told her she "needed to see a work comp doctor." T. 38.

Petitioner testified she asked her manager, Troy Harnett, for medical treatment due to her injury. T. 39.

Petitioner testified that Shawn Wheeler was in the Wal-Mart when her accident occurred but that Wheeler was not working with her that day. T. 39. Petitioner reiterated she knows Wheeler because they worked together for CLA and for Respondent. Petitioner denied seeing Wheeler socially. Since she was his manager, however, she sometimes had to drop off supplies to him. T. 40. Over her attorney's relevancy objection, Petitioner admitted being convicted of felony arson. She testified she was "falsely accused" of this crime. She "will be returning back to court for that." T. 42. She appealed her conviction to the Appellate Court. The Appellate Court upheld the conviction. She has not yet filed an appeal to the Supreme Court but "the other attorney who is working that case will be" filing an appeal. Petitioner testified that the person who was actually accountable for the arson was Shawn Wheeler. T. 42-43.

On redirect, Petitioner testified she worked for Respondent during two different time periods totaling about five years. The second period started in 2010. T. 43. She saw Dr. Bhan in late September 2012, after the accident. T. 43. When she first worked for Respondent, she worked "in the assistant sales side for about three years." T. 44. She was never written up at work during the periods she worked for Respondent. T. 44. Respondent asked her to move from the assistant sales side to the HP side, where her salary was higher. She has recruited employees for Respondent. She recommended several individuals, including Shawn Wheeler, to Respondent. T. 46. She was convicted of felony arson in about 2007, at which point she was employed by Respondent. T. 47. At that time, she had a different manager. This manager knew she had been falsely accused and had hired an attorney to "get this straightened out." T. 47-48. After she left Respondent, she worked for CLA before being re-hired by Respondent. Respondent took her back after the conviction. T. 47. On October 10, 2012, she received an E-mail from Michele Gohlke. T. 47-48. She identified this E-mail in the group of documents marked as PX 1. T. 48-49. Michele Gohlke is an account manager at Respondent. T. 50-51. She communicated with Gohlke concerning issues relating to "OnStar." T. 52. Petitioner testified she believed things were going well for her at work even after the injury. T. 53.

Petitioner called Lauren Paul to testify. Paul testified she knows Petitioner because Petitioner used to be the "HP rep" at the Wal-Mart store where Paul works. T. 56. After Paul acknowledged discussing the facts of the claim with Respondent's counsel via telephone two days before the hearing and meeting with Respondent's counsel just prior to the hearing, the Arbitrator allowed Petitioner's counsel to treat Paul as an adverse witness. T. 57-62. Paul also testified she gave a statement to a male representative of Travelers Insurance about six months prior to the hearing. T. 58, 61.

Paul testified she recalls the incident involving Petitioner but does not recall the date on which this incident occurred. Respondent's counsel informed her of this date. T. 59. Paul testified she was working in the photo department at WalMart on the date of the incident. She observed Petitioner lifting boxes and pulling supplies out on that date. She recalled Petitioner

saying that the boxes were heavy. T. 63. Petitioner called for assistance with the boxes. T. 64-65. A male individual came over to Petitioner and assisted her. Paul testified this individual had accompanied Petitioner to WalMart on a few previous occasions. The Individual was wearing a blue shirt bearing an HP logo. T. 63-64.

In response to questions posed by Respondent's counsel, Paul testified she was appearing pursuant to subpoena. T. 79. Paul testified that, when she conversed with Respondent's counsel two days before the hearing, Respondent's counsel "made sure" she was planning to appear at the hearing and went over her testimony. Respondent's counsel did not tell her what she was supposed to say, testimony-wise. T. 65-66. Paul testified she has worked at the WalMart in Orland Hills for almost nine years. She works in the photo lab as a "photo web specialist." T. 67. She knows Petitioner. Petitioner came to the photo lab on the day of the incident to show her new products. Petitioner typically comes to the store twice a year. T. 68. Paul testified she finds the visits of HP representatives memorable because those visits are infrequent. T. 68. On the day in question, Petitioner was in the store for an hour or two. T. 76. Petitioner showed her a video about a new product. Petitioner was accompanied by a male individual. This individual had accompanied Petitioner to the store on a few prior occasions. T. 69. Respondent's counsel then showed Paul a driver's license. Paul identified the person shown on the license as the male individual who accompanied Petitioner. T. 70. On those occasions when this individual accompanied Petitioner to the WalMart, he lifted "stuff" and worked with software on the HP machines. T. 71. Paul testified that, on the day in question, she was present during the entire time that Petitioner and the male individual were in the photo lab. Petitioner was within six feet of her. T. 71. Petitioner was removing boxes from a pallet. There were "lots of boxes" on the pallet. The male individual was "over by the kiosks" working on software. T. 72. Petitioner cautioned Paul against lifting a particular box. Petitioner asked the male individual to come over and lift that box. T. 72-73. Paul testified Petitioner did not wince, say "ouch" or otherwise do anything indicating she had hurt herself. T. 73. Petitioner did not tell Paul she had injured herself. T. 74. Paul testified she saw Petitioner leave the store. Petitioner was carrying her HP bag. Petitioner was not holding the bag gingerly or rubbing her arm or shoulder. T. 75. More than six months later, Petitioner called Paul and told her she was on a leave because she had hurt herself at WalMart. Paul found this surprising. She "didn't even know [Petitioner] got injured." T. 78. She had not seen Petitioner during the intervening six months. T. 78. Paul indicated her testimony was consistent with the statement she gave to the Travelers Insurance representative. T. 86. Paul testified she spoke with Petitioner's counsel shortly before the hearing. Petitioner's counsel alluded to an earlier conversation she claimed to have had with Paul. Petitioner's counsel tried to persuade Paul to testify differently than she actually did. T. 87-88.

In response to additional questions posed by Petitioner's counsel, Paul testified she did not recall having spoken with Petitioner's counsel in February. She did recall speaking with Petitioner's counsel by telephone. During that conversation, Petitioner's counsel told her she planned to serve her with a subpoena. T. 89-90. During her meeting with Respondent's counsel, Respondent's counsel showed her a driver's license and asked her if she recognized the person shown on the license. Paul did not recall receiving a call about the case at work in

late January or early February. T. 92. Paul testified that Petitioner's counsel did not tell her specifically what to say at the hearing but did make a suggestion as to what to say. T. 92-93. Petitioner's counsel told her to try to remember a conversation the two of them had in February. T. 94. When Petitioner called her, Petitioner did not tell her "you should testify for me." Instead, Petitioner told her that someone was going to call her and ask her a few questions. T. 95.

Suzanne Kohlberg testified on behalf of Respondent. Kohlberg testified she has worked for Respondent for fourteen years. She is currently Vice President of human resources. T. 98. She knows Petitioner. In her opinion, Petitioner is not a truthful person. T. 98-99. Respondent conducted an audit of five stores that Petitioner reported having visited for the purpose of training store employees. One store reported that Petitioner conducted training for only half an hour or an hour rather than the typical three or four hours. Another store reported that Petitioner kept rescheduling the training sessions and ultimately never appeared. Another store reported having no knowledge of the two employees Petitioner claimed to have trained. Respondent paid Petitioner for the training she claimed to have conducted. T. 100. The audit also revealed that Petitioner was accompanied by a large man at each store she serviced. T. 112.

Kohlberg identified RX 2 as a First Report of Injury. It is customary for Respondent to complete such a document if an employee calls in and reports a work injury. T. 100-101. Such documents are kept in the ordinary course of business. T. 101. Petitioner did not object to the admission of RX 2. T. 160.

Kohlberg testified that Petitioner reported her claimed injury to her in late October. Kohlberg asked Petitioner if anyone witnessed the injury. Petitioner indicated that two individuals, Lauren and Shawn, witnessed her injury. Kohlberg asked Petitioner if she knew the last name of either of these individuals. Petitioner said no. Petitioner indicated that Lauren is a WalMart employee and that Shawn "just happened to be at the store" doing work for Respondent. T. 102.

Kohlberg testified she telephoned Petitioner on November 12, 2012 and asked whether one of the two witnesses was Shawn Wheeler. Petitioner replied, "I don't know, it could have been." Petitioner was "very upset" by Kohlberg's question. At that point, Kohlberg said to Petitioner, "I don't think you are being completely honest with me." Kohlberg went on to say "we fully know that you know Shawn." Petitioner said she did not want to talk anymore and then hung up. T. 103.

Kohlberg testified that Petitioner was scheduled to conduct a "critical" training session on October 12, 2012, "very early in the morning." Petitioner did not conduct this session. Kohlberg conducted an investigation so as to determine why Petitioner failed to do this. Petitioner told Kohlberg she left her manager a voice mail message at 5:45 AM on October 12, 2012 indicating her rental car had broken down and she was thus unable to attend the session. Petitioner had the "800" number for the rental car agency on her key chain. Petitioner also had

access to the Internet via her Respondent-provided cell phone but made no attempt to contact the agency to get a different car. T. 105. Petitioner was "basically MIA" on the morning the training was to take place. For two or three hours, Petitioner did not respond to calls that managers placed to her cell phone and personal phone. When Petitioner finally responded, she indicated she was on the side of the road, that smoke was coming out of her car and that Triple A was en route. T. 106. Respondent later determined that Petitioner returned her rental car to the agency and made no mention of any problems with the car. Petitioner rents cars from this agency "all the time." The agency conducted a "test drive" and determined there were no problems with the car. T. 107.

Kohlberg testified that Petitioner subsequently resigned from Respondent because she "did not want to be grilled over [the] car incident." Petitioner was not pleased with the manner in which she was questioned. T. 108.

Kohlberg testified that Petitioner was transferred to a different division at one point, with that transfer resulting in "additional money." However, the transfer did not constitute a promotion. T. 109.

Kohlberg testified that Respondent did not learn of Petitioner's felony conviction until after Petitioner resigned. T. 110. At some point after Petitioner resigned, Petitioner called her and asked to have her job back. It was after Kohlberg refused to give Petitioner her job back that Petitioner mentioned her claimed injury to Kohlberg. T. 110. The E-mails that Petitioner sent to her supervisor, Troy Harnett, were the extent of what Respondent knew about Petitioner's injuries. Petitioner did not request medical treatment before she resigned. T. 111.

Kohlberg testified that Shawn Wheeler worked for Respondent in the past. Wheeler was not working for Respondent on September 21, 2012. T. 112-113. It is against Respondent's policy for an employee who is not assigned to a particular store to do work at that store. T. 115, 117. Respondent was not aware of Wheeler's felony conviction when Respondent hired Wheeler. T. 113. It was during the investigation that Kohlberg became aware of Petitioner's relationship with Wheeler.

Kohlberg identified RX 1 as part of Shawn Wheeler's personnel file. Respondent maintains the documents in RX 1 in the ordinary course of business. T. 118. The Arbitrator admitted RX 1 into evidence over Petitioner's foundational objection. T. 159.

Kohlberg testified she finds it "very odd" that the Application for Adjustment of Claim describes Petitioner as single. When she talked with Petitioner, Petitioner constantly referred to her "husband." Petitioner told Kohlberg that her husband returned the rental car. T. 119. Petitioner did not indicate that Shawn Wheeler returned the rental car. T. 119.

Under cross-examination, Kohlberg testified she was not involved in hiring Petitioner. T. 121. She supervises various human resources representatives. One of those representatives was in direct communication with Petitioner. T. 120. She does not know when the First Report

of Injury was completed. The First Report of Injury is undated, "which is unusual." T. 121. The individuals who conducted the store audits were Troy Harnett, Petitioner's direct supervisor, and Delores Wilson. Wilson is a manager who visited three of the stores. She provided some information that was used in the audits. T. 124. The audits were conducted a week or two after October 12, 2012. T. 123. Kohlberg testified she requested the audits because, at that point, Petitioner was "adamant" about wanting to "be able to continue" working for Respondent. T. 123. Kohlberg testified it is her job to gather all of the information to ensure that Respondent is making a good decision to either allow an employee a "second chance" or to "part ways" and accept an employee's resignation. T. 123. No one directed her to conduct the audits. T. 124. Kohlberg testified she has never met or talked with Shawn Wheeler. She was not involved in Wheeler's hiring. T. 125. Kohlberg did not talk with Petitioner on October 12, 2012. T. 127. Before October 12, 2012, Kohlberg had no dealings with Petitioner. T. 128. It is Respondent's policy to do a background check of each applicant. Kohlberg does not conduct these checks. One of the employees who works under Kohlberg does this. Respondent has about 5,000 employees so background checks constitute a full-time job. T. 129. To Kohlberg's knowledge, Petitioner never left Respondent's employment at any point prior to her resignation. If a Respondent employee has a gap in employment of one year or less, that employee is not considered a "re-hire" and no new background check is required. T. 129. Kohlberg testified that Petitioner told her she was injured while pulling out supplies. This conversation took place "during the First Report of Injury." T. 130. After Petitioner resigned, Kohlberg asked Petitioner to E-mail her all of the injury-related documents. T. 130-131. Petitioner E-mailed her something that indicated she was injured while pulling supplies. T. 131. Kohlberg testified it was Troy Harnett who drew Petitioner's felony conviction to her attention. T. 132. Kohlberg indicated that most of her interaction with Harnett took place after Petitioner resigned. T. 132. "During the First Report of Injury," Petitioner told Kohlberg she had previously reported her injury to Harnett on two separate occasions. T. 133. An employee in Petitioner's position would not report a work injury to her. An employee in Petitioner's position would report a work injury to his or her manager. T. 134.

On redirect, Kohlberg testified that the First Report of Injury reflects Petitioner saw a doctor on October 22, 2012. She thus estimates that the First Report of Injury was completed after October 22, 2012. T. 135. She thinks it was completed in late October but she is not positive. T. 135. She is an executive. Harnett is not an executive. T. 136. Michele Gohlke is a manager, not an executive. Collette Walton, who may be related to Petitioner, is not an executive. Erin Watkins, Tina Palermo, Stephanie Pollock, Jon Oliver, Dolores Wilson and Karen Santarossa are not executives. T. 138.

Under re-cross, Kohlberg acknowledged that, on October 23, 2012, she received and opened an E-mail that Petitioner sent to Troy Harnett. T. 143.

Respondent offered into evidence records from Dr. Bhan, an internist. Dr. Bhan's note of September 26, 2012 reflects that Petitioner was seen for purposes of a routine gynecological examination. The note contains no mention of any shoulder or arm complaints. In fact, the note states that Petitioner voiced no complaints. RX 3.

Respondent also offered into evidence a report authored by Dr. Fetter, an orthopedic surgeon, in which the doctor commented as to the reasonableness and necessity of Petitioner's treatment. The doctor described Petitioner's injury as a left shoulder strain. He opined that Petitioner reached maximum medical improvement on November 21, 2012 and needed only a home exercise program as of that date. RX 4.

Arbitrator's Credibility Assessment and Conclusions of Law

Was Petitioner credible? Did Petitioner establish a compensable work accident of September 21, 2012?

Petitioner was not confrontational or unpleasant. At times, however, she was far too ready to explain away inconsistencies. Those inconsistencies were not few in number.

Petitioner testified she "hollered" and "went down" after lifting an unexpectedly heavy box at a WalMart store on September 21, 2012. Lauren Paul, a WalMart employee who testified pursuant to subpoena, confirmed that Petitioner unloaded boxes at the store and warned her not to lift a particular box but denied that Petitioner cried out or gave any other indication of having been injured. Petitioner and Paul agree they were within six feet of one another on the day in question.

Petitioner testified she reported her injury to Troy Harnett, her regional manager, via phone on September 21, 2012 and via E-mail on the morning of September 22, 2012. The Arbitrator notes that Petitioner's E-mail of Saturday, September 22, 2012 (sent at 9:30 PM) does not "mirror" her detailed, dramatic testimony as to the events of September 21, 2012. Rather, it vaguely alludes to more than one occasion on which Petitioner experienced difficulty moving supplies. As for an injury, the E-mail simply states "I think I pulled a muscle" with no indication as to when or where this might have occurred. PX 1.

On direct examination, Petitioner testified she resigned under duress on October 12, 2012 and first sought treatment for her claimed injuries on October 22, 2012. Under cross-examination, Petitioner admitted seeing her internist, Dr. Bhan, on September 26, 2012, only five days after the claimed accident. Petitioner testified she told Dr. Bhan about her accident and injuries. According to Petitioner, Dr. Bhan stated she could not treat these injuries and directed Petitioner to see a "workers' comp" doctor. Dr. Bhan's note of September 26, 2012 contains no mention of a work accident or work-related injuries.

Petitioner acknowledged being convicted of felony arson in 2007, although she indicated she was "falsely accused" of this crime. The Arbitrator admitted RX 5, a Rule 23 order of March 16, 2011 affirming the conviction, into evidence over Petitioner's objection. In her proposed decision, Petitioner maintains that this ruling was erroneous and that her conviction is "wholly irrelevant to whether she sustained a work injury in 2012." In the Arbitrator's view,

evidence concerning the conviction is admissible pursuant to Supreme Court Rule 609 and relevant to the issue of credibility.

Having considered Petitioner's demeanor and weighed the foregoing, i.e., the variance between Petitioner's testimony and initial E-mail, the variance between Petitioner's and Paul's accounts, the variance between Petitioner's testimony and Dr. Bhan's note, and Petitioner's felony arson conviction, the Arbitrator finds that Petitioner was not credible and failed to prove a work accident of September 21, 2012. The Arbitrator clarifies that she gives no consideration to Kohlberg's testimony in making these findings. The Arbitrator views the remaining disputed issues as moot.

Compensation is denied.

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

Cynthia Henson,
Petitioner,

14IWCC0222

vs.

NO: 11 WC 10117

Chicago Transit Authority,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 21, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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: MAR 27 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0222

HENSON, CYNTHIA
Employee/Petitioner

Case# 11WC010117

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 5/21/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID FEUER
ONE N LASALLE ST SUITE 2600
CHICAGO, IL 60602

0515 CHICAGO TRANSIT AUTHORITY
ARGY KOUTSIKOS ESQ
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

☐	Injured Workers' Benefit Fund (§4(d))
☐	Rate Adjustment Fund (§8(g)
☐	Second Injury Fund (§8(e)18)
☒	None of the above

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

14IWCC0222

CYNTHIA HENSON
Employee/Petitioner

Case #11 WC 10117

v.

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on April 17, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☐ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ What is the nature and extent of injury?

M. ☐ Should penalties or fees be imposed upon the respondent?

FINDINGS

- On September 13, 2010, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $52,416.00; the average weekly wage was $1,008.00.
- At the time of injury, the petitioner was 48 years of age, *single* with no children under 18.
- The parties agreed that the petitioner received all reasonable and necessary medical services.
- The parties agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Robert Williams

5/21/13
Date

MAY 21 2013

FINDINGS OF FACTS:

The petitioner, a rail custodian, had work duties on September 13, 2010, of cleaning the common areas, bathrooms, rail platforms, stairs, etc. and removing garbage at a rail station. She used cleaning solutions. The petitioner filed a written report of injury with the respondent the same day that her nose and throat was burning, her throat was congested and she was having a reaction. She received immediate care at Concentra and reported that while wearing a mask her nose and throat started to burn while disinfecting, emptying garbage and cleaning a bathroom and that now her sinuses were hurting. The petitioner described mild and aching pain on the bilateral maxillary sinuses exacerbated by dust without radiation and alleviated by rest. She denied shortness of breath, coughing or difficulty breathing. The doctor noted a pulse oximetry of 96% on room air, mild bilateral maxillary sinus tenderness, clear breath sounds bilaterally, clear auscultation and percussion in lungs and no rales or wheezes. The diagnosis was inhalation of gas, fumes or vapors and upper respiratory infection and the recommendation was the remainder of the day off and regular work the next day.

The petitioner saw her primary care physician, Dr. Maria Ignacio of Advocate Medical Group, on September 20th, who noted a prior history of intrinsic asthma and asthmatic bronchitis. The petitioner was asymptomatic and had clear lungs with no coughing or wheezing. The diagnosis was bronchial asthma. On October 15th, the petitioner felt well and requested a return to work with restrictions of no working with fumes or chemicals.

The petitioner reported frequent exacerbation of her asthma on April 27, 2011, and the doctor noted faint bilateral wheezes in her lung. At a pulmonary evaluation on

May 26, 2011, wheezing was noted in her right lower lung. Her lungs were clear at an evaluation on June 30, 2011, and August 1, 2011.

On August 24, 2011, the petitioner saw Dr. David Marder of the University of Illinois Medical Center, who noted that her pulmonary tests showed mild obstructive pulmonary impairment that were similar to previous tests on prior visits and subjective improved symptoms. The doctor recommended full-duty work and a NIOSH-approved respirator if she worked with cleaning agents that caused irritation. At an asthma follow-up at Advocate on October 18, 2011, a faint wheeze in her upper lung field was noted and at a pulmonary visit on October 20th, her peak flows were noted to be less than 80% of her personal best. On November 15, 2011, she reported emergency treatment for an asthma attack two days earlier. The doctor noted mild rhonchi in her lungs that were cleared with a cough.

On January 24, 2012, the petitioner sought treatment at Concentra for headaches and sinus pressure due to cold air from a respirator. Their assessment was acute sinusitis and regular activity was recommended. She sought treatment at Advocate on January 26, 2012, and was released to work. She followed up at Concentra on February 4 and 7, 2012. The petitioner followed up at Advocate on February 23, 2012, and March 15, 2012, and reported failing to comply with her maintenance inhaler and medication but denied having an asthma attack for a few weeks.

In a letter to the respondent, the petitioner stated that she was diagnosed with asthma in 1997. The records of Dr. Ignacio on September 20, 2010, indicate that she was following up for asthma. The petitioner applied for short-term disability for bronchial asthma on several occasions from August 11, 2009, through September 7, 2010.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that she sustained an accident or an exacerbation of her pre-existing asthmatic condition on September 13, 2010, arising out of and in the course of her employment with the respondent. At her initial medical care at Concentra, the petitioner's complaints were limited to burning in her nose and throat and painful sinuses. She denied shortness of breath, coughing or difficulty breathing. The doctor noted a pulse oximetry of 96% on room air, mild bilateral maxillary sinus tenderness, clear breath sounds bilaterally, clear auscultation and percussion in lungs and no rales or wheezes. When the petitioner saw Dr. Ignacio on September 20th, she was asymptomatic and had clear lungs with no coughing or wheezing. In fact, the petitioner's report of injury to the respondent referred only to her throat and nose. The petitioner failed to prove that she had a work injury or an asthmatic attack/flare-up on September 13, 2010, or immediately thereafter.

Moreover, the petitioner had pre-existing intrinsic and bronchial asthma with periodic flare-ups or attacks due to unknown causes. The speculation as to the effect of the cleaning supplies on her asthma without more is not sufficient or persuasive. The petitioner's request for benefits is denied and the claim is dismissed.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

14IWCC0223

Andrea Kopsell,
Petitioner,
vs.

NO: 09 WC 38241

W. W. Henry Company,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of accident, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0223

KOPSELL, ANDREA
Employee/Petitioner

Case# **09WC038241**

W W HENRY COMPANY
Employer/Respondent

On 6/7/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0575 REGAS GUBBINS & REGAS
MATTHEW T GUBBINS
ONE DEARBORN SQ SUITE 300
KANKAKEE, IL 60901

0766 HENNESSY & ROACH PC
JOSEPH A ZWICK
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0223

Andrea Kopsell
Employee/Petitioner

v.

W.W. Henry Company
Employer/Respondent

Case # **09** WC **38241**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **May 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **1/26/2009**, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$40,439.88**; the average weekly wage was **$777.69**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

The Arbitrator had determined that Petitioner has reached maximum medical improvement since June 16, 2010 and since the Arbitrator is denying Petitioner's request for prospective medical, no benefits are awarded at this time.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 24, 2013
Date

ICArbDec19(b)

JUN - 7 2013

STATEMENT OF FACTS

Petitioner testified that she worked as a filling operator on the alleged date of accident. Petitioner described that her job would involve operating a machine that filled cartridges with glue. Petitioner states that glue would end up on the floor in her area from time to time. She states that on January 26, 2009, her left foot got caught on some of the glue while she was turning. Petitioner states that she felt a popping sensation and pain in her left hip. After her initial visit at St. Mary's Hospital, Petitioner sought treatment at St. Mary's Occupational Medicine Clinic where she saw Dr. Panusczka. Petitioner states that she subsequently sought treatment with Dr. Michalow of Orthopedic Associates of Kankakee. Petitioner testified that Dr. Panusczka initially provided physical therapy. Dr. Michalow administered an injection to the left hip and referred Petitioner to Athletico for physical therapy. Petitioner testified that Dr. Panusczka and Dr. Michalow provided work restrictions of lifting limited to 20 to 30 lbs. Petitioner testified that Respondent did accommodate the restrictions.

Petitioner states that she eventually sought treatment with Dr. Charles Bush-Joseph. It appears from the records that her initial visit to Dr. Bush Joseph was for an IME requested by the Respondent. Petitioner indicates that Dr. Panusczka had suggested possible follow-up with Dr. Bush-Joseph. Petitioner notes that Dr. Bush-Joseph continued her restrictions and also recommended consideration of surgery to the left hip. Petitioner indicates that she wishes to pursue surgery.

Petitioner testified that she noticed a stabbing pain in the left hip area extending to her left knee. Petitioner reports that the pain has been consistent through-out the course of her treatment. Petitioner testified that she continued to work in a restricted

duty capacity, subject to the 20 to 30 lbs lifting restriction, from the date of accident up through a layoff which occurred on February 26, 2013. Following her layoff, Petitioner indicates that she has applied for "a couple" of positions but has not returned to employment. Petitioner acknowledged that her layoff was the result of a general layoff at Respondent's company.

Petitioner submitted as Exhibit Number 1, records from Provena St. Mary's Hospital. The records indicate that Petitioner was first seen on January 28, 2009, at which time she reported feeling a "pop" in her left hip when she turned and her left foot remained planted. Petitioner saw Dr. Panusczka at St. Mary's Occupational Medicine Clinic. Dr. Panusczka did recommend physical therapy which was also completed at St. Mary's Occupational Clinic and reflected in Petitioner's Exhibit Number 3. Dr. Panusczka initially provided a lifting restriction of 10 lbs.

On February 2, Petitioner reported some improvement and on February 9, Dr. Panusczka noted normal x-rays. Petitioner's diagnosis was listed as a sprain. On February 17, 2009, the therapy notes indicate weakness in the left hip. The notes of February 27 indicate that Petitioner as showing improvement. On March 2, Dr. Panusczka eased Petitioner's restrictions to 15 lbs but recommended an MRI on March 11. An MRI was completed on April 1, 2009, and interpreted as showing an increase in signal in what appeared to be the gluteus medius muscle tendon with a possible small amount of fluid within the bursa adjacent to the gluteus medius muscle and the greater trochanter of the hip consistent with a possible tear.

Petitioner followed up with Dr. Michalow who diagnosed a left hip abductor muscle strain with persistent greater trochanter bursitis. Dr. Michalow administered an

injection and stated that she could continue to work with a 15 lbs restriction. Dr. Michalow continued Petitioner's physical therapy at Athletico and Petitioner did note improvement on July 8 at which time her restrictions and diagnosis remained the same. On September 14, Dr. Michalow recommended a functional capacity evaluation which was completed on October 20. The functional capacity evaluation reported that Petitioner would be limited to 35 minutes with certain job functions and work conditioning was recommended.

Petitioner noted that she continued to receive treatment from Dr. Michalow until June of 2010, at which time she was discharged. On October 14, 2009, Dr. Michalow noted that Petitioner's restrictions had been eased to allow up to 50 lbs lifting. However, Petitioner stated that the increased activity level increased her symptoms. As of December 23, 2009, Dr. Michalow recommended work restrictions of 20 to 30 lbs lifting. Dr. Michalow recommended a repeat MRI which was completed on February 18 and interpreted as showing mild trochanter bursitis and a normal lift tensor facia lata and visualized IT band. Dr. Michalow indicated that the MRI findings were consistent with a lateral left hip trochanter bursitis but stated that the findings with regard to the rest of the exam were normal. On June 16, 2010, Dr. Michalow noted that Petitioner reported ongoing pain that was not progressing but not resolving. Dr. Michalow noted that Petitioner intended to see a physician at Rush.

Petitioner testified that she had seen Dr. Fletcher at Respondent's request. Petitioner submitted the records of Dr. Fletcher as Petitioner's Exhibits 7 and 8. The reports indicate that Dr. Fletcher evaluated Petitioner on June 4, 2009 and April 19, 2010. On June 4, 2009, Dr. Fletcher did recommend continued injections and

continued restrictions. On April 19, 2010, Dr. Fletcher recommended one more round of injections followed by aggressive rehabilitation. He further indicated that Petitioner would be considered at maximum medical improvement following that course of treatment.

Petitioner submitted as Exhibit Number 6, the records from Dr. Charles Bush-Joseph. Dr. Bush-Joseph first saw Petitioner on January 11, 2011, at which time he diagnosed chronic greater trochanteric bursitis of the left hip, probable partial interstitial tearing of the gluteus medial and IT band syndrome. At that time, Dr. Bush-Joseph suggested that surgery could be considered but noted that he did not see a greater than 60% to 70% chance of relieving Petitioner's discomfort through surgical intervention. However, Dr. Bush-Joseph also indicated that Petitioner could consider working through conservative measures. Dr. Bush-Joseph saw Petitioner again on September 13, 2012, at which time he again offered out-patient surgery. Otherwise, he indicates that she would be at maximum medical improvement.

Petitioner was also evaluated by Dr. Kevin Walsh at the request of the employer on April 17, 2012 and issued a report in connection with the evaluation. Dr. Walsh also issued an addendum on October 9, 2012 based upon review of additional records. Respondent submitted the reports of Dr. Walsh as Respondent's Exhibits Numbers 1 and 2, respectively. Dr. Walsh concluded that it was not at all likely that Petitioner's subjective complaints were related to a reported twisting accident in 2009. Dr. Walsh based his opinion upon the MRI of April 2002 that showed an increase signal in the gluteus medius with a possible small amount of fluid within the bursa adjacent to the medius and the greater trochanter, consistent with a possible tear. He notes that the

follow-up MRI in February of 2010 showed only a mild left trochanter bursitis without evidence of tenodesis, tendonitis, peritendinitis or tear in the gluteal. Finally, a third MRI reportedly showed no evidence of a tendon tear but severe left gluteal medius tendonisis and mild bilateral hip arthrosis. Dr. Walsh felt that Petitioner exhibited symptom magnification. He concluded that Petitioner did not require surgery and was able to return to regular employment. He also noted that the treatment Dr. Bush Joseph was recommending was to the gluteal ***minimus*** muscle, not the gluteal ***medial*** muscle, and was at a loss as to explain the discrepancy, as Dr. Bush Joseph had not explained his reasons for wanting to operate on a muscle that had never been indicated on any subjective or objective tests as being involved in Petitioner's condition.

Respondent submitted as Exhibit Number 3, a Utilization Review report by Dr. Robert Holladay noting that the surgery by Dr. Bush-Joseph was not certified.

Respondent's Exhibits 4 and 5 were job descriptions of Petitioner's regular job duties and the employment she worked in her accommodate position. Respondent's Exhibits Numbers 6 and 7 were the corresponding videos depicting Petitioner's regular employment and the modified position she worked following the accident. Petitioner agreed that the job description and job videos were accurate but noted that the job video depicted her pre-injury job in its current form. She noted that there were modifications made to the position that are not in the video. Specifically, Petitioner testified with regard to more significant walking around the machine that was previously required.

CONCLUSIONS OF LAW

In relation to (F) causal connection, the Arbitrator finds as follows:

It is stipulated that Petitioner suffered an accident while working on January 26, 2009. Petitioner reports that she noticed immediate pain in her left hip but continued working. Petitioner received treatment from Dr. Panusczka and Dr. Michalow. Respondent's prior evaluating physician, Dr. Fletcher, stated that Petitioner's condition at that time was related to the alleged accident. It is clear that Respondent is simply disputing causal connection with regard to Petitioner's ongoing complaints and alleged restrictions. However, based upon the opinions of Dr. Walsh, Respondent argues that Petitioner's condition and treatment is not related to the original accident. The Arbitrator does note that Petitioner reports ongoing pain in the left hip since the date of accident. However, Dr. Walsh explains that Petitioner exhibited symptoms magnification. Moreover, Dr. Walsh notes that the MRI in April of 2009 reported findings consistent with a possible tear. However, the MRI in February of 2010 demonstrated bursitis without evidence of tear. Dr. Walsh's opinions were supported by Utilization Review. The Arbitrator notes that Dr. Walsh's opinions as to medical causal connection are highly credible and based on all of the medical evidence extent in the present case, and the Arbitrator adopts same.

Based upon the entire circumstances, The Arbitrator finds that the Petitioner's ongoing complaints are not related to the alleged accident.

In relation to (L) temporary total disability, the Arbitrator finds as follows:

Petitioner alleges that she is entitled to TTD benefits from February 27, 2013 through the date of hearing of May 16, 2013. It is noted that Petitioner did continue to work in a lighter duty position until she was laid off on February 26, 2013. Petitioner agreed that she was laid off as part of a general economic layoff.. Petitioner would not currently be working in light of the economic layoff.

It is axiomatic that the threshold question with regard to whether or not Petitioner is entitled to temporary total disability is whether or not Petitioner's condition has stabilized. Petitioner's testimony was essentially that she has noticed pain in her left hip since the date of accident. Petitioner reports that there has been essentially no change in her symptoms. Dr. Michalow had previously discharged Petitioner in June of 2010, indicating that Petitioner was at maximum medical improvement at that time. Dr. Bush-Joseph has further conceded that Petitioner is at maximum medical improvement absent the surgery he has offered. (Dr. Bush-Joseph also notes that the surgery is not a guaranteed improvement and this is further addressed in prospective medical below).

It is noted that Dr. Panusczka reported in 2012 and 2013 that Petitioner would be subject to a sitting position with limited standing or walking. However, by Petitioner's own account, she was not limiting her employment to a sitting position only. Petitioner reported ongoing complaints that do not appear to change with her ongoing employment. It is noted that Dr. Bush-Joseph is the only physician that has discussed the possibility of surgery. Noting the findings set forth below, that the surgery proposed by Dr. Bush Joseph is not reasonable or necessary to cure or relieve the effects of Petitoner's injury, the Arbitrator finds that Petitioner has reached maximum medical

improvement, her condition is stabilized and she is not entitled to any TTD after the economic layoff of February 26, 2013.

In relation to (K) prospective medical, the Arbitrator finds as follows:

Notwithstanding any of the above findings, it is noted that Petitioner has expressed a desire to undergo surgery as recommended by Dr. Bush-Joseph. It was noted that Dr. Kevin Walsh disputes the need for the surgery. In reviewing the entire medical file, the Arbitrator notes that Petitioner saw Dr. Panusczka and Dr. Michalow prior to seeing Dr. Bush-Joseph. Neither Dr. Panusczka nor Dr. Michalow prescribed surgery for Petitioner. Dr. Bush-Joseph has seen Petitioner on only two occasions. On the very fist visit with Dr. Bush-Joseph, Dr. Bush-Joseph stated that surgery could be considered an option, "as a last resort." Dr. Bush-Joseph also notes that there was "no greater than" 60-70% chance of any relief with surgery. It is unclear as to whether or not Dr. Bush-Joseph actually reviewed the prior treating records. Dr. Walsh, on the other hand, did appear to review the medical records available at that time. Dr. Walsh noted that the review of the MRI scans show conflicting conclusions with regard to whether or not a tear was present. Moreover, the progression of the scans suggests actual improvement. Dr. Walsh also expressed concern in the fact that Dr. Bush-Joseph did not describe the type of surgery he intended to perform. Dr. Walsh also noted that Dr. Bush Joseph proposed to operate on a muscle that was never indicated on any test to be a problem, ie the gluteal minimal muscle. While it is noted that Dr. Bush-Joseph is a treating doctor and Dr. Walsh is an examining physician obtained under Section 12, it is equally true that both physicians have rendered their opinions after one visit. However, it is clear that Dr. Walsh had the benefit of the full medical chart. Moreover, the proposed surgery was evaluated by a Utilization Review by Dr.

Robert Holladay who concluded that the medical documentation does not support a recommendation for surgery.

As such, the Arbitrator finds that the surgery offered by Dr. Bush-Joseph is not reasonable and necessary treatment under the Workers' Compensation Act for this claim.

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

Jerome George,

Petitioner,

vs.

NO: 09WC 14189

14IWCC0224

Abbington Rehab & Nursing Center,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, maintenance, vocational rehabilitation, permanent total disability, medical expenses both current and prospective and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC0224

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
o031914
RWW/jrc
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

GEORGE, JEROME
Employee/Petitioner

Case# **09WC014189**

14IWCC0224

ABBINGTON REHAB & NURSING CENTER
Employer/Respondent

On 9/16/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0274 HORWITZ HORWITZ & ASSOC
MARK WEISSBURG
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW SHERIFF
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

14IWCC0224

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jerome George
Employee/Petitioner
v.
Abbington Rehab & Nursing Center
Employer/Respondent

Case # 09 WC 14189

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **July 17, 2013.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **nature and extent, vocational rehabilitation.**

FINDINGS

On the date of accident, **March 21, 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 $**7,000.00**; the average weekly wage was $**400.00**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**34,005.75** for TTD.

ORDER

- Respondent shall pay for reasonable and necessary medical care and treatment as provided in Section 8(a) of the Act until 06-16-12.
- No prospective medical care is awarded after 06-15-12.
- Respondent shall pay Petitioner temporary total disability benefits of $ 266.67 per week for 56 weeks, commencing from 03-22-09 to 04-19-09, then from 06-20-09 to 11-24-09, then from 02-21-10 to 09-08-10, as provided in Section 8(b) of the Act.
- Respondent shall pay Petitioner maintenance benefits of $ 266.67/ week for 40 weeks, commencing on 09-09-10 through 06-15-12.
- No penalties are awarded in this matter.
- Respondent shall pay Petitioner permanent partial disability benefits of $ 360.00 week for 75 weeks, because the injuries caused the Petitioner 15 % loss of the person as a whole, as provided in Section 8(d)(2) of the Act.
- Petitioner is not entitled to vocational rehabilitation.
- The parties acknowledge a child support lien from the State of Illinois in the amount of $ 15,261.63.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

Date 09-15-13

ICArbDec19(b)

SEP 16 2013

14IWCC0224

Illinois Workers' Compensation Commission

Jerome George Case # **09** WC **14189**
Employee/Petitioner

v.

Abbington Rehab & Nursing Center
Employer/Respondent

I. FINDINGS OF FACT

On March 21, 2009, the petitioner, Mr. Jerome George, was working as a CNA for the respondent on a part-time basis. According to his testimony, the petitioner began working for Abbington Rehab for approximately one year prior to the accident. Petitioner testified that as he attempted to assist a patient using the Hoyer lift, Petitioner felt pain in his lower back.

The petitioner initially treated at the Schaumburg Treatment Center on March 21, 2009 and was diagnosed with a low back strain. Petitioner was reporting pain radiating to the right knee. It was also noted that he was suffering from drop foot on the right side which was an "old injury." Petitioner had a pre-existing drop foot.

The petitioner began treatment with Dr. Zindrick, whose notes on April 3, 2009 indicate that "Two years ago, the patient had episode of low back pain from a work-related injury." It was also noted that the petitioner has a prior history of tendon transfer in the right leg due to a traumatic injury, and continued to have atrophy, weakness and drop foot on the right side. The diagnosis at that time was acute low back pain, and the petitioner was referred for physical therapy. (Pet. Ex. 4).

The petitioner's therapy continued in late May and early June of 2009 and it was noted on June 9, 2009 that the petitioner was "no longer complaining of radiating pain into the left leg and pain overall is reduced 50%." (Pet. Ex. 4).

On July 20, 2009 the petitioner was seen by Dr. David Trotter for an independent medical examination at the request of the respondent. The doctor reviewed the medical records up to that point, and also conducted a physical examination of the petitioner. Following this examination the doctor rendered his opinion that the petitioner does appear to have suffered a soft tissue sprain/strain injury superimposed on pre-existing degenerative condition in his spine. Dr. Trotter was of the opinion that there was no longer any residual component from the March 21, 2009 injury and any problems the petitioner continued to experience were based on long-standing issues. The doctor also felt that the petitioner was at maximum medical improvement with regard to the March 21, 2009 accident and could return to work full duty. (Resp. Ex. 1).

Meanwhile, the petitioner was being accommodated on a light duty basis by the respondent from mid-April to late June of 2009; however, effective June 20, 2009 light duty was no longer available and the petitioner began receiving temporary total disability benefits.

On August 6, 2009 the petitioner returned to Dr. Zindrick for follow-up at which time the doctor had the opportunity to review the independent medical examination of Dr. Trotter and indicated that he disagreed with that opinion. Dr. Zindrick recommended continuing physical therapy and that the petitioner obtains an MRI scan for the lumbar spine.

The petitioner continued to have physical therapy at Advanced Rehabilitation Clinic in August of 2009, and noted some improvement, but still continued to complain of pain. (Pet. Ex. 2).

On August 26, 2009 the petitioner was seen by Dr. Stephen Bardfield at Hinsdale Orthopedics complaining of pain in his mid to low back region. Following the exam, the petitioner was diagnosed with discogenic low back pain at L5-S1 with central disc protrusions. The doctor then recommended a series of epidural injections.

On September 3, 2009 the petitioner returned to Hinsdale Orthopedics and was again seen by Dr. Zindrick, who reviewed the MRI and noted a "small central/rightward L5-S1 disc herniation." Dr. Zindrick recommended a series of epidural steroid injections and continuing therapy. Dr. Zindrick referred the petitioner to Dr. Simon Ho.

On September 9, 2009, Dr. Simon Ho wrote that petitioner had pain from 8/10 to 9/10, but without radiation

On October 1, 2009 the petitioner returned to Dr. Zindrick, stating his back pain was unchanged. It was also noted the petitioner was going to have a total knee replacement in October of 2009, something that all agree was unrelated to the incident of March 2009. Apparently, the petitioner's back treatment was going to be put on hold while the knee replacement surgery and rehabilitation took place. (Pet. Ex. 4).

On November 24, 2009 the petitioner returned to Dr. Zindrick following the total knee replacement indicating that his knee "felt great." Petitioner was still experiencing back pain which he would rate as a 7/10 and on examination Dr. Zindrick noted the petitioner now had a negative straight leg raise examination. The petitioner was requesting an attempted trial return to work in a CNA position, and the doctor still felt that although epidural steroid injections would be appropriate, he returned the petitioner to full duty work effective November 24, 2009.

Following this release, the petitioner returned to work on a full duty basis for Abbington Rehab and functioned in that capacity until late February of 2009. Meanwhile, the petitioner

also had a lumbar epidural steroid injection on December 17, 2009 by Dr. Daniel Cha, who noted that the petitioner had no radiation of symptoms down his lower extremities.

On February 24, 2010 the petitioner returned to Dr. Zindrick stating that the injection provided some relief; however, he was having fairly constant back pain. The doctor prescribed a second epidural injection and told his patient to continue to work without restrictions. (Pet. Ex. 4). There was an addendum office note issued February 24, 2010 which indicated that the petitioner was to have some restrictions, though could still function as a CNA.

On March 25, 2010 the petitioner presented to Dr. Wayne Kelly of Health Benefits Pain Management Services for the second lumbar epidural steroid injection.

On April 15, 2010, the Petitioner underwent an EMG performed by Dr. Kelly, which was abnormal, chronic and positive at L4-5. Dr. Kelly characterized the sensory/motor polyneuropathy as being of unclear etiology. The lumbosacral polyneuropathy as being related to the herniated disc.

The petitioner returned to Dr. Zindrick in April of 2010 where he was prescribed work restrictions of no prolonged standing/walking/sitting and no bending or lifting greater than 20 pounds.

On May 10, 2010 the petitioner returned to Dr. David Trotter for a second independent medical examination at the request of the respondent. Following his review of the medical treatment records from the time of his prior examination to that date as well as his personal physical examination of the petitioner, Dr. Trotter felt that it was "improbable" that the central disc herniation was caused or aggravated by the March 21, 2009 incident, and that there was no causal connection between his current complaints and the accident of March 21, 2009. The doctor also felt that any treatment rendered from his prior exam in July of 2009 to May of 2010

was not related to the original incident. The doctor felt that the central disc abnormality noted on the MRI does not correlate to petitioner's ongoing subjective or objective findings, and that there was evidence of significant symptom magnification. In addition Dr. Trotter was of the opinion that the petitioner should not be taking medications such as Oxycontin or Cymbalta. Dr. Trotter did feel the petitioner had some restrictions which would be appropriate; however, those would be related to his underlying condition and not the incident of March 2009. (Resp. Ex. 2).

On July 1, 2010, Dr. Kelly wrote that he did not recommend surgery, "especially given the fact that his symptoms are primarily localized lower back pain with no radicular compenent at this time at all."

The Petitioner underwent medical branch blocks, but did not enjoy long enough benefits to qualify for radio frequency ablations. Dr. Kelly placed the petitioner at MMI on September 9, 2010, stating that the petitioner would require long term pain management and the petitioner was to remain off work.

The petitioner's treatment then transitioned from Dr. Zindrick to Dr. Kelly to focus on pain management since the beginning of March 2011. On March 25, 2011 the petitioner presented to Dr. Kelly and received medial branch blocks on the left side at L3, L4 and L5. The doctor also renewed the ongoing prescriptions for Oxycontin and Hydrocodone.

On April 15, 2011 the petitioner returned to Dr. Kelly for additional medial branch blocks, and at that time the doctor recommended radiofrequency ablations.

On May 13, 2011 the petitioner presented to Dr. Kelly for follow-up indicating he was "doing about the same." The petitioner apparently did not want to pursue the radiofrequency ablations and that was not pursued by the physician. Petitioner was continued to be prescribed

Oxycontin and Hydrocodone and returning on a 1 month basis for essentially medication renewal.

On June 17, 2011 the petitioner returned to Dr. Kelly stating he was "doing well on the medications," however, the doctor wanted to wean the petitioner off of the Oxycontin and he was to transition to some sort of generic form of the same medication. (Pet. Ex. 5).

On July 15, 2011 petitioner returned to Dr. Kelly with essentially the same pain complaints and the same diagnosis. The medications including Hydrocodone and Morphine Sulfate were continued. Dr. Kelly found bilateral lower radiculopathies.

On November 3, 2011 the petitioner was examined by Dr. Steven Stanos at the Rehabilitation Institute of Chicago Center for Pain Management, upon the request of the respondent. Following his examination and the medical treatment records regarding the petitioner's treatment from the onset of the accident to that date as well as his personal examination of the petitioner, Dr. Stanos is of the opinion that the petitioner is suffering from chronic lumbosacral pain, and pursuant to the work history regarding the March 21st incident would be considered at least an exacerbation of his pre-existing condition, although that was somewhat unclear. The doctor was somewhat confused as to how the petitioner was being treated, as there was no objective evidence regarding facet joint issues as the petitioner was being treated, and a diagnosis of severe underlying sensory motor idiopathic polyneuropathy was not accurate. Since the petitioner was only experiencing mild reduction in pain and no significant functional improvement with the opioid therapy, the petitioner should be placed in some sort of interdisciplinary pain program to focus on functional restoration and return to work. The doctor outlined this program specifically at the end of which an FCE should be obtained. The doctor felt that those treatment recommendations that he outlined would be causally related to the

March 21, 2009 accident. The doctor also felt that the petitioner could at least return to a medium level of work based on his examination and possibly obtain an FCE for a higher level. Significantly, there was an addendum added to the report which reflected that the toxicology screen the petitioner took on November 3, 2011 in advance of the IME was negative for any opioids, despite the Oxycontin and Morphine the petitioner was being prescribed at that time. Due to the fact that the opioids were not really helping the petitioner either in his pain or his functional capacity, and now there is evidence suggesting that they were not even possibly being taken, the doctor recommended a discontinuing of that treatment. (Resp. Ex. 3).

The next day, Dr. Kelly stated that the petitioner has increased low back pain that radiates to the bilateral inguinal area, which is new and in additional to the bilateral lower extremity radiating pain. A repeat MRI was prescribed. (Pet. Ex. #5). A new bulging disc was found at L3-4 and additional epidural injections were prescribed to quite down the pain at that level.

On January 6, 2012, the petitioner achieved "modestly managed" maximum medical improvement with Dr. Kelly who stated that the petitioner will need long-term pain medication management with opiods. He will also need periodic injections and physical therapy. (Pet. Ex. #5)

On February 3, 2012, Dr. Kelly wrote that the petitioner's opiod medications were lost in the mail and that's why the drug screen test with Dr. Stanos was negative. (Pet. Ex. #5)

On March 2, 2012, Dr. Kelly wrote that his patient was stable and will see him once every three months unless a problem develops. The petitioner was required to come to the office to pick up the morphine sulfate every month. (Pet. Ex. #5) Nevertheless, a later prescription had a UPS tracking number on it. (Pet. Ex. #5)

On May 25, 2012, Dr. Kelly wrote a prescription for an FCE to determine petitioner's work capacity. (Resp. Ex. 4).

On June 15, 2012 the petitioner presented to ATI Physical Therapy for an FCE which was noted to be a valid representation of the petitioner's present physical capabilities. The therapist indicated that in his opinion the petitioner had reached the medium physical demand level, and the therapist noted that a CNA is typically considered a medium physical demand job. As a result, the petitioner could return to his previous position within those guidelines. (Resp. Ex. 5).

The petitioner returned to Dr. Kelly and Dr. Kelly was of the opinion that the FCE did not adequately demonstrate the petitioner's duties, nor did it adequately take into consideration the petitioner's subjective pain complaints as it failed grade the pain complaints. (Pet. Ex. 5). The doctor also indicated that petitioner had reached maximum medical improvement effective May 25, 2012 and can "only be maintained on his opioid medications."

The medical treatment records from his prior examination to the present date were sent to Dr. Stanos for comment and a record review report which he authored dated April 25, 2012. In his report, Dr. Stanos indicated that he reviewed the FCE and that it was legitimate, and that the petitioner should be released to work at least a medium strength level as detailed in that report. The fact that there was a negative urine toxicology connected to Dr. Stanos' previous examination of the petitioner and that there was no evidence of any positive toxicology screens conducted by Dr. Kelly, means that continued use of opioid medications with the petitioner were not appropriate. The doctor again recommended a program which would wean him off opioids and focus on functional capacity, as outlined in his prior report, and if that was not going to be attempted then no additional treatment would be necessary. (Resp. Ex. 6).

On August 3, 2012, repeat FCE was performed indicating that the petitioner could work only a sedentary work level.

The petitioner's treatment continued with health benefits and pain management services and significantly when the petitioner was seen by Dr. Alzoobi on October 29, 2012 the doctor again indicated that there was a negative urine toxicology screen from back in February, and that he was putting a hold on medications until they could obtain a more recent toxicology screen. In addition the doctor felt that the petitioner's back pain and condition was "rather moderate" and definitely questioned the need for Morphine and Hydrocodone as currently being prescribed. (Resp. Ex. 7).

Despite this, the petitioner has continued to treat with Dr. Kelly and Health Benefits Pain Management Services and continued to obtain medications on a monthly basis to today's date.

The respondent has suspended payment for the visits to Health Benefits Pain Management Services since the examinations of Dr. Stanos; however, has continued to pay for the medications as prescribed in order to avoid withdrawal issues of the petitioner.

The respondent also suspended temporary total disability benefits in the fall of 2012 based on the medical treatment records placing the petitioner at maximum medical improvement, as well as the FCE report and the opinions of Dr. Stanos and the previous opinion of Dr. Trotter.

On March 21, 2013, the petitioner reported to Dr. Kelly that his pain level was at 3-4/10 on a regular basis. Norco was prescribed. (Pet. Ex. #5)

II. CONCLUSIONS OF LAW

F. Is petitioner's current condition of ill-being causally related to the injury?

In support of the Arbitrator's finding that the petitioner's current condition is ill-being is causally related to the injury, the Arbitrator states as follows:

It is accepted by all parties that the petitioner suffered an incident on March 21, 2009 wherein he was attempting to lift a patient and when that patient lost his balance and fell, the petitioner suffered pain in his back. It was also without question that the petitioner had significant history of right foot drop which pre-dated that accident. The petitioner was treated with physical therapy by his treating physician Dr. Zindrick, and the respondent's independent examiner, Dr. Trotter, felt that the petitioner sustained a soft tissue injury as a result of this accident and that treatment beyond the first 8-10 weeks was no longer related to the incident itself.

Despite this, the petitioner has transitioned to a pain management program which has prescribed opioid medication for a number of years, despite the fact that the petitioner has experienced no significant benefit from pain management nor improved functional capacity.

The Arbitrator finds that the opinion of Dr. Stanos is controlling and most credible. Dr. Stanos found that causal connection was "at least an exacerbation of his pre-existing condition." (Tr. 18) and that the opioid medications, due to the fact that they are not helping the petitioner either in pain management nor in functional capacity, are no longer an effective treatment and should be discontinued.

The Arbitrator finds causal connection for the small, herniated disc at L5-S1 as a result of the accident of March 21, 2009. In noting this, the Arbitrator does not want to minimize the petitioner's injury and states that the MRI does show moderate to severe stenosis. However, no doctor has ever prescribed surgery, nor a pain pump. Petitioner did not want the radio frequency ablations. In contrast, Dr. Kelly's opinions are somewhat compromised by finding no

radiculopathy, then finding it months later and suggesting that it was always present. The petitioner's radiating symptoms to his inguinal groin area seem non-anatomic. The amount of narcotic medication and lack of meaningful monitoring of the same also create a cloud of uncertainty on the claim. The medical records state the medication was lost in the mail, but at trial, the petitioner stated that he had run out and had not taken them for only a day or two. Later, Dr. Kelly states he would no longer mail the medications to petitioner, but later, continued to do so. In all, it seems to Arbitrator that an unoperated herniated disc is not a severe enough injury to justify sedentary work restrictions, vocational rehabilitation and unending medical treatment including narcotic medications.

J. Were the medical services that were provided to the petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?

In support of the Arbitrator's finding that the medical services that have been paid by the respondent were reasonable and necessary, however the petitioner's current treatment is no longer reasonable and necessary the Arbitrator states as follows:

As indicated above, the Arbitrator finds that the initial treatment with Dr. Zindrick was appropriate, however that the continuing pain management is no longer appropriate and the treatment is not deemed reasonable and necessary based on the opinions of not only Dr. Trotter, but also Dr. Stanos.

The Arbitrator finds that the alleged unpaid medical bills presented by the petitioner at the hearing are reasonable, necessary and related to the incident of March 21, 2009, but only up the date of Dr. Stanos' Section 12 report, dated on June 15, 2012.

L. **What temporary benefits are in dispute? (Maintenance)**

In support of the Arbitrator's finding that the petitioner is no longer entitled to maintenance benefits, the Arbitrator states as follows:

It is agreed by the parties and contained in the trial stipulation sheets (Arb. Ex. 1) that the petitioner was temporary total disabled for a time period which was paid by the respondent, and also temporary partially disabled for a time which was also paid by the respondent.

A dispute arose following the petitioner's FCE which placed him at a medium level and allowed a return to work as a CNA, though the petitioner declined to pursue that return to work and has continued to remain unemployed.

The Arbitrator finds that the petitioner has reached maximum medical improvement and could find employment within his current restrictions; therefore maintenance benefits are no longer appropriate after June 15, 2012.

Petitioner's job search indicating that he responded to want ads that repeated responded "they did not have any phlebotomist position available," was not compelling. (Pet. Ex. #10) How can it be a "want ad" if no positions were open? It would seem that if the search was legitimate, it would include a search of places that were actually seeking a phlebotomist. Later, petitioner searched at places that were actually seeking a phlebotomist, but all wanted experienced applicants. Additionally, a legitimate job search would include different positions and job titles. No bona-fide effort was made to secure new employment.

M. **Should penalties or fees be imposed upon the respondent?**

In support of the Arbitrator's finding that no penalties or fees should be imposed upon the respondent the Arbitrator states as follows:

The petitioner alleges that the respondent should be liable for penalties and attorney's fees based on the suspension of maintenance benefits as well as the non-payment of selected medical bills.

As stated above, the Arbitrator finds that the medical bills in dispute are not reasonable, necessary, and related to the incident after June 15, 2012, and therefore are not the responsibility of the respondent. The respondent relied on competent medical testimony of both Dr. Trotter and Dr. Stanos to challenge these medical bills, and penalties under Sections 16, 19(k), or 19(l) are not warranted.

In addition, the Arbitrator finds that the suspension of TTD/maintenance benefits following the petitioner's release at maximum medical improvement and completion of the FCE is appropriate, and that the respondent has relied on competent medical testimony of Dr. Trotter as well as Dr. Stanos to suspend these benefits. The Arbitrator finds that penalties under Sections 19(k) and 19(l) or attorney's fees under Section 16 are not appropriate in this case.

Additionally, the Arbitrator finds the testimony of the Petitioner that several weeks or months of late payments to be far too vague and non specific in order to render an award.

O-1. <u>Vocational Rehabilitation</u>

In support of the Arbitrator's finding that the petitioner is not currently entitled to vocational rehabilitation, the Arbitrator states as follows:

It is noted in the medical treatment records as well as the independent examination reports and deposition transcripts submitted by both petitioner and respondent that the petitioner has reached maximum medical improvement. The petitioner's restrictions also appear to be in a position to be accommodated as a CNA, the petitioner's part-time position at the time of this incident, therefore vocational rehabilitation services appears unnecessary.

Due to the above, the Arbitrator finds that vocational rehabilitation services are not warranted in this case. Patsaves' conclusion that Petitioner has a learning disorder does not seem to fit with Petitioner's work history and testimony.

O-2. What is the nature and extent of the injury?

In support of the Arbitrator's finding that the petitioner has sustained 15% loss of man as a whole, the Arbitrator states as follows:

Although the petitioner and petitioner's attorney indicate that vocational rehabilitation should begin and that the case is not ripe for a nature and extent evaluation, the Arbitrator finds that nature and extent is appropriate at this time. The request for hearing sheet shows that nature and extent is a disputed issue at trial.

The Arbitrator has taken into account the medical treatment records as well as the independent medical examination reports and the deposition transcripts of those physicians, and has concluded that the petitioner has suffered a 15% loss man as a superimposed upon a pre-existing right foot drop and chronic polyneuropathy of unknown etiology.

09-15-13
Dated

Arbitrator Kurt Carlson

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gregory Donaldson,

Petitioner,

vs.

No. 11WC048159

14IWCC0225

Sangamon County Circuit Clerk,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, benefit rates, wage calculations, medical expenses, prospective medical care and temporary disability, and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

FACTS

Pre-accident medical records show that Petitioner began treating with Dr. Gary Rull, his primary care physician, on July 30, 2007. Petitioner reported having residual abdominal pain from infectious colitis as well as diabetes. Petitioner continued to treat for abdominal pain and other digestive problems through 2011.

A written warning form dated October 25, 2011, and signed by Petitioner and Ms. Cook states that the warning was given for "[l]ack of progress in learning job skills." The form also states that the warning was a follow up to a meeting held on October 14, 2011, and it established

several goals for Petitioner to meet by November 10, 2011. Additionally, the form states: "[i]f you do not meet these goals, I will be forced to recommend that you be terminated from your position."

An Employer's First Report of Injury form dated November 1, 2011, states that at 4:20 p.m. on October 31, 2011, Petitioner "lifted and carried a case of paper," and twisted his back when he "[p]icked up and turned with the case of paper."

On November 3, 2011, Petitioner treated with Dr. Andrew Varney, Dr. Rull's associate. Petitioner complained of back pain after a work injury and reported that on October 31, 2011, he "lifted a 60 lbs box while rotating." Since then, Petitioner experienced lower back pain, mostly left-sided numbness, muscle spasms and a tingling sensation in his big toes. On examination, Petitioner had a positive straight leg raise test on the right as well as right leg dyesthesia in the S1 distribution. Dr. Varney diagnosed Petitioner with lumbar back pain with radiculopathy, noted that Petitioner likely had S1 nerve radiculopathy, prescribed medication, recommended that Petitioner begin physical therapy and follow up with Dr. Rull and placed Petitioner off work for two days.

On November 10, 2011, Petitioner returned to Dr. Varney and reported that his lower back pain had not improved and he was not scheduled to begin physical therapy until the end of December. Dr. Varney reiterated his diagnoses from the previous appointment and recommended that Petitioner follow up with Dr. Rull.

On November 16, 2011, Petitioner treated with Dr. Rull and reported having persistent lower back pain, sometimes rated ten out of ten. Petitioner noted that his physical therapy appointment was scheduled for November 21, 2011, and he was unable to return to work. Dr. Rull concurred with Dr. Varney's diagnosis, prescribed Cyclobenzaprine and instructed Petitioner to go to the emergency room if his symptoms worsened or if he developed red flag symptoms.

On November 17, 2011, Dr. Rull called Petitioner and recommended that he undergo an MRI as Petitioner continued to complain of severe lower back pain. On November 18, 2011, Petitioner underwent a lumbar spine MRI which showed moderately severe spinal stenosis at L3-L4, secondary to a disc bulge with a possible focal disc herniation; edema in the L3 and L4 vertebral bodies which suggested the presence of microfractures; and moderate spinal stenosis at L2-L3. That day, Dr. Rull called Petitioner and recommended that he go to the hospital for pain control and a consultation with a spine surgeon that night. Despite Dr. Rull's warnings about possible permanent damage if his disc herniation created more pressure on the spinal cord, Petitioner decided to go to the hospital the next morning.

On November 19, 2011, Petitioner went to Memorial Medical Center and reported having severe back pain since lifting a box on Halloween. Petitioner indicated that he had similar back pain several years ago that resolved with steroid injections. Dr. Mark Eilers, an orthopedic spine surgery fellow with Dr. Per Freitag, examined Petitioner. Petitioner reported having lower back

pain since lifting a box at work on October 31, 2011. Dr. Eilers reviewed the lumbar spine MRI and noted that is showed an acute disk bulge at L3-L4 with significant narrowing of the canal; a significant amount of increased signal changes at L3-L4 suggestive of an acute injury; and disk bulging at L4-L5 and L5-S1 with associated canal narrowing and foraminal stenosis at L3-L4, L4-L5 and L5-S1. Dr. Eilers diagnosed Petitioner with an acute ruptured disk at L3-L4 and strongly recommended that Petitioner consent to being admitted overnight for pain control and observation. Petitioner refused to be admitted and Dr. Eilers prescribed a Medrol Dosepak, and recommended that he return to the emergency room if his symptoms worsened and keep his physical therapy appointment as long as the therapist was certified in McKenzie exercises.

On November 29, 2011, Petitioner returned to Dr. Rull and reported that he went to the emergency room three days before because he had worsening lower back pain and a "transient episode of right foot drop." Since then, he had experienced three episodes of right foot drop. Petitioner rated his pain as eight to eleven out of ten.

On December 8, 2011, Petitioner returned to Drs. Freitag and Eilers and reported that "on November 1, 2011, [sic] he was at work and attempted to pick up a box of papers. He was carrying several rims [sic] of paper and he reports that he had back pain instantly and has since had continued back pain and bilateral lower extremity weakness." Petitioner also reported having a couple of episodes where his right foot dropped, meaning that he was unable to keep it dorsiflexed while walking. Dr. Freitag diagnosed Petitioner with back pain and radiculopathy, and recommended that he continue physical therapy and undergo EMG studies to localize which nerve root was most affected.

On February 2, 2012, Petitioner returned to Dr. Rull and reported that his pain had not improved with physical therapy. Dr. Rull recommended that Petitioner follow up with Dr. Freitag. On March 12, 2012, Petitioner underwent EMG/NCV studies that showed bilateral, moderate lumbosacral radiculopathy of the L4, L5 and S1 nerve roots, with predominant involvement at L5; as well as mild sensory neuropathy in the lower extremities which was probably diabetic neuropathy.

On March 21, 2012, Dr. Freitag reviewed the EMG/NCV studies, noted that they showed bilateral L4-L5 and S1 radiculopathy, and recommended that Petitioner undergo a right L5 transforaminal lumbar epidural steroid injection. On May 8, 2012, Petitioner underwent a lumbar epidural steroid injection. Petitioner followed up with Dr. Freitag on May 30, 2012, who noted that Petitioner had a "marked setback," developing a severe headache, nausea and vomiting after the injection. Dr. Freitag noted that the injection appeared to have no effect on Petitioner's pain and recommended that he undergo a foraminal decompression surgery.

On June 18, 2012, Dr. David Lange, an orthopedic surgeon, performed a section 12 examination of Petitioner at Respondent's request. Dr. Lange noted that Petitioner was an information service clerk who sustained an injury "when he 'went to pick up a box of paper' on October 31, 2011." Petitioner stated that the box weighed 60 to 70 pounds and "'as soon as [he] turned, [he] knew something was wrong.'" Dr. Lange also noted that Petitioner dropped the box

to the floor. Additionally, Dr. Lange noted that Petitioner denied having prior symptoms and took Hydrocodone for several years for long standing colitis. Dr. Lange diagnosed Petitioner with mechanical low back pain on the right, "currently without a specific anatomic location," bilateral lower extremity symptoms, chemical dependency, premorbid psychological disease and occupational stressors. Dr. Lange opined:

> "It would appear to be impossible today to suggest his subjective complaints are definitely related to an October 31, 2011 work-related incident. Getting beyond the faulty nature of his past history and chronic chemical dependency, Mr. Donaldson today suggested he actually had **dropped** a '60-70 pound' box when he felt discomfort upon rotating. This history does not appear in the medical records most concurrent with the alleged incident. It must also be remembered one of the more common somatic complaints in individuals with premorbid psychological disease (particularly anxiety and depression) is low back pain.
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> ***
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> Although a decompressive procedure has been offered, the clinical examination of Mr. Donaldson is extremely benign from an objective point of view. Any 'findings' are actually positive Waddell in nature. Offering surgery for such subjective clinical findings would be fraught with uncertainty."

On June 25, 2012, Dr. Lange generated an addendum to his June 18, 2012, section 12 report. Dr. Lange reviewed plain x-rays of the lumbar spine dated December 8, 2011, as well as Petitioner's November 18, 2011, lumbar spine MRI. Dr. Lange opined that the x-rays showed "severe multilevel degenerative changes over essentially the entire lumbar spine," and the MRI findings were consistent with the x-rays. Dr. Lange concluded that the x-rays and MRI did not change his opinion on the issue of causation.

On July 12, 2012, Dr. Lange generated another addendum to his June 18, 2012, section 12 report. Dr. Lange reviewed a job description "presumably applicable to Mr. Donaldson," and a DVD of surveillance pictures, presumably from October 31, 2011. Dr. Lange noted that the DVD showed "intermittent surveillance every few seconds." Dr. Lange stated that two contiguous surveillance photographs showed Petitioner beginning to grasp a box and carrying it. Dr. Lange opined that "[t]here is nothing about his facial expression while he was carrying the box to suggest any immediate symptoms. There is also, nothing to suggest he 'dropped it to the floor.'" Lastly, Dr. Lange noted that one photograph showed Petitioner walking out of view with his right hand behind his back. Dr. Lange opined: "[w]hat this might conceivably mean cannot be stated from this single photo. A review of the surveillance today does not substantiate the mechanism of injury claimed by Mr. Donaldson."

On July 16, 2012, Petitioner returned to Dr. Rull whom he had seen about once per month since October 31, 2011. Petitioner reported having continued lower back pain. Dr. Rull noted that Petitioner was likely physically dependent on narcotics due to his chronicity of use.

At his November 1, 2012, deposition, Dr. Lange testified that the diffuse lower extremity symptoms that Petitioner complained about were typically seen in people with peripheral neuropathy caused by diabetes but noted that he was unaware of Petitioner having a history of diabetes. Dr. Lange noted that Petitioner's EMG/NCV studies showed peripheral neuropathy, which could explain Petitioner's complaints of lower extremity numbness. On cross-examination, Dr. Lange acknowledged that hypothetically, lifting a box weighing about 50 to 60 pounds and twisting could cause an exacerbation of underlying degenerative disc disease. Dr. Lange also acknowledged that Petitioner's symptoms were consistent with the MRI findings.

On November 2, 2012, Dr. Freitag performed a lumbar decompression at L4-L5 and L5-S1 bilaterally with a laminotomy and partial facetectomy. On November 14, 2012, Petitioner returned to Dr. Freitag and reported that he had less back pain and his leg pain had improved. Dr. Freitag removed Petitioner's staples and recommended that he begin hydrotherapy.

At his December 3, 2012, deposition, Dr. Freitag, an orthopedic surgeon specializing in spine surgery, opined that the focal disc herniation at L3-L4 was not degenerative and was "directly related to his trauma." However, the narrowing at all levels likely predated the October 31, 2011, injury. Dr. Freitag also opined that Petitioner's symptoms on December 8, 2011, were not consistent with a focal disc herniation at L3-L4 as his symptoms were below the L3-L4 area. An individual such as Petitioner can have degenerative disc disease and be asymptomatic. Petitioner's EMG/NCV studies showed two sources of nerve involvement: bilateral and moderate lumbosacral radiculopathy of the nerve roots at L4, L5 and S1; and some mild sensory neuropathy which was most likely diabetic neuropathy. Dr. Freitag's clinical findings were consistent with the EMG study results, especially at L5, as Petitioner had complaints of weakness in his big toes. Dr. Freitag opined that the diabetic neuropathy did not play a role in Petitioner's presentation of symptoms on December 8, 2011. Dr. Freitag recommended that Petitioner undergo surgery to improve his radiculopathy and because conservative treatment had failed. Lastly, Dr. Freitag opined that the work accident of picking up a box and twisting exacerbated Petitioner's preexisting degenerative changes, which were previously asymptomatic.

On December 18, 2012, Mr. Charlie Stratton, Respondent's human resources director, sent Petitioner a letter stating that his employment with Respondent had been terminated as of December 17, 2012. A work status note from Dr. Rull's office dated February 4, 2013, shows that Petitioner was released to work with restrictions of no lifting greater than 50 pounds and no repetitive bending or twisting activities.

At the February 7, 2013, section 19(b) arbitration hearing, Petitioner testified that he began working for Respondent in September of 2011. Petitioner's job consisted of inputting data and scanning mail. When he first began working for Respondent, Petitioner experienced upper back tightness from sitting at his desk for about six hours each day. Petitioner was not used to sitting for a long period of time and he would lie on the floor at work and pop his back a few times each day for the first three weeks that he worked for Respondent. Petitioner had a difficult relationship with his supervisor, Ms. Debbie Cook, who would "berate" him publicly about data entry errors and exclude him from office functions.

About seven to nine years before October of 2011, Petitioner treated with Dr. Paul Smucker for lower back problems and Petitioner underwent two epidural injections. Petitioner testified that "[he] was fine," after the injections. Dr. Rull has been Petitioner's primary care physician since July of 2007 and Petitioner did not seek treatment for lower back problems or have lower back pain until October 31, 2011. Prior to the same date, Petitioner took Hydrocodone for unresolved colitis, which he continued to take for back pain after the date of injury. Between July of 2007 and October of 2011, Petitioner helped his two sons move about four times.

At some point prior to October 31, 2011, Mr. Chase Short, one of Respondent's assistant managers, instructed Petitioner to make sure that the printers were filled with paper in the afternoons. On October 31, 2011, Petitioner began to refill the printers with paper and noticed that he did not have enough paper. Petitioner went to the hallway at the entrance of the office where Respondent kept 60 pound boxes of paper and "grabbed a box." Petitioner explained that he "turned and when [he] turned and took a step [he] just thought, oh, this doesn't feel right and as [he] kept walking [he] just felt a little more uncomfortable and when [he] got to the table [he] just dropped the paper instead of placing it down, the box." Petitioner described the mechanism of injury further and stated that he picked up the box and twisted. Petitioner also stated that he initially experienced back pain just below the belt line which seemed to radiate down his thighs and calves.

Petitioner testified that there is a camera, which takes pictures every six to seven seconds, located in the hallway where Respondent stores the paper. It is used as a time clock to take pictures of Respondent's employees when they come and go from work. Petitioner reviewed some photographs taken from the time clock camera on the day of the injury. Petitioner testified that photograph number two showed him picking up the box of paper by some plastic straps and photograph number three showed him with his body turned toward the camera. Petitioner twisted his body at some point between the time that photographs two and three were taken. Petitioner described photograph number six as a shot of him "pushing against [his] back because it's uncomfortable."

After the accident, Petitioner went home and his back pain worsened overnight. The next morning, Petitioner reported the injury to Ms. Cook as he could not stand up or sit well and could not sleep due to lower back pain. Respondent terminated Petitioner's employment on December 18, 2012. Leading up to his back surgery, Petitioner could not sit without having radiating pain in his calves and he could not walk up and down stairs. Petitioner testified that since the surgery, he has been "100 percent" and he no longer has radicular symptoms. Currently, he can walk up and down stairs and his back pain is better. As of the arbitration hearing, Dr. Freitag had not released Petitioner to full duty work and Petitioner continued to undergo water therapy.

On cross-examination, Petitioner testified that on October 31, 2011, he did not feel he needed immediate medical attention because he thought his back would improve in one or two days, and he was able to go home shortly after he injured his back as the injury occurred about five to ten minutes before the end of his shift. Petitioner acknowledged that prior to the date of

accident, his coworkers knew he had some upper back pain because they saw him lie down on the floor and pop his back.

Mr. Chase Short, one of Respondent's assistant managers, testified on Respondent's behalf. Within the first two weeks of Petitioner's employment with Respondent, Mr. Short saw Petitioner lie on the floor and Petitioner stated that his back hurt but did not specify which part of his back hurt. Around 4 p.m. on October 31, 2011, Petitioner asked Mr. Short where he could find copy paper. Subsequently, Mr. Short saw Petitioner walk into the room with a box of paper but Petitioner did not demonstrate facial expressions or behavior indicating that he was in pain, and did not complain of pain. Mr. Short agreed that he told Petitioner to make sure the printers were filled with paper but he also stated that reams of paper were always kept under a table across from the printers. Mr. Short can see the printers and the table across from the printers from his desk and he did not see Petitioner drop the box of paper. On cross-examination, Mr. Short acknowledged that he saw Petitioner carrying the box of paper for less than "a couple seconds." Mr. Short did not see Petitioner put down or drop the box of paper.

Ms. Deborah Cook, Respondent's scanning and data entry supervisor, testified on Respondent's behalf. Ms. Cook testified that Petitioner's performance was "not up to standard" and prior to the alleged accident, she spoke to Petitioner about the problems with his work. On October 25, 2011, she gave Petitioner a written warning, establishing goals for Petitioner to meet. One week later, Petitioner had not met the goals set out in the written warning, and he continued to have a high rate of data entry errors and did not produce as much work as the other clerks. Prior to the alleged accident, Petitioner complained of having back pain and a "bad back" but did not specify which part of his back hurt. On cross-examination, Ms. Cook acknowledged that at no point prior to the date of the alleged accident did Petitioner demonstrate behavior that would be consistent with having lower back pain.

Mr. Stratton testified on Respondent's behalf. Mr. Stratton testified that on October 3, 2012, he saw Petitioner at a grocery store, carrying two plastic bags that appeared to be heavy because "he appeared to be having some difficulty - - he was carrying them as if they were heavy and the bags appeared to be strained."

The Commission reviewed nine photographs taken on October 31, 2011, which were admitted into evidence. At the section 19(b) arbitration hearing, Petitioner testified that he is the man depicted in the photographs. Photograph number one shows Petitioner in a hallway in front of a stack of boxes. Photograph number two shows Petitioner holding two plastic straps that are around one of the boxes. Photograph number three shows Petitioner holding the box by the plastic straps with his arms bent and the box at stomach-level. Photograph number four shows Petitioner walking in the opposite direction than he was before with an empty box in one hand. Photograph number six shows Petitioner walking in the direction he had been walking in the third photo with his mouth open and his right hand behind him, seemingly touching his lower back.

14IWCC0225

DISCUSSION

The Arbitrator found Petitioner proved by a preponderance of the evidence that he sustained an accident arising out of and in the course of his employment with Respondent on October 31, 2011. The Commission disagrees.

Petitioner failed to prove that he sustained a compensable work accident on October 31, 2011. Petitioner testified that when he first began working for Respondent in September of 2011, he experienced upper back tightness from sitting at his desk for about six hours each day. Petitioner would lie on the floor at work and pop his back a few times each day. Mr. Short testified that within the first two weeks of his employment, he saw Petitioner lie on the floor and Petitioner told him that his back hurt. Ms. Cook testified that prior to October 31, 2011, Petitioner complained of having back pain and a bad back. The Commission finds it significant that Petitioner had persistent complaints of back pain prior to the alleged work accident. Petitioner's testimony that he only had upper back pain prior to the accident is not credible or persuasive. The Commission also notes that Petitioner did not report a lower back injury on the alleged date of accident. Based upon the inconsistencies in Petitioner's testimony, the inconsistencies in the medical records and the totality of the record presented before the arbitrator, the Commission finds that Petitioner has failed to prove his case by a preponderance of the evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on March 14, 2013, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 28 2014
MB/db
o-01/29/14
52

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

NOTICE OF 19(b) DECISION OF ARBITRATOR

DONALDSON, GREGORY
Employee/Petitioner

Case# **11WC048159**

14IWCC0225

SANGAMON COUNTY CIRCUIT CLERK
Employer/Respondent

On 3/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2217 SHAY & ASSOCIATES
TIMOTHY SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

RUSIN MACIOROWSKI & FRIEDMAN LTD
MARK COSIMINI
2506 GALEN DR SUITE 104
CHAMPAIGN, IL 61821

14IWCC0225

TATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gregory Donaldson
Employee/Petitioner

v.

Sangamon County Circuit Clerk
Employer/Respondent

Case # 11 WC 048159

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **February 7, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **10/31/2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**26,000.00**; the average weekly wage was $**500.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $15446.46 for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $15446.46.

Respondent is entitled to a credit of $**$14,492.06** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner Temporary Total Disability benefits of $289.59/week for 65 and 1/7 weeks, commencing 11/3/2011 through 11/4/2011 and 11/11/2011 through 2/7/2013, as provided in Section 8(b) of the Act.

Medical Bills

Respondent shall pay Petitioner's outstanding medical bills, directly to the providers, according to the Medical Fee Schedule adopted, as set forth in Section 8(a) of the Act.

Respondent shall be given credit for $14,492.06 for medical benefits paid by Blue Cross/Blue Shield under Section 8(j) of the Act. Respondent shall indemnify and hold Petitioner harmless against any claim made by Blue Cross/Blue Shield for collection of any medical bills granted credit for under Section 8(j) of the Act. Specifically, the Respondent shall settle the liens of Blue Cross/Blue Shield set forth in Petitioner's Exhibits #22 and #23.

Respondent shall reimburse the Petitioner for out-of-pocket medical expenses in the amount of $582.26.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. Ryan McCarthy
Signature of Arbitrator

March 11, 2013
Date

ICArbDec19(b)

MAR 14 2013

ADDENDUM

In support of the Arbitrator's Decision with respect to issues (C), Accident, and (F), Causal Connection, the Arbitrator finds the following facts:

The Petitioner was a single, 56 year-old man on the date of his accident. He was employed by the Respondent, Sangamon County Circuit Clerk's office. Seven to nine years before he began working for the Respondent he received two epidural injections from Dr. Paul Smucker for lower back pain. The Petitioner testified that after those epidural injections, he did not experience any lower back pain until October 31, 2011, his date of accident.

Dr. Gary Rull has been the Petitioner's primary care physician since July 30, 2007. Dr. Rull's pre-accident records were entered into evidence at Petitioner's Exhibit # 4. The Petitioner's last visit with Dr. Rull before the accident was October 17, 2011. None of the Petitioner's pre-accident records indicate that the Petitioner suffered lower back pain during the period of July 30, 2007 to October 17, 2011 nor was any treatment given for lower back pain during that period. (Px. 4)

The Petitioner testified that during the years prior to his accident, he moved several times and helped his two sons move as well. He also testified that he was involved in other physical activities during that period.

The Petitioner testified that he began working for the Respondent on September 19, 2011. His supervisor at his job with the Respondent was Debbie Cook. He indicated that he worked in the basement level of the Circuit Clerk's office in the information services department. He testified that he was not given his job description until three or four days before he was placed under an off duty work restriction. However, he did testify that his job required data input and scanning.

The Petitioner testified that he spent six and a half hours per day at his desk. He testified that when he first started, he was not used to sitting for that length of time and his upper back would get tight. To alleviate the stress to his upper back, he would lay on the floor to pop his upper back. After his third week working for the Respondent, he no longer had tightness in his upper back and did not need to pop it anymore.

The Petitioner testified that boxes of printer paper were kept in the entrance hallway of the basement level. He testified that there were approximately 20 to 30 boxes and that they weighed approximately sixty pounds. The Petitioner testified that he was told by Chase Short, the assistant manager, that he needed to make sure that the printers were filled with paper after he ran his reports at 4:15 p.m. so that the printers would not run out of paper when the 4:30 p.m. reports were run.

The Petitioner testified that on October 31, 2011, while he was at work, the print station ran out of extra paper. In order to refill the printers after he ran his reports, as he had been instructed to do by Mr. Short, he went out into the hallway and picked up a box of paper. He testified that he turned, took a step, and felt discomfort in his lower back. He testified that he continued walking to the print station, and as he walked his back became more and more uncomfortable. He testified that when he finally reached the print station he dropped the box of paper because he was so uncomfortable.

The Petitioner was presented with a series of still shots taken from a security camera in the hallway where the accident occurred. These stills were included in Respondent's Exhibit # 3, the evidence

deposition of Dr. Lange, as Petitioner's Deposition Exhibit # 3. The Petitioner testified that he had seen the surveillance film. Photograph number two depicted him lifting a box of paper, while photograph number 3 shows his body turned toward the camera. (Rx 3, PDEx 3) The Petitioner testified that in the time between when the two photographs were taken, he had twisted his body. Photograph number 6 depicts the Petitioner reaching behind his body toward his back. (Rx. 3, PDEx 3) The Petitioner testified that at that time, his back was not comfortable and that he was pushing on his back trying to relieve his pain.

The Petitioner testified that after the incident, his back did not feel right. He indicated that his back pain was right below the belt line, and that it radiated down both of his thighs and calves into his feet. However, he testified that he did not immediately report the accident. He ultimately reported the accident to Debbie Cook in her office the next morning on November 1, 2011. He reported that he was picking up a box of paper before he left the day before, had hurt his back, and that the pain had gotten increasingly worse over the course of the evening.

The Petitioner presented to Dr. Rull's office at Southern Illinois University School of Medicine on November 3, 2011. He was seen by Dr. Andrew Varney, another physician in the office, because Dr. Rull was out of town. The medical Records from Dr. Rull's office were entered into evidence as Petitioner's Exhibit # 5. The Petitioner testified that in the three days prior to his appointment with Dr. Varney, he noticed that he could not stand up or sit well, that he hurt, and that he was having trouble sleeping.

Dr. Varney indicated that the Petitioner reported back issues starting while he was at work and lifted a 60 pound box while rotating and since had lower back pain, numbness mostly on the left side, muscle spasms, and a tingling sensation down to the level of his bit toes. (Px. 5) Upon physical examination, Dr. Varney noted a positive straight leg test on the right side, that the Plaintiff found it painful to walk on his toes, and that he had dysesthesia on the right leg in the S1 distribution. (Px. 5) Dr. Varney diagnosed the Petitioner with lumbar pain with radiculopathy. (Px. 5) He referred the Petitioner for physical therapy and prescribed Gabapentin. (Px. 5)

The Petitioner testified that prior to his injury he had been using prescription Hydrocodone 7.5 for several years to control pain from an acute infectious colitis that had never cleared up. Records of this illness and prescription are included in Petitioner's Exhibit # 4. Dr. Varney continued the Petitioner's Hydrocodone 7.5 prescription to help alleviate his lower back and leg pain. (Px. 5)

The Petitioner was seen again by Dr. Varney on November 10, 2011. The Petitioner indicated that his pain was not improving. (Px. 5) Dr. Varney noted that Petitioner's physical therapy was not scheduled to begin until the end of December 2011. (Px. 5) Upon physical examination, Dr. Varney noted that the Petitioner had a positive straight leg test on both the left and right sides and that he continued to exhibit pain walking on his toes. (Px. 5) Dr. Varney increased the Petitioner's dosage of Hydrocodone to 10 and took the Petitioner off of work until he could be seen by Dr. Rull. (Px. 5)

The Petitioner was seen by Dr. Rull on November 16, 2011. The Petitioner reported that he was still experiencing the same amount of pain and that his pain was sometimes a 10 out of 10. (Px. 5) He indicated that he could not get comfortable in any position and that the pain was keeping him awake at night. (Px. 5) The Petitioner reported occasional pain radiating down both legs, more so on the right than left, as well as intermittent numbness down the legs. (Px. 5) Dr. Rull examined the Petitioner, noting that he could not get an accurate straight leg test due to the Petitioner's low back pain. (Px. 5) Dr.

Rull prescribed cyclobenzaprine and advised the Petitioner to present to the emergency room if he developed any "red flag symptoms." (Px. 5) Dr. Rull continued the Petitioner's off work restriction until November 30, 2011. (Px. 5)

Dr. Rull followed up with the Petitioner over the telephone on November 17, 2011. (Px. 5) The Petitioner indicated that the cyclobenzaprine helped him sleep, but that he was still in severe pain and was not able to do much at all. (Px. 5) As a result of this conversation, Dr. Rull ordered an MRI of the Petitioner's lumbar spine. (Px. 5)

The MRI was taken on November 18, 2011. The MRI Report was entered into evidence as Petitioner's Exhibit # 7. The MRI showed some moderately severe spinal stenosis at the L3-L4 level secondary to disc bulge with possible focal disc herniation as well as flava hypertrophy degenerative change. (Px. 7) It also showed a moderate spinal stenosis at L2-L3 and edema in the L3 and L4 vertebral bodies that may have represented microfractures. It also showed diffuse disc bulge at the L4-5 level with bilateral neural foraminal deformation with the left being slightly more stenosed than the right. Finally, there is disc bulge at L5-S1 with no spinal stenosis. (Px. 7)

Based on the Petitioner's MRI results and symptoms, Dr. Rull recommended the Petitioner be admitted to Memorial Medical Center for pain control and consultation with a spine surgeon. (Px. 5) The Petitioner ultimately presented to Memorial Medical Center on November 19, 2011. The Memorial Medical Records for November 19, 2011 were entered into evidence as Petitioner's Exhibit # 8. Petitioner was given several injections of hydromorphone for his pain. (Px. 8)

While the Petitioner was at Memorial Medical Center, Mark Eilers, a resident working under orthopedic surgeon Dr. Per Freitag, was called for a consult. (Px. 8) The Petitioner reported that he had injured his back at work on October 31, 2011, while trying to lift up a carton of printer paper. (Px. 8) He reported that he immediately noticed pain in his back and the pain had been unrelenting since. (Px. 8) Upon physical examination, Resident Eilers noted that the Petitioner's back was tender to palpation on the paraspinal musculature and lumbar region, greater on the right than the left. (Px. 8) He also noted markedly diminished patellar reflexes on the right side. (Px. 8)

Resident Eilers reviewed the Petitioner's November 18, 2011 MRI, noting that he had what appeared to be an acute disk bulge at the level of L3-L4 with significant narrowing of the canal. (Px. 8) He also noted a significant amount of increased signal changes at the disk levels of L3-L4, suggestive of an acute injury. (Px. 8)

Resident Eilers diagnosed the Petitioner with an acute ruptured disc at L3-L4 with decreased canal space and foraminal stenosis. (Px. 8) He prescribed the Petitioner a Medrol Dosepak and instructed him to keep his physical therapy appointment for the following Monday, with direction to ensure that the physical therapist was doing McKinzie exercises as other physical therapy could be detrimental. (Px. 8) The Petitioner was subsequently discharged later on November 19, 2011.

The Petitioner returned the Emergency Department at Memorial Medical Center on November 26, 2011. The records from the Petitioner's November 26, 2011 visit to Memorial Medical Center were entered into evidence as Petitioner's Exhibit # 9. The Petitioner testified that he returned to the Emergency Department on that date because his foot was beginning to drop, and he believed that was a sign that his condition was worsening. The treating physician's notes indicated that the Petitioner complained of stiffness in the neck and a warm sensation traveling up the spine. (Px. 9) The Petitioner was evaluated and no imminent problems were

discovered. (Px. 9) Therefore, the Petitioner was instructed to follow up with Dr. Rull within one to two days and was discharged. (Px. 9)

The Petitioner followed up with Dr. Rull on November 29, 2011. The Petitioner reported that since his discharge from Memorial Medical Center on November 26, he had experienced three episodes of right foot drop which lasted for one or two steps. (Px. 5) He reported that he continued to experience intermittent numbness and tingling in both legs, greater on the right side than the left. (Px. 5) He also complained of some tingling in the right upper buttock region. (Px. 5) Dr. Rull took the Petitioner off of work duty until December 12, 2011 and indicated that his suitability to return to work would be reassessed after he presented to physical therapy and was seen by Dr. Freitag. (Px. 5) The Petitioner continued to follow up with Dr. Rull for management of his pain medication throughout his treatment for his back. Dr. Rull continued to keep the Petitioner on an off work restriction until February 4, 2013. (Px. 5)

The Petitioner first presented to Dr. Freitag on December 8, 2011. Dr. Freitag's records were entered into evidence as Petitioner's Exhibit # 6. Dr. Freitag also testified via his evidence deposition, taken on December 3, 2012, which was entered into evidence as Petitioner's Exhibit # 21. Dr. Freitag testified that he is an orthopedic surgeon and that he primarily performs spine surgery. (Px. 21, p. 6) Dr. Freitag is also an Associate Professor of Orthopaedic Surgery at Southern Illinois University School of Medicine. (Px. 21, p. 8)

On his first visit to Dr. Frietag, the Petitioner reported that he had a work accident where he attempted to pick up a box of paper and experienced instant back pain that had continued and extended into the legs. (Px. 6) He reported that his pain was worse when he was sitting or with any level of activity or bending and that it was better when he was lying flat. (Px. 6) He also reported that over the previous several weeks he had experience a couple episodes where his right foot dropped, meaning he was unable to keep it dorsiflexed while walking. (Px. 6)

On physical examination, Dr. Freitag noted bilateral weakness of the extensor halluces longus, tibialis anterior, and gastroc-soleus complex, worse on the right than the left. (Px. 6) He noted that the weakness was most significant on the right lower extremity, extensor halluces longus, and sibialis anterior. (Px. 6) He opined that the locations of most significant weakness indicated L4-L5 nerve root involvement. (Px. 6) Dr. Freitag testified that the Petitioner also exhibited a positive bilateral straight leg test, which he testified means that the Petitioner had increased pain in the legs when they were lifted. (Px. 21, pp. 15-16)

Dr. Freitag ordered x-rays of the lumbar spine, which were taken and reviewed in office the same day. The x-ray report was entered into evidence as Petitioner's Exhibit # 10. The x-ray showed disc space narrowing at all levels between L2-S1, most significantly at the L3-L4 interspace. (Px. 10) It also showed some evidence of retrolisthesis of L5 on S1. (Px. 6) Dr. Freitag also reviewed the Petitioner's November 18, 2011 MRI films. (Px. 10) He testified that the MRI revealed some stenosis at L 3-4 with a disc herniation or protrusion and some hypertrophy or thickening of the ligamentum flavum. (Px. 21, p. 16) The MRI also showed some bulging of the disc at L4-5 and L5-S1. (Px. 21, p. 17)

Dr. Freitag acknowledged that the Petitioner's MRI report indicated a focal disc herniation at L3-4, however he testified that this was not consistent with the Petitioner's presentation on December 8, 2011, because herniation at L3-4 would not involve the L5 nerve root. (Px. 21, p. 17) Dr. Freitag also testified that while the narrowing and stenosis indicated on the MRI was degenerative in nature, the disc protrusion was obviously related to a trauma because it was focal. (Px. 21, p. 17) Furthermore, Dr. Freitag indicated that although the degenerative findings predated the Petitioner's October 31, 2011 date of accident, his review of the Petitioner's medical records indicated that the degenerative findings had been asymptomatic for quite some time

prior to that date. (Px. 21, pp. 17-18) He also opined that the disc bulging at L3-4 could have an acute cause because it was central and more towards the right side. (Px. 21, p. 18)

Dr. Freitag recommended that the Petitioner continue with physical therapy. (Px. 6) He testified that the continued physical therapy was reasonable and necessary within a reasonable degree of medical certainty because generally in bulging disc cases, good physical therapy can resolve the issue. (Px. 21, p. 19) He also recommended an EMG study in order to help localize which nerve root was most affected. (Px. 6) Dr. Freitag testified that an EMG is more accurate than an MRI when it comes to predicting the outcome of improvement from treatment because it shows the specific nerve root involved. (Px. 21, p. 19) Dr. Freitag planned to perform a transforaminal injection if the EMG results showed pathology at a specific nerve root. (Px. 6)

The Petitioner presented to Physio Therapy Professionals for physical therapy on January 20, 2012. The Petitioner's records from Physio Therapy were entered into evidence as Petitioner's Exhibit # 11. He continued to treat with Physio Therapy Professionals until February 17, 2012. at which time he was discharged. (Px. 11) The Petitioner's visit notes from January 26, 2012, January 30. 2012, and February 1, 2012 indicated that the Petitioner had difficulty with all of the exercises due to pain, but that he managed to work through them. (Px. 11)

On March 12, 2012, the Petitioner underwent an EMG with Dr. Zen Wang at SIU HealthCare. The EMG report was entered into evidence as Petitioner's Exhibit # 12. Dr. Wang noted on physical examination that the Petitioner had slightly decreased sensation to his feet and that he exhibited bilateral lumbosacral radiculopathy and peripheral neuropathy in the lower extremities. (Px. 12) After reviewing the EMG studies, Dr. Wang concluded that the Petitioner had bilateral moderate lumbosacral radiculopathy of the nerve roots of L4, L5 and S1, with L5 predominant involvement, as well as some likely diabetic mild sensory neuropathy bilaterally. (Px. 12) Dr. Freitag testified in his evidence deposition that the EMG indicated two different sources of nerve involvement. The neuropathy involving the L4, L5, and S1 nerve roots emanated from the spine itself, while the mild sensory neuropathy was likely caused by the Petitioner's diabetes. (Px 21, pp. 20-21) Dr. Freitag further testified that the EMG results were consistent with his clinical examination of the Petitioner, especially the L5 nerve root involvement because of the Petitioner's weakness in his big toe extensor. (Px. 21, p. 21)

The Petitioner returned to Dr. Freitag's office on March 21, 2012 for follow up regarding his EMG results. He indicated that he was unable to do significant walking or standing secondary to his severe back pain. (Px. 6) Dr. Freitag indicated that the EMG results showed bilateral L4-L5 and L5-S1 radiculopathy. (Px. 6) The Petitioner complained that his pain was worse on the right side than the left, and that he was experiencing pain all the way down from his hip to his leg. (Px. 6) Upon physical examination, Dr. Freitag noted that the Petitioner had some tenderness along the lumbar spine which was moderate to severe for the patient. (Px. 6) Dr. Freitag recommended a right L5 transforaminal lumbar epidural steroid injection. (Px. 6) He testified that the epidural steroid injection was reasonable and necessary treatment because the EMG indicated primary L5 radiculopathy, which indicated treatment of that nerve root in particular (Px. 21, p. 24) Dr. Freitag placed the Petitioner under an off work restriction until further notice. (Px. 6)

The Petitioner presented to Dr. Ferdinand Salvacion of Spineworks Pain Center for consultation for a transforaminal lumbar epidural steroid injection on April 17, 2012. Dr. Salvacion's records were entered into evidence as Petitioner's Exhibit # 13. Upon physical examination, Dr. Salvacion noted that the Petitioner's gait was stiff and that his lumbar range of motion was limited in flexion and extension secondary to pain. (Px. 13) He noted that he had a positive straight leg raise on the right leg. (Px. 13) Dr. Salvacion also reviewed the Petitioner's MRI of the lumbar spine and EMG results. (Px. 13) Dr. Salvacion diagnosed the Petitioner with

lumbar stenosis, lumbosacral radiculopathy, and lumbar degenerative disc disease. (Px. 13) Dr. Salvacion scheduled the Petitioner for a trial lumbar epidural steroid injection. (Px. 13)

The Petitioner underwent the first of a series of epidural steroid injections on May 8, 2012 with Dr. Salvacion. The records from the epidural steroid injection were entered into evidence as Petitioner's Exhibit # 14. The Petitioner testified that subsequent to the injection, he became quite ill. He indicated that he woke up at 3:30 in the morning after the injection, was vomiting, had a splitting headache, and was in intense pain. He testified that he presented to Memorial Medical Center for treatment, but was instructed to present to St. John's Hospital because the emergency room was closed. He testified that he ultimately followed up at St. John's Hospital. The St. John's Hospital records from May 9, 2012 were entered into evidence as Petitioner's Exhibit # 26.

Dr. Freitag indicated that there were two possible causes for the Petitioner's adverse reaction to the epidural steroid injection. First, he testified that epidural steroid injections often cause a significant rise in blood sugar in diabetic patients, up to 600 or 700. (Px. 21, p. 25) Dr. Freitag indicated that the Petitioner's severe headaches, nausea, vomiting, and ultimate state of being bedridden were indicative of high blood sugar. (Px. 21, p. 25) Second, Dr. Freitag testified that there could have been an incidental penetration of the dura causing a dura leak, which can cause a spinal headache involving nausea. (Px. 21, pp. 25-26)

On May 30, 2012, the Petitioner returned to Dr. Freitag's office. Dr. Freitag testified that the Petitioner exhibited no improvement from the epidural steroid injection and that he still had lumbosacral radiculopathy. (Px. 21, p. 26) Dr. Freitag recommended that the Petitioner undergo a foraminal decompression to his lumbar spine. (Px. 6) Dr. Freitag testified that he opted for a decompression only opposed to a decompression and fusion because of the possible negative future side effects fusion could have on the Petitioner's bulging disc at L3-4. (Px. 21, pp. 26-27) Further, Dr. Freitag testified that the decompression would help with the radiculopathy, which would help with the back pain some and resolve the pain to the legs. (Px. 21, p. 27) Dr. Freitag testified that although fusion was an option, the long term side effects did not make it the best option. (PX. 21, p. 28) Dr. Freitag continued the Petitioner's off duty restriction pending surgery. (Px. 6)

On September 19, 2012, the Petitioner returned to Dr. Freitag. (Px. 6) He indicated that his pain was progressively getting worse. (Px. 6) Dr. Freitag noted on physical examination that the Petitioner exhibited bilateral positive straight leg test with definite weakness of both big toe extensors. (Px. 6) At this time, Dr. Freitag scheduled the Petitioner for foraminal decompression surgery. (Px. 6) Dr. Freitag extended the Petitioner's off work restriction until after February 2, 2012, to allow for recovery from surgery.

The Petitioner underwent two level foraminal decompression surgery on November 2, 2012 with Dr. Freitag. Prior to surgery, the Petitioner was required to undergo a number of tests in order to be cleared for surgery. The records of these tests, taken at Memorial Medical Center, were entered into evidence as Petitioner's Exhibit # 17. He further was required to receive cardiac clearance for the surgery which was given by Dr. Wilfred Lam. Dr. Lam's records were entered into evidence as Petitioner's Exhibit # 16.

Dr. Freitag's operative report was entered into evidence as Petitioner's Exhibit # 18. Dr. Freitag testified that he performed a lumbar decompression at L4-5 and L5-S1, which involved taking down the facet joints and opening up the foramina and decompressing the nerve at those two levels. (Px. 21, p. 30) Dr. Freitag's post-operative diagnoses were marked foraminal stenosis at L4-L5 and L5-S1 bilaterally, with more pain on the right and neuralgia of the sciatic nerve. (Px. 18) He testified that in his opinion the decompression surgery was reasonable and necessary treatment for the Petitioner because conservative treatment had failed and his condition was becoming worse. (Px. 21, p. 30)

As a result of catheterization during surgery, the Petitioner developed urinary retention, which necessitated the intervention of Dr. Alex Gorbonos, a urologist. Dr. Gorbonos' records were entered into evidence as Petitioner's Exhibit # 20. This issue has since resolved. Furthermore, as a result of this complication, the Petitioner was required to be hospitalized at Memorial Medical Center for five days opposed to one day.

The Petitioner returned to Dr. Freitag's office on November 14, 2012 for a post-operative follow up. (Px. 6) He reported that his pain had decreased since the surgery. (Px. 6) Dr. Freitag testified that the Petitioner looked like he was doing somewhat better and was no longer experiencing pain in his legs. (Px. 21, p. 32) He testified that the surgery seemed successful at that point. (Px. 21, p. 32) Upon physical examination, Dr. Freitag noted no discomfort to the lumbar spine with palpation and a negative straight leg test on both sides. (Px. 6) Dr. Freitag referred the Petitioner for hydrotherapy and ordered Percocet for pain. (Px. 6) The Petitioner presented for hydrotherapy at the YMCA on November 28, 2012. The YMCA Physical Therapy Records were entered into evidence as Petitioner's Exhibit # 25. The Petitioner continues to receive hydrotherapy at the YMCA. (Px. 25)

On December 18, 2012, the Petitioner was terminated from his position with the Respondent. The Petitioner's termination letter was entered into evidence as Petitioner's Exhibit # 28. The reason given for the Petitioner's termination was his extended absence from work while treating for his injury. (Px. 28)

On February 4, 2013, the Petitioner was seen by Jacob Monsivais, a Physician's Assistant in Dr. Rull's office. The notes from this office visit were entered into evidence as Petitioner's Exhibit # 29. At that time, P.A. Monsivais returned the Petitioner to work with a light duty restriction of no lifting greater than 50 pounds and no repetitive bending and twisting activities. (Px. 29) This was the last return to work slip the Petitioner received prior to the February 7, 2013 Arbitration Hearing.

In his evidence deposition, Dr. Freitag testified that his ultimate diagnosis of the Petitioner was foraminal compromise because of neuropathy and radiculopathy due to the twisting while he was holding a box of printer paper at work. (Px. 21, p. 34) He testified that although the Petitioner had some preexisting degenerative changes in his back prior to the work injury, they had been asymptomatic and that these degenerative changes had been exacerbated by the injury. (Px. 21, p. 34)

The Petitioner was sent for an Independent Medical Evaluation (IME) with Dr. David Lange, an orthopedic spine surgeon. Dr. Lange testified via his evidence deposition, entered into evidence as Respondent's Exhibit # 3. Dr. Lange testified that the Petitioner reported to him that he had been injured on October 31, 2011 while picking up a box of paper, that he noticed something was wrong with his back, and that he immediately dropped the box. (Rx. 3, p. 8) It was Dr. Lange's opinion that the Petitioner suffered from mechanical low back pain due to degenerative changes in his back and that his symptoms to the lower extremities could be due to spinal stenosis or peripheral neuropathy. (Rx. 3, p. 21)

Dr. Lange further testified, that his notes from taking the Petitioner's history said " "went to pick up a box of paper." I dropped it to the floor. "60 to 70 pounds." As soon as I turned, I knew something was wrong." He indicated that his notes did not indicate when the box was dropped, and in fact did not even suggest that he dropped the box. (Rx. 3, p. 35) Dr. Lange testified that if the Petitioner had not immediately dropped the box, it might affect his opinions with regards to the Petitioner's injury. (Rx. 3, p. 36) Dr. Lange testified that neither the Report of Injury nor Supervisor's Investigation Report indicated that the Petitioner immediately dropped the

box. (Rx. 3, p. 39) Dr. Lange further testified that stills of the surveillance video were consistent with the Petitioner picking up the box and turning with it. (Rx. 3, p. 40-41)

Dr. Lange further testified that on one of the stills, it looked like the Petitioner was grabbing his lower back and that such an action would be consistent with having sustained a sprain-strain or other type of injury to the lower back. (Rx. 3, p. 42) Dr. Lange then testified if the Petitioner had twisted his back while working with the box enough that he dropped the box, than the Petitioner may have sustained a sprain-strain or other low back injury on October 31, 2011. (Rx. 3, pp. 43-44)

Dr. Lange also testified that he did not see any medical record regarding back issues in the Petitioner's medical records from 2007 up until the date of accident. (Rx. 3, p. 46) While Dr. Lange opined that he Petitioner had degenerative findings in his lower back prior to October 31, 2011, he testified that a person can have degenerative disc findings like the Petitioner's and not have symptoms. (Rx. 3, p. 47) Further, he testified that lifting a box weighing 50 to 60 pounds and then twisting could cause an exacerbation of an underlying degenerative disc disease and caused it to become symptomatic. (Rx. 3, p. 47) He also testified that considering the Petitioner's medical records were devoid of any complaints of lower back pain from 2007 until October 31, 2011, and that Petitioner had complaints almost immediately following his trauma on October 31, 2011, it would be "illogical to disagree with" the contention that he sustained an aggravation or exacerbation of his underlying degenerative disc disease which caused him to be symptomatic. (Rx. 3, pp. 55-56)

Dr. Lange testified that the Petitioner's EMG findings of bilateral moderate lumbosacral radiculopathy of the nerve roots of L4, L5, and S1, with L5 being the predominant involvement were objective findings and would explain the complaints that the Petitioner presented with regard to his legs. (Rx. 3, pp. 53-54)

The Petitioner testified that subsequent to his surgery, he no longer has radicular symptoms and that his back pain has improved. He testified that he would like to return to work, and has been working on his resume in order to find new employment.

After a review of the totality of the evidence, the Arbitrator finds that on October 31, 2011, the Petitioner sustained an accident arising out of and in the course of his employment with the Respondent when he lifted a box of paper and twisted, causing immediate discomfort to his back. The photographs from the Respondent's security camera included in Respondent's Exhibit # 3 clearly show that the Petitioner picked up a box of paper and subsequently twisted on the date and time reported. Furthermore, these photographs also show the Petitioner pushing on his lower back in apparent distress and discomfort. (Rx. 3, PDEx. 3)

While the Petitioner admitted not reporting his accident on the date it happened, the circumstances do not cause the Arbitrator to change his conclusions on accident. Mr. Short, who was the only other person who was in the Petitioner's work area after he had lifted the box, testified that he saw the Petitioner lifting the box and did not notice anything unusual about his posture or facial expression. He admitted, however, that he was doing his own work and only observed the Petitioner for a couple of seconds. The Petitioner, whose work day ended about twenty minutes after his accident, said that at that time he was only experiencing back pain and that his legs began to bother him over the next two days. He also reported his accident to his manager, Ms. Cook, the following day.

Relying primarily on the testimony and medical records of the Dr. Freitag and the medical records of Dr. Rull, both prior to and subsequent to the date of accident, the Arbitrator finds that the Petitioner's lower back and leg pain was causally connected the October 31, 2011 work accident. Although the Petitioner had by his own admission treated for lower back pain in the past, Dr. Rull's pre-accident records indicate that the

Petitioner had not complained of any back pain for the four years prior to the accident. (Px. 4) Furthermore, Dr. Freitag testified that the Petitioner had suffered foraminal compromise because of neuropathy and radiculopathy caused by the accident. (Px. 21, p. 34) He opined that the Petitioner's disc bulging at L3-4 could have an acute cause because it was central and more towards the right side. (Px. 21, p. 19) He also testified that the Petitioner's pre-existing degenerative changes were aggravated and exacerbated by the injury. (Px. 21. p. 34) Therefore, the Arbitrator finds that the Petitioner sustained an accidental injury on October 31, 2011 when he picked up and twisted his body while holding a box of paper weighing fifty to sixty pounds and his condition of ill-being is causally related to his October 31, 2011 work accident.

In support of the Arbitrator's decision relating to issue (J), Medical Expenses, the Arbitrator finds the following facts:

Dr. Freitag has testified that the Petitioner's physical therapy. epidural steroid injection, and decompression surgery were all reasonable and necessary treatment for the Petitioner's lower back and leg complaints. (Px. 21, pp. 19, 24. 30) Therefore, the Arbitrator finds that all of the Petitioner's treatment was reasonable and necessary for treatment for his work related injuries.

The Respondent shall pay the outstanding medical bills. as set forth in Petitioner's Exhibit # 24 directly to the medical providers pursuant to the Medical Fee Schedule set forth in Section 8(a) of the Act. Respondent shall be given a credit pursuant to Section 8(j) in the amount of $14,620.65 for all bills paid by Blue Cross/Blue Shield and will hold Petitioner harmless for any subrogation claim asserted by Blue Cross/Blue Shield. Specifically, the Respondent shall settle the Liens of Blue Cross/Blue Shield set forth in Petitioner's Exhibits # 22 and # 23.

The Arbitrator further orders the Respondent to reimburse the Petitioner in the amount of $582.26 for out-of-pocket medical expenses paid by the Petitioner for injuries arising from the accident of October 31, 2011.

In support of issue (K), Temporary Total Disability, the Arbitrator finds the following facts:

The Petitioner missed work on November 3 and 4, 2011 in order to attend doctor's visits and to manage his pain shortly after the accident. He was then excused from work by Dr. Varney, Dr. Rull, and Dr. Freitag from November 11, 2011 until February 4, 2013. On February 4, 2013, the Petitioner was returned to work by Dr. Rull's physician's assistant with a light duty restriction of no lifting greater than 50 pounds and no repetitive bending and twisting. (Px. 29) The Petitioner was terminated from his position with the Respondent on December 18, 2012. (Px. 28) Prior to the Arbitration hearing on February 7, 2013, the Petitioner had not returned to work anywhere.

The Arbitrator awards the sum of $289.69 per week for 65 and 1/7 weeks for the time period of November 3, 2011 through November 4, 2011 and the time period of November 11, 2011 through February 7, 2013. The Respondent shall be given a credit in the amount of $15,446.36 representing Temporary Total Disability benefits the Respondent has already paid to the Petitioner.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Garrett,
Petitioner,

vs.

NO: 11WC 46777

Transport Labor Contract/Delco Transport,
Respondent,

14IWCC0226

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, prospective medical treatment, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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: MAR 2 8 2014
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RWW/jrc
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

GARRETT, KEVIN
Employee/Petitioner

Case# **11WC046777**

14IWCC0226

TRANSPORT LABOR CONTRACT/DELCO TRANSPORT
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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:

0465 SCHEELE CORNELIUS & HARRISON PC
DAVID C HARRISON
7223 S ROUTE 83 PMB 228
WILLOWBROOK, IL 60527

1826 LEAHY EISENBERG & FRAENKEL LTD
JAMES P TOOMEY
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)SS.

COUNTY OF Jefferson)

14IWCC0226

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kevin Garrett
Employee/Petitioner

v.

Transport Labor Contract/Delco Transport
Employer/Respondent

Case # 11 WC 46777

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **07-09-2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other ___

14IWCC0226

FINDINGS

On the date of accident, **02-18-2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**1,893.94**; the average weekly wage was $**473.49**.

On the date of accident, Petitioner was **38** years of age, *married* with **2** dependent children.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**2,000.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proof regarding the issue of accident. Claim denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/22/13
Date

ICArbDec19(b)

AUG 29 2013

FINDINGS OF FACT

Testimony of Petitioner, Kevin Garrett

Petitioner, who was 5'11" tall and weighed 368 pounds as of the date of hearing, testified that he was employed as a diesel mechanic by Respondents, Transport Labor Contract and Dellco Transport (hereafter Respondent) on February 18, 2011. He classified the work as "heavy" work, which would include lifting 100 pounds. Petitioner agreed that he began working for Respondent on January 21, 2011. Petitioner testified that in October of 2010, he had settled two workers' compensation claims for injuries related to his left knee, case numbers 10 WC 1396 (date of accident October 9, 2009) and 10 WC 18727 (date of accident of April 4, 2010). Petitioner identified Pet. Ex. 3 as the settlement contract and indicated that he signed the document. The Arbitrator notes that these claims against Travel Center of America resolved for approximately 45.1% loss of use of the left leg.

Petitioner testified that prior to February 18, 2011, he was able to perform his full duties with Respondent. He testified that he had "a little" problems with his left knee. On the date of accident, he was under a semi-trailer attempting to break free frozen brakes with a hammer. He testified that three other individuals were present at the occurrence site: Brian Moran, who was driving the semi-tractor; Patrick Guenther; and Troy Slifer. While he was under the trailer, Patrick Guenther told Brian Moran to pull forward. Petitioner testified that his left knee became pinned between the ICC bumper of the trailer and the pavement. He testified that the ICC bumper "rolled" over his leg. After becoming pinned between the ICC bumper and the pavement, his left knee became hard to bend and became swollen. He testified that his knee brace was broken, and that he told Mr. Moran and Mr. Guenther about the incident. Petitioner testified that Mr. Moran requested that he not seek medical attention, as Mr. Guenther was currently treating for a workers' compensation injury.

Petitioner continued working for Respondent and his left knee condition worsened. He wore a bandage, and his knee swelled up daily. He testified that he told Mr. Moran of his worsening left knee condition. Petitioner's last date of work with Respondent was March 17, 2011, when he was laid off. Thereafter, he received unemployment insurance benefits. He has applied for approximately 50 jobs in the past six months, including fast food restaurants, as he likes to work.

Petitioner saw Dr. Robert Gurtler, the orthopedic surgeon who performed his prior left knee surgery, on July 27, 2012. He indicated that Dr. Gurtler administered a cortisone injection that helped for 2 weeks, but that his knee problems returned.

Petitioner testified that his left knee continues to bother him. He testified that he utilizes a cane, as if he does not use his cane, he "falls on [his] face." He can walk approximately a block without his cane. He testified that he elevates his leg while sitting, and that he has to move his leg if he sits for more than 5-10 minutes. Petitioner testified that he could stand for five to six minutes, but then needs to lean or sit down. He additionally indicated that he climbs stairs one at a time, using his right leg to step first. He also indicated that his left knee pops, and that he wakes up three to four times a night due to left knee pain.

On cross-examination, Petitioner testified that he was working on the trailer driver side brake, and that his entire body was under the trailer. He testified that Mr. Guenther was operating as a spotter for Mr. Moran on the driver side of the trailer, and that Mr. Slifer was on the passenger side of the trailer. Petitioner admitted that he did not seek medical treatment at any time through September 2011, when he first made a claim through Respondent's insurance carrier. He testified that he had filed a previous workers' compensation claim for his

left knee, and a claim for his right knee many years ago. In fact, the present matter is Petitioner's ninth workers' compensation claim filed with the IWCC, ranging from accidents in 1999 through 2011.

Petitioner additionally testified that he understood he closed out any future medical benefits for his left knee when he settled the two claims against Travel Center of America for his left knee injuries on October 9, 2009 and on May 4, 2010. He indicated that he did not work between the time he settled his claims against Travel Center of America and the start of his employment with Respondent. He additionally testified that he had no group medical insurance from the time he settled his claims with Travel Center of America and throughout his employment with Respondent. He admitted that he was terminated by Travel Center of America because his supervisor was not accommodating his restrictions.

Petitioner testified that he advised Brian Moran of his permanent restrictions when he was hired by Respondent, and that he adhered to his restrictions. He admitted that Dr. Gurtler provided him no off work note on his visit on July 26, 2012. He agreed that during that visit, Dr. Gurtler advised that he was not a candidate for a left knee replacement, and that he needed to lose 50 pounds. This was similar to the previous visit on September 7, 2010. Petitioner agreed that on his first visit with Dr. Gurtler on January 7, 2010, he weighed 335 pounds, but that on July 26, 2012, he weighed 387 pounds. He admitted that he had a one pack per day cigarette smoking history for 14 years. Petitioner agreed that on his July 26, 2012 visit, he told Dr. Gurtler he had been doing "well" until a year prior. Petitioner was then questioned regarding his visit on September 7, 2010. He admitted to instability in the knee, but claimed the only pain he experienced was from his brace.

Petitioner admitted that he has a physician who prescribes his blood medication, Dr. Zahoor, and that he has seen the doctor as recently as a month ago. Petitioner denied ever telling Dr. Zahoor about his knee complaints or seeking treatment from Dr. Zahoor.

Testimony of Troy Slifer

Petitioner called Troy Slifer as an occurrence witness. Mr. Slifer testified that on February 18, 2011, he was a part-time employee of Respondent. He testified that on the date of accident, there were two trailers side by side in the trailer drop yard. He testified that he fixed the brakes on one trailer, and that Petitioner fixed the brakes on the other trailer. According to Mr. Slifer, Petitioner, Mr. Guenther, Mr. Moran, and himself were present at the scene. He testified that Mr. Guenther yelled for the trailer to move, and that he noticed Petitioner under the trailer. Mr. Slifer testified that he yelled to Mr. Moran to stop the trailer, but it was too late: Petitioner was struck by the ICC bumper. Mr. Slifer testified that Petitioner got out from under the trailer and was limping on the leg that he had previously injured. Mr. Slifer testified that Mr. Moran was concerned that he would have to take Petitioner to the hospital, and that he advised Petitioner to attempt to "walk it off." On cross-examination, Mr. Slifer admitted that he was 20-30 feet away from Petitioner and Mr. Moran after the alleged incident and could not hear the conversation. He testified that Petitioner never made any left knee complaints while working for Respondent prior to the February 18, 2011 incident. He admitted that Petitioner did walk slowly with a limp. He testified that he currently works for Travel Center of America, where Petitioner previously injured his left leg. Mr. Slifer further testified that he considers himself a personal friend of Petitioner, and has known Petitioner for nine years. In fact, he testified that he currently lives with Petitioner, and he gave a recorded statement to Phil Liotta at Petitioner's residence. He testified that he has never discussed the details of Petitioner's accident with Petitioner since February 18, 2011.

Respondent's counsel presented Mr. Slifer with Respondent's Ex. 2, which Mr. Slifer indicated he signed and filled out. Respondent's Ex. 2 is a "Witness Report" dated September 27, 2011 that Mr. Slifer indicated he received from the workers' compensation carrier. Mr. Slifer read his description of the accident on Resp. Ex. 2: "they were backing up trailer into garage boss Brain [*sic*] Marion [*sic*] got trailer to [*sic*] close to building while backing up." Resp. Ex. 2. Mr. Slifer further read "that they smashed or got Kevins knee caught between building & ICC bumper while backing trailer in shop." When asked to explain the obvious difference between the "witness report" history and his testimony under oath, Mr. Slifer indicated, after obvious stammering, that his "witness report" was for a second accident that occurred involving Petitioner's left knee. He stated that the "witness report" was for a "totally different deal here," as it occurred at the shop, not at the trailer drop site.

Testimony of Patrick Guenther

Petitioner then called Patrick Guenther as a witness. Mr. Guenther testified that he was employed as a driver / mechanic with Respondent for a couple years, but that he is currently unemployed. On February 18, 2011, he was at the truck parking lot at Fleetmaster because brakes had frozen on a trailer. According to Mr. Guenther, no other trailers were being worked on at the same time. He was hurt at the time and was wearing a sling, so he could not crawl underneath the trailer. He explained that Petitioner crawled underneath the trailer to attempt to free the frozen brakes, and that Petitioner hollered for the trailer to move forward. When Petitioner yelled stop, Mr. Guenther yelled stop to Mr. Moran. Mr. Guenther testified that he did not actually see an accident occur, but that Petitioner came out from under the trailer and stated "man that hurt," and that Petitioner further told him that he bumped his knee. He observed Petitioner limping. Mr. Guenther testified that Mr. Moran walked back toward Petitioner and himself, but he did not know if Mr. Moran was aware of any incident. He admitted that Mr. Moran was his brother-in-law, and that he and Mr. Moran rode to the hearing site together.

On cross-examination, Mr. Guenther testified that while he was wearing a sling, he had other job duties to do, including making telephone calls. Mr. Guenther testified that Troy Slifer was not present when the incident occurred. Mr. Guenther testified that he received a pay check for his work on February 18, 2011. He testified that Petitioner did not really make complaints related to his left leg before the incident, but Petitioner had informed him that he hurt his leg before at Travel Center of America. Mr. Guenther agreed that his last day of work for Respondent was about March 30, 2011, when the company closed. He had not discussed the details of the incident with his brother-in-law, Mr. Moran. After Petitioner got out from under the trailer, Mr. Guenther asked if Petitioner was okay. Petitioner replied that he was hurting but he thought he was okay. Mr. Guenther testified that Petitioner did make left knee complaints after February 18, 2011, and had to "sit down for a bit" on occasion. Mr. Guenther testified that he "kinda sorta" ran the shop, but that his job duties did not include anything related to workers' compensation claims. He testified that he never told Petitioner to avoid seeking medical treatment, and he never reported the incident to Mr. Moran.

Mr. Guenther was presented with Resp. Ex. 3, which was a settlement contract for two claims against "Delco Transport" for injuries sustained on December 15, 2010 (case number 11 WC 13901) and January 20, 2011 (11 WC 12554). Petitioner acknowledged that he signed the contract, which was settled for left arm injuries for 11% loss of use of the left arm and was approved on July 24, 2012. The settlement contract indicates that Mr. Guenther was paid TTD benefits of $437.17 per week for 32 weeks, from February 4, 2011 through September 21, 2011. When asked about the settlement contracts, Mr. Guenther then changed his testimony and indicated that although he was working on the date of occurrence of February 18, 2011, he did not receive a paycheck—he instead was only receiving workers' compensation benefits.

Testimony of Brian Moran

Respondent called Brian Moran as a witness, who testified that he was a driver / manager of Respondent as of February 18, 2011, and was also a "part-owner" of Dellco Transport. He testified that he was unaware of any permanent work restrictions that Petitioner had prior to February 18, 2011. He did not recall Petitioner wearing a protective device. During his employment with Respondent, Mr. Moran indicated that he recalled three other workers' compensations claims. He testified that injured workers would notify their supervisor or Mary Banning, who handled reporting injuries to TLC. The only occurrence he could remember relative to Petitioner was at the Fleetmaster parking lot. He testified that it was daylight and a chilly day, and that Petitioner was helping free frozen brakes on a trailer. Mr. Moran testified that he called Mr. Guenther to release the frozen brake, but Petitioner released the brake because Mr. Guenther was injured. Mr. Moran testified that Petitioner yelled to roll forward, so he pulled forward approximately three feet. He testified that he then drove the truck and parked it. He denied getting out of the truck to speak with Petitioner or Mr. Guenther. Mr. Moran testified that he would not have been able to see any injury occur, as the length of the tractor and trailer was 80 feet. He testified that he had no conversation with Petitioner regarding any injury on that day, and that he did not know about a workers' compensation claim until he spoke with Respondent's attorney. Mr. Moran additionally denied that he ever told Petitioner to refrain from seeking medical treatment. Mr. Moran further testified that he stopped working for Respondent on March 30, 2011, and that he recalled the date because it was the day when Illinois Registration Permits were due and one of the owners was selling off the company. Mr. Moran testified that Petitioner contacted him later in the year to discuss the present claim.

Medical Evidence

Petitioner introduced medical records from Dr. Paul Oltman as Petitioner's Exhibit 1. These records relate to medical treatment for Petitioner's previous October 9, 2009 accident date. Petitioner first sought treatment with Dr. Oltman on October 16, 2009, seven days after the date of accident with Travel Center of America. (PX 1) Petitioner underwent x-rays of the left knee on December 14, 2009 at St. Anthony's Memorial Hospital, which showed nonspecific mild degenerative changes with marginal osteophytes arising from the lateral femoral condyle and tibial plateau. (PX 1) Petitioner underwent an MRI of the left knee on December 17, 2009, which showed a complex multidirectional tear of the body and posterior horn of the lateral meniscus; a horizontal oblique tear of the posterior horn of the medial meniscus that extended to the inferior articular surface; mild tricompartmental osteoarthritis with chondrosis; a small joint effusion with a tiny popliteal cyst; and a small probable ganglion cyst anterior to the proximal tibiofibular joint. (PX 1)

Petitioner then came under the care of Dr. Robert A. Gurtler, an orthopedic surgeon. On January 7, 2010, Dr. Gurtler reviewed the MRI of the left knee and agreed with the radiologist's findings, noting arthritis in addition to the tears. Dr. Gurtler recommended surgery but advised that he cannot change the fact that Petitioner has arthritis in his knee, and noted that Petitioner weighed 335 pounds. (PX 2) On February 8, 2010, Dr. Gurtler performed arthroscopic surgery on Petitioner's left knee at Carle Surgicenter. Dr. Gurtler noted that that he performed "basically" a total meniscectomy of the medial meniscus. He then performed a total lateral meniscectomy due to complete disruption of the lateral meniscus. (PX 2)

Petitioner's last treatment with Dr. Gurtler's office prior to the February 18, 2011 occurrence was on September 7, 2010, wherein it was noted that Petitioner had a continued struggle with instability and pain. Petitioner noted that his left knee occasionally felt as if it was going to give out. After reviewing the x-rays, Dr. Gurtler agreed

that the restrictions of wearing a brace, eight hour shifts, and no kneeling or squatting would be permanent. The medical records indicated, "At some point in time in the future, he will need a knee replacement, but he is too young at this juncture." (PX 2) Petitioner did not wish to undergo the viscous supplementation injections recommended. (PX 2)

Petitioner next saw Dr. Gurtler on July 26, 2012, complaining of pain and swelling for a year after his left knee was caught under a trailer and twisted, damaging his brace. (PX 4). Petitioner told Dr. Gurtler that he was doing "well" until this incident. Dr. Gurtler noted that Petitioner weighed 387 pounds with a BMI of 55. Dr. Gurtler reviewed the MRI from March of 2012 and noted no new meniscal damage but severe osteoarthritis, particularly in the medial compartment. X-rays showed a little bit of joint space narrowing and a little bit of varus deformity, but no profound osteoarthritis. Dr. Gurtler administered a cortisone injection, and noted that his weight was a "big factor" in his pain. Dr. Gurtler opined that no arthroscopic surgery would help, and that he would need a total knee replacement "undoubtedly someday," but that he would need his BMI to be below 50. (PX 4) Petitioner's x-ray report from July 26, 2012 noted scattered degenerative spurring and mild medial compartment and patellofemoral narrowing, and that there was "[n]o change from 2010." (PX 4)

Dr. Gurtler testified via evidence deposition on March 12, 2013. He testified that the injury as described from 2011 could have made Petitioner's arthritis worse. Dr. Gurtler testified on cross-examination it was fair to state that the need for a knee replacement had nothing to do with the alleged twisting accident of February 18, 2011. (PX 6, p. 10, 27) He further testified that he could not differentiate whether the worsening of Petitioner's osteoarthritis was due to weight, smoking, or the accident. Dr. Gurtler agreed that Petitioner's weight had a deleterious effect on his knees, and such weight would accelerate an osteoarthritic condition even without a knee injury. (PX 6, p. 17) Dr. Gurtler indicated that he did not recall Petitioner requesting a new knee brace. He admitted that there was no appreciation of swelling of the left knee on July 16, 2012. (PX 6, p. 17-18) Dr. Gurtler further conceded that based upon a review of Petitioner's medical treatment records through September 7, 2010, it was fair to state that Petitioner was not doing "well" upon his release. (PX 6, p. 25)

On February 6, 2012, Dr. Michael Milne examined Petitioner at Respondent's request pursuant to Section 12 of the Act. Dr. Milne testified via evidence deposition on April 2, 2013. He testified that there was no structural change in Petitioner's knee as a result of the February 18, 2011 incident. He additionally opined that he did not believe that the knee was permanently aggravated as a result of the injury based on the MRI findings, indicating that he may have had a temporary aggravation of pain and swelling. He believed that the Petitioner's condition was likely related to his age, weight, history of smoking, history of prior knee complaints, family history and genetics.

CONCLUSIONS OF LAW

1. Regarding the issue of whether the Petitioner sustained an accident, the Arbitrator notes that the testimony of all the witnesses mentioned above raise questions of credibility. For this reason, the Arbitrator looks to the Petitioner's testimony, in which he describes the mechanism of injury as his leg being "pinned" between a semi truck trailer bumper and the pavement. Petitioner also described the semi truck trailer bumper rolling over his left leg and breaking his leg brace. Despite having a semi truck roll over his left leg, Petitioner did not attempt to seek medical treatment until after he was laid off over a month later in March, 2011. Despite his leg brace being destroyed when the semi truck rolled over his left leg, there is no indication that the Petitioner had any structural change to his leg according to the x-rays and MRI reports, much less any indication that the Petitioner sought to replace his broken leg brace.

Petitioner's description of what allegedly happened to his left leg is quite different from what is reported in Dr. Gurtler's records as a "twisting" injury. Finally, the fact that the Petitioner called occurrence witnesses, who themselves were less than credible, in addition to the facts indicated above, all lead to the conclusion that the Petitioner's testimony regarding his alleged accident lacked credibility. Accordingly, the Arbitrator finds that the Petitioner failed to meet his burden of proof regarding the issue of accident.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eduardo Hernandez,

Petitioner,

vs.

NO: 11WC 21040

14IWCC0227

Kemper Sports Mgmt. d/b/a The Glen Club,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, permanent partial disability, prospective medical treatment, penalties, fees, and unspecified "evidentiary issues." and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 17, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0227

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: MAR 2 8 2014

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RWW/jrc
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

NOTICE OF 19(b) DECISION OF ARBITRATOR

HERNANDEZ, EDUARDO
Employee/Petitioner

Case# **11WC021040**

14IWCC0227

KEMPER SPORTS MGMT D/B/A THE GLEN CLUB
Employer/Respondent

On 7/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

4583 SOFFIETTI JOHNSON TEEGEN ET AL
DAVID J BAWCUM
74 E GRAND AVE PO BOX 86
FOX LAKE, IL 60020

0560 WIEDNER & MCAULIFFE LTD
EMILY BORG
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC0227

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Eduardo Hernandez
Employee/Petitioner

v.

Kemper Sports Mgmt. d/b/a The Glen Club
Employer/Respondent

Case # **11 WC 21040**

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 **June 27, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **3/24/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being for the left hip is causally related to the accident, Petitioner's current condition of ill-being for the lumbar spine is not causally related to the accident.

In the year preceding the injury, Petitioner earned $**$18,200.00**; the average weekly wage was $350.00.

On the date of accident, Petitioner was 54 years of age, ***single*** with **0** dependent children.

Respondent ***RESERVED FOR LATER HEARING*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**$23,849.70** for TTD, $**n/a** for TPD, $**n/a** for maintenance, and $**n/a** for other benefits, for a total credit of $**$23,849.70**.

Respondent is entitled to a credit of $**n/a** under Section 8(j) of the Act.

ORDER

Respondent shall pay temporary total disability of $<u>**253.00**</u> *per week for* <u>**93-5/7**</u> *weeks commencing* <u>**3/31/11**</u> *through* <u>**1/14/13**</u> *. Respondent shall receive credit for amounts paid.*

Respondent shall pay to Petitioner reasonable and necessary medical expenses incurred through 1/14/13 except as delineated in the Decision pursuant to Section 8(a) of the Act. Respondent shall receive credit for amounts paid.

Petitioner's request for prospective lumbar surgery is denied. See Decision

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

David A. Kane
Signature of Arbitrator

<u>**July 16, 2013**</u>
Date

JUL 17 2013

14IWCC0227

STATE OF ILLINOIS } SS
COUNTY OF COOK

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eduardo Hernandez,
Petitioner,
vs.
Kemper Sports Mgmt. d/b/a The Glen Club,
Respondent.

Case No. 11 WC 21040

ATTACHMENT TO ARBITRATOR'S DECISION

STATEMENT OF FACTS

The Arbitrator notes that with regard to the paragraph on the Decision form relating to temporary total disability, the proper rate is $253.00, due to the petitioner's status as married, as set forth on the Request for Hearing Stipulation form. TTD does not begin to run until March 31, 2011, as this is the first date off work claimed on the aforesaid Request for Hearing form.

The petitioner, Eduardo Hernandez, was employed with Kemper Sports Management, d/b/a The Glen Club, the respondent, on March 24, 2011. Petitioner testified at trial he was using a backpack leaf blower when he fell onto his left side. The medical records introduced at trial evince that petitioner presented to the emergency room At NorthShore University Health Systems on March 28, 2011, four days after the accident, reporting

left lower back and buttock pain. The medical indicated petitioner had no radiation of pain, nor numbness and tingling in his extremities. X-rays of the petitioner's pelvis revealed marked degenerative disc disease in the lumbar spine, along with degenerative arthritis in both hips, more pronounced in the left hip than the right hip. The left hip X-ray notes complete loss of superior joint space. Petitioner was diagnosed with only a hip contusion.

Petitioner returned to the emergency room at NorthShore University Health Systems on March 31, 2011. Petitioner complained of back pain with radiation in his left hip. X-rays of the lumbar spine revealed degenerative disc disease at L4 through S1 with advanced degenerative changes of the left hip. (PX 1).

Petitioner followed up with Dr. Oh at NorthShore University Omega in April of 2011. Dr. Oh's records of April 5, April 11 and April 18 note petitioner had complaints of left buttock and hip pain following the fall. Petitioner denied any radiation of pain below the hip and again denied any numbness or tingling in his lower extremities. The assessment from Dr. Oh remained gluteal contusion with exacerbation of left hip degenerative joint disease. As of April 18, 2011, Dr. Oh referred the petitioner to an orthopedic physician with a diagnosis of left hip pain. (PX 2).

Petitioner followed up with Dr. Koh on April 26, 2011. Dr. Koh noted petitioner was a grossly obese male who fell and suffered a contusion to his posterior left thigh and buttock. Petitioner reported pain primarily into the left groin area. X-rays demonstrated severe left hip osteoarthritis. Dr. Koh recommended an MRI of petitioner's left hip. The MRI was performed on May 2, 2011. On May 10, 2011, Dr. Koh reviewed the MRI and noted it demonstrated a significant edema in the femoral neck with what appeared

to be a small depression or fracture versus a large cyst. Severe arthritis of both the femoral and acetabular sides of the left hip was noted. Petitioner was to be referred to a joint replacement specialist. (PX 3).

Petitioner presented to Dr. O'Rourke at Illinois Bone & Joint on May 17, 2011. The medical history contained in Petitioner's Exhibit 4 indicates petitioner was only present for left hip pain. The location of symptoms was noted to be the "hip." Dr. O'Rourke recommended a total hip replacement on that first visit. (PX4)

The petitioner was independently evaluated under Section 12 by Dr. Walter Virkus. Dr. Virkus opined petitioner suffered from left hip osteoarthritis secondary to CAM lesion and femoral head avascular necrosis. In his report, Dr. Virkus offered the opinion that the condition was not caused by the work trauma, but that the pre-existing condition was temporarily aggravated by the fall. Dr. Virkus felt it was surprising that petitioner reported no pain in his hip prior to the accident, given the severe degeneration of the hip combined with the petitioner's excessive weight. Dr. Virkus felt petitioner's surgery was warranted based on the pre-existing condition. Dr. Virkus testified consistently at his deposition. (RX 4).

The petitioner saw Dr. O'Rourke again on February 7, 2012, where he presented with "left hip pain." The impression was advanced left hip osteoarthritis. Dr. O'Rourke again recommended total hip replacement surgery. Petitioner underwent a left total hip replacement on May 7, 2012, after a delay due to a complication from his diabetes. Petitioner continued to treat with Dr. O'Rourke following the hip replacement and was seen on May 24, June 21, July 19, and November 1, 2012. These medical records from Dr. O'Rourke do not contain notations of back pain. (PX4)

On November 1, 2012, petitioner was noted to have a positive straight leg raise on physical examination. At that time, Dr. O'Rourke recommended an MRI of the petitioner's lumbar spine. (PX 4). The MRI of petitioner's lumbar spine, performed on November 7, 2012, revealed posterior bulging at L4-L5 and L5-S1 indenting the L4-L5 nerve roots. On December 6, 2012, Dr. O'Rourke recommended a hip aspiration to rule out a low-grade infection and evaluation by a spine surgeon. (PX 4).

Petitioner saw Dr. Gary Shapiro on January 22, 2013. Two reports resulted from that visit. (PX4) Dr. Shapiro reviewed the MRI and diagnosed degenerative disc disease at L4-L5, L5-S1, with lumbar spinal stenosis with foraminal narrowing. In his first report, Dr. Shapiro noted that there was litigation regarding whether his back condition was related to the work injury. Dr. Shapiro stated, "I have not been able to review all of his medical records for this office visit. Certainly, I would be willing to do so in the future if these medical records were made available to me." (PX4)

Dr. Shapiro issued an addendum report, also dated January 22, 2013, where he added the paragraph that **based upon the history provided to him by the petitioner**, the petitioner had a permanent aggravation of his pre-existing condition of lumbar stenosis and degenerative disc disease. He noted petitioner had complaints of low back pain and buttock pain while at Glenbrook Hospital and has had persistent low back complaints that remain significant at that time. He noted petitioner did not have a prior history of lumbar spine problems pre-dating the accident.

Dr. Shapiro admitted on deposition that he did not have any of petitioner's medical records to review when he issued the addendum report

offering a causation opinion. When specifically questioned on Page 31 of the transcript, "So if the record suggested that petitioner did not complain of back pain consistently since the accident, would that change your opinion as to causation?" Answer: "It could." Dr. Shapiro admitted that his **opinions were based upon the petitioner's own representation that he had pain in his low back consistent from the date of accident forward.** Dr. Shapiro further admitted he was not aware of the specifics of the mechanism of the fall. Dr. Shapiro offered no opinions regarding whether petitioner's lumbar complaints were caused, aggravated or accelerated by any sequelae of petitioner's left hip injury. Petitioner offered no testimony his back pain was a sequelae of the hip condition or treatment.

The respondent had the petitioner independently evaluated by Dr. Michael Lewis on January 14, 2013 as Dr. Virkus relocated to Indiana. Dr. Lewis opined that while the petitioner's hip condition and left groin pain were caused by the alleged work trauma, the work trauma did not cause the low back condition. Dr. Lewis noted his opinion was based on the petitioner's representation that he did not have back pain until after the left hip replacement surgery, back pain was not mentioned in the records after the first 2 emergency room visits, as well as the fact that petitioner clearly had a pre-existing severe degenerative disc disease at L4-L5 and L5-S1. (RX3) In an addendum dated April 2, 2013, Dr. Lewis notes that while the initial emergency records do note pain in the low back area, it became apparent to the treating doctors that his injury was a fracture of the hip. He felt it was common for there to be initial confusion between the origin of pain in the hip area as to whether it was originating in the low back or the hip. The etiology of the pain was in petitioner's left hip, which was verified by subsequent X-ray, MRI and improvement after the surgery. Petitioner in

fact testified at trial that the groin pain and his hip pain had resolved as of the hearing. Dr. Lewis notes again that petitioner specifically told him that the low back pain began after his left hip surgery. Therefore, Dr. Lewis concluded the need for the spinal fusion was not related to the workplace fall almost two years prior. (RX3)

Petitioner did undergo multiple therapies after the hip replacement surgery. Of note, in Petitioner's Exhibit 1, the standing and aqua physical therapy records from NorthShore University Health System do not contain any references to low back pain, only hip and groin pain. The Accelerated Physical Therapy records from June through September of 2012 have a few notations of low back soreness, all of which occur after the hip replacement surgery, 15 months after the accident.

In support of the Arbitrator's decision as to whether the condition of ill-being was caused by the injury, and whether the prospective medical treatment is appropriate and related, the Arbitrator finds as follows:

The Arbitrator finds that the petitioner proved a compensable left hip fracture and that the subsequent left hip replacement surgery was causally related to the work injury of March 24, 2011. The Arbitrator further finds that petitioner failed to prove that his current lumbar complaints, now more than two years after the accident, are causally related to the March 24, 2011 left-sided fall. The Arbitrator further finds that the lumbar fusion surgery proposed by Dr. Shapiro is not causally related to that workplace incident.

It is fundamental that the petitioner has a burden of proving all elements of his right to recover by preponderance or a greater way to be evidenced. The right to recover must arise out of facts thus established and may not be based on speculation or conjecture. *Deere & Company v. Ind. Comm'n.*, 47 Ill.2d 144. The courts have consistently held that a claimant has the burden of proving by the preponderance of credible evidence all elements of the claim, including that any alleged state of ill being was caused by a workplace accident. *Parro v. Ind. Comm'n.*, 26D. Ill.App.3d 551 (1993). The Commission has clearly noted in the past that causal connection opinions are only as good as the facts upon which they are based. If the basis for the causal connection opinion is flawed in any way, the Commission may disregard said opinions. *Sorensen v. Ind. Comm'n.*, 281Ill.App.3d 373 (1996), *Horvath v. Ind. Comm'n.*, 96 Ill.2d 349 (1983).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical testimony. *Caterpillar Tractor Company v. Ind. Comm'n.*, 124 Ill.App.3d 650 (1984). Even when the evidence in the record might sustain a claim, such evidence is insufficient if it appears from all testimony and circumstances shown in the record that a finding is against the manifest weight of the evidence. *Board of Education of the City of Chicago v. Ind. Comm'n.*, 83 Ill.2d 475 (1981).

The evidence introduced at trial establishes that petitioner did have a compensable accident on March 24, 2011 when he fell onto his left side while blowing leaves on the golf course. The petitioner did seek immediate medical attention and has relayed a consistent history of hip pain with radiation from the groin around the hip. The left hip MRI did in fact reveal a probable compression fracture of the femoral head in the weight-bearing

area versus avascular necrosis. In addition, Respondent's Section 12 examining physician, Dr. Lewis, specifically provides in his January 14, 2013 report that petitioner's pre-surgical left groin pain was caused by the alleged work trauma, given that petitioner suffered immediate groin pain. He opined that petitioner's diagnosis was status post hip replacement, which appeared to have been a successful operation.

In an addendum, dated February 19, 2013, Dr. Lewis opined petitioner's left hip examination was normal at the time of the IME. Petitioner reported his pre-surgery groin pain had resolved. Indeed, at trial, petitioner testified his groin and hip pain had resolved. Dr. Lewis felt petitioner could return to work at his prior job as it relates to his left hip injury.

While the compensability of the hip injury is supported by the trial testimony and the medical evidence submitted at trial, the petitioner has failed to prove that his lumbar condition and the proposed surgery are related to the work accident. The Arbitrator notes that the petitioner's testimony was inconsistent with the medical evidence submitted at trial. Specifically, other than the emergency room records of March 28 and March 31, none of the medical records from Dr. O'Rourke, Dr. Koh, Dr. Oh, Dr. Kogan, the aqua therapy records or the physical therapy records from NorthShore University Health System contain any references to low back pain. Dr. O'Rourke, the primary orthopedic surgeon's records, do not even reference the low back until petitioner is nearing release at MMI at the end of 2012. Even when the petitioner is seen by Dr. O'Rourke in November of 2012, he does not specifically report low back pain. Dr. O'Rourke recommended the MRI because petitioner had a positive straight leg raise. Prior records from Dr. O'Rourke note a negative straight leg raise.

Given the inconsistencies in the medical records, the Arbitrator cannot rely on petitioner's representation that he suffered from low back pain from the date of accident forward. The Arbitrator notes petitioner sought no back treatment during the 19 month course of care for the hip, nor were any back complaints referenced in the medical records. The records however do contain consistent and repeated reports of groin and hip pain. The Arbitrator finds petitioner's assertion that he relayed back pain from the time of the fall to the IME physician unfounded. Dr. Lewis specifically opined in two reports that petitioner represented his back pain began after the hip replacement surgery. That assertion is supported by the medical evidence, which is devoid of low back complaints until after the hip surgery.

The only medical opinion causally relating the petitioner's lumbar spine condition to the workplace fall is flawed. Dr. Shapiro did not have an opportunity to review any of the medical records in this case. Dr. Shapiro admitted on deposition that his opinion was based upon petitioner's representation of back pain since the day of the fall. Dr. Shapiro admitted that if the petitioner's representations were not borne out in the medical records, his opinion on causation could change. Dr. Shapiro never offered the opinion that petitioner had an altered gait, or change in posture, which caused, aggravated or accelerated petitioner's lumbar spine condition.

Dr. Lewis's opinions negating causation were the most informed and most reliable. Dr. Lewis, unlike Dr. Shapiro, was privy to a review of the complete medical records. Dr. Lewis' report goes at length to detail every medical record he reviewed. Dr. Lewis offered the supported position that petitioner's pre-existing severe spinal stenosis at L4-L5 and L5-S1 was not caused by the work trauma. He noted that because the back pain did not

begin until several months after the alleged injury, the back pain would not be work-related. He also noted petitioner's representation that the back pain did not begin until after his left hip replacement. In his addendum, Dr. Lewis clarified that, although the petitioner had initial back pain complaints, the pain was noted primarily to be in his left groin area. Indeed, the March 28, 2011 emergency room records contain only a diagnosis of a hip contusion. Dr. Lewis explained that it became clear to the physicians treating the petitioner that the pain was related to the fracture in the petitioner's hip, as verified by X-ray and MRI. Again, Dr. Lewis opined that since the back pain did not begin until after the spinal surgery, which is supported by the medical evidence, the condition was not related to the alleged fall.

As the Arbitrator finds that the petitioner's allegation that his back pain was continuous after the accident is unreliable, he relies instead upon the clear and supported opinions of Dr. Lewis and the medical evidence in denying the lumbar fusion surgery.

Compensation has been similarly denied in numerous other cases based upon the lack of corroborative medical histories, conflicting medical histories and/or lack of claimant credibility. *McRae v. Ind. Comm'n.*, 285 Ill.App.3d 448 (1996); *Banks v. Ind. Comm'n.*, 134 Ill.App.3d 312 (1985); *Luby v. Ind. Comm'n.*, 82 Ill.2d 353 (1980). The Arbitrator notes oral testimony in conflict with contemporaneous documentary evidence deserves little weight. *United States v. United States Gypsum Company*, 333 U.S. 364 (1947).

In support of the Arbitrator's decision relating to whether TTD benefits are due and owing, the Arbitrator finds as follows:

Having failed to establish causal connection for the lumbar condition, the Arbitrator denies petitioner's claim for TTD benefits after January 14, 2013. Petitioner testified at trial that his hip and groin pain has resolved. Dr. Lewis opined that at the time of his evaluation, the physical examination of petitioner's left hip was essentially normal and symmetrical with the right hip. He felt the surgery was successful and that petitioner's groin pain, which was present prior to the surgery, was no longer present. Dr. Lewis specifically opined petitioner could return to work full duty as it relates to his left hip.

In support of the Arbitrator's decision relating to whether penalties and fees should be assessed against the respondent in this case, the Arbitrator finds as follows:

The Arbitrator finds that no penalties are due and owing in this case. Section 19(k) penalties are imposed where there has been an unreasonable or vexatious delay in payment of compensation, or proceedings have been instituted by the employer which are frivolous or for the purpose of delay. *Boker v. Illinois Ind. Comm'n.*, 14 Ill.App.3d 51 (1986). Section 16 fees are awarded when an employer has engaged in an unreasonable or vexatious delay, intentional underpayment, or frivolous defenses under Section 19(k). Unlike other penalties under the Act that are mandatory, the award of substantial penalties under Section 19(k) and

attorney's fees under Section 16 is discretionary. *McMahon v. Ind. Comm'n.*, 183 Ill.2d 499 (1998).

The Illinois Supreme Court in *McMahon* noted that the imposition of Section 19(k) and Section 16 attorney's fees requires a higher standard than the award of additional compensation under 19(l). Further, the Court noted that Section 19(k) and 19(l) penalties were intended to address different situations, with 19(k) providing substantial penalties in positions which are discretionary rather than mandatory. Section 16 includes language identical to the language of 19(k), and was intended to apply in the same type of circumstances. Section 19(l) provides for the imposition of a penalty where the employer, without good or just cause, fails to pay or delays payment of TTD benefits. The respondent in this matter did pay TTD benefits in good faith up through February 19, 2013, despite the opinions from Dr. Virkus that the workplace fall did not result in the severe osteoarthritis of petitioner's left knee, and that absent the injury, petitioner would have required hip replacement surgery. Despite this report, the respondent paid for the left hip replacement and all accompanying TTD benefits.

The denial of further TTD benefits is based upon the medical opinions of Dr. Lewis, which are supported by the medical records introduced into evidence by the petitioner at trial. As the Arbitrator has found that the petitioner's lumbar condition is not related to the workplace fall, any TTD benefits associated with the lumbar condition are hereby denied. In addition, the Arbitrator notes that it was not until petitioner was one month prior to discharge by Dr. O'Rourke for the left hip that the spinal surgery evaluation was recommended.

Therefore, the Arbitrator finds that no penalties or fees should be awarded against the respondent in this case.

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

Michael McNulty,
Petitioner,

vs.

NO: 09WC 42326
10WC 04999

14IWCC0228

Averitt Express, Inc,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and 8(a) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0228

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 8 2014

o031914
RWW/jrc
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
8(a)

McNULTY, MICHAEL
Employee/Petitioner

Case# **09WC042326**

10WC004999

14IWCC0228

AVERITT EXPRESS INC
Employer/Respondent

On 7/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4984 ROBIN LAW OFFICE
SHAWN M ROBIN
30 N LASALLE ST SUITE 1210
CHICAGO, IL 60602

1337 KNELL & KELLY LLC
CHARLES D KNELL
504 FAYETTE ST
PEORIA, IL 61603

14IWCC0228

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) and 8(a)

Michael McNulty
Employee/Petitioner

v.

Averitt Express, Inc.
Employer/Respondent

Case # **09** WC **42326**

Consolidated cases: **10 WC 4999**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **January 25, 2013** and **March 15, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **causal connection; medical bills; TTD; TPD; + prospective medical**

FINDINGS

On the date of accident, **July 6, 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 not* causally related to the accident as explained *infra*.

In the year preceding the injury, Petitioner earned **$14,217.84**; the average weekly wage was **$273.42**.

On the date of accident, Petitioner was **46** years of age, *single* with **3** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services as explained *infra*.

Respondent shall be given a credit of **$7,192.08** for TTD, **$3,034.45** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,226.53**. *See* AX1-AX2.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner's claimed current condition of ill being is not causally related to his accident on July 6, 2009 or January 8, 2010. As explained in the Addendum, the Arbitrator finds as follows:

Respondent shall pay Petitioner temporary total disability benefits of $273.42/week for 24 weeks, commencing July 7, 2009 through December 21, 2009, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from July 6, 2009 through January 25, 2013, and shall pay the remainder of the award, if any, in weekly payments. Respondent shall be given a credit of $7,192.08 for temporary total disability benefits and $3,034.45 for temporary partial disability benefits that have been paid. Petitioner's claim for further temporary total disability and temporary partial disability benefits is denied.

Respondent shall pay reasonable and necessary medical services of Advanced Occupational Medicine Specialists bills reflected in PX12 as provided in Sections 8(a) and 8.2 of the Act. The bills from MedFinance which were purchased from Dr. Citow, Dr. Vargas, Dr. Michael, Libertyville Imaging, Lake County Anesthesiologists, Dr. Thakkar, and out-of-pocket costs paid to Dr. Citow are denied.

Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 27, 2013
Date

ICArbDec19(b)

JUL - 1 2013

14IWCC0228

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) and 8(a)

Michael McNulty
Employee/Petitioner

v.

Averitt Express, Inc.
Employer/Respondent

Case # **09** WC **42326**

Consolidated cases: **10 WC 4999**

FINDINGS OF FACT

A consolidated hearing was held in both of Petitioner's cases. The issues in dispute in the above-captioned cases involve causal connection, Respondent's liability for certain medical bills, a period of temporary total disability benefits, a period of temporary partial disability benefits, penalties and fees pursuant to Sections 16, 19(k), 19(l), and Petitioner's entitlement to prospective medical care for the low back. *See* Arbitrator's Exhibit ("AX") 1 and AX2; January 25, 2013 Arbitration Hearing Transcript; March 15, 2013 Arbitration Hearing Transcript. The parties have stipulated to all other issues.

Background

Petitioner testified that he was a dock worker employed by Respondent on the date of accident. His duties included loading and unloading trailers and sometimes moving containers in the yard using a "mule," which is a tractor utilized to hook, move, and pull around containers. Petitioner testified he was required to perform heavy lifting of objects anywhere from 5-100/200 pounds. A job description signed by Petitioner on July 10, 2009 reflects that Petitioner's essential functions included: (1) loading and unloading freight up to 80 pounds; (2) moving freight up to 54 pounds; (3) lifting and opening trailer doors up to 46 pounds; (4) counting freight; (5) operating a scanner; (6) completing manifests; (7) operating a forklift; and (8) regular predictable attendance. PX3 at 6. A nonessential function was hooking and unhooking trailers up to 90 pounds. *Id.*

Prior to July 6, 2009, Petitioner testified that he had no medical problems or medical treatment for conditions related to his neck or back. Petitioner is diabetic, has a heart condition, and had surgery to the left elbow/shoulder prior to his first injury where a muscle was pulled back into place. The records reflect that Petitioner had left rotator cuff surgery in 2007. PX3 at 36.

July 6, 2009 Injury

On the date of accident, Petitioner testified that he was injured when a large wall of safety glass fell on top of him and pinned him between two walls of glass. Petitioner testified that the top glass wall weighed approximately 600 pounds. Petitioner recalled waking up and trying to breathe and later being removed by a coworker from under the glass. He also testified that he had back pain, right leg pain, left elbow pain, chest/stomach pain, knee pain, pain, hand pain, and the taste of blood in his mouth. Petitioner did not testify that he experienced neck pain. Petitioner testified that he drove himself to Loyola hospital.

The medical records reflect that Petitioner went to Loyola's emergency room on July 6, 2009. PX2. Petitioner reported handling a large piece of glass (600 lbs.) which slipped and pinned him against the trailer mostly on the right side. PX2 at 10. Petitioner underwent left elbow, chest, abdomen, and pelvis x-rays. PX2 at 9-10. The

left elbow x-ray showed no fracture, dislocation, or joint effusion. *Id.* The remaining x-rays were essentially normal. *Id.* On examination, Petitioner exhibited pain localized to the upper abdomen/coastal margin both sides with palpation of ribs associated with voluntary guarding, pain on palpation of the right iliac crest, and pain on palpation and movement of the left elbow. PX2 at 12. Petitioner was discharged without restrictions and instructed to follow up if needed. PX2 at 32-33.

On July 8, 2009, Petitioner went to Advanced Occupational Medicine Specialists and saw a certified physician's assistant, Erica Becker, PA-C ("Ms. Becker"). PX3 at 1-11. Petitioner reported right hip, left elbow, right chest wall pain as well as pain with deep inhalation, nausea, and one episode of vomiting without blood. *Id.* petitioner did not report any neck or low back pain. *Id.* On examination of the hips, Petitioner had tenderness on the right posterior-superior iliac spine and sacral iliac joint and a 16 cm x 6 cm area of ecchymosis on the right interior quadricep. *Id.* On examination of the back, Petitioner had pain with lateral rotation to the left, pain with side bending to the right, pain on supine straight leg raises on the right, tenderness to palpation on the T1-2 spinous process and L5 to S1 spinous processes, and tenderness to palpation from L3 to S1 right paraspinous muscles with spasm. *Id.* Petitioner's left elbow examination showed pain and numbness with Tinel's sign and maximal tenderness at the lateral epicondyle and along the extensor muscles of the forearm. *Id.* Petitioner also had tenderness to palpation along his right side and anterior ribs, in the right upper quadrant and lower left quadrant, and along the rectus abdominus muscles. *Id.*

Ms. Becker diagnosed Petitioner with a right chest wall contusion, right abdominal strain, right sacroiliitis, right abdominal contusion, left lateral epicondylitis, right paraspinal muscle strain, and right paraspinal muscle spasm. *Id.* She restricted Petitioner to sedentary work only with instructions to alternate sitting and standing as tolerated, and no driving a forklift, bending, squatting, pushing, pulling, or lifting. *Id.* Ms. Becker also ordered an arm brace for the left elbow, prescribed ibuprofen 800 mg and cyclobenzaprine 10 mg, and scheduled a follow-up visit with Dr. Bender on July 10, 2009. *Id.*

Petitioner saw Dr. Bender on July 10, 2009. PX3 at 4, 12-14. Petitioner reported chest/abdomen pain, right hip/back pain, and left elbow pain. *Id.* Petitioner did not report any neck pain. *Id.* She diagnosed Petitioner with a full body crush injury, intestinal trauma, lumbago, right sacroiliitis, lateral epicondylitis, and paraspinous muscle spasm and kept Petitioner on light duty work. *Id.*

Petitioner returned on July 15, 2009 at which time Dr. Bender ordered further diagnostic tests and physical therapy three times per week for two weeks. PX3 at 15-20. Petitioner reported low back pain with radiation to the low abdomen/groin, chest pain, and left elbow pain, but did not report any neck pain. *Id.* Petitioner underwent an initial physical therapy evaluation for the left lateral epicondylitis at Advanced Occupational Medicine Specialists on July 24, 2009. PX3 at 36-37. Petitioner completed the occupational therapy on August 4, 2009. PX3 at 49.

Petitioner underwent the recommended lumbar spine MRI with and without contrast on July 20, 2009. PX3 at 21-22. The interpreting radiologist noted the following: (1) a disc protrusion at L2-3 with end plate degenerative changes and kyphotic angulation and moderate to severe neural foraminal narrowing bilaterally; (2) scattered mild other degenerative changes as above with mild neural foraminal narrowing at L3-4, L4-5, and L5-S1; and (3) a small focus of susceptibility artifact within the inferior end plate of L2 of uncertain etiology possibly related to a prior surgery. *Id.*

On July 22, 2009, Dr. Bender noted that it was Petitioner's "1st visit today for back pain" which radiated to his right leg and updated Petitioner's diagnoses to a full body crush injury, intestinal trauma (worse), L2-L3 disc

protrusion with foraminal narrowing, L1-S1 facet hypertrophy, left lateral epicondylitis, paraspinous muscle spasm (worse), and a right scaphoid contusion. PX3 at 23-27. Petitioner did not report any neck pain. *Id.* She kept Petitioner on light duty work and ordered additional physical therapy three times per week for two weeks. *Id.*

Petitioner underwent an initial physical therapy evaluation for left lateral epicondylitis on July 24, 2009 and he reported having no pain or discomfort localized to the left elbow before his incident at work. PX3 at 36-37. He had an initial physical therapy evaluation related to his lumbago/suspected HNP at Advanced Occupational Medicine Specialists on July 30, 2009. PX3 at 28-30. Petitioner completed the physical therapy on August 3, 2009. PX3 at 49.

Petitioner returned to Dr. Bender on August 5, 2009. PX3 at 49-53. Petitioner reported low back pain at a level of 8-9/10, left elbow pain at a level of 5/10, and no right wrist pain. *Id.* Petitioner did not report any neck pain. *Id.* Dr. Bender examined Petitioner and updated his diagnoses to a full body crush injury, intestinal trauma (same), L2-L3 disc protrusion (same), left lateral epicondylitis (slightly improved), and a right scaphoid contusion (resolved). *Id.* She kept Petitioner on light duty work restrictions, ordered an abdominal CT scan, and referred Petitioner to Dr. Vargas, a pain management specialist, for an epidural steroid injection consultation. *Id.*

Petitioner underwent the recommended abdominal CT scan on August 11, 2009. PX3 at 54. The interpreting radiologist noted the following: (1) slightly enlarged prostate with thickened bladder wall; (2) occasional diverticula sigmoid colon; and (3) spondylolysis at L5 with suspicion of spondylolisthesis at L5-S1. *Id.* He also noted degenerative changes in the upper lumbar spine. *Id.*

On August 14, 2009, Petitioner saw Dr. Bender. PX3 at 55-60. Petitioner reported low back pain, right buttock paresthesias (intermittent), less abdominal pain, and no right wrist pain. *Id.* Petitioner did not report any neck pain. *Id.* Dr. Bender examined Petitioner and updated his diagnoses to a full body crush injury, intestinal/abdominal trauma (improved), L2-L3 disc protrusion (same), left lateral epicondylitis (improved). *Id.* She kept Petitioner on light duty work restrictions and ordered additional physical therapy for the left lateral epicondylitis three times per week for two weeks. *Id.*

Petitioner initially saw Dr. Vargas at River North Pain Management Consultants on August 22, 2009. PX3 at 61-64; PX4 at 45-51. Petitioner reported approximately 6 to 7 weeks of progressively worsening distal lower back pain with associated right sided lower extremity sciatica symptoms soon after his injury at work. *Id.* Dr. Vargas noted that Petitioner was a poor historian, but Petitioner informed Dr. Vargas that he was injured at work when he was pinned under a 500 pound piece of glass. *Id.*

During his examination, Petitioner reported constant, sharp, stabbing, shooting, electrical-like pain at the distal lower back that radiated caudally into both buttocks progressing further distantly via a postero-lateral route into both thighs, calves, ankles, and feet more so on the right. *Id.* He also reported paresthesia described as a tingling sensation from L2-L4 more so on the right at L2-L3, frank neurological claudication, a mild foot drop, pain ranging from 6/10 to 9-10/10 worsened with ambulation, increased pain with transfers, and ameliorated pain lying down with knees flexed. *Id.*

Among other findings, Dr. Vargas noted that Petitioner had a mild limp favoring his left lower extremity, he climbed onto the examining table with some difficulty, he had decreased range of motion in the lumbosacral spine, he was unable to toe walk or heel walk, he was unable to squat upon request due to "mild exacerbation"

of his pain, he had mild weakness at the right sided biceps femoris, "mild but relevant" right-sided foot drop, and mild hyporeflexia to the left patellar and Achilles tendon. *Id.* He diagnosed Petitioner with multilevel lumbosacral spondylosis, multilevel degenerative disc disease and facet arthropathy, bilateral L2-L3 neural foraminal stenosis, and discogenic L2-L3 radiculopathy. *Id.* Dr. Vargas noted that Petitioner's "clinical presentation [was] somewhat perplexing, as most of his symptoms seem to be right-sided, although he presents a bilateral neuroforaminal stenosis." *Id.* He ordered a series of transforaminal epidural steroid injections. *Id.*

On August 24, 2009, Petitioner returned to Dr. Bender and reported low back pain with right buttock paresthesias, less abdominal pain, left elbow pain at a level of 3-4/10, abdominal pain at a level of 2/10, and epigastric pain. *Id.* Petitioner did not report any neck pain. *Id.* Dr. Bender maintained her diagnoses of Petitioner's condition, Petitioner on light duty, noted that the injections recommended by Dr. Vargas had not yet been approved, and ordered additional physical therapy for Petitioner's lumbago and left lateral epicondylitis. PX3 at 65-67.

Petitioner underwent the first epidural steroid injection with Dr. Vargas on August 29, 2009. PX3 at 71-72; PX4 at 35-44.

Petitioner returned to Dr. Bender on September 8, 2009 and reported low back pain at a level of 7-8/10, right buttock paresthesias (constant) with PS at a level of 10/10 (intermittently), left elbow pain at a level of 8/10 (occasionally), and some epigastric pain. *Id.* Petitioner did not report any neck pain. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, intestinal trauma (improved), left lateral epicondylitis (resolved), and lumbago with L2/L3 disc protrusion. PX3 at 77-81. She kept Petitioner on light duty work restrictions, discontinued his use of the left forearm splint, and ordered the completion of the previously ordered physical therapy for the left lateral epicondylitis three times per week for two weeks. *Id.*

Petitioner returned to Dr. Vargas on September 10, 2009[1]. PX3 at 84-86; PX4 at 27-28. Petitioner reported a significant improvement of his overall lower back pain and radicular symptoms within 24-36 hours up his first injection, intermittent pain and stiffness in the distal lower back with radiation mostly into the right buttock, no left sided symptoms, and overall improvement of 30-40% decrease in overall symptoms, and lessened pain at a level of 5/10. *Id.* Dr. Vargas maintained his diagnoses of Petitioner and recommended continuation of the epidural steroid injection series. *Id.* The second injection was administered on September 17, 2009. PX3 at 88-89; PX4 at 24-34.

Petitioner returned to Dr. Bender on September 22, 2009. PX3 at 90-92. He reported left elbow pain at a level of 2/10, back pain at a level of 8-9/10, right buttock to right knee paresthesias pain, left leg paresthesias pain to the knee, epigastric pain at a level of 4/10, and constipation. *Id.* Petitioner did not report any neck pain. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, L2/L3 disc protrusion, lumbago (worsened), bilateral leg paresthesias (worse), and left lateral epicondylitis (improved). *Id.*; *Cf.* PX3 at 77-81 (September 8, 2009 diagnosis of resolved left lateral epicondylitis) and PX3 at 1-76 (no prior diagnosis of leg paresthesias from Dr. Bender or Ms. Becker). She kept Petitioner on light duty work restrictions, referred Petitioner to Dr. Vargas for evaluation of a possible spinal headache, and ordered the completion of the previously ordered physical therapy for the left lateral epicondylitis three times per week for two weeks. *Id.*

[1] The Arbitrator notes that the date of service listed in Dr. Vargas' progress note is August 22, 2009; however, Dr. Vargas' records contain the same progress noted dated September 10, 2009 which also refers to last seeing Petitioner on August 29, 2009 and he ordered physical therapy under the direction of Dr. Bender in a handwritten script dated September 10, 2009. PX3 at 84-86. The Arbitrator further notes that this progress note appears to have been faxed by or to Advanced Occupational Medicine Specialists on September 17, 2009. *Id.*

On September 29, 2009, Petitioner saw Dr. Vargas. PX3 at 96-97; PX4 at 21-22. Dr. Vargas noted a conversation with Petitioner during the prior week wherein Petitioner reported developing progressive postural occipital-temp oral headaches, mild photophobia, and prostration within 24-36 hours of his second injection. *Id.* Dr. Vargas further noted that as Petitioner's "overall symptoms worsened further… I recommended for him to undergo a product epidural autologous blood patch (EBP)." *Id.* He maintained his diagnoses of Petitioner and added a diagnosis of post-dural puncture headache (PDPH). *Id.* Petitioner underwent the recommended epidural autologous blood patch on October 3, 2009. PX3 at 100-101; PX4 at 11-20.

Petitioner returned to Dr. Bender on October 6, 2009. PX3 at 105-106. Petitioner reported right buttock pain and paresthesias to the right knee at a level of 7-8/10, and left elbow pain at a level of 0-1/10. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, L2/L3 disc protrusion, lumbago (slightly improved), bilateral leg paresthesias (worse), and left lateral epicondylitis (resolved). *Id.*; *Cf.* PX3 at 77-81 (September 8, 2009 diagnosis of resolved left lateral epicondylitis) and PX3 at 90-92 (September 22, 2009 diagnosis of improved left lateral epicondylitis). Petitioner did not report any neck pain. *Id.* Dr. Bender ordered additional physical therapy for Petitioner's lumbago on October 6, 2009 three times per week for an additional four weeks. PX3 at 103. She also ordered a functional capacity evaluation. PX3 at 104.

On October 15, 2009, Dr. Vargas administered Petitioner's third epidural steroid injection. PX3 at 107-108; PX4 at 2-10. Petitioner testified that the injections with Dr. Vargas were not helpful.

Petitioner saw a new doctor for his spine, Dr. Michael. PX3 at 116. On October 19, 2009, Petitioner saw Dr. Michael at the Illinois Neurospine Institute. PX3 at 109; PX5 at 14-18. Petitioner provided a history of his work accident including a reported loss of consciousness, pain from his head to his right knee, low back pain "much, much worse than associated right leg pain[,]" severe pains with sitting/standing/walking, particular discomfort with driving and bumpy roads, numbness and tingling in the right second through fourth toes, neck pain and headaches which were bilaterally occipital, and no arm pain, numbness, tingling, or weakness. *Id.* Dr. Michael reviewed Petitioner's low back MRI which he interpreted to show L2-L3 loss of disc space height, degenerative changes, endplate changes with broad-based protrusion, and L5-S1 desiccation and protrusion with possible L5 bilateral spondylosis. *Id.* On examination, Petitioner had a negative bilateral straight leg raise test. *Id.*

Dr. Michael ordered a cervical spine MRI for neck pain and a lumbar spine five view MRI to rule out spondylolysis. *Id.* He diagnosed petitioner with pre-existing L2-L3 degenerative disc disease and L5-S1 disc degeneration with possible spondylolysis that were "clearly causally aggravated by the work-related injury." *Id.* Dr. Michael also diagnosed petitioner with non-specific cervicalgia. *Id.* He did not indicate whether this condition was causally related to his injury at work and he did not impose any work restrictions on Petitioner related to any of his diagnoses. *Id.*

Petitioner underwent a cervical spine MRI on October 26, 2009. PX3 at 115. The interpreting radiologist noted the following: disc bulging/bony proliferation at C5-6 and C6-7 levels, significant narrowing of the left neural foramen at C6-7, and no central canal stenosis. *Id.*

Petitioner returned to Dr. Bender on October 27, 2009. PX2 at 116-118. He reported no left elbow pain, back pain and right middle [illegible] pain at a level of 7/10, lower right leg pain to the calf area, and increased pain with extended sitting. *Id.* Petitioner did not report any neck pain. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, L2/L3 disc protrusion status post three epidural steroid injections with Dr.

Vargas, lumbago (same), bilateral leg paresthesias (same on the left, resolved on the right), and left lateral epicondylitis (resolved). *Id.*; *Cf.* PX3 at 77-81 (September 8, 2009 diagnosis of resolved left lateral epicondylitis) and PX3 at 90-92 (September 22, 2009 diagnosis of improved left lateral epicondylitis). She kept Petitioner on light duty work restrictions, ordered continued physical therapy for Petitioner's lumbago as previously ordered on October 6, 2009, and renewed her order for a functional capacity evaluation. *Id.*

First Section 12 Examination – Dr. Wehner

On November 16, 2009, Petitioner submitted to an independent medical evaluation with Dr. Wehner at Respondent's request. PX3 at 135-136; RX11. Petitioner reported sustaining an injury on July 6, 2009 when 500 pounds of glass fell off the truck onto him hitting his head and back. *Id.* On examination, Petitioner appeared in mild distress, had a normal gait pattern, reported low back pain with heel walking on the right, had normal toe walking, and could bend and touch his toes on the left, but only to the mid-tibia on the right. *Id.* Petitioner had some mild pain with right S1 joint palpation, axial compression or axial rotation. *Id.* He had no paraspinal spasm or scoliosis, a negative straight leg raise, knee and ankle reflexes at 2+, motor strength at 5/5, painless range of motion in the hip, and mildly stiff figure 4 testing. *Id.* Dr. Wehner reviewed various treating medical records including diagnostic test results through October 26, 2009. *Id.*

Ultimately, she diagnosed Petitioner with back pain with right leg pain in a radicular pattern, status post crush injury contusion to the back. *Id.* Dr. Wehner noted that it appeared that Petitioner had only undergone three weeks of physical therapy, and thus, she recommended another three weeks of physical therapy focusing on lumbar stabilization and restricted him to light duty work only with no lifting over 20 pounds. *Id.* Dr. Wehner did not recommend a discogram (as recommended by Dr. Michael) given that Petitioner had only undergone three weeks of physical therapy and it had only been four months since his date of injury; she recommended a discogram at six months if Petitioner did not improve with further conservative treatment. *Id.* Dr. Wehner further noted that Petitioner had significant pre-existing degenerative changes at L2-3 and that he may benefit from a fusion if he continued to have pain. *Id.* She noted that Petitioner denied any baseline back problems pre-existing his injury, but that the radiologic findings of disc degeneration at L2-3 preexisted his injury at work. *Id.*

Continued Medical Treatment

On November 23, 2009, Petitioner saw Dr. Michael. PX5 at 12. He reported continued and worsened low back pain, right leg pain, neck pain, and left shoulder pain. *Id.* Dr. Michael noted that Petitioner was unchanged neurologically. *Id.* He reviewed Petitioner's cervical spine films which showed C5-C6 and C6-C7 disc protrusions with left C6-C7 and narrowing and lumbosacral spine films which he believed showed spondylolysis at L5. *Id.* He diagnosed Petitioner with L2-L3 degenerative disc disease and L5-S1 degeneration for which he recommended a lumbar discogram and post-discogram CT to definitively determine whether Petitioner had spondylolysis. *Id.* Dr. Michael did not indicate whether Petitioner's neck condition was causally related to his injury at work and he did not impose any work restrictions on Petitioner related to any of his diagnoses. *Id.*

On November 30, 2009, Petitioner saw Dr. Bender. PX3 at 128-129. Petitioner reported feeling the same with no improvements, having undergone an independent medical examination on November 16, 2009, decreased numbness, right leg still the same, intermittent left elbow pain, and inability to sit over 20-30 minutes before experiencing back pain. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, L2/L3 disc protrusion status post three epidural steroid injections with Dr. Vargas getting injection from Dr. Michael on 12/3/09, lumbago (same), right leg paresthesias (same), left leg paresthesias (resolved) and intermittent left

lateral epicondylitis pain. *Id.*; *Cf.* PX3 at 77-81 (September 8, 2009 diagnosis of resolved left lateral epicondylitis) and PX3 at 90-92 (September 22, 2009 diagnosis of improved left lateral epicondylitis) and PX3 at 116-118 (October 27, 2009 diagnosis of resolved right leg paresthesias). She kept Petitioner on light duty work restrictions and ordered a TENS unit per Dr. Vargas' instructions. *Id.*

Petitioner underwent the recommended discogram with Dr. Michael on December 3, 2009 for L2-L3 degenerative disc disease and L5-S1 degeneration and saw him thereafter on December 7, 2009 at which time he reported low back and leg pain. PX5 at 9-11. Dr. Michael found L2-L3 and L5-S1 discs were pathologic on tension, morphological, and pain provocation. *Id.* Dr. Michael reiterated his causal connection between Petitioner's low back condition and his work accident, but he did not indicate whether Petitioner's neck condition was causally related. *Id.* He did not impose any work restrictions on Petitioner related to any of his diagnoses. *Id.*

On December 15, 2009, Petitioner saw Dr. Bender. PX3 at 131-133. Petitioner reported feeling the same, feeling and occasional pop in the left elbow, decreased pain in the right leg a bit better, numbness, and having undergone a discogram one week earlier. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, right leg paresthesias (same), left leg paresthesias (resolved), lumbago (same), L2-L3 disc protrusion, and intermittent left lateral epicondylitis pain. *Id.* She kept Petitioner on light duty work restrictions and recommended use of the TENS unit per Dr. Vargas' instructions. *Id.*

On cross examination, Petitioner acknowledged that he had no physical therapy for his neck from July of 2009 through December of 2009, he returned to work on December 22, 2009, and he continued to work through September 13, 2010.

January 8, 2010 Injury

On re-direct examination, Petitioner testified that he was reared ended by a forklift and experienced a burning sensation in his neck and his head became hot. Petitioner did not testify at trial about any low back symptomatology immediately following his second accident. On cross examination, Petitioner testified that he did not go to the hospital, but rather went to the clinic.

On January 9, 2010, Petitioner called Dr. Bender. PX3 at 138. He reported being hurt the prior day [January 8, 2009] at work while driving a forklift and was hit from behind. *Id.* Petitioner reported experiencing immediate increased neck and back pain. *Id.* Petitioner had missed an appointment with Dr. Michael on January 4, 2010, and with Dr. Bender on January 8, 2010. *Id.* Dr. Bender offered Petitioner the opportunity to "come now to be evaluated, he declined." *Id.* A follow-up appointment was scheduled for January 11, 2010. *Id.*

On cross examination, Petitioner acknowledged that he worked part-time from January 10, 2010 through September 13, 2010 when Dr. Citow took him off work completely.

On January 11, 2010, Petitioner saw Dr. Bender. PX3 at 139-141; PX5 at 8. He reported being hit from behind while in a forklift on January 7, 2010 with neck and back pain at a level 10/10, pain radiating from his head to his right foot, worsened numbness, and increased left arm pain with sitting. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, lumbago (worse), right leg paresthesias (worse), left lateral epicondylitis (resolved), and neck pain with spasm. *Id.*; *Cf.* PX3 at 77-81 (September 8, 2009 diagnosis of resolved left lateral epicondylitis) and PX3 at 90-92 (September 22, 2009 diagnosis of improved left lateral epicondylitis). She kept Petitioner on light duty work restrictions. *Id.*

On January 11, 2010, Petitioner also saw Dr. Michael. PX3 at 143; PX5 at 7-8. He reported low back pain, right leg pain, severe neck and arm pain, and a "hot" feeling in his neck. *Id.* Dr. Michael noted that, regrettably, Petitioner returned to work without his authorization[2] and was rear-ended by a forklift. *Id.* He maintained that Petitioner had L2-L3 degenerative changes with L5-S1 disc degeneration, discogenic pain from L3-S1, and C5-C7 disc protrusions. *Id.* Dr. Michael stated that Petitioner's low back condition was related to his accident at work and the aggravating accident at work. *Id.* He did not causally relate Petitioner's neck condition to either accident. *Id.* Dr. Michael commented that Petitioner was inappropriately return to work and not told to be off his medications while working which was "negligent" on the clinic physician's part. *Id.* He placed Petitioner off work for four weeks. *Id.*

On January 21, 2010, Petitioner saw Dr. Bender. PX3 at 144-146. He did not have a scheduled appointment that day, but reported neck pain radiating to the forehead at a level of 10/10 preventing sleep and tolerable lower back at a level of 8/10 and left elbow pain at a level of 2/10. *Id.* Dr. Bender updated Petitioner's diagnoses to a cervical strain, muscle spasm, and neck pain. *Id.* She kept Petitioner on light duty work restrictions and ordered physical therapy for Petitioner's neck. *Id.*

On February 8, 2010, Petitioner returned to Dr. Bender. PX3 at 147-149. He reported low back pain at a level of 8/10, left elbow pain at a level of 0-10/10 with popping, right buttock and posterior thigh pain at a level of 9/10, and neck pain at a level of 9/10. *Id.* Dr. Bender administered a corticosteroid injection into the left epicondyle. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, lumbago (improved), left lateral epicondylitis (worse), L2-3 disc bulge, and C5-6 and C6-7 disc bulge (etiology unclear if work related). *Id.*; *Cf.* PX3 at 77-81 (September 8, 2009 diagnosis of resolved left lateral epicondylitis), PX3 at 90-92 (September 22, 2009 diagnosis of improved left lateral epicondylitis), and PX3 at 139-141 (January 11, 2010 diagnosis of resolved left lateral epicondylitis). She kept Petitioner on light duty work restrictions, ordered a left forearm splint, and continued use of the TENS unit. *Id.*

Petitioner also saw Dr. Michael on February 8, 2010. PX5 at 6. He reported continued, severe and worsening low back and right leg pain as well as nausea and vomiting secondary to the pain. *Id.* Petitioner also reported neck pain, headaches, and arm pain, with minimal activity precipitating severe pain. *Id.* Dr. Michael noted that Petitioner's L2-L3 and L5-S1 disc degeneration with discogenic pain at L2-L3 and L5-S1 were aggravated by his work related injury. *Id.* Additionally, Dr. Michael noted that Petitioner had disc protrusions from C5-C7 with bilateral C6-C7 foraminal stenosis for which he recommended a series of three cervical epidural steroid injections or, alternatively, Petitioner could learn to live with his pain and accept it, which Petitioner felt he could not. *Id.*

On March 1, 2010, Petitioner returned to Dr. Michael. PX5 at 3-4. Dr. Michael noted Petitioner's January 10[3], 2010 forklift incident at work at which time Petitioner reported that he "jerked his low back and neck" which Dr. Michael found resulted in aggravated neck pain, aggravated low back pain, severe headaches, and vomiting. *Id.* Dr. Michael again noted Petitioner's L2-L3 and L5-S1 disc degeneration with discogenic pain at L2-L3 and L5-S1. *Id.* He recommended a posterior lumbar fusion and noted that Petitioner symptoms were even more aggravated, and reiterated his recommendation for three cervical epidural steroid injections to treat Petitioner's C5-C7 disc protrusions. *Id.* Dr. Michael placed Petitioner off work. *Id.*

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[2] The Arbitrator notes that Dr. Michael did not place Petitioner off work prior to this visit.

[3] The Arbitrator notes that the reported date of accident is listed as January 10, 2010 and not January 8, 2010 and no explanation was provided at trial for this discrepancy.

On March 8, 2010, Petitioner returned to Dr. Bender. PX3 at 150-152. He reported left elbow pain at a level of 4/10, low back pain at a level of 8/10 radiating to the right leg, and neck pain at a level of 8-9/10. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, lumbago (same by report), left lateral epicondylitis (worse), L2-3 disc bulge, and C5-6 and C6-7 disc bulge. *Id.* She kept Petitioner on light duty work restrictions. *Id.*

On April 9, 2010, Petitioner returned to Dr. Bender. PX3 at 153-154. He reported that he could not feel his legs and fell to the ground three weeks ago at home. *Id.* He also reported only working two or three hours a week, returning more often for medication because it helped with his pain, and tingling in the lower right leg still the same. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, lumbago (same), left lateral epicondylitis (worse by report), L2-3 disc bulge, C5-6 and C6-7 disc bulge, and neck pain (worse). *Id.* She kept Petitioner on light duty work restrictions. *Id.*

On May 10, 2010, Petitioner saw Dr. Michael. PX5 at 1-2. Petitioner reported loss of feeling in his legs below the knees, severe headaches, and neck pain. *Id.* Dr. Michael again noted Petitioner's L2-L3 and L5-S1 disc degeneration with discogenic pain at L2-L3 and L5-S1, which he noted were clearly aggravated by his recent injury, and he reiterated his recommendation for three cervical epidural steroid injections to treat Petitioner's C5-C7 disc protrusions. *Id.* Dr. Michael placed Petitioner off work. *Id.*

Petitioner testified that this was his last visit with Dr. Michael because the insurance would not pay for the treatment. He also testified that another attorney recommended MedFinance, a company that does not work with Dr. Michael. Petitioner testified that he did not have the recommended low back fusion at this time because he could not afford it. The Arbitrator takes judicial notice of the Commission's own files and notes that Petitioner had previously filed a motion pursuant to Section 8(a) of the Act on March 8, 2010 and did not file another such motion until July 2, 2012.

Petitioner missed an appointment on May 12, 2010, but followed up with Dr. Bender on May 14, 2010. PX3 at 156-162. Petitioner reported left elbow pain a level of 3/10, burning in the left arm at times, back pain at a level of 8/10 radiating to the right leg at the knee, and neck pain at a level of [illegible]/10. *Id.* Petitioner also reported that he was no longer driving the forklift since April 10, 2010 because it hurt his back. *Id.* Dr. Bender updated Petitioner's diagnoses to a full body crush injury, lumbago (improved), left lateral epicondylitis (improved), bilateral arm and right leg paresthesias, and neck pain (same). *Id.* She kept Petitioner on light duty work restrictions and referred him to one of her partners, Dr. Khanna, for a bilateral upper and lower extremity EMG due to continued complaints of neck and back pain with bilateral upper and lower extremity paresthesias. *Id.*

On June 21, 2010, Petitioner underwent the recommended EMG. PX3 at 163-169. Dr. Khanna found the following: (1) an abnormal left ulnar motor nerve conduction studies with significantly decreased amplitudes of the proximal responses both below and above the elbow which could indicate a forearm conduction block which is a rare finding or a normal anatomical variant of the Martin-Gruber and anastomosis; (2) no evidence of bilateral median neuropathy or right ulnar neuropathy; (3) no evidence of right or left cervical radiculopathy from C5-T1; (4) no evidence of peripheral polyneuropathy; and (5) evidence of a right mid-lumbar posterior rami denervation with no lower limb findings which would indicate lumbosacral radiculopathy. *Id.*

Second Section 12 Examination – Dr. Wehner

Petitioner submitted to a second independent medical evaluation with Dr. Wehner on August 16, 2010. RX12. Petitioner provided additional history and reported to episodes of passing out as well as his second accident at work in January. *Id.* Petitioner reported pain on the top of his head, burning down his left arm, vomiting, that headaches pain at a level of 6/10, and burning in the left hand and on the left side of his face. *Id.* After an examination and review of additional medical records[4], Dr. Wehner diagnosed Petitioner with cervicalgia and low back pain. *Id.* She noted that Petitioner's other symptomatology including abdominal pain, changes in bowel habits, vomiting, passing out and/or seizures, could not be explained based on Petitioner's cervical or low back findings and were not related to his work injury. *Id.* Dr. Wehner stated that she would not recommend any type of epidural injection given Petitioner's history of passing out and vomiting, she noted that Petitioner was diabetic and it was unclear if this was contributing to his other symptomatology, and she opined that he was not a surgical candidate. *Id.* Ultimately, Dr. Wehner opined that Petitioner could work full duty and that his neck and low back conditions were preexisting conditions. *Id.*

Continued Medical Treatment

Petitioner testified that he then went to Dr. Citow, a doctor that works with MedFinance. Petitioner saw Dr. Citow at Lake County Neurosurgery for the first time on September 3, 2010. PX6 at 30-31. Petitioner reported bothersome neck and back pain with pain extending through the right upper extremity toward the thumb and index finger as well as right lower extremity for the lateral foot with numbness, weakness, and paresthesias. *Id.* On examination, Petitioner's neck and back were tender in the paraspinal musculature, his range of motion was limited secondary to pain, his motor strength was 5/5, and sensation was grossly intact. *Id.* Dr. Citow ordered cervical and lumbar MRIs. *Id.*

Petitioner underwent the recommended MRIs which Dr. Citow reviewed and noted as follows: the cervical spine MRI showed spondylosis at C5-7 with foraminal narrowing on the left side at C6-7 and lesser disease at C4-5 and the lumbar spine MRI showed significant spondylosis with moderate foraminal narrowing at L2-3 and some bulging with foraminal narrowing at L5-S1. PX6 at 25. He recommended a follow up visit to discuss further injections and possible decompression surgery. *Id.*

On September 13, 2010, Dr. Citow placed Petitioner off work. PX6 at 24; PX7. Petitioner testified that he has not worked since this date.

October 4, 2010, Dr. Citow's partner, Dr. Alzate, administered facet injections to Petitioner at C5-6 and C6-7. PX6 at 23. Then, on October 15, 2010, Petitioner returned to Dr. Citow reporting continued bothersome neck and back symptoms after three low back injections and one cervical spine injection[5] without any benefit. PX6 at 20-21. On examination, Dr. Citow noted tenderness in the cervical and lumbar paraspinal musculature, limited range of motion secondary to pain, and intact motor strength and sensation. *Id.* He kept Petitioner off work and recommended a C5-7 anterior cervical decompression and stabilization. *Id.*

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[4] Dr. Wehner noted that it was unclear what surgery Dr. Michael recommended and that she did not have his discogram report. *Id.*

[5] It is unclear from the records whether Dr. Citow is referring to Petitioner's prior epidural injections from Dr. Vargas, but there is no evidence that Petitioner underwent additional injections at his office. It is also unclear whether Petitioner underwent one or two cervical injections with his partner, Dr. Alzate.

On November 3, 2010, Dr. Citow ordered preoperative medical clearance testing and kept Petitioner off work. PX6 at 18-19. On December 2, 2010, Petitioner underwent preoperative clearance testing with Dr. Thakkar. PX10.

Petitioner underwent the recommended surgery with Dr. Citow on December 9, 2010. PX6 at 14-17. Pre- and postoperatively, Dr. Citow diagnosed Petitioner with C5-C6 and C6-C7 disc protrusions. *Id.* He performed an anterior cervical discectomy and fusion from C5 through C7 with cornerstone implants, an anterior cervical plate and microdissection, intraoperative fluoroscopy and monitoring with baseline EMGs and continuous EMG monitoring throughout the case as well as bilateral upper and lower extremity motor evoked potentials and somatosensory evoked potentials. *Id.* Petitioner testified that he obtained relief from the surgery.

Petitioner returned to Dr. Citow on December 15, 2010 reporting itchiness, mild discharge, and erythematous rash around the neck and forehead after the bone stimulator implant on December 9, 2010. PX6 at 13. Dr. Citow ordered medications and scheduled a follow-up for December 29, 2010. *Id.* Petitioner returned on that date reporting no radicular arm pain, numbness, weakness, or paresthesias, but some pain between the shoulder blades. PX6 at 12. Dr. Citow kept Petitioner off work and ordered physical therapy and a course of Celebrex. *Id.*

In a narrative letter addressed "to whom it may concern" dated January 6, 2011, Dr. Citow opined that Petitioner's January 10, 2010 injury aggravated Petitioner's July 6, 2009 injury which required him to have the surgery performed on December 9, 2010. PX6 at 11; PX8.

Petitioner returned to Dr. Citow on March 2, 2011. PX6 at 8-9; RX14. He reported neck pain at a level of 5/10 without radicular arm pain and some bothersome back pain and right sided sciatica. *Id.* Dr. Citow released Petitioner back to full duty work without restrictions with regard to the neck, but recommended L2-3 surgery for the back. *Id.* On cross examination, Petitioner testified that he did not recall a full duty release. With regard to the low back, Dr. Citow placed Petitioner on light duty work restrictions with no lifting over 20 pounds, unless his back went out, until his low back surgery. PX9; RX10. Petitioner testified that these restrictions were not accommodated.

Approximately eleven months later, on January 27, 2012, Petitioner returned to Dr. Citow reporting back pain extending through the right leg to the calf and into the left hip related to his work injury. PX6 at 7. Dr. Citow examined Petitioner noting tenderness in the lumbar pure spinal musculature and a limited range of motion secondary to pain with intact motor strength and sensation. *Id.* He ordered a lumbar MRI and noted that he would likely proceed with the L2-3 decompression and stabilization previously recommended. *Id.*

On February 10, 2012, Petitioner underwent the recommended lumbar MRI which the interpreting radiologist noted showed the following: (1) prominent Schmorl's nodes and endplate reactive changes within the lower thoracic spine extending to L3, most prominent at the L2-3 level; (2) diffuse lumbar spondylosis with multilevel annular and neural foraminal disc bulging contributing to neural foraminal stenosis at multiple levels, most severe at L2-3 bilaterally and at L5-S1 on the left side; and (3) grade I retrolisthesis of L2 on L3 and L4 on L5. *Id.*

On March 9, 2012, Petitioner returned to Dr. Citow reporting persistent back pain extending to the right leg to the calf and into the left hip without improvement after medications, therapy, and injections. PX6 at 3-4. Petitioner's physical examination remained unchanged and Dr. Citow noted that Petitioner's straight leg raise test was negative bilaterally. *Id.* Dr. Citow diagnosed Petitioner with lumbar spondylosis and recommended an

L2-3 decompression and stabilization. *Id.* Petitioner testified that this was his last visit to Dr. Citow because he cannot afford additional treatment.

Medical Bills & Temporary Benefits

Petitioner testified that some of his medical bills have been paid, but not all of them. He testified that he has received unpaid bills and gave them to his former attorney, Anthony Esposito.

Petitioner testified that he talked to Joanna at MedFinance and signed documents regarding his medical bills. He testified that he understood that MedFinance would pay for the medical bills and that the only way that he has an obligation to pay MedFinance is if he wins his case.

Petitioner also testified that he has not received any temporary total disability benefits since he was placed off work by Dr. Citow. He testified that he did receive some temporary partial disability benefits, but they eventually stopped and he does not know why.

Petitioner testified that he has not worked since March of 2011. He testified that he has looked for work within a 20 lb. limit, but he did not keep a job log. He testified that he is still looking for work, but he has no list of places where he has looked for work. Petitioner also testified that he applied for unemployment some years ago, but he has not received any unemployment benefits through 2012.

Brad Carder – MedFinance

Brad Carder ("Mr. Carder") is an Illinois licensed attorney and testified that as a representative of MedFinance. He explained that MedFinance purchases medical accounts in personal injury and workers' compensation claims including from CompToday (prescriptions), Lake County Neurosurgery (Dr. Citow), Total Rehab (physical therapy), and Vista Medical Center (the hospital where Petitioner had cervical fusion). Mr. Carder refused to disclose the amount paid by MedFinance to these entities for their accounts with Petitioner. *See also* PX11.

Additional Information

Regarding his current condition, Petitioner testified that he feels bad. He still has headaches, although not so bad as before. He testified that he has lower back popping, which hurts then goes away and that he experiences this every day. Petitioner testified that he takes Aleve, has stomach issues, and there are things that he can no longer do including work because he is up for two days then the third day he passes out due to pain and pressure in the low back.

Petitioner testified that he is going to a free clinic for his low back and that he has not returned to Dr. Michael. He testified that Dr. Citow is his main doctor for the low back and neck. He further testified that he takes prescription medications from the free clinic including cyclobenzaprene for pain, soma, and another unspecified pain killer. He testified that he drove part of the way to court today, but that he can only drive 30-45 minutes before he has to get up.

Petitioner testified that he wishes to undergo the recommended lumbar spine fusion.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill being is not related to his accidents at work on July 6, 2009 or January 8, 2010. In so finding, the Arbitrator finds that Petitioner's testimony is not credible on the whole and is inconsistent with the medical records and the Arbitrator further finds that the opinions of Respondent's Section 12 examiner, Dr. Wehner, are persuasive given the totality of the record.

While Petitioner's first work accident involved a 500-600 pound piece of glass, his claimed injuries as a result of the accident do not directly correlate to the weight of the glass that fell on him as he would have others believe. Petitioner gave testimony about a severe and disabling neck and low back condition of ill being at the time of trial as a result of his work accidents that are not consistent with the objective medical evidence contained in the record about his physical condition or even his reports to various physicians about the work accidents and his claimed ongoing condition.

First, the Arbitrator addresses Petitioner's claimed cervical condition. At trial, Petitioner did not testify about any neck pain occurring immediately after his incident at work. The lack of testimony on this point is notable in light of the medical records which reflect that Petitioner's initial complaints in the emergency room on July 6, 2009 were localized to his chest, abdomen, and left elbow. Petitioner did not report symptoms in the neck or the low back and he was released to work without restrictions.

Two days later, Petitioner went saw Ms. Becker, a certified physician's assistant, reporting right hip, right chest wall, left elbow and inhalation pain with nausea and one episode of vomiting. Petitioner did not report neck pain or low back pain. Notwithstanding, Petitioner's low back was examined along with a general physical examination and he had some low back pain and tenderness to palpation, a bruise on the interior of the right leg, some tenderness to palpation along the right side ribs/abdomen, and some pain and numbness on the left epicondyle. Ms. Becker diagnosed Petitioner with a right chest wall contusion, right abdominal strain, right sacroiliitis, right abdominal contusion, left lateral epicondylitis, right paraspinal muscle strain, and right paraspinal muscle spasm. No cervical condition was diagnosed.

Petitioner continued to follow up with Ms. Becker and then Dr. Bender at Advanced Occupational Medicine Specialists during which time he made no documented complaints of any pain or symptomatology in the neck. Dr. Bender did not examine Petitioner's neck or cervical spine. In fact, Petitioner's neck is not referenced in the medical records until almost three months after the work accident when he first saw Dr. Michael on October 19, 2009 at which time Petitioner provided a different history than that which he reported to emergency room staff or Dr. Bender's office.

Specifically, Petitioner reported loss of consciousness, pain from his head to his right knee, low back pain "much, much worse than associated right leg pain[,]" severe pains with sitting/standing/ walking, particular discomfort with driving and bumpy roads, numbness and tingling in the right second through fourth toes, neck pain and headaches which were bilaterally occipital, and no arm pain, numbness, tingling, or weakness.

Petitioner did not testify about any loss of consciousness at the time of his accident on July 6, 20909 and there is no corroborating reference in contemporaneous medical records about such a condition. Moreover, Petitioner had no arm pain, numbness, tingling or weakness, which is contrary to the reports that he made to Dr. Bender and upon which she relied in rendering diagnoses about Petitioner's radicular pain and any left arm condition.

Shortly after this initial visit to Dr. Michael, Petitioner returned to Dr. Bender on October 27, 2009 and he did not complain of any neck pain. Similarly, Petitioner did not complain of any neck pain to Respondent's Section 12 examiner, Dr. Wehner, on November 16, 2009. While Petitioner argues that Dr. Wehner failed to opine on Petitioner's cervical condition, there is no evidence that Petitioner presented with any complaints related to the cervical spine requiring examination.

Moreover, at no point before or even after Petitioner's second work accident does Dr. Michael causally relate Petitioner's neck condition to either accident at work. To the contrary, Dr. Michael carefully iterates his contention that Petitioner's pre-existing low back condition was aggravated by both work accidents and only then does he add that Petitioner has cervical diagnoses. He does not specifically opine that Petitioner's cervical condition is causally related to either work accident.

Based on all of the foregoing, the Arbitrator finds that Petitioner failed to establish by a preponderance of credible evidence that his claimed current condition of ill being in the neck/cervical spine is causally related to his accident at work on July 6, 2009 or January 8, 2010.

Second, the Arbitrator addresses Petitioner's claimed low back condition. He claims that his current low back condition is causally related to both work accidents and the record is devoid of evidence that Petitioner had any low back symptomatology or treatment before his first accident; however Petitioner's low back treatment, diagnoses, objective test results and testimony about the low back are convoluted at best. Petitioner's treating physicians and Respondent's Section 12 examiner agree, however, that Petitioner had a pre-existing low back condition prior to either accident at work.

The treating medical records reflect that Petitioner's low back was examined and he began complaining of low back pain within days of his work accident. Petitioner was diagnosed with lumbago, right sacroiliitis, and paraspinous muscle spasm as of July 10, 2009. Petitioner, a 46 year old man at the time of his work accidents, underwent a lumbar spine MRI on July 20, 2009 which revealed a disc protrusion at L2-3, end plate degenerative changes, moderate to severe bilateral neural foraminal narrowing and scattered mild other degenerative changes with mild neural foraminal narrowing at L3-4, L4-5, and L5-S1 along with a small focus of susceptibility artifact within the inferior end plate of L2 of uncertain etiology possibly related to a prior surgery. On July 22, 2009, Dr. Bender diagnosed Petitioner with an L2-L3 disc protrusion with foraminal narrowing, L1-S1 facet hypertrophy, and she recommended physical therapy for the low back, which Petitioner eventually underwent.

Petitioner continued to treat with Dr. Bender and she referred him to Dr. Vargas for pain management on August 22, 2009. Dr. Vargas noted that Petitioner's "clinical presentation [was] somewhat perplexing, as *most of his symptoms seem to be right-sided, although he presents a bilateral* neuroforaminal stenosis." *Emphasis* added. These inconsistencies between Petitioner's objective clinical presentation to Dr. Vargas compared to his subjective symptomatology reports are notable in light of the other inconsistencies in this record; that is, Petitioner's testimony at trial about his low back condition and its severity varies from what he reported to physicians during contemporaneous medical treatment and Petitioner's symptomatology and historical reports to physicians during his medical treatment varies among the different physicians treating him or evaluating him for

the low back.

Moreover, the Arbitrator is not persuaded by Dr. Michael's causal connection opinion given the record as a whole. While he vehemently maintained that Petitioner's first, and then second, accident at work aggravated Petitioner's pre-existing low back condition, he did not place Petitioner off work or impose any work restrictions related to the low back until January 11, 2010.

Petitioner testified that he had a second work accident where he was reared ended by a forklift and experienced a burning sensation in his neck and his head became hot. Petitioner did not testify about any low back symptomatology immediately following this second accident and the medical records reflect conflicting historical reports about the accident itself. Interestingly, the medical records also reflect that Petitioner had missed an appointment with Dr. Michael a few days earlier on January 4, 2010 and that he missed an appointment with Dr. Bender on the date of accident, January 8, 2010. Petitioner called Dr. Bender the following day on January 9, 2010 and reported experiencing immediate neck and back pain as a result of the accident, but he declined to come in for an evaluation. Instead, Petitioner scheduled an appointment on January 11, 2010 at which time he reported neck and back pain at a level 10/10, pain radiating from his head to his right foot, and worsened numbness.

Petitioner did not testify about why he missed an appointment with Dr. Bender on January 8, 2010. He did not testify about why he declined to come in for an evaluation the following day on January 9, 2010. There is no evidence about how Petitioner managed the "10/10" maximum level neck and back pain for over three days after the forklift accident without having sought medical attention. Finally, there is no evidence explaining a different and more severe mechanism of injury reported to Dr. Michael on March 1, 2010 where Petitioner reported that he "jerked his low back and neck." Petitioner stopped treating with Dr. Michael after May 10, 2010[6] because he testified that he could not afford it. Petitioner continued to treat with Dr. Bender, however, and she ordered an EMG to address Petitioner's reports of radiating pain into the upper and lower extremities. Petitioner underwent this EMG on June 21, 2010 which showed *no* evidence of bilateral median neuropathy or right ulnar neuropathy, *no* evidence of right or left cervical radiculopathy from C5-T1, *no* evidence of peripheral polyneuropathy, and *no* lower limb findings which would indicate lumbosacral radiculopathy. *Emphasis* added.

In any event, Petitioner testified that he was referred to Dr. Citow, a doctor that works with MedFinance, and he eventually saw him on September 3, 2010. Dr. Citow's records reflect that Petitioner reported bothersome neck and back pain with pain radiating into the right upper and lower extremities for which Dr. Citow ordered updated neck and low back MRIs for an injury at work on January 10, 2010. There is no evidence that Dr. Citow was aware of Petitioner's June 21, 2010 EMG findings, but he nonetheless continued to treat Petitioner for his neck and low back conditions with a focus on the neck first. Notably, Dr. Citow does not opine that Petitioner's neck or low back conditions are work related. It appears that Petitioner relies upon the opinions of Dr. Michael to this effect.

Thus, while it is undisputed between the parties that Petitioner was involved in a forklift accident in January of 2010, the Arbitrator does not find Petitioner to be credible given the inconsistencies in his reported

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[6] The Arbitrator takes judicial notice of the Commission's own files. Petitioner filed a motion pursuant to Section 8(a) of the Act two days before his last visit to Dr. Michael on March 8, 2010. This record reflects that Respondent required Petitioner to submit to a second Section 12 examination with Dr. Wehner on August 16, 2010. However, other than Petitioner changing legal representation at some point thereafter and the Commission's files reflecting that a petition for fees was filed by Petitioner's prior counsel on May 22, 2012, no explanation was provided at trial through testimonial or documentary evidence as to why Petitioner did not file a 19(b) or another 8(a) motion until years later on July 2, 2012.

symptomatology to various treating physicians upon which they relied when viewed in light of objective medical evidence and in comparison to Petitioner's reports and clinical presentation to Dr. Wehner. Under these circumstances, the Arbitrator finds the opinion of Respondent's Section 12 examiner, Dr. Wehner, to be persuasive.

Based on all of the foregoing, the Arbitrator finds that Petitioner failed to establish by a preponderance of credible evidence that his claimed current condition of ill being in the low back/lumbar spine is causally related to his accident at work on July 6, 2009 or January 8, 2010.

Finally, while Petitioner did not testify at trial about any continuing symptomatology in the left arm he argues that he has a left arm condition that is causally related to a work accident. The medical records reflect that Petitioner was treated for symptomatology in the left arm; however, no physician has opined that Petitioner's left arm condition is or was causally related to either work accident. Thus, the Arbitrator finds that Petitioner failed to establish by a preponderance of credible evidence that his claimed current condition of ill being in the left arm is causally related to his accident at work on July 6, 2009 or January 8, 2010.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

Petitioner sought medical treatment at Advanced Occupational Medicine Specialists and submitted bills for treatment through June 29, 2010. Petitioner sought treatment there at Respondent's behest and Respondent does not dispute its liability for such bills. Thus, the Advanced Occupational Medicine Specialists bills reflected in PX12 are awarded and to be paid pursuant to Sections 8(a) and 8.2 of the Act.

As explained above, Petitioner failed to establish a causal connection between his claimed current condition of ill being in the neck or low back and either work accident. Thus, the bills from MedFinance which were purchased from Dr. Citow for an undisclosed amount, Dr. Vargas, Dr. Michael, Libertyville Imaging, Lake County Anesthesiologists, Dr. Thakkar, and out-of-pocket costs paid to Dr. Citow are denied.

In support of the Arbitrator's decision relating to Issue (L), Petitioner's entitlement to temporary total disability and temporary partial disability benefits, the Arbitrator finds the following:

Petitioner claims entitlement to temporary total disability benefits from July 7, 2009 through December 21, 2009 and from September 13, 2010 through January 25, 2013. AX1-AX2. Respondent concedes Petitioner's entitlement to such benefits from July 7, 2009 through December 21, 2009. *Id.* Notwithstanding, the record reflects that Petitioner was placed on light duty work from July 8, 2009 through December 21, 2009 through treatment at Advanced Occupational Health during which time Petitioner submitted to a Section 12 examination with Dr. Wehner on November 16, 2009. Petitioner returned to work on December 22, 2009. Thus, the Arbitrator awards Petitioner temporary total disability benefits from July 7, 2009 through December 21, 2009.

As explained in detail above, the Arbitrator finds that Petitioner's neck and low back conditions of ill-being are not causally related to work accidents. Thus, Petitioner's claim for additional temporary total disability and temporary partial disability benefits is denied.

In support of the Arbitrator's decision relating to Issues (M), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As Petitioner has failed to establish a causal connection between his claimed current condition of ill being and his work accidents, his claim for prospective medical care is denied.

In support of the Arbitrator's decision relating to Issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds the following:

Given the facts presented in this case, and after considering the parties' motion and response, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's condition subsequent to either date of accident was causally related to his injuries at work as alleged and Respondent required Petitioner to submit to two Section 12 examinations. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Arnold,
Petitioner,
vs.

NO: 12WC 33664
14IWCC0229

Plastipak Packaging,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical expenses both current and prospective and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 18, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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: MAR 28 2014
o031914
RWW/jrc
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

ARNOLD, CHARLES
Employee/Petitioner

Case# **12WC033664**

14IWCC0229

PLASTIPAK PACKAGING
Employer/Respondent

On 7/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

0465 SCHEELE CORNELIUS & HARRISON
DAVID C HARRISON
7223 S ROUTE 83 PMB 228
WILLOWBROOK, IL 60527

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

14IWCC0229

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Charles Arnold
Employee/Petitioner

v.

Plastipak Packaging
Employer/Respondent

Case # **12 WC 33664**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Urbana**, on **May 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **September 8, 2012**, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$28,080.00**; the average weekly wage was **$540.00**.

On the date of accident, Petitioner was **60** years of age, **single** with **no** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services under group.

Respondent shall be given a credit of **$ -0-** for TTD, **$ -0-** for TPD, **$ -0-** for maintenance, and **$377.40** for other benefits for which a credit may be allowed under Section 8(j).

Respondent is entitled to a credit under Section 8(j) for any medical bills paid by their group carrier.

ORDER

Petitioner failed to prove his condition of ill-being in his right foot/ankle was causally related to his accident of September 8, 2012. Petitioner's claim for compensation is denied. No benefits are awarded.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

July 15, 2013
Date

ICArbDec19(b)

JUL 18 2013

Petitioner alleges that he injured his right foot/ankle as a result of an accident on September 8, 2012. The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical care. Witnesses testifying at the time of arbitration included Petitioner and Jamie Smith.

Having considered all of the evidence presented, the Arbitrator finds:

Prior to the alleged occurrence on September 8, 2012, Petitioner had undergone both right knee surgery and left knee surgery, the latter having been performed on June 19, 2012, by Dr. Mark Hanson. Petitioner testified that both knee surgeries were brought on by Petitioner twisting his knee and feeling a pop. The records of Dr. Hanson were admitted into evidence as Petitioner's Exhibit No. 1 (PX 1) and they reflect Petitioner's care and treatment through August 29, 2012. (PX 1)

On August 29, 2012 Petitioner presented to Dr. Hanson for a bilateral shoulder evaluation. At that time Dr. Hanson noted right medial knee pain and occasional grinding with a feeling of instability. They discussed scheduling an MRI but Petitioner chose to hold off. (PX 1)

Petitioner works for Respondent as a "technician" and essentially sets up machinery. An Incident Investigation Report was completed on September 8, 2012. According to Part 1 of the Report, which was signed off on by Petitioner, Petitioner injured his right foot on September 8, 2012 when he was walking down the back aisle (west wall near dock C) and tripped over the dock plate stubbing his toe. Greg Wolf was identified as a witness. Petitioner did not seek any treatment at that time. (RX 1) He continued working his regular twelve hour shifts for three days.

Petitioner presented to the office of Dr. Brian L. Hamm on September 12, 2012. Petitioner completed an information sheet as part of the examination. In that form, Petitioner noted he had a work accident on September 10, 2012 when he "tripped on dock plate injured right ankle and leg." (PX 3) In another form completed by Petitioner, Petitioner described his foot problem as "Achilles tendon hurts, tripped ankle swollen, heel, ankle, calf all hurt." (PX 3)

According to Dr. Hamm's office note, Petitioner had been referred to him by Dr. Hanson due to right Achilles pain. Dr. Hamm recorded Petitioner's history of tripping at work a week earlier, experiencing increased pain and swelling, and continuing to work for another three days thereafter. Petitioner presented with "significant pain." Petitioner also reported that he had been standing at work, pivoted to turn around and talk to someone who had spoken to him from behind when he experienced a sharp intense pain but no real "pop or give" that he could appreciate. (PX 3, p. 1) On physical

examination Petitioner had mild edema to his right lower extremity with ecchymosis noted medial and lateral of the Achilles tendon at the level of the watershed area and just distal. Dr. Hamm further noted fusiform edema with significant pain on side to side compression of the fusiform edema within the Achilles tendon on the right but no deficit in the Achilles tendon. Petitioner also had significant pain to palpation of his calf at the myotendinous junction. In light of Petitioner's history of having pivoted followed by the immediate sensation of sharp pain, Dr. Hamm recommended an MRI. He also recommended a cam boot with a thirty pound weight limit. (PX 3, p. 1) Petitioner was given a return to work form indicating he must wear the boot at all times and not push, pull, or lift over thirty pounds. (PX 3)

On September 13, 2012 Greg Wolf provided a written statement regarding the events of September 8, 2012. Mr. Wolf indicated that he had punched in and was walking through line 24 when he noted that Petitioner was screaming loudly into an empty trailer which was docked at the time with the door open. Mr. Wolf could not recall whether he had called out to Petitioner or if Petitioner had kicked a dock door plate before he noted Petitioner screaming. Mr. Wolf walked over to Petitioner and asked if he was okay. Petitioner responded in the negative and continued to yell and shake. Mr. Wolf asked Petitioner if he needed any help and the offer was declined. Later in the day, Mr. Wolf spoke with a co-worker of Petitioner's to see if Petitioner had gone home to "ice his foot" and Mr. Wolf, to his surprise, was advised Petitioner had stayed at work. Petitioner approached Mr. Wolf the next day and apologized for his behavior. (RX 1)

In a letter dated September 20, 2012, Petitioner was advised that Respondent's workers' compensation carrier was denying his claim. (PX 2)

Petitioner underwent a right ankle MRI on September 26, 2012.

Petitioner's Application for Adjustment of Claim was filed with the Commission on September 27, 2012. (AX 2)

Petitioner followed up with Dr. Hamm on September 28, 2012, at which time Petitioner reported ongoing pain. Petitioner's physical examination was similar to that of his earlier September 12, 2012 visit. Dr. Hamm reviewed Petitioner's MRI noting it was consistent with noninsertional Achilles tendinitis but lacking any evidence of a tear. The MRI also showed tendinosis of the peroneus longus and brevis tendons, tenosynovitis of the flexor hallucis longus tendon, a complete tear of the anterior talofibular ligament, interosseous lipoma of the calacaneus, chronic thickening of the central cord of the plantar fascia without rheumatoid changes and edema around the ankle joint. While the MRI was positive

in a number of areas Dr. Hamm noted Petitioner only had clinical evidence of achilles tendinosis. He recommended physical therapy and advised Petitioner to return in three weeks. (PX 3)

On September 28, 2012 Petitioner was given a full duty return to work release effective October 2, 2012. (PX 3)

Petitioner returned to work for Respondent on October 2, 2012. (PX 9)

Petitioner underwent physical therapy beginning October 5, 2012. The initial therapy evaluation notes an onset date of September 8, 2012 when Petitioner tripped on an object at work. (PX 6)

According to Dr. Hamm's medical records, on October 10, 2012, the doctor's office received a call from John Ireland at Respondent's office, requesting clarification on Petitioner's work restrictions. Mr. Ireland was informed that as of September 28, 2012, Petitioner had been released without any restrictions. (PX 3)

Petitioner returned to see Dr. Hamm on October 19, 2012. Petitioner reported improvement in his complaints but ongoing pain while at work, especially on longer days. Petitioner noted that use of the brace, taping, ibuprofen, and stretching exercises helped him get through work. (PX 3; See also PX 6) On physical examination Petitioner still had fusiform edema and pain with side-to-side compression. Petitioner was given an ASO brace and instructed to continue with physical therapy. (PX 3)

Petitioner returned to Dr. Hamm's office on December 4, 2012. Petitioner's diagnosis remained unchanged. Dr. Hamm noted Petitioner had prominence of the Achilles tendon, and pain to palpation in the watershed area. The tendon itself remained intact. Petitioner continued to have plantarflexion of his foot with compression of his calf muscle. In light of the fact Petitioner was only 30% better after 12 weeks of therapy Dr. Hamm recommended ongoing therapy with activity to tolerance or surgical excision of his Achilles tendinosis. Petitioner elected to continue with therapy and wait on surgery. (PX 3)

Petitioner continued with physical therapy through January 30, 2013. As of January 30, 2013 Petitioner was still symptomatic and ongoing therapy was recommended; however, Petitioner reported he might not be able to continue with therapy due to financial constraints. (PX 6)

On February 7, 2013, Dr. Hamm authored a letter to Petitioner's attorney advising him that it was his opinion that Petitioner's achilles tendon injury and/or tendinitis was either caused or, at the very least, significantly aggravated by Petitioner's "reported injury at work one week prior to their September 12, 2012 visit." Petitioner presented with fusiform edema and pain to palpation consistent with his

description of the injury. According to Dr. Hamm Petitioner described a tripping incident at work in which Petitioner was "standing at work [and] pivoted to turn around to talk to someone and felt an intense, sharp pain at the area of his Achilles tendon." Petitioner denied any significant pop or "give" at that time. Dr. Hamm noted that he had last recommended ongoing therapy or surgery. The doctor had not seen Petitioner since December 4, 2012. (PX 5)

At Respondent's request Petitioner was examined by Dr. George Holmes on March 13, 2013. Petitioner reported he was at work on September 8, 2012 when he was "standing and pivoting to talk to [a] coworker. He noted the onset of intense sharp pain without any pop in the right Achilles area." Petitioner told the doctor that physical therapy had been helping. Petitioner was working full duty and using a lace-up brace and taking ibuprofen as needed. Petitioner's complaints included some "achy pain" in the Achilles, especially when going up an incline or using stairs and/or a ladder. Dr. Holmes noted some swelling but nothing "major." Petitioner reported discomfort when walking on a flat surface and with inclines. Heat was helpful in reducing Petitioner's pain complaints. Petitioner was noted to have a history of hypertension and other health issues. Petitioner's examination revealed full range of motion of the ankle, subtalar, and midfoot joints. Petitioner also displayed fusiform thickening in the Achilles tendon and two areas of discomfort along the posterior aspect of the Achilles. Dr. Holmes' diagnosis was Achilles tendinosis; however, he did not feel Petitioner needed any additional care other than a night splint on an ongoing or intermittent basis. Dr. Holmes further recommended that physical therapy "wrap up." Petitioner needed no surgery or work restrictions. Dr. Holmes was of the opinion Petitioner condition "may or may not be related to his work on the dock." He noted that Petitioner did not provide a history of stubbing his toe; rather, he related talking to someone and turning around to talk to someone else – an event that could have happened most anywhere and had nothing "instrinsic to his job." Dr. Holmes did not believe the Achillles tendinosis was "caused" by the motion that Petitioner participated in at that time, but, instead was possibly caused by his underlying history of hypertension and weight. He also noted the MRI demonstrated no evidence of a tear, edema, or collateral damage attributable to an acute injury. In sum, Dr. Holmes opined Petitioner's condition was more likely than not due to the fact it was Petitioner's "time to become symptomatic from his Achilles tendinosis and tendinopathy." (RX 2)

At arbitration Petitioner testified that he twisted his right ankle at the age of sixteen while playing baseball and sliding into home base. He wore a cast for about six weeks and, thereafter, had no further problems. Petitioner further acknowledged bilateral knee problems. Petitioner explained that in 2005 he felt a pop in his right knee while turning it at home. He had surgery on his knee and it remained a little

painful thereafter. Petitioner also injured his left knee in May of 2012 when it popped while he was turning in his kitchen. Petitioner was off work for two weeks and was released in August of 2012.

Petitioner also testified that when he was last examined by Dr. Hanson on August 29, 2012, he was experiencing some right ankle pain, he mentioned the complaints to Dr. Hanson and Dr. Hanson recommended he go see Dr. Hamm, another doctor in the same clinic. Petitioner further testified that an appointment was made for him to see Dr. Hamm on October 12, 2012. Petitioner's attorney asked Petitioner what, if anything, he noticed about his right leg when seen by Dr. Hanson in August of 2012. Petitioner testified he was having some ankle pain. Petitioner's attorney then responded, "Right ankle pain?" to which Petitioner responded, "Right ankle pain, yes."

Petitioner testified that at the time of his occurrence, he was employed as a Technician for Respondent. Petitioner testified that it was his job to set up machinery and it required him to be on his feet and lift up to 15 pounds. Petitioner testified that on September 8, 2012, he was walking into work to punch in and Greg Wolf, a fellow employee, was walking in the opposite direction when Greg called out his name. Petitioner testified that he caught his toe on a plate and felt pain going up his calf. Petitioner further testified that he would talk to Wolf on occasion and they talked about baseball or "Illinois." Petitioner testified that the conversation that he had with Wolf that day was not related to work.

Petitioner testified that he was screaming and Greg Wolf asked him if he was okay and he said "no." Petitioner further testified that he reported to his work station and worked 12 hours on Saturday, 12 hours on Sunday and 12 hours on Monday. He testified that he sought no medical care on any of those days.

Petitioner testified that he informed his foreman about the incident at the "after the morning meeting" and he completed an accident report two days later. Petitioner testified that the pain he was experiencing did not go away over the weekend.

Petitioner testified that he went to Dr. Hamm on the 12th and the doctor ordered an x-ray, MRI, boot, and took him off work. Petitioner further testified that he took the note to his employer and that he gave a recorded statement two days later when an adjuster called.

Petitioner testified that he continued treating with Dr. Hamm who ordered physical therapy and released him to return to work on October 2, 2012. Petitioner further explained that he was given a lace-up brace to work but only wore it at home due to safety issues. Petitioner testified he stopped going to physical therapy in January of 2013 because the bill was getting too high.

Petitioner acknowledged seeing Dr. Hamm on September 12, 2012. When confronted with the history of "he states that while he was standing at work, he pivoted to turn around and talk to someone

who had spoken to him from behind and had a sharp intense pain but without real history of pop or give way that he could be appreciated" Petitioner denied same. After the denial, he was asked by Respondent's counsel about the history he gave to Dr. George Holmes (RX 2). The history to Dr. Holmes was "he reports standing and pivoting to talk to a co-worker. He noted the onset of intense sharp pain without any pop in the right Achilles area." Petitioner denied giving that history to Dr. Holmes. He was then asked how both doctors could have the same incorrect history. Petitioner's response was that "they must have been thinking about his knee injuries which occurred that way."

Petitioner testified he would like to receive further treatment for his injury. He further testified that he has changed jobs at work due to ongoing soreness but that he feels like his knee has healed. Petitioner currently works nights sitting in the guard shack. to being taken off work on September 12, 2012 and being released to return to work on October 2, 2012. He testified to the conservative care and physical therapy he was provided to include wearing a boot at home, and then a closed shoe at work for safety reasons. Petitioner testified that he would have difficulties with stairs, but his condition was getting better. He testified that he stopped physical therapy because he could not afford the co-pays. He testified that he last saw Dr. Hamm in December of 2012. Petitioner acknowledged he is 5'5" tall and weighs between 290 and 295 lbs.

Petitioner admitted to going to the IME with Dr. Holmes. He admitted that he was suffering from hypertension. He testified that he was taking medication for his hypertension and was not taking any medication for his Achilles tendon injury. Petitioner testified that Jamey Smith filled out the incident report based upon information Petitioner provided to him. Petitioner further testified that he told Jamey Smith that his ankle hurt at the time of the incident.

Jamey Smith testified on behalf of Respondent. Mr. Smith is Petitioner's supervisor. Mr. Smith testified that Petitioner reported an incident to him on September 8, 2012 in which Petitioner stubbed his toe. Mr. Smith asked Petitioner if he wanted medical care and Petitioner denied it. Mr. Smith did not recall Petitioner ever mentioning any ankle pain. On cross-examination Mr. Smith acknowledged that Petitioner complained of toe and foot pain over the course of the next three days but he was able to work and it wasn't until September 10th that he requested an accident report be filled out.

The Arbitrator concludes:

Petitioner testified that he was experiencing right ankle pain prior to September 8, 2012. Petitioner testified that when seen by Dr. Hanson in August of 2012 he mentioned right ankle pain complaints to

the doctor and it was recommended that he go and see Dr. Hamm, another doctor in the clinic. An appointment was scheduled for October 12, 2012 before Petitioner injured himself on September 8, 2012. Petitioner testified that on September 8, 2012 he tripped over a dock plate. The accident on September 8, 2012 involved Petitioner's right toe, not his ankle. When Petitioner was examined by Dr. Hamm on the 12th Petitioner gave a history of tripping at work and experiencing an increase in pain. Petitioner didn't say his pain began with the incident at work; rather, something happened that made the pain greater than it had been. Petitioner had right ankle pain before anything happened on September 8, 2012.

The Arbitrator further notes the history contained in Dr. Hamm's initial visit of September 12, 2012, which clearly suggests that Petitioner had two incidents one occurred when Petitioner tripped over the dock plate; the other involved pivoting when Mr. Wolfe called out to him. Which of these incidents occurred exactly when is uncertain although it appears the tripping at work occurred approximately one week before Dr. Hamm's visit and he worked another three days thereafter. Petitioner did not indicate when the pivoting incident occurred. The pivoting accident at work would not be compensable. If Petitioner was responding to Mr. Wolf's calling out to him and pivoted, Petitioner's accident did not arise out of his employment as there is was no increased risk of injury stemming from Petitioner's employment. Petitioner was going in to clock in and was exchanging pleasantries with Mr. Wolf regarding subjects having nothing to do with work.

The Arbitrator concludes that on September 8, 2012 Petitioner sustained an accident arising out of and in the course of his employment when he tripped over the dock plate. Petitioner testified as such. Petitioner's accident report (RX 1) described the incident as a trip over a dock plate. Mr. Wolf's statement does not shed a great deal of light as he could not recall if he had called out to Petitioner or if Petitioner had kicked a dock door.

The Arbitrator further concludes that Petitioner failed to prove that his current condition of ill-being in his right ankle or foot is causally related to the September 8, 2012 accident. Petitioner has the burden of proof regarding causation. Petitioner failed to meet that burden of proof as Dr. Hamm's opinion is based upon an inaccurate history regarding Petitioner's injury as Petitioner failed to explain to the doctor how he was experiencing right ankle pain prior to September 8, 2012, and the appointment in September was requested for the prior complaints and not as a result of the September 8, 2012 accident. Tripping and pivoting are two distinct actions and nowhere does Petitioner give a history of both occurring at the same time. Petitioner's failure to give any doctor a complete and accurate history of his ankle and foot complaints undermines any causal connection determination. The Arbitrator is also not convinced by a preponderance of the evidence that Petitioner's pain in his Achilles tendon began on September 8, 2012.

There is also a discrepancy between Dr. Hamm's medical records and his causation opinion (PX 5). In Dr. Hamm's office note of September 12, 2012, he clearly associates the pivoting action with the Achilles tendon injury and not the tripping episode. (PX 3, p. 1) His opinion letter to Petitioner's attorney suggests differently but not persuasively. (PX 5) Furthermore, Drs. Hamm and Holmes were both given the same exact history of a pivoting accident and not a tripping accident. Petitioner's testimony that the doctors must have been confusing his knee injury histories with his ankle complaints was not convincing given the complete circumstances of the case.

Petitioner's claim for compensation is denied and no benefits are awarded.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Russell Grady,
Petitioner,

vs.

NO: 11WC 15158, 11WC15164
11WC 15178, 11WC 15353

State of Illinois/Jacksonville Developmental Center,
Respondent,

14IWCC0230

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent, accident, causation, temporary total disability, medical, wage calculations, "motion to strike application per accident,"and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAR 3 1 2014
o032514
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRADY, RUSSELL
Employee/Petitioner

Case# **11WC015158**

11WC015164
11WC015178
11WC015353

SOI/JACKSONVILLE DEVELOPMENTAL CENTER
Employer/Respondent

14IWCC0230

On 5/7/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

2934 JOHN V BOSHARDY & ASSOC PC
1610 S 6TH ST
SPRINGFIELD, IL 62703

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

3291 ASSISTANT ATTORNEY GENERAL
DIANA E WISE
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 7 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0230

STATE OF ILLINOIS)
)
COUNTY OF ADAMS)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Russell Grady
Employee/Petitioner

Case # 11 WC 15158

v.

11 WC 15164, 11 WC 15178
11 WC 15353

State of Illinois/Jacksonville Developmental Center
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Quincy**, on **March 6, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☒ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's present condition of ill-being causally related to the injury?

G. ☒ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On **March 16, 2011** , Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $ **56,873.04** ; the average weekly wage was $ **1,093.71** .

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **729.14**/week for **6 & 5/7** weeks, commencing **March 24, 2011** through **Aprill 11, 2011 and then again from April 14, 2011 through May 12, 2011** , as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ **656.22**/week for **66.625** weeks, because the injuries sustained caused **17.5% loss of use of the right hand and 15% loss of use of the left hand** as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **March 16, 2011** through **March 6, 2013** , and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $ **26,102.73** for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Nancy Lindsay
Signature of arbitrator

May 3, 2013
Date

ICArbDec p. 2

MAY - 7 2013

Russell Grady vs. State of Illinois - Jacksonville Developmental Center
IWCC No. 11 WC 15158

Petitioner has four claims pending against Respondent, all of which allege repetitive trauma to Petitioner's upper extremities with different accident/manifestation dates. At the time of arbitration, all four claims were consolidated with the parties agreeing that one decision would be issued. The disputed issues are accident; causal connection; notice[1]; earnings; medical expenses; temporary total disability; and nature and extent.

ATTACHMENT C

In support of the Arbitrator's findings on the issue of **(C) Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent? (D) What was the date of accident, and (E) was timely notice of the accident given to Respondent,** the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated herein by reference.

On March 16, 2011, Petitioner was employed by Respondent at the Jacksonville Developmental Center. Jacksonville Developmental Center is a residential facility for mentally and physically disabled adults.

Petitioner first began working at Jacksonville Developmental Center in May of 1988. Petitioner began his employment as a Mental Health Tech trainee. Petitioner became a Mental Health Tech I in 1989. Petitioner became a Mental Health Tech II in 1990. In 2000, Petitioner was promoted to a Mental Health Tech III.

Petitioner cared for approximately 30 to 32 residents. There were two wings of sixteen residents each and the Petitioner moved from one wing to another during his workday as needed.

When Petitioner was a Mental Health Tech II there were only two workers on each wing. The Mental Health Tech III position was created when the Petitioner began working as one in 2000. The position did not exist before then. Petitioner testified that when working as a Mental Health Tech II his work activities were very similar to those he performed as a Mental Health Tech III with the only difference being that when Petitioner became a Mental Health Tech III the amount of activity with his hands increased.

Petitioner described his work activities as a Mental Health Tech III. Petitioner worked forty hours a week and would be required to work a mandated overtime shift once or twice a week, which he described as an extra eight hour shift. Petitioner could refuse a mandated overtime shift only twice a year.

[1] Respondent stipulated to notice in 11 WC 015353

Petitioner arrived in the morning and had to get the residents out of bed. Petitioner stated that most of the residents were soiled so Petitioner would have to clean them. About fifteen or sixteen of the residents could not walk. If the residents were not able to stand, Petitioner would use his hands and arms to roll them on the side by placing his hands on the residents' back and buttocks, holding the residents with one hand, taking the wet sheets out, and cleaning them with his other hand. Petitioner rolled the residents back and forth with his hands until they were clean. Petitioner dried the beds by wiping them down and then dressed the residents.

Dressing the residents required Petitioner to hold them on their side with his hand and pull on the residents' socks, underwear, pants, and shirt with the other hand. Petitioner testified that dressing the residents was very difficult because they did not want to cooperate. The residents would kick, move, squirm, and Petitioner would really have to hold them with his hands tightly and hang onto the clothes hard to slide on the clothes. Petitioner dressed at least 20 residents a day. Dressing the residents took about an hour.

After the residents were dressed, Petitioner fed the 40% of the residents who were unable to feed themselves. Petitioner scooped up the food with a spoon using his hand and poured the drinks in a cup. Sometimes the residents did not like the food and would spit it back, so Petitioner kept on trying to feed them.

After Petitioner was done feeding the residents, he would take them to the bathroom and assist them in sitting on a toilet. Petitioner testified that he brought approximately ten residents to the toilet and the rest of them would have to be laid on the bed to have their diapers changed. The residents were required to be toileted every two hours due to all the fluids that they would be given.

In toileting, Petitioner used his hands to unbuckle the resident's pants, pull them down, sit them on the toilet and wait a while. If the residents were unable to sit on a toilet, Petitioner had to lay the resident on the bed, pull down the resident's pants and underwear, pull their adult diaper off, and change them. If the residents were not able to stand up, he would have to lay them on the bed and roll them with his arms and hands. The residents were not cooperative.

Eighty percent of the residents were in wheelchairs, so it would be necessary to lift them out of the wheelchair and lay them on the bed. Some of the residents weighed 100 pounds, others weighed over 300 pounds. Petitioner had to lift them, position them to remove the diapers off, and then dress them again.

Some of the residents who were in wheelchairs would not stay in the facility all day. Approximately twenty five of the thirty two residents would go to a workshop. In order to take them to workshop Petitioner lifted them underneath the legs and behind their back, and set them in wheelchairs. The heavier residents required two people to lift them, with one at the feet, and one on the back.

When the buses showed up, Petitioner would push the residents outside, down a very steep ramp, and load them on the bus. Petitioner testified that because the ramp was so steep he would need to grip and hold onto the wheelchair to prevent picking up too much speed.

Some of the residents could not ride the bus, so he would push them all the way to the workshop, which was approximately 200 yards.

If the residents did not go to workshop, Petitioner would do hand to hand activities. In these activities Petitioner would grab the resident's hand with his own hand and rub an item, such as a piece of sandpaper, or silk, and show the resident the texture of the item. Most of the residents would not cooperate because they did not like to be touched. Petitioner explained that he would have to forcefully grip the resident's hand, hang onto it, and pull them to the object being touched.

Petitioner also described that he would need to reposition the residents so they did not develop bedsores. The residents had to be moved every hour. Any resident in a wheelchair would need to be moved from the wheelchair to the bed and from the bed to a recliner.

Petitioner cleaned the furniture. Petitioner cleaned the mattresses every day. Petitioner used a spray bottle of bleach and cleaned the furniture with a towel with his hands. Petitioner removed the sheets, sprayed the mattresses with a bottle of bleach and wiped it down with his hands.

Petitioner also remade the beds. There was a bed pad, a fitted sheet, a flat sheet, a blanket, a bed spread, and pillow cases. Petitioner would make the majority of the beds as the group leaders stayed with the residents. The urine would soak through, so Petitioner would have to mop up the floors as well.

Petitioner also completed paperwork everyday. Petitioner stated that he had to do the paperwork longhand. He would have a face-check sheet that he would have to mark every half an hour with a pen. Every day Petitioner needed to write a progress note regarding what the residents did, note their behavior, and if anything happened. If a resident left the campus, a note needed to written on where they went and what they did. If there was an injury Petitioner had to write about an hour's worth of paperwork. In addition to the face-check sheets, Petitioner would also complete a walkthrough paper. Petitioner testified that every month they would have new paperwork that he would need to complete.

Residents became combative every day. When the residents became combative, Petitioner needed to use quite a bit of exertion to restrain or control them as they were very strong. Petitioner testified that he had to hold them down using his arms, shoulders, and hands.

Petitioner stated that eighty to ninety percent of his day involved gripping or forceful gripping with his hands.

Petitioner's testimony regarding his work activities was un-rebutted.

Petitioner noticed that he developed occasional numbness approximately two years before he mentioned the problem to his doctor. Petitioner noticed that his condition worsened over the two years preceding a visit he had with his primary care physician, Dr. John Peterson of Jacksonville Family Practice on January 28, 2011. (P.X.4) Petitioner saw his doctor on January 28, 2011 for a recheck of his hypertension medication when he noted that he had arm and hand

pain. Petitioner's blood pressure on January 28, 2011 was 130 over 90. (P.X. 4) Petitioner stated that he did not discuss his work activity with him and a diagnosis was not provided to him by his doctor. (P.X.4) Dr. Peterson made a provisional diagnosis of carpal tunnel and referred the Petitioner to Dr. Fortin for an NCS. (P.X.4) Petitioner was not restricted from working.

Petitioner was seen by Dr. Claude Fortin on February 23, 2011 for an EMG/NCV study. (P.X.11, Dep. Ex. 2) Dr. Fortin noted he had a two year history of bilateral hand numbness which had been increasingly problematic at night for the past year. Petitioner testified that he did not discuss his work activities with Dr. Fortin and the records confirm this. Dr. Fortin diagnosed the Petitioner with bilateral severe carpal tunnel syndrome. (P.X. 11, Dep. Ex. 2) Petitioner stated that Dr. Fortin told him he had carpal tunnel syndrome.

Dr. Peterson referred the Petitioner to Dr. Darr Leutz of the Springfield Clinic for treatment of his bilateral carpal tunnel syndrome. (P.X.5, Dep. Ex. 2) Petitioner was seen by Dr. Leutz on March 16, 2011. Petitioner testified that Dr. Leutz discussed with him the cause of carpal tunnel and this was when Petitioner was first informed that his work activities could have caused his bilateral carpal tunnel syndrome.

Petitioner notified his supervisor of his diagnosis of bilateral carpal tunnel syndrome on March 17, 2011 and Petitioner was provided with a workers' compensation injury packet which he completed on March 18, 2011. Respondent stipulated that it received notice of the Petitioner's claim of bilateral carpal tunnel on March 18, 2011.

The Arbitrator notes Petitioner's credible testimony and finds Petitioner's bilateral carpal tunnel syndrome manifested itself on March 16, 2011, as that is the date on which Petitioner became aware that he had the condition and that it might be related to his employment. There is no evidence indicating that Petitioner had this knowledge until he discussed his work activity with Dr. Leutz on March 16, 2011. The Employer's Form 45 dated March 18, 2011 states that Petitioner was experiencing discomfort in both wrists due to repetitive dressing and undressing of clients. (PX. 2) Petitioner filed four applications for adjustment of claim alleging four separate manifestation dates, with March 16, 2011 being one. The case number for accident date March 16, 2011 is 11 WC015158.

The Arbitrator concludes that the accident date for purposes of this claim is March 16, 2011 and since Respondent acknowledged receiving notice on March 18, 2011, notice to Respondent has also been established. The Arbitrator makes no findings or conclusions with respect to the other claims filed.

Russell Grady vs. State of Illinois - Jacksonville Developmental Center
IWCC No. 11 WC 15158

ATTACHMENT F

In support of the Arbitrator's findings on the issue of **(F) Is the Petitioner's present condition of ill-being causally related to the injury?,** the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Dr. Darr Leutz testified in this matter on the issue of causal relationship, as did Respondent's IME physician, Dr. James Williams.

Dr. Leutz diagnosed the Petitioner with bilateral carpal tunnel syndrome. (P.X. 5, Dep. Ex. 2) Dr. Leutz performed bilateral carpal tunnel releases to treat the condition of ill being. (P.X. 5, Dep. Ex. 2)

Dr. Leutz performs about two to three carpal tunnel releases per week, or 90 to 150 cases per year. (P.X.5, p. 19) Dr. Leutz stated that about half are caused by work injuries. (P.X.5, p. 19)

Dr. Leutz stated that people with carpal tunnel syndrome will commonly have symptoms at night. (P.X.5 p. 8) Dr. Leutz felt that the Petitioner did not have any systemic conditions which might predispose the Petitioner to develop carpal tunnel syndrome besides being overweight. (P.X.5, p. 8)

Dr. Leutz testified that he is a little familiar with the duties of a Mental Health Tech III and it was his usual practice to ask patients like Petitioner about their work activities. (P.X.5, pp. 15-16, 20-21) Dr. Leutz did not note Petitioner's work activities in his initial record but noted it was his practice to discuss work activities with his patient. (P.X.5 pp. 20, 23)

Dr. Leutz was provided a hypothetical description of the Petitioner's work activities which, although less detailed than the Petitioner's testimony regarding his specific work activities, provided a fair and accurate summary of the Petitioner's work activities and the use of his hands as a Mental Health Tech III. (P.X.5, pp. 16-17) Dr. Leutz stated that the activities described would either be causative or an aggravation of his carpal tunnel syndromes. (P.X.5, p. 18)

Dr. Leutz felt that the Petitioner's work activities were repetitive and strenuous. (P.X.5, pp. 18-22) Dr. Leutz stated that it was his opinion that Petitioner's activities were repetitive and strenuous because of the activities of "donning and doffing of clothes", moving patients, lifting residents from side to side to clean, grasping sheets, and other care-giving activities involving pulling, grasping, pushing, and lifting. (P.X.5, p. 22)

Dr. Leutz stated that he did not know how long the Petitioner would have to perform this activity to be considered repetitive. (P.X.5, p. 22) Dr. Leutz noted that the activities described were strenuous to the hands in that they required Petitioner to lift and reposition patients such as other care giver type situations such as nurses which have the same type of phenomena happen. (P.X.5, p. 18)

Dr. Leutz testified that there is no test to determine how much repetitious activity a person has to experience before developing carpal tunnel syndrome and the amount of repetitious activity required would depend on that person's predispositions, genetics, and the amount of time a person is performing the tasks. (P.X.5, pp. 27-28) Dr. Leutz stated that idiopathic meant that there was no explanation for the development of carpal tunnel in an individual. (P.X.5, p. 29) Dr. Leutz was of the opinion, however, that because he felt the Petitioner's work activities did contribute to his carpal tunnel syndrome, the Petitioner's carpal tunnel syndrome was not idiopathic. (P.X.5, p. 29)

Dr. Leutz opined that having high blood pressure or hypertension was not a cause of carpal tunnel syndrome. (P.X.5, pp. 24-25)

Respondent sent Petitioner to Dr. James Williams for an independent medical evaluation on May 9, 2012 for the purpose of an independent medical evaluation. (R.X. 4. p. 5) Dr. Williams reviewed a "Job Demands Report" or job description prepared by Christina Austin. (R.X. 4, pp. 9-10) Dr. Williams stated it was his opinion, "based on the job description", that Petitioner's work activities did not cause or aggravate his carpal tunnel syndrome because he did not think that the job activities required any vibration or sustained, repetitive, forceful gripping. (R.X.4, pp. 14-15) Petitioner's counsel made a timely objection to a discussion of the "Job Demands Report" based on hearsay and foundation. (R.X. 4, p. 9-10) Petitioner's counsel reiterated the objection at arbitration. Respondent failed to offer the testimony of Christina Austin, the person who created the "Job Demands Report" to establish a foundation for its admissibility or for cross examination. Dr. Williams testified that the causation opinions he made in his IME report were based on the job description. (R.X. 4, p. 12) The Arbitrator sustains the Petitioner's objection and strikes the "Jobs Demand Report" and any causation opinions offered by Dr. Williams based thereon.

Petitioner did not provide Dr. Williams with any more information about his work activities other than what was in the "Job Demands Report". (R.X. 4, p. 23) Accordingly, Dr. Williams had no other admissible facts on which to base a causation opinion.

Dr. Williams stated that it was his opinion that the job duties of a Mental Health Technician III were very similar to a CNA. (R.X. 4, pp. 13-14) Respondent offered no evidence regarding the activities of a CNA or how the same might be similar to the work of a Mental Health Technician III.

Dr. Williams was asked whether there were any treatises which he knew which would support his opinon. (R.X. 4, p. 15) Petitioner's counsel moved to strike the question and answer since Respondent did not disclose any such treatises to Petitioner's counsel within 48 hours of Dr. Williams' deposition. (R.X. 4, p. 15) Petitioner offered as Williams' Deposition Exhibit 3 Petitioner's counsel's letter to Respondent's counsel dated October 10, 2012, along with a facsimile confirmation report receipt of same, demanding production of, inter alia, any medical treatises on which Dr. Williams might rely. (R.X. 4, Deposition Exhibit 3) The Arbitrator sustains Petitioner's counsel's objection and Dr. Williams' opinions based on any such medical treatises are stricken.

On cross-examination, Dr. Williams admitted that he had been retained by Respondent to perform independent medical evaluations on Respondent's employees since February 2011.

(R.X. 4, p. 17) Dr. Williams admitted performing three such exams per week, which had recently increased in that since April or May of 2012 Dr. Williams had been performing as many as 3 to 4 were for Respondent. (R.X. 4, pp. 17-18) Dr. Williams admitted that he received $2,000.00 per examination every week before November of 2011, but thereafter his fee increased to $2,500.00 per examination. (R.X. 4, p. 18)

Dr. Williams did not have the Mental Health Technician II job description and had no information about those work activities. (R.X. 4, p. 21)

Dr. Williams agreed that carpal tunnel syndrome was a cumulative disorder syndrome. (R.X. 4, p. 21)

Dr. Williams admitted that he had no information that the Petitioner might be required to forcefully restrain a combative adult disabled person. (R.X. 4, p. 23) Dr. Williams admitted that he had no description of the activities Petitioner would perform in repositioning a combative or redirecting a combative adult mentally handicapped individual. (R.X. 4, pp. 23-24) Dr. Williams admitted that dressing a severely mentally handicapped adult might require restraint but did not know the type. (R.X. 4, p. 24)

Dr. Williams admitted that there are systemic factors which might predispose a median neuropathy. (R.X. 4, p. 24) Dr. Williams agreed that carpal tunnel syndrome is very often occupationally related. (R.X. 4, p. 25) Dr. Williams classified hypertension as a risk factor for carpal tunnel syndrome. (R.X. 4, p. 27) Dr. Williams noted that the Petitioner's blood pressure was only slightly elevated at 140 over 97 on the day of his exam. (R.X. 4, p. 39) Dr. Williams agreed that not all people with hypertension will develop carpal tunnel syndrome. (R.X. 4, p. 41) Dr. Williams also admitted that there are no studies which isolate hypertension as a cause of carpal tunnel syndrome. (R.X. 4 pp. 41-42)

Dr. Williams stated that Petitioner had two predisposing risk factors in being mildly obese and hypertensive. (R.X. 4, pp. 27-28) Dr. Williams agreed that there were no specific number of repetitions that a person must experience to develop carpal tunnel syndrome. (R.X. 4, p. 28) Dr. Williams admitted that since there was no baseline number of repetitions that a person must experience to bring about the symptoms of carpal tunnel syndrome in any given individual, the amount of repetitious activity a person must be exposed to varied from person to person based upon a combination of genetic predisposition, systemic risk factors, and occupational risk factors. (R.X. 4, p. 33) Dr. Williams further admitted that there was no way to determine with any scientific certainty what proportional contribution systemic factors provide in a given patient. (R.X., 4, p. 34)

Dr. Williams acknowledged that varying work activities does not necessarily mean that the worker is not using their hands. (R.X. 4, pp. 43-44) Dr. Williams also acknowledged that the Petitioner worked "a lot" of overtime and the Respondent did not inform him that Jacksonville Developmental Center had mandated overtime hours. (R.X. 4, p. 47) Dr. Williams acknowledged that the number of hours a person works is important in determining occupational risk. (R.X. 4, pp. 47-8)

The Arbitrator notes that both Dr. Leutz and Dr. Williams testified that occupational risk factors exist which might cause, aggravate, or contribute to the development of carpal tunnel syndrome, often in conjunction with predisposing health issues and genetic factors.

The Arbitrator finds that Dr. Williams did not have any facts regarding, or admissible description of, the Petitioner's work activities on which to base his causation opinions and, therefore, his opinions against a finding of a causal relationship cannot be given any weight.

The Arbitrator notes Petitioner's credible testimony regarding his work activities and Dr. Leutz' testimony of a causal relationship between Petitioner's work activities and the bilateral carpal tunnel syndrome Petitioner developed. The Arbitrator concludes that Petitioner's bilateral carpal tunnel syndrome was causally related to his work activities and accident of March 16, 2011.

Russell Grady vs. State of Illinois - Jacksonville Developmental Center
IWCC No. 11 WC 15158

ATTACHMENT G

In support of the Arbitrator's findings on the issue of **(G) What were Petitioner's earnings?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Petitioner submitted his earnings records from the pay period ending April 1, 2010 through pay period ending March 14, 2011. In all but one pay period, that ending December 1, 2011, Petitioner received overtime earnings. Petitioner testified that overtime was mandated due to understaffing and he could only refuse mandated overtime twice a year.

Petitioner's gross earnings, including overtime for the period, above was $56,873.04 yielding an average weekly wage of $1,093.71. (P.X. 3)

The Arbitrator concludes that Petitioner's average weekly wage for purposes of this claim is $1,093.71.

Russell Grady vs. State of Illinois - Jacksonville Developmental Center
IWCC No. 11 WC 15158

ATTACHMENT J

In support of the Arbitrator's findings on the issue of **(J) Were the medical services that were provided to the petitioner reasonable and necessary?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Petitioner submitted his related medical expenses as Exhibit 10. Having resolved the issue of accident and causal relationship in Petitioner's favor, the Arbitrator concludes the medical expenses submitted were reasonable and necessary and orders Respondent to pay the same as follows:

Jacksonville Family Practice, 1/28/11	$ 124.00
Springfield Clinic, 2/23/11-4/20/11	$ 9,230.00
Passavant Area Hospital, 3/16/11	$ 240.96
Passavant Area Hospital, 3/24/11	$ 6,165.53
Passavant Area Hospital, 4/14/11	$ 6,910.37
Passavant Area Hospital, 4/28/11-5/16/11	$ 2,326.87
Anesthesia Care Associates, 3/24/11	$ 510.00
Anesthesia Care Associates, 4/14/11	$ 595.00
Total:	**$26,102.73**

As stipulated by the parties, Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to the providers. Respondent shall pay any unpaid, related medical expenses according to the Fee Schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

Russell Grady vs. State of Illinois - Jacksonville Developmental Center
IWCC No. 11 WC 15158

ATTACHMENT K

In support of the Arbitrator's findings on the issue of **(K) What amount of compensation is due for Temporary Total Disability?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Dr. Leutz removed Petitioner from work following his left carpal tunnel release on March 24, 2011. (P.X.5, p. 11) Petitioner was released to return to work without restrictions on April 11, 2011 and then removed again from work following his right carpal tunnel surgery on April 14, 2011. (P.X. 5, Dep. Ex. 2) Dr. Leutz released Petitioner to return to work on May 12, 2011 without restrictions.

The Arbitrator concludes Petitioner was temporarily and totally disabled from March 24, 2011 through April 11, 2011 and then again from April 14, 2011 through May 12, 2011, a period of 6 and 5/7 weeks.

Russell Grady vs. State of Illinois - Jacksonville Developmental Center
IWCC No. 11 WC 15158

ATTACHMENT L

In support of the Arbitrator's findings on the issue of **(L). What is the nature and extent of the injury?** the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Petitioner underwent bilateral carpal tunnel releases by Dr. Darr Leutz with the left carpal tunnel release being performed on March 24, 2011 and the right carpal tunnel release being performed on April 14, 2011. (P.X.7 & 8) Dr. Leutz noted Petitioner's median nerve had an hourglass appearance. (P.X.7 & 8)

Petitioner now works for the Respondent for a different agency as Jacksonville Developmental Center closed. Petitioner now works in the mail room for Department of Human Services. Petitioner notes that his right hand grip is not all the way there and he drops envelopes. Petitioner estimates that he has lost 20% to 30% of his grip strength on his right hand and 5% to 10% loss on his left hand. He notices his right hand feels swollen but it is not swollen, almost like a fullness feeling to it.

Dr. Williams performed grip strength testing over a year after Petitioner's surgeries and Dr. Williams noted that the Petitioner's grip strength on the right, his dominant hand, was decreased when compared to his left hand. (R.X. 4, pp. 44-46, Dep. Ex. 4) Dr. Williams testified that the dominant hand should be 10 to 15% stronger on the dominant hand than the non-dominant hand.(R.X. 4, p. 46) The test was done approximately one year postoperatively and showed a "bell shaped curve" showing maximum voluntary effort. (R.X. 4, pp. 44-5)

The Arbitrator notes that the testing demonstrates Petitioner has a measurable loss of grip strength of approximately 20% on the right. Normative values were not available to compare Petitioner's original grip strengths. The Arbitrator concludes the injuries sustained caused 17.5% loss of use of Petitioner's right, dominant hand, and 15% loss of use of Petitioner's left hand.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Paul Kazmierski,

Petitioner,

vs. NO: 09WC 33851

Peoria Journal Star and Gatehouse Media,

14IWCC0231

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, medical expenses, causal connection, temporary total disability, permanent partial disability, attorneys' fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 28, 2012, is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 3 1 2014
o032514
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KAZMIERSKI, DAVID PAUL
Employee/Petitioner

Case# **09WC033851**

PEORIA JOURNAL STAR AND GATEHOUSE MEDIA
Employer/Respondent

14IWCC0231

On 11/28/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1009 KAVANAGH LAW FIRM
JAMES W SPRINGER
301 S W ADAMS ST SUITE 700
PEORIA, IL 61602

1337 KNELL & KELLY LLC
CHARLES D KNELL
504 FAYETTE ST
PEORIA, IL 61603

14IWCC0231

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID PAUL KAZMIERSKI ,
Employee/Petitioner

v.

PEORIA JOURNAL STAR and GATEHOUSE MEDIA ,
Employer/Respondent

Case # 09 WC 33851

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **August 27, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On **August 23, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned **$57,366.92**; the average weekly wage was **$1,103.21**.

On the date of the alleged accident, Petitioner was **51** years of age, *single* with **one** dependent child.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and **$9,060.10** for other benefits, for a total credit of **$9,060.10**.

Respondent is entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that an accidental injury occurred that arose out of and in the course of his employment with Respondent on **August 23, 2007.**

Petitioner further failed to prove that he gave Respondent timely notice of this alleged injury as defined by the Act.

Petitioner further failed to prove that the conditions of ill-being complained of are causally related to any work activities performed on behalf of this Respondent.

All claims for compensation made by Petitioner in this matter are thus hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator **JOANN M. FRATIANNI**

November 16, 2012
Date

NOV 28 2012

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Petitioner filed an Application for Adjustment of Claim in this case alleging an accident date of August 14, 2009. (Px23, Rx1) Petitioner claimed on the Request for Hearing form an accident date of August 23, 2009. (Arb.Ex.1)

Petitioner testified that he worked as a mailer trainee for Respondent and was hired in November of 1978. This work involved hand insertion of paper into machines, stacking bundles, and preparing newspapers to be mailed to customers. Two year later he was promoted to journeyman mailer. His responsibilities were the same and he would lift bundles of inserts that weighed 15-30 pounds. He worked in such a fashion for 29 years full time. In 2005 he was promoted to "man in charge." Petitioner testified his lifting involved no more than 20% of the total time he spent working each shift. When he was so promoted, Respondent had ergonomic aides for pallet lifts and used loaders rather than hand feeding product. He was still required to occasionally lift an empty skid placed on the floor. With ergonomic aides, there were pallet lifts and turntables to those lifts which would allow one to not bend and twist as much. These devices appeared in the 1990's.

Petitioner was asked on direct examination if he recalled the date of accident. He testified that he was not clear and he knew it was between August 23, 2007 and August 29, 2007. Petitioner then responded with an approximate date of August 24.

Petitioner testified that he saw his family physician, Dr. Lawless, as soon as he could and that was the basis for his estimation of the date of accident. Petitioner testified on the night of his alleged injury, he was not lifting bundles of newspapers, but was putting a heavy plastic pallet on top of a pile of similar pallets by himself, when he experienced a tremendous shooting pain down his left leg which he described as getting stabbed by an ice pick.

Petitioner at no time filled out an accident report for this alleged injury. He testified that he told Tim Burnside, the night manager, about the accident. Petitioner then testified that he called department head, John Phillips, the next day, and told him he had a back injury but did not reference it as work related at that time. He then notified the human resources manager, Julie O'Donnell, which he testified occurred at least two days after the alleged injury.

Petitioner saw Dr. Lawless on August 29, 2007. Petitioner testified he told Dr. Lawless he had an injury which took place on August 24, 2007 when he placed a plastic pallet on top of another pallet. The records of Dr. Lawless in evidence do not contain such a history but refer to low back pain radiating down the left leg for the past 10 days. (Rx15) Dr. Lawless then referred him to see Dr. Klopfenstein, a neurosurgeon.

Petitioner saw Dr. Klopfenstein on September 20, 2007. Petitioner admitted that he did not give a history of injury to the doctor of lifting pallets. Petitioner testified that he told the doctor it was a work-related accident. Petitioner filled out a Patient Information Sheet at the doctor's office in which he identified and admitted that he did not check off a box that would indicate a work related accident. That form indicates an accident or injury of August 1, 2007. (Rx9)

Dr. Klopfenstein prescribed surgery. Petitioner underwent surgery to his lower back with Dr. Klopfenstein and remained under his care post surgery, which included physical therapy. Dr. Klopfenstein released Petitioner to return to full duty work in January of 2008. At that time he returned to work as a journeyman mailer.

During his time off of work, Petitioner received short term disability benefits, which he did not claim was due to a work injury. Petitioner also denied being a weightlifter, which is contradicted by Dr. Lawless' office note dated March 26, 2002. On that date he saw Dr. Lawless for back spasms and indicated he was a weightlifter. Petitioner denied telling Dr. Lawless he was a weightlifter.

Petitioner also wrote a letter to Dr. Klopfenstein dated June 28, 2010 in which he asked him to write an opinion as to whether 32 years of lifting, twisting and bending was a cause of his back problems. Nowhere in that letter did Petitioner reference lifting a plastic pallet or stacking pallets. (Rx10)

Dr. Klopfenstein testified by evidence deposition in this matter and denied receiving a history of a specific work injury from Petitioner. Dr. Klopfenstein gave an opinion during his testimony in response to a hypothetical question assuming repetitive trauma to the lumbar spine and whether such work could cause or aggravate the condition he treated. (Px14)

Ms. Julie O'Donnell testified that she is the human resources manager for Respondent. Part of her responsibilities included processing workers' compensation claims brought any employee. Ms. O'Donnell testified that when so notified, a First Report of Injury form is filled out and signed by the employee and her. Ms. O'Donnell testified that at no time in August of 2007 was she made aware of any work related injury. All of Petitioner's medical bills were submitted and paid by group health insurance and he applied and received short term disability benefits. She first became aware of a work injury claim when she received the Application for Adjustment of Claim in July of 2009.

Respondent introduced into evidence a report of Dr. Soriano, an orthopedic surgeon, dated March 25, 2010. Dr. Soriano indicates in that report that he reviewed numerous medical records from Dr. Klopfenstein, Dr. Lawless and others and concluded there was no documented causal relationship between the herniation and any work related injury. (Rx6)

At no time did Petitioner amend the filed Application for Adjustment of Claim.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury to his lumbar spine which arose out of and in the course of his employment by Respondent on August 24, 2007 or any other date alleged.

E. Was timely notice of the accident given to Respondent?

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that Petitioner failed to give Respondent timely notice of an accidental injury as defined by the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that the condition of ill-being to the lumbar spine is not causally related to the claimed accidental injury in this matter.

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?

See findings of this Arbitrator in "C," "E," and "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C," "E," and "F" above.

Based upon said findings, all claims made by Petitioner for temporary total disability benefits in this matter are hereby denied.

L. What is the nature and extent of the injury?

See findings of this Arbitrator in "C," "E," and "F" above.

Based upon said findings, all claims made by Petitioner for permanent partial disability benefits in this matter are hereby denied.

M. Should penalties or fees be imposed upon Respondent?

See findings of this Arbitrator in "C," "E," and "F" above.

Based upon said findings, all claims made by Petitioner for penalties and fees in this matter are hereby denied.

N. Is Respondent due any credit?

See findings of this Arbitrator in "C," "E," and "F" above.

Based upon said findings, all claims made by Petitioner for credit are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matthew Flowers,
Petitioner,

vs.

NO: 10WC 25400

State of Illinois/Pinckneyville Correctional Center,
Respondent,

14IWCC0232

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 25, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAR 3 1 2014
o032614
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FLOWERS, MATTHEW Case# **10WC025400**
Employee/Petitioner

SOI/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

14IWCC0232

On 1/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1580 BECKER SCHROADER & CHAPMAN PC
TODD J SCHROADER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794

ASSISTANT ATTORNEY GENERAL
MOLLY WILSON DEARING
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601

1350 DEPARTMENT OF CORRECTIONS
WORKERS' COMPENSATION CLAIMS
1301 CONCORDIA COURT
PO BOX 19277
SPRINGFIELD, IL 62794

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 25 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0232

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Matthew Flowers
Employee/Petitioner

v.

State of Illinois/Pinckneyville Correctional Center
Employer/Respondent

Case # 10 WC 25400

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 William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on December 11, 2012. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On June 4, 2010, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $55,765.00; the average weekly wage was $1,072.40.

On the date of accident, Petitioner was 39 years of age, married with 3 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $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. The parties stipulated at trial that TTD benefits have been paid in full.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 8 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability of $643.44 per week for 116.9 weeks because the injuries sustained caused the 15% loss of use of the right arm, 15% loss of use of the left arm, 10% loss of use of the right hand and 10% loss of use of the left hand as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

January 18, 2013
Date

JAN 25 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of June 4, 2010, and further stated that as a result of repetitive trauma, Petitioner sustained injuries to the right and left hands and right and left arms. Respondent disputed liability on the basis of accident, notice and causal relationship. At trial Petitioner sought an order for payment of medical bills and permanent partial disability. The parties stipulated that all temporary total disability benefits had been paid in full.

Petitioner testified he worked for Respondent as a Correctional Officer for 18 1/2 years and that he initially worked at Big Muddy Correctional Center from June, 1994, until he was transferred to Pinckneyville Correctional Center in January, 1999. Petitioner worked numerous job assignments at Pinckneyville Correctional Center since that time. Included in those assignments Petitioner performed while working at Pinckneyville was an assignment to work in the R5 segregation unit. This segregation unit does require a higher level of security for the inmates than those inmates that are in the general prison population.

Petitioner testified that approximately one year prior to June 4, 2010, he worked in the R5 segregation unit. One of the duties Petitioner described was opening a chuckhole to hand the inmates their laundry bag. The chuckhole is a rectangular shaped opening on the door to the cell and it is opened utilizing a Folger-Adams key that is approximately 4 to 6 inches in length. Petitioner testified that he was required to insert the key forcefully and turn it with a ratcheting twisting motion and, at the same time, pull on the chuckhole to open it. Petitioner testified that turning the key was difficult because on many occasions the lock would stick. When it was necessary to remove inmates from the cell, the chuckhole had to be opened again, the inmate would place his hands inside the chuckhole so Petitioner could cuff him and then the chuckhole had to be closed. Another key was then used to open the cell door and those keys are approximately three inches in length.

Petitioner testified he would obtain laundry approximately 30 to 50 times a day and then return the laundry in that same quantity. Petitioner reviewed Respondent's Exhibit 11, the Key Estimation Study, and he disagreed with the count stating that it was not broad enough to cover everything that he does as a Correctional Officer. Petitioner testified that on a busy day there would be 300 to 350 key turns and the constant turning of keys is required to go anywhere in the facility. On a very slow day, Petitioner agreed that the counts could be lower than those estimated in Respondent's Exhibit 11. Petitioner testified during this time period he worked approximately 60 shifts, 16 hour each, and, during those double shifts he could turn keys up to 800 times. In a slow double shift, Petitioner could have turned approximately 300 to 400 keys.

The Petitioner would have to use the same opening and closing of the chuckhole and cuffing of inmates when inmates would have to go to the infirmary or when they would use the shower. Opening and closing of the chuckhole was also performed by the Petitioner when he was required to feed the inmates. This would require opening and closing 30 chuckholes to deliver the tray of food and then the same procedure when he retrieved the trays. Petitioner began to experience symptoms of pain in both of his hands in either 2008 or 2009 and he did obtain some

wrist splints in 2009; however, he did not seek any medical care or treatment at that time. Petitioner reported this repetitive trauma injury to Major Pickering on June 14, 2010, as is evidenced in Respondent's Exhibits 2 and 3.

Respondent called Lieutenant Jason M. Thompson to testify on its behalf and he was present during Petitioner's testimony when Petitioner stated that he turned keys between 300 to 350 times per shift. Lieutenant Thompson stated that turning 300 to 350 key turns per shift was possible but it was probably not common. Lieutenant Thompson did concede that it was possible that a Correctional Officer could have been many key turns per shift because there are times that an officer gets busy. Lieutenant Thompson also stated that his count was not exact as he did not have time to run with a counter with every Correctional Officer. He also agreed that on any given day, the key turn count may be higher.

Petitioner sought medical treatment for the first time on May 25, 2010, when he was seen by Dr. J. Gregg Fozard, his family physician. Petitioner complained of bilateral numbness and pain in his hands with occasional involvement of the elbows. Dr. Fozard ordered nerve conduction studies which were performed on June 4, 2010, by Dr. Fakhri Alan. The impression was moderately severe bilateral cubital tunnel syndrome and mild bilateral carpal tunnel syndrome. This is the date of manifestation alleged in the Claim for Compensation. As noted herein, Petitioner gave notice to Respondent on June 14, 2010, and a First Report of Injury was prepared.

Petitioner was seen by Dr. David Brown on July 12, 2010. In connection with that examination, Petitioner completed a patient questionnaire in which he described his job duties which included the use of Folger-Adams keys on locks that were stiff and difficult to operate. In this questionnaire, Petitioner erroneously stated that he turned keys 400 to 500 times per hour and this should have actually indicated per shift. (Dr. Brown also stated that he interpreted this to be a per shift estimation as well.) Dr. Brown examined Petitioner and opined that he had severe bilateral cubital tunnel syndrome and chronic bilateral carpal tunnel syndrome. Dr. Brown recommended surgery and noted Petitioner's job duties and the lack of any other medical problems that would put him at risk. Dr. Brown stated that Petitioner's work as a Correctional Officer was an aggravating or contributing factor in the development of both conditions.

Dr. Brown performed surgery on Petitioner's right elbow and wrist on August 27, 2010, the procedure consisting of a cubital tunnel release and ulnar transposition with lengthening of the flexor pronator tendon. At the same time, Dr. Brown performed a carpal tunnel release. Dr. Brown performed the identical surgical procedures on the left elbow and wrist on September 17, 2010. Post-surgically, Petitioner received physical therapy at Pinckneyville Community Hospital from August 30, 2010, through November 3, 2010. Dr. Brown released Petitioner to return to work without restrictions on November 15, 2010.

Dr. Brown was deposed on March 27, 2012, and his deposition testimony was received into evidence. Dr. Brown's testimony in regard to the diagnosis and treatment of Petitioner was consistent with the information contained in his medical records. In respect to the issue of causality, Dr. Brown reviewed two job site analysis reports prepared by CorVel dated December 17, 2010, and February 2, 2011; two DVD's also prepared by CorVel showing various job duties

of a Correctional Officer; and a report prepared by Dr. James Williams who performed a records review at the request of Respondent. When he was deposed, a lengthy hypothetical question was posed which summarized Petitioner's job duties and Dr. Brown opined that there was a causal relationship between Petitioner's job activities and the conditions that he diagnosed and treated. Dr. Brown opined that the work activity was an aggravating factor even assuming the accuracy of job site analysis and Key Estimation Studies and whether or not the hypothetical question posed was completely accurate.

At the request of Respondent, Dr. James Williams reviewed various medical treatment records, Respondent's reports regarding Petitioner's condition and the same job site analysis and DVD's that were also reviewed by Dr. Brown. Dr. Williams also personally visited Respondent's facility in Pinckneyville; however, he did not personally examine the Petitioner. Dr. Williams opined that there was not a causal relationship between Petitioner's work activities and the conditions in his upper extremities and that Petitioner's activities of fishing, gardening and hunting could be causative factors in the development of the conditions. He did not identify any systemic medical causative factors of the condition.

Petitioner testified that the surgeries were helpful. Petitioner was able to successfully return to work as a Correctional Officer.

Conclusions of Law

In regard to disputed issue (E) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did give notice to Respondent within the time limit prescribed under the Act.

In support of this conclusion the Arbitrator notes the following:

In a repetitive trauma case, the date of accident is the date of manifestation which has been defined as the fact of an injury and the causal relationship of it to a work activity would be apparent to a reasonable person. Peoria County Belwood Nursing Home v. Industrial Commission, 505 N.E.2d 1026 (Ill. 1987). While Petitioner had symptoms and self administered splints in 2009, no medical treatment was sought by him at that time and there was no diagnosis until the nerve conduction studies were performed on June 4, 2010. The Arbitrator thereby concludes that the date of manifestation is June 4, 2010. Petitioner gave notice to Respondent on June 14, 2010, which is within the statutory time limit.

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained a repetitive trauma injury to both upper extremities arising out of and in the course of his employment for Respondent.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds Petitioner was a credible witness on his own behalf and testified as to the repetitive use of his upper extremities, in particular, the frequent key turns.

Respondent's witness, Lieutenant Thompson, disagreed with Petitioner's testimony as to the frequency of key turns but conceded that the amount of key turning Petitioner testified to was possible if the Correctional Officers were busy.

Dr. Brown's opinion as to causal relationship is more credible than that of Dr. Williams. Dr. Brown reviewed all of the data including the Key Estimation Studies and DVD's prepared at Respondent's direction and concluded even if information was accurate and the hypothetical was not completely accurate, there still was a causal relationship between the work activities and the conditions for which he diagnosed and provided treatment. Further, there was no systemic medical reason for Petitioner developing these conditions and the Arbitrator is not persuaded that his outside activities of fishing, gardening and hunting are the cause of the his conditions.

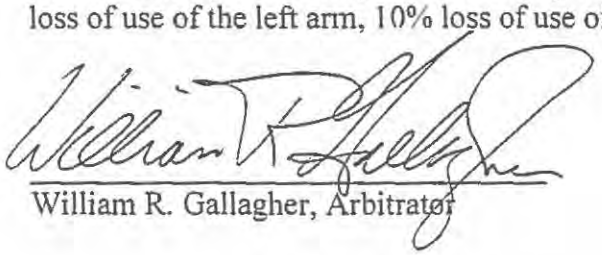
In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator finds that all the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 8 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that as a result of repetitive trauma injuries of June 4, 2010, Petitioner has sustained permanent partial disability to the extent of 15% loss of use of the right arm, 15% loss of use of the left arm, 10% loss of use of the right hand and 10% loss of use of the left hand.



William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Chris Murphy,
Petitioner,

vs.

Chris Henry, Injured Workers Benefits Fund
Illinois State Treasurer, and Jeremy Wilson,
Respondent.

14IWCC0233

NO: 11 WC 16333

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability, wages, medical expenses, employer employee relationship and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAR 3 1 2014
KWL/vf
O-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0233

MURPHY, CHRIS M
Employee/Petitioner

Case# 11WC016333

CHRIS HENRY,INJURED WORKERS BENEFIT FUND ILLINOIS STATE TRESURER & JEREMY WILSON
Employer/Respondent

On 6/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0080 PRUSAK WINNE & McKINLEY LTD
JOSEPH E WINNE
403 N E JEFFERSON ST
PEORIA, IL 61603

2187 HEIPLE LAW OFFICE
JEREMY HEIPLE
7620 N UNIVERSITY SUITE 203
PEORIA, IL 61614

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
500 S SECOND ST
SPRINGFIELD, IL 62706

PINNACLE LAW OFFICE
NICK OWENS
401 MAIN ST SUITE 105
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0233

CHRIS M. MURPHY,
Employee/Petitioner

v.

CHRIS HENRY, INJURED WORKERS BENEFIT FUND, ILLINOIS STATE TREASURER, and JEREMY WILSON,
Employer/Respondent

Case # 11 WC 16333

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **November 27, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Were Respondents 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 Respondents?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondents?
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? Have Respondents 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 Respondents?
N. ☐ Are Respondents due any credit?
O. ☒ Other: Motion to Dismiss Application for Adjustment of Claim.

FINDINGS

On **April 2, 2011**, Respondents *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did not* exist between Petitioner and Respondents.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident *was* given to Respondents.

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned $ **0.00**; the average weekly wage was $ **0.00**.

On the date of the alleged accident, Petitioner was **28** years of age, *single* with **one** dependent child under 18.

Petitioner *has* received all reasonable and necessary medical services.

Respondents *have not* paid all appropriate charges for all reasonable and necessary medical services.

Respondents 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**.

Respondents are entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner failed to prove that an employee and employer relationship existed between himself and the Respondents Chris Henry and Jeremy Wilson on April 2, 2011.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. **No award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. No award is hereby entered against any Respondent, and no benefits are due Petitioner in this case.** Normally, if a Respondent employer fails to pay any awarded benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. **As no such benefits are awarded, there is no such right of recovery by the fund. As there are no benefits awarded, the Respondent/Employer/Owner/Officer need not reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.** The parties have stipulated that the Fund has paid no compensation to Petitioner in this case.

All claims for compensation in this matter as made by Petitioner are thus hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator JOANN M. FRATIANNI

June 21, 2013
Date

JUN 25 2013

B. Was there an employee-employer relationship?

Petitioner testified he received a contact by a friend concerning a roofing job. The name of the friend was Mr. Justin Heft. Mr. Heft informed him that Chris Henry had a roofing job. Mr. Heft further informed Petitioner he had found another job that was just starting, and that he could not work on Henry's roofing project. Mr. Heft informed Petitioner that he could take his spot with that job.

Petitioner testified that he then called Mr. Henry prior to April 2, 2011. Mr. Henry told him to meet him at 6920 Rockvale Drive, Peoria, on the morning of April 2, 2011. Petitioner testified that he arrived at the work site that morning approximately two hours ahead of time in order to meet with Mr. Henry. Petitioner testified that Mr. Henry hired him to work on the roof of the residence at that location, which was owned by Mr. Jeremy Wilson. Petitioner testified that it was agreed between Mr. Henry and himself that he would be paid $10.00 an hour for his time worked. Petitioner testified that it was his belief based on that conversation he was hired by Mr. Henry not only for that job, and for future employment on a full-time basis. Petitioner testified that Mr. Henry told him about his roofing business that he had for over nine years.

Petitioner testified that at the end of the fifth hour of work, and while he was carrying tarpaper off the roof and onto a ladder, he slipped and fell backwards onto his back and left arm, injuring his left arm.

Petitioner testified the tools and equipment used on that date were owned by Mr. Henry. Petitioner further testified that he believed he received his direction and control from the job by Mr. Henry and it was his impression that Mr. Henry had the right to hire and/or fire him from that job. Petitioner testified that the homeowner, Mr. Jeremy Wilson, was on the roof on April 2, 2011 periodically, but gave no orders or directions to workers.

Mr. Chris Henry testified that he was employed installing drywall for Trueblood Drywall. He was also employed as a part time security guard at Grande Prairie Mall in Peoria. Mr. Henry testified that he was friends with Respondent Jeremy Wilson for the year prior to April 2, 2011. Mr. Henry testified that he offered to help Mr. Wilson replace his roof for $10.00 each hour cash for each hour worked. In addition, Mr. Henry offered to round up more individuals to work on the roof when Mr. Wilson's other helpers, Mr. Wilson's father and brother, were unable to help as planned. Mr. Henry testified that he informed Mr. Wilson that he knew some guys who may be interested in helping and that they would accept $10.00 cash per hour in exchange. Mr. Henry testified he had never worked on a roof for pay before this project and has not since. Mr. Henry further testified he had not worked with any of the individuals before April 2, 2011, or after that date.

Mr. Henry testified that he arranged for Mr. Aharon Bouchez, Mr. Matt Knutt, Mr. Justin Heft, and a later date, Mr. Spencer Flier, to work on that particular roofing project. Mr. Henry testified that he informed all of them that the homeowner would pay $10.00 cash per hour to each. Mr. Henry testified that he did not speak to Petitioner prior to meeting him on April 2, 2011 at the work site. Mr. Henry testified that he had been at work at Grande Prairie Mall that morning and did not arrive at the job site until approximately 1:30 p.m. Mr. Henry testified that he then met Petitioner, who was there to work in Mr. Heft's place, as Mr. Heft had found other gainful employment.

Mr. Henry testified that on April 2, 2011, that he, Mr. Wilson, Petitioner, Mr. Bouchez, Mr. Knutt, and Mr. Shawn McIntyre, a friend of the homeowner, were all working on the roof. Mr. Henry testified that everyone was simply tearing off old shingles and moving material off the roof so the new shingles could be moved into place and installed. Mr. Henry testified that everyone was performing this work and no real instruction was sought or given to any individual on April 2, 2011. Mr. Henry testified that at some point on one of the days, it was discovered somehow that Mr. Bouchez had the most experience laying tarpaper, so he performed that task and would be paid an extra $100.00 for that skill. No testimony was elicited as to how that decision to make that extra payment was made, who instructed Mr. Bouchez to perform that task or if he merely volunteered.

Mr. Henry testified he provided a hammer, tape measure, nail gun, pry bar and a ladder to use on the project. Mr. Henry testified he shared these tools with other individuals at the site and transported them in his personal truck. Mr. Henry testified that Mr. Bouchez also brought a nail gun that was used on the project, and the property owner, Mr. Wilson, provided a ladder that was used on the backside of the house. Mr. Henry testified that at the end of the last day, Mr. Wilson gave him a check for $1,300.00 to split between himself and the other workers at the rate of $10.00 per hour. No testimony was elicited as to who decided how much this check would be for.

Mr. Henry testified that they all wanted cash payment upon completion of the work the final day, and agreed to all go to the bank to split the check as the homeowner Wilson did not have the cash available. Mr. Henry testified he cashed the check at the bank and gave payment to each person who worked the last day. Mr. Henry recalled giving Petitioner's payment to Mr. Heft to pass along as he was not present. Mr. Knutt testified that he only worked on the first day of the project, so Mr. Henry kept his payment and contacted him later to pass it along.

Mr. Henry testified concerning his involvement in the purchase of materials for this project from ABC Supply. Mr. Henry testified that Mr. Wilson asked him to use his account at ABC because one needed an account to purchase anything from the shop. Mr. Henry testified that in order to get an account, one had to pass a credit check, and Mr. Henry was not wiling to go through that. Mr. Wilson had given him a check to pay for the materials at ABC, but there was a problem with the check, so Mr. Wilson ended up going and paying for the materials in person. The invoice reflects that Mr. Wilson paid for the materials and the account used was Mr. Henry's. (Px8) Mr. Henry testified he was paid about $400.00 for the week out of the $1,300.00 check issued, that that he worked about 39 hours total on the roof.

Mr. Jeremy Wilson testified that he was the homeowner at the site. Mr. Wilson testified that Mr. Henry provided him with a bid or this roofing job in an amount of $5,000.00, including time and materials. At the conclusion of the job, Mr. Wilson wrote Mr. Henry a check for $1,300.00, which represented the amount of time all of the workers spent on the job site, and for which they were compensated at $10.00 an hour. Mr. Wilson further testified that he did not give direction and control to workers, and that was the responsibility of Mr. Henry. Mr. Wilson testified that he was on the roof periodically working as the others were, helping out however he could. Mr. Wilson testified that at no time did he give any orders to the workers as to how the work was to be performed. Mr. Wilson did admit to paying for the materials that were used on the roof, paying for a dumpster from Kevs' Kans and providing a ladder. Mr. Wilson testified all remaining tools and equipment were provided by Mr. Henry. Mr. Wilson testified that his occupation is that of an engineer and he is employed by Caterpillar, Inc. in Peoria.

Mr. Matthew Knutt testified that Mr. Henry told him Mr. Jeremy Wilson needed a roof completed and would pay the roofers $10.00 per hour. Mr. Knutt testified he worked on the roof putting down sheet paper and nailing down exposed nails. Mr. Knutt testified that while he worked on the roof, on occasion he would ask Mr. Henry what to do because he knew Mr. Henry. Mr. Knutt testified that another guy, who was not Mr. Wilson nor Mr. Henry, asked him to help tighten tar paper at one point and he did so. Mr. Knutt testified that he only worked one day for 8-12 hours, did not keep track of his time, did not report his time to anyone, and was paid an amount he could remember at a later time because he only worked on the day of the accident. Mr. Knutt testified he felt he was paid fairly for the work he performed at the time.

Mr. Spencer Flier testified that one to two weeks prior to Apri 2, 2011, Mr. Flier and Mr. Henry went to the homeowner's residence, and talked to Mr. Wilson. At that time they measured the roof and Mr. Henry informed Mr. Wilson the whole project would cost around $5,000.00. Mr. Flier testified he was not trying to listen to their conversation because it was their business and not his, but he overheard Mr. Henry telling Mr. Wilson that people would work on the roof for $10.00 an hour and that was acceptable to Mr. Wilson.

Mr. Flier further testified that Mr. Henry called him one day after this accident, and said there were less people working on the roof and that it would take longer and go quicker if Mr. Flier came and helped. Mr. Flier testified that Mr. Henry didn't really care if he helped at that point but it would be nice since it wouldn't take them as long to complete the roof. Mr. Flier testified there were two nail guns being used for the roofing job and one was owned by Mr. Henry. Mr. Flier testified that he was paid cash for his time worked.

Mr. Flier testified that everyone was just using common sense to decide what to work on while they were on the roof, that no one was giving real instruction on what to do, but that he felt both Mr. Wilson, as the homeowner, and Mr. Henry, as the one who contacted him to help, could tell him to get off the roof. Mr. Flier testified he brought a hammer and pry bar that he used when he helped work on the roof. Mr. Flier testified keeping track of the hours he worked himself, maybe in a little notebook, and he informed someone prior to getting paid how many hours he worked, but he only recalls working between 15-20, or 25 hours, and that he was paid between $150.00 and $200.00. Mr. Flier testified that Mr. Wilson was on the roof "doing basic stuff."

In order to determine whether or not an employer and employee relationship existed between the parties, an Arbitrator must look at the factors of agency to determine whether an individual is an independent contractor or not. "Right to control the manner in which the work was done, the method of payment, the right to discharge, the skill required in the work to be done, and the furnishing of tools, materials or equipment . . . of these factors, the right to control the work is perhaps the most important single factor." *Coontz v. Industrial Commission*, 19 Ill. 2d 574, 169 N.E. 2d 94, 96 (1960).

Concerning the right to control, the Arbitrator finds there was little or no control by either Respondent. There was no testimony elicited of a direction of tasks, a divvying of work, or instruction on how to perform a specific task. There was testimony that each person used common sense to know what to do, asked what they could do if they did not know themselves and that one worker was at one time asked by another, who was not one of the Respondents, to assist with some tar paper. Mr. Henry testified that there was no real instruction tearing off shingles. Mr. Knutt testified no one instructed him. Mr. Flier testified there was no instruction and everyone used common sense. While Mr. Knutt testified to asking Mr. Henry what he could do at one point during the job, he also testified that this was because Mr. Henry had told him about the roofing project and that the was the only one that Mr. Knutt knew well.

Concerning the method of payment, the Arbitrator finds that while Mr. Wilson issued the check to pay for the labor, Mr. Henry, at a minimum, assisted in distributing those funds. There was no evidence presented as to how Mr. Wilson knew to make the check out for $1,300.00 for labor, as opposed to some other amount. Each Respondent testified that the other determined how much time each worker would get paid. The non-party workers were unable to recall whether they reported their time to either Respondent or how the time was tracked.

Concerning the right to discharge, the Arbitrator notes that each worker seemed quite independent. No testimony was elicited that the roofers were told what time to show up or when they could leave, or even which days they were to work. It seems pretty clear from the testimony before this Arbitrator that each person was free to work whatever days they wished or wanted, or even to substitute themselves with another worker without some type of approval, as was the case with Mr. Heft and Petitioner. Mr. Flier testified that he felt like since it was Mr. Wilson's home and since he was informed of the work by Mr. Henry, that either one of them could tell him to get off the roof.

Concerning the skill required to perform the work, the Arbitrator finds very little skill was required. Each worker chose to help at whatever skill level they possessed. The only roofer who appeared to have skill above average was Mr. Bouchez, who laid the tarpaper. It appears from the testimony that this was decided at the time the tarpaper needed to be laid and that Mr. Bouchez may or may not have volunteered for this task. There is no testimony that Mr. Bouchez was instructed to lay the tarpaper.

Concerning the furnishing of tools, materials and equipment, the Arbitrator finds the homeowner, Respondent Wilson, provided the materials and that many of the workers brought tools. There was testimony and exhibits that establishes that Mr. Wilson paid for the roofing shingles and materials along with a dumpster. There is also testimony that tools were furnished or brought by Mr. Wilson in the form of a ladder, by Mr. Bouchez, in the form of a nail gun, by Mr. Henry, in the form of a nail gun, pry bar, taper measure, hammer and ladder, and by Mr. Flier, in the form of a hammer and pry bar. There is no testimony that anyone instructed anyone as to what tools to bring. There was testimony that a nail gun broke during the roofing project, but no testimony that anyone was to go and get a replacement.

Based upon the above, the Arbitrator finds the testimony of all the witnesses to be more credible than that of Petitioner in this case. The Proctor Hospital emergency room records reflect that Petitioner drank 4-5 alcoholic beverages a day and had admitted to using marijuana as recently as two weeks before April 2, 2011. In spite of this, there is no evidence presented that alcohol or marijuana was a cause of the injury. In addition, Petitioner told the staff at Proctor Hospital that he owned his own construction company, which contradicts his testimony that he worked for Mr. Henry. The Arbitrator also notes that Petitioner's testimony that Mr. Henry informed him that he had owned a roofing business for the past nine years is not corroborated by other testimony by other witnesses, but it similar to the testimony of Mr. Henry that he has worked or has been a co-owner in a drywall business for nine years.

Based upon the above, and applying all of the factors noted above, the Arbitrator concludes and finds that Petitioner failed to prove that an employer and employee relationship existed between himself and the two named Respondents on April 2, 2011.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondents?

See findings of this Arbitrator in "B" above.

Based upon said findings, the Arbitrator further finds that Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his alleged employment by Respondents on April 2, 2011.

F. Is Petitioner's current condition of ill-being causally related to the injury?

See findings of this Arbitrator in "B" above.

Based upon said findings, the Arbitrator further finds that Petitioner failed to prove that his current condition of ill-being is causally related to an accidental injury that arose out of and in the course of his alleged employment by Respondents on April 2, 2011.

G. What were Petitioner's earnings?

See findings of this Arbitrator in "B" above.

Based upon said findings, the Arbitrator further finds that Petitioner failed to prove that he earned any salary for the year preceding April 2, 2011 through his alleged employment by Respondents.

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 expenses?

See findings of this Arbitrator in "B" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for medical expenses incurred from an alleged work injury on April 2, 2011 are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "B" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for temporary total disability benefits incurred from an alleged work injury on April 2, 2011 are hereby denied.

L. What is the nature and extent of the injury?

See findings of this Arbitrator in "B" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for permanent partial disability benefits incurred from an alleged work injury on April 2, 2011 are hereby denied.

O. Motion to Dismiss Application for Adjustment of Claim?

See findings of this Arbitrator in "B" above.

Based upon the above, the Motion to Dismiss the Application for Adjustment of Claim is denied, as the matter has been adjudicated that on April 2, 2011, no employer and employee relationship existed between the parties.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
MADISON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AARON A. BROOKINS,

Petitioner,

vs.

NO: 09 WC 31240

14IWCC0234

AMERICAN STEEL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of evidentiary findings, temporary total disability benefits and the nature and extent of the injury, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found that Petitioner was permanently and totally disabled. We reverse the Arbitrator and find that Petitioner is not permanently and totally disabled. Instead, we award Petitioner 45% loss of the person as a whole.

We hold that Petitioner has not met his burden of proof to show that he is permanently and totally disabled. An employee can establish that he is entitled to permanent total disability benefits in one of three ways: "by a preponderance of medical evidence; by showing a diligent but unsuccessful job search; or by demonstrating that, because of age, training, education, experience, and condition, there are no available jobs for a person in his circumstance." *Prof'l Transp., Inc. v. Ill. Workers' Comp. Comm'n, 2012 Ill. App. LEXIS 33 (Ill. App. Ct. 3d Dist. 2012)*. The court further detailed the claimant's burden when proving that he falls into the "odd

lot" category of permanent and total disability.

> 'Under *A.M. T. C*, if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what [h]as been termed the "odd-lot" category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market [citation]), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant [citation].' [Citations]."

Id.

In this case, Petitioner has not proved that he falls into the odd lot category and thus has not met his initial burden of proof. Petitioner's treating physicians gave him permanent restrictions and allowed him to return to work within those restrictions. On June 9, 2011, Dr. Gornet concluded Petitioner had reached maximum medical improvement and was able to work with permanent restrictions of no lifting greater than 10 pounds, to alternate between sitting and standing as needed, no repetitive bending or lifting, and no pushing or pulling. Dr. Gornet did not restrict Petitioner from working over 40 hours or week, more than eight hours a day or overhead work.

Yet on the same day Petitioner received permanent restrictions, he applied for social security disability benefits. Petitioner did not attempt to return to work and has never applied for any jobs. Petitioner did not seek the assistance of vocational rehabilitation services to help him find alternative work. Instead, Petitioner testified that he has never sought and did not want vocational rehabilitation services. He also stated he was unwilling to commit to participating in a vocational rehabilitation plan to become re-employed.

Petitioner's medical records do not establish that he is completely restricted from working. Respondent's Section 12 examiner, Dr. Lange, also placed Petitioner at maximum medical improvement on July 7, 2011, and gave him permanent work restrictions consistent with sedentary to light physical demand levels. Instead, Petitioner began receiving his social security disability benefits on September 3, 2011. He continues to receive them and has not found employment.

Furthermore, Petitioner's subsequent medical records document that his low back condition actually improved. Petitioner told Dr. Boutwell on January 6, 2012, that his discomfort was relatively well controlled. Dr. Boutwell noted that Petitioner was in no acute distress, his lumbar range of motion was less limited and his quality of movement appeared to have improved since the May 2011 visit. Dr. Boutwell only refilled one of Petitioner's prescriptions and told him to return in a year. Petitioner followed up with Dr. Gornet on January 9, 2012, who also

noted that Petitioner was functioning better than in June 2011, was off all narcotics and the x-rays showed good position of his devices. While Petitioner told Dr. Gornet for the first time that any prolonged activity increased his pain to the point where Petitioner only felt relief from lying in a fetal position, Dr. Gornet did not change his work restriction. Petitioner followed up with Dr. Gornet again on August 16, 2012. Dr. Gornet stated that Petitioner's condition was permanent and "clearly he has some limitations." Again, Petitioner's work restrictions remained unchanged. Dr. Gornet again noted that his radiographs looked excellent, his fusion was solid and Petitioner took non-narcotic medications to help with "some of his pain." Petitioner also saw Dr. Lange again at Respondent's request on June 26, 2012. Petitioner again claimed it was necessary for him to lie in a fetal position several times a day. However, Dr. Lange also did not recommend additional work restrictions for Petitioner. The medical records reflect that Petitioner's low back condition had improved. No objective findings supported Petitioner's subjective claim of needing to lie in the fetal position to relieve his pain. Moreover, no physician gave Petitioner restrictions or opined that he was permanently and totally disabled.

Instead, based on Petitioner's own testimony, he leads a rather active life style. Petitioner cares for his 12 year old son, drives him to and attends school and sport activities. He helps his son with homework. Petitioner cooks meals, cleans the house, vacuums, does laundry, grocery shops and drives for several errands. He attends church and family activities and visits friends. Petitioner admitted he has driven to Chicago and St. Louis to attend sporting and entertainment events. This does not support that Petitioner's life style is so restricted that he has to stay home and lie in bed to relieve his pain.

Additionally, Petitioner has not demonstrated that he is motivated to find alternate employment and thus demonstrate that a stable labor market for one with Petitioner's age, skills, education and experience does not exist. Respondent sent Petitioner to vocational rehabilitation counselors Blaine and Dolan on November 15 and 17, 2011, respectively. Petitioner told both Blaine and Dolan that he needed to lie down in the fetal position regularly throughout the day; this is the first time Petitioner claimed to be so sedentary. Petitioner also told the counselors that he was not capable of working, or participating in additional training or education for re-employment because of his back pain. These limitations are not supported by the medical records. However, Dr. Gornet never gave Petitioner work restrictions of lying down as needed. Petitioner admitted during his testimony that his only work restrictions were those issued by Dr. Gornet on June 9, 2011.

Blaine and Dolan concluded that Petitioner was a candidate for additional vocational services, including training for sedentary level work. Dolan also concluded that Petitioner had the aptitude to complete a vocational school or community college program for sedentary jobs. This is consistent with Petitioner's education, work history and skills. He is a high school graduate, attended two and a half years of college with a major in business, took a real estate license course and uses a computer at home. Petitioner has worked a number of different jobs requiring a variety of skills, including reading machinery and production line blueprints and manuals, medical bookkeeping, account bookkeeping, and other administrative type duties. Further, Petitioner admitted that learning new job skills was never a problem for him. Yet,

14IWCC0234

Petitioner never followed up with Blaine or Dolan to participate in vocational rehabilitation. Instead, Petitioner testified he never read their reports. Petitioner has demonstrated he is not motivated to return to work.

Petitioner has not shown that he is unable to find a position in the open labor market. Petitioner has not even attempted to return to work and has self imposed significant restrictions on his physical abilities, which are not supported by the medical records. Petitioner has not shown interest in participating in vocational rehabilitation and it is doubtful that he would put in full effort to attempt to secure employment. The evidence does not support that Petitioner is unable to find alternative employment. We find that Petitioner has not proved that he is permanently and totally disabled.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $607.29 per week for a period of 101-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $546.56 per week for a period of 225 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent partial disability to the extent of 45% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAR 3 1 2014
TJT: kg
o 1/28/14
51

Daniel R. Donohoo

Kevin W. Lamborn

DISSENT

Because I believe Petitioner demonstrated that he is permanently and totally disabled, I respectfully dissent from the decision of the majority to reverse the well-reasoned decision reached by Arbitrator Lee.

A person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546 (1981). The claimant need not be reduced to total physical incapacity but "must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007).

Here, Petitioner successfully established he falls into the "odd-lot" category by demonstrating the unavailability of employment to a person in his circumstances. Petitioner's treating physicians provided Petitioner with significant permanent restrictions that effectively exclude Petitioner from obtaining gainful employment. Dr. Gornet placed Petitioner at maximum medical improvement on June 9, 2011, with permanent restrictions of no lifting greater than 10 pounds, no repetitive bending or lifting, and no pushing or pulling. The restrictions also required that Petitioner be given the ability to alternate between sitting and standing as needed. At Respondent's request, Petitioner was then examined by Dr. Lange on July 7, 2011, and Dr. Lange indicated that Petitioner would require permanent restrictions consistent with sedentary to light physical demand levels, and that Petitioner would require intermittent activity with respect to sitting, standing, and walking. After a Section 12 exam on June 26, 2012, Dr. Lange agreed with Dr. Gornet that Petitioner was at maximum medical improvement. Dr. Lange stated that Petitioner "will need medications on a permanent basis," and he added that Petitioner "probably is not employable."

Further, Respondent sent Petitioner to two vocational rehabilitation counselors, Mr. Dolan and Ms. Blaine, who both agreed Petitioner cannot perform the same job duties he had performed prior to the injury that gave rise to this action. The two experts agreed Petitioner is incapable of finding a sedentary position of employment given his training. Mr. Dolan opined that Petitioner would not be employable. Mr. Dolan noted that it would be very difficult for Petitioner to work an eight-hour day or to undergo any sort of retraining or education since he needed to lie down in the middle of the day. Even if retraining were possible, Mr. Dolan questioned whether an employer would hire Petitioner given his restrictions. Mr. Dolan stated that employers are going to see Petitioner as a potential liability in their workplace and not as an answer to their staffing needs.

Because Petitioner has satisfied his initial burden, Respondent must prove that Petitioner is employable in a stable labor market and that such a market exists. The record does not establish that Petitioner is employable in a stable labor market that exists despite Ms. Blaine's suggestions to the contrary. Ms. Blaine opined that Petitioner can find employment only in a sedentary position, and she concluded that Petitioner does not possess the skills necessary to find

such employment. Ms. Blaine suggested that retraining would allow Petitioner to find employment, but she failed to consider whether Petitioner's circumstances would allow him to participate in such training. Of particular significance here is that fact that Ms. Blaine did not have Dr. Lange's final report available to her at the time of her evaluation because that report was created several months after Ms. Blaine's evaluation. Thus, Ms. Blaine was unable to consider or rely upon Dr. Lange's most recent opinion about Petitioner's condition, its affect on Petitioner's restrictions and his ability to work or take part in retraining. This is important because Dr. Lange's final report concluded that Petitioner is not employable because of his significant physical limitations. Further, Respondent sent Petitioner to be evaluated by Mr. Dolan, who had Dr. Lange's report available to him, and he opined that retraining would be very difficult for Petitioner to undertake and that he is not employable. The opinions offered by Respondent's vocation rehabilitation counselors suggest that Petitioner will not be able to find alternative employment.

For the reasons stated above, I hold that Petitioner has met his burden of proving that he is permanently and totally disabled, and I hold that Respondent has failed to demonstrate Petitioner is employable in a stable labor market and that such a market exists. Therefore, the arbitrator's decision should stand.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BROOKINS, AARON
Employee/Petitioner

Case# **09WC031240**

AMERICAN STEEL
Employer/Respondent

14IWCC0234

On 4/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2424 SAUTER SULLIVAN & EVANS
CHRISTOPHER GELDMACHER
3415 HAMPTON AVE
ST LOUIS, MO 63139

0385 BONALDI CLINTON & DAVIS LTD
DAVID W CLINTON
2900 FRANK SCOTT PKWY W #988
BELLEVILLE, IL 62223

14IWCC0234

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [x] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] None of the above

CORRECTED
ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

AARON BROOKINS
Employee/Petitioner

v.

AMERICAN STEEL
Employer/Respondent

Case # **09** WC **31240**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward N. Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **December 21, 2012**. By stipulation, the parties agree:

On the date of accident, **June 16, 2009**, 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 **$40,992.21**, and the average weekly wage was **$910.94**.

At the time of injury, Petitioner was **37** years of age, ***married*** with **1** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$110,085.25** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$110,085.25**.

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.

14IWCC0234

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $ 607.29/week for 101 1/7 weeks, commencing 7/6/09 through 7/19/09 and 7/23/09 through 6/9/11, as provided in Section 8(b) of the Act.

Permanent Total Disability
Respondent shall pay Petitioner permanent and total disability benefits of $607.29 for life, commencing 6/10/11, as provided in Section 8(f) of the Act.

Respondent shall be entitled to a credit for all temporary total disability benefits and permanent and total disability benefits which have already been paid to Petitioner.

Commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for cost of living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/8/13
Date

APR 10 2013

STATEMENT OF FACTS:

Petitioner started working for Respondent on December 6, 2007. On June 16, 2009, Petitioner was operating a grinder, attempting to grind approximately a quarter inch of steel off of a train bolster, when he felt a pop in his back.

Petitioner went to the plant's medical dispensary. The medical dispensary referred Petitioner to Midwest Occupational Medicine. Dr. George Dirkers of Midwest Occupational Medicine ordered an MRI of Petitioner. (PX. 8). After Petitioner received the MRI of his lumbar spine (PX. 9), Dr. Dirkers sent Petitioner back to work full duty.

Petitioner sought a second opinion from his primary care physician, Dr. Khaled Hassan. Dr. Hassan saw Petitioner on July 23, 2009, and noted low back pain and radiculopathy. (PX. 10). Dr. Hassan instructed Petitioner to be off of work. (PX. 10). Dr. Hassan referred Petitioner to Dr. Matthew Gornet, a back surgeon.

Dr. Gornet saw Petitioner on August 13, 2009. (PX. 6). Dr. Gornet reviewed the MRI films and diagnosed an annular tear at L5-S1 which was "consistent with (Petitioner's) low back, buttock, and leg pain. (PX. 6). Dr. Gornet ordered and Petitioner received epidural steroid injections. (PX. 6). Dr. Gornet instructed Petitioner to remain off of work. (PX. 6).

Dr. Gornet stated in his October 5, 2009, note that the injections and physical therapy had failed. On January 26, 2010, Petitioner underwent an anterior decompression of L5-S1 with a disc replacement. (PX. 15).

Petitioner testified that two weeks after having the disc replacement surgery, he "had a major problem." The disc replacement that had been placed in his spine had shifted. Dr. Gornet advised Petitioner that he would require a second surgery in which a fusion of the discs would be performed. (PX. 6). The fusion surgery was performed on June 2, 2010. (PX. 6).

After the second surgery, Petitioner was instructed to wear a bone stimulator to assist with the fusion. Further visits to Dr. Gornet on July 15, 2010, and September 1, 2010, included CT scans which showed that the fusion was failing to adequately fuse. (PX. 6).

Dr. Gornet referred Petitioner for pain management treatment. (PX. 6). Petitioner received pain management from Dr. Kaylea Boutwell which consisted of narcotic medications which were later weaned to non-narcotic medications, and injections. (PX. 19).

Dr. Gornet placed Petitioner at maximum medical improvement on June 9, 2011. (PX. 6). On June 9, 2011, Dr. Gornet provided Petitioner with permanent restrictions of no lifting greater than ten (10) pounds, no repetitive bending, no repetitive lifting, no pushing or pulling, and that Petitioner must be able to alternate between sitting and standing as needed. (PX. 6).

Respondent sent Petitioner to Dr. David Lange for a Section 12 exam on June 26, 2012. (PX. 1). Dr. Lange agreed with Dr. Gornet that Petitioner was at maximum medical improvement. (PX. 1). Dr. Lange stated that Petitioner "probably is not employable." (PX. 1). Dr. Lange stated in his report that Petitioner "will need medications on a permanent basis." (PX. 1). In a previous exam on July 7, 2011, Dr. Lange indicated that Petitioner would require permanent restrictions

consistent with sedentary to light physical demand levels, and that Petitioner would require intermittent activity with respect to sitting, standing, and walking. (PX. 2).

On November 17, 2011, Petitioner was seen by vocational rehabilitation specialist J. Stephen Dolan. Mr. Dolan found that according to both Dr. Gornet and Dr. Lange, Petitioner could only return to a position of employment "where he does very little physical work" and would require a job "where he can change position as he needs for pain control." (PX. 7). Mr. Dolan stated that very few jobs exist for workers who do not have training for sedentary work, and that potential employers are going to see Petitioner as a potential liability in the workplace, and not as an answer to their staffing needs. (PX. 7). Mr. Dolan opined in his report that based upon Petitioner's education, work experience, academic skills, work skills, and the restrictions placed on him by Dr. Gornet and Dr. Lange, Petitioner is not able to maintain employment in the open labor market. (PX. 7). Finally, Mr. Dolan found that Petitioner's restrictions would give him the same problems with any potential retraining as it would give him in a sedentary style employment. (PX. 7).

On November 15, 2011, Petitioner was seen by vocational rehabilitation specialist June Blaine at the request of Respondent. Ms. Blaine opined in a report dated December 30, 2011, that based upon Dr. Gornet's permanent restrictions, Petitioner needed to focus on jobs in the sedentary level of work. (RX. 11). Ms. Blaine opined that training could include clerical skills would enable Petitioner to work in support role for jobs with pain in the $8.50 to $10.00 per hour range. (RX. 11).

Ms. Blaine's report references Dr. Lange's July 7, 2011, report, by stating that Dr. Lange found that Petitioner "would also have intermittent activity with respect to sitting, standing and walking." (RX. 11). This appears to be citing to Dr. Lange's statement in his July 7, 2011, report in which he stated that Petitioner "would also need to have intermittent activity with respect to sitting, standing and walking." (PX. 2). Ms. Blaine's one and a half pages of findings do not reference Dr. Lange's statement about Petitioner having intermittent activity with respect to sitting, standing, and walking. (RX. 11).

Further, Ms. Blaine did not have available to her at the time of her evaluation, Dr. Lange's final report on Petitioner which was created after his final visit with Petitioner on June 26, 2012. (PX. 1). As such, Ms. Blaine was unable to consider or rely upon Dr. Lange's most recent opinion about Petitioner's condition and its affect on Petitioner's restrictions and his ability to perform work. In this June 26, 2012, report, Dr. Lange stated that Petitioner is "probably not employable." (PX. 1).

Petitioner testified that since his appointment with June Blaine on November 15, 2011, no one at the employer has ever approached him about any vocational assistance or any kind of retraining. Further Petitioner testified that when he saw Dr. Lange on June 26, 2012, Dr. Lange told Petitioner that he was probably not employable. Petitioner testified that the first time he heard anything from Respondent about performing any vocational retraining was during cross examination at the hearing.

Petitioner testified that he did not believe that he could perform retraining. Specifically, Petitioner testified that his body could not get through retraining.

CONCLUSIONS: 14IWCC0253

The Arbitrator finds that Petitioner suffered a disc injury at L5-S1 on June 16, 2009, while in his employment with Respondent. Petitioner's condition caused radiculopathy and necessitated a disc replacement surgery which occurred on January 26, 2010, and later a fusion surgery which occurred on June 2, 2010. Petitioner's condition has resulted in the permanent restrictions placed upon Petitioner by his treating physician, Dr. Gornet, and by the Section 12 examiner, Dr. Lange. The Arbitrator finds the combination of Dr. Gornet and Dr. Lange's opinions persuasive, particularly Dr. Lange's comment in his June 26, 2012, report in which he admitted that Petitioner was "probably not employable."

Given Dr. Lange's June 26, 2012 statement, and Dr. Gornet and Dr. Lange's opinions regarding Petitioner's permanent disabilities, June Blaine's opinion that additional training could render Petitioner employable is found not to be credible. Ms. Blaine's opinion was rendered prior to Dr. Lange's final comment on Petitioner's condition on June 26, 2012. Further, Mr. Dolan's opinion that Petitioner's physical condition would not allow retraining is found to be credible. Mr. Dolan's finding that Petitioner is not able to maintain employment in the open labor market is also found to be credible.

Petitioner has met his burden of proving that he is permanently and totally disabled. Petitioner is found to be permanently and totally disabled. It is further found that Petitioner requires ongoing medical attention for his condition which includes, but may not be limited to, ongoing provision of medications, ongoing visits with Dr. Gornet, and ongoing visits with Dr. Boutwell.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alisa Adair,

Petitioner,

vs.

NO: 11 WC 39250

14IWCC0235

Madison County Circuit Clerk's Office,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability, medical expenses, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC0235

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: MAR 31 2014
TJT:yl
o 3/25/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ADAIR, ALISA
Employee/Petitioner

Case# **11WC039250**

MADISON COUNTY CIRCUIT CLERK'S OFFICE
Employer/Respondent

14IWCC0235

On 7/24/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

1580 BECKER SCHROADER & CHAPMAN PC
TODD J SCHROADER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

1001 SCHREMPF BLAINE KELLY & DARR
MATTHEW W KELLY
307 HENRY ST #415 PO BOX 725
ALTON, IL 62002

14IWCC0235

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alisa Adair
Employee/Petitioner

v.

Madison County Circuit Clerk's Office
Employer/Respondent

Case # **11** WC **039250**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 29, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0235

FINDINGS

On **01/04/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$40,600.56**; the average weekly wage was **$780.78**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **2** children under 18.

Petitioner has received all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent would be entitled to a credit of up to **$5,521.59** under Section 8(j) of the Act.

ORDER

See attached decision.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

July 22, 2013
Date

JUL 24 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALISA ADAIR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 39250
	)	
MADISON COUNTY CIRCUIT CLERK'S OFFICE,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner is a right-hand dominant woman, 41 years old as of the asserted date of loss, who works as a deputy clerk in the Madison County Circuit Clerk's Office with approximately 22 ½ years in that office on the date of trial. She testified she was assigned as a clerk for a judge in the family law division, and her job tasks included various clerical duties, including retrieving files, typing orders, updating computerized case information, reviewing mail and putting correspondence into the proper file, answering phones and dealing with walk-in business. She works Monday to Friday, 8:30-4:30, with one hour for lunch and two 15-minute breaks.

The petitioner testified she had gradual complaints of pain in her hands at night with her right pinky finger locking up occasionally. On January 4, 2011, she saw Dr. Timothy Penn in connection with those complaints. See PX1. She advised him that her symptoms began in approximately November 2010. He noted a negative Tinel's sign and he noted the only significant finding was of some triggering at the right little finger. He injected the A1 tendon and recommended wrist splints for possible early carpal tunnel syndrome. He told her to follow up in a month.

The petitioner testified that she told her supervisor she was going to see a physician in connection with her hand complaints. However, it does not appear that the petitioner reported a work injury at that time. No paperwork was completed, the petitioner used her personal insurance, and Gina Hargrove, the petitioner's supervisor, testified that the first time she heard that the claimant was relating her hand symptoms to work was October 2011, which is when she filled out the report of injury (RX2). Ms. Hargrove noted that the petitioner mentioned having received treatment during this period, as the petitioner had mentioned having the EMG, but did not relate it work.

The petitioner did not return to Dr. Penn. By February 21, 2011 she had retained counsel, though no Application was filed at that time; her attorney had arranged for her to

see Dr. Michael Beatty that day, but she could not attend due to car trouble. PX2. She saw Dr. Beatty on April 11, 2011. At that time, she complained of nine to twelve months' history of pain of increasing severity. He noted a positive Tinel's sign on the right wrist and positive Phalen's bilaterally, and ordered EMG testing. PX2.

On May 26, 2011, the EMG/nerve conduction studies were performed. They were entirely normal. PX3.

On June 30, 2011, Dr. Beatty saw the petitioner in follow-up. Despite the negative diagnostic studies, he maintained his diagnosis and recommended bilateral carpal tunnel release surgery. PX2.

The petitioner was seen for a Section 12 evaluation by Dr. Gerald Lionelli on January 6, 2012. Dr. Lionelli discussed the petitioner's job duties and reviewed a formal job analysis. Dr. Lionelli found negative Tinel's on the right, positive on the left, and negative Phalen's bilaterally. He also noted the negative EMG testing. He concluded the petitioner had an "atypical" presentation of problems with her bilateral hands and concluded she did not have carpal tunnel syndrome, but did have evidence of stenosing tenosynovitis in her right little finger. After a detailed review of petitioner's complaints and her employment duties, as well as other potential contributory causes such as the petitioner's long history of smoking, Dr. Lionelli concluded the petitioner's employment duties had not caused or contributed to the petitioner's condition in her hands.

Dr. Beatty performed right carpal tunnel release and the release of the A1 pulley area of the right fifth finger on April 10, 2012. PX4. Postoperatively the sutures were removed on April 23 and she was noted to be coming in the next week for surgery. PX2. He thereafter performed a release of the left carpal tunnel on May 1, 2012. See PX 5. In a postoperative appointment on May 7, her right hand was "doing okay" and her left hand was noted to be healing. On May 14, the remaining sutures in the left hand were removed. PX2.

The claimant underwent postoperative occupational therapy in June 2012. PX6. The petitioner was released to full duty work as of July 2, 2012. Dr. Beatty found the petitioner was at MMI and had done well post-operatively as of July 23, 2012. PX2. The petitioner has continued to work in her pre-surgical capacity for the respondent.

Depositions of Dr. Beatty were conducted on January 19, 2012, and on November 14, 2012. Dr. Lionelli testified via evidence deposition on July 31, 2012. PX7-8, RX1.

OPINION AND ORDER

Accident and Causal Relationship

In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the

claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show that the claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987). The causation of carpal tunnel syndrome via repetitive trauma has been deemed to fall in the area of requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill.2d 438 (1982).

While treating physicians are usually given a degree of deference, in this case the treating physician's opinions regarding carpal tunnel syndrome and the subsequent surgical recommendation are undermined by the physical examinations and diagnostic evidence. The Tinel's signs have been thoroughly inconsistent; Dr. Penn's was negative, Dr. Beatty's was only positive on the right side, and Dr. Lionelli's only on the left. The Phalen's tests were also inconsistent between Dr. Beatty and Dr. Lionelli. More importantly, the EMG testing was negative. Dr. Beatty's attempt to minimize the reliability of electrodiagnostic testing is not consistent with the usual and customary reliance of practitioners on such studies in similar cases.

In this case, Dr. Lionelli's opinion is deemed more persuasive relative to the carpal tunnel syndrome diagnosis and surgery, as it appears more coherent with the objective studies and clinical examination. As such, the Arbitrator finds a failure of proof establishing a work-related accidental injury due to repetitive trauma with such being causally connected to the petitioner's conditions in her bilateral wrists.

The physicians do agree, however, that the petitioner did suffer from A1 tendon tenosynovitis in the right fifth (pinky) finger. The physical evidence of this condition is much more coherent and less equivocal. On this issue, Dr. Beatty's causation opinion that her employment could have accelerated this particular condition is deemed credible, and the Arbitrator finds a causal relationship to have been established.

Notice

The Arbitrator finds sufficient oral notice relative to the pinky finger to have been provided on or about January 4, 2011, when the claimant advised that she was going to the doctor for evaluation of the finger.

Relative to the wrists, this issue is moot given the above findings.

Medical Services Provided

The respondent is directed to pay the medical bills (see PX9) related to the right small finger diagnosis and surgery pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for any and all amounts previously paid but shall hold the

petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments. These include Dr. Penn's date of service 1-4-2011; those aspects of the 4-10-12 surgery (Anderson Hospital and Millenium Anesthesia) related to the right small finger; and Dr. Beatty's treatment for the finger. While Dr. Lionelli's expenses are listed in PX9, for obvious reasons that is an error, as he was not a treating provider and the respondent is liable for those expenses.

The medical services provided with regard to the bilateral wrist surgery are denied, due to the lack of a causal relationship.

Temporary Total Disability

The right small finger surgery appears to have been partially responsible for the petitioner's recovery post-surgery until May 7, when Dr. Beatty's attention shifted to the opposite wrist. As such, the respondent shall pay the claimant $520.52 per week for the period of April 10, 2012, through May 7, 2012, inclusive, a period of 4 weeks.

Nature and Extent

The Arbitrator finds that the petitioner's work-related accident was causally related to the right small finger A1 pulley release to address the tendon synovitis. The petitioner has since returned to her regular and unrestricted job duties. The petitioner having reached maximum medical improvement, respondent shall pay the petitioner the sum of $468.68 per week for 4.4 weeks because the injury sustained caused the 20 percent loss of the right fifth finger.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cynthia Draege,

Petitioner,

vs.

NO: 11 WC 33052

14IWCC0236

State of Illinois Department of Children and Family Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 17, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAR 3 1 2014
TJT:yl
o 3/25/14
51

Thomas J. Tyrrel

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRAEGE, CYNTHIA
Employee/Petitioner

Case# **11WC033052**

ST OF IL/DCFS
Employer/Respondent

14IWCC0236

On 7/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUL 17 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

14IWCC0236

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Cynthia Draege
Employee/Petitioner

v.

State of IL/DCFS
Employer/Respondent

Case # 11 WC 33052

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin** , on **5/16/13**. 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 **Section 5(b) lien credit**

FINDINGS

On **8/3/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$71,894.00**; the average weekly wage was **$1,382.52**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$all service connected time paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$all service connected time paid**.

Respondent is entitled to a credit of $- under Section 8(j) of the Act.

ORDER

Respondent shall pay the medical expenses contained in Petitioner's group exhibit. Respondent shall have credit for any amounts previously paid. Respondent shall hold Petitioner harmless from any claim by any health care provider contained therein. If Petitioner's group health carrier requests reimbursement, Respondent shall indemnify and hold Petitioner harmless.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 150 weeks, because the injuries sustained caused the 30% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall receive credit for any payments made or prospective payments to be made to Petitioner by Respondent, involving the accident of August 3, 2011, from any proceedings recovered by Petitioner in her 3rd party claim regarding the automobile accident of August 3, 2011, pursuant to §5(b) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

7/15/13
Date

JUL 17 2013

14IWCC0236

FINDINGS OF FACT

Petitioner is an advance investigator for Respondent specializing in child protection. When she receives a report of child abuse in her area, she drives to interview the alleged victims and alleged perpetrators and writes a report. This requires driving, which she does every day. The parties stipulated that on August 3, 2011 she was involved in a severe automobile accident in the course of her duties. The accident totaled her car. In the accident she injured her neck, chest, shoulder and upper torso.

At Arbitration, Petitioner testified that she was in an earlier automobile accident on November 8, 2009. She was rear ended and struck her head on the driver side window. Following the 2009 accident, Petitioner had good relief with epidural injections and was discharged to return to work. Immediately following the 2011 accident, she was taken by ambulance to Herrin Hospital. There she was seen with left shoulder pain and moderate left-sided chest pain. There she was noted to have bruising from her neck to the mid-line of her trunk. She was given chest x-rays, which were negative; left shoulder x-rays, which suggested a possible acromioclavicular joint separation; and a CAT scan of the chest, abdomen, and pelvis, which were also negative.

On August 8, 2011, she saw her primary care physician, Dr. William Huffstutler. He took the history of the accident and noted that Petitioner was taking narcotic pain medication. His history showed increasing migraines with neck soreness. He recommended time off since she was taking narcotic pain medication, and believed that she had a hairline fracture in her chest that was missed on x-rays or a severe contusion to the chest wall. He told Petitioner to continue her medication and to return if needed.

Petitioner then returned to Dr. David Raskas, who had treated her for the 2009 accident. He testified by way of deposition that the last time he saw Petitioner before the current accident was October 25, 2010 and at that time her pain score was zero. At that time, Dr. Raskas placed her at MMI. His note following the August 3, 2011 accident indicated that Petitioner was having neck pain, which radiated into her arms. He believed that she had similar symptoms in the past, but they were not active prior to the accident. He ordered a new MRI scan and compared it to the MRI taken from the 2009 accident and did not see significant changes. He believed that the accident aggravated Petitioner's pre-existing degenerative neck condition, and recommended conservative treatment. On October 19, 2011, despite having ongoing radiating pain, Dr. Raskas did not believe Petitioner was in need of any further treatment from him and she was released on a PRN basis.

Following that visit with Dr. Raskas, Petitioner continued to treat with her family physician, Dr. Huffstutler. He saw her on January 6, 2012 and noted that Petitioner was still having symptoms. Petitioner complained of cervical pain and Dr. Huffstutler advised Petitioner to use heat, rest, and range of motion exercises. Less than 5 weeks later, Petitioner returned to Dr. Raskas with a history of increasing neck pain, which had been going on for a couple of months. Her symptoms radiated into her left shoulder. Dr. Raskas noted limited range of motion in her neck with positive orthopedic signs. His impression was cervical radiculopathy, and he recommended conservative treatment. (Injections) These were done by Dr. Hurford, but did not offer any improvement. On May 25, 2012, Dr. Raskas noted that because Petitioner had failed injections, therapy, and medication, the surgical intervention of "last resort" would be performed. This was done on July 31, 2012 in the form of a C4-C6 anterior cervical fusion with anterior cervical plating and allograft. Following surgery, Petitioner missed minimal time from work and was placed at maximum medical improvement on March 11, 2013.

Dr. Raskas testified that the August 3, 2011 automobile accident was a contributing factor in the need for her symptoms being alleviated by surgery. Dr. Raskas believed that, while Petitioner's MRI films had not changed,

14IWCC0236

her symptoms and condition changed such so that it was no longer amenable to the conservative treatment of the injections performed by Dr. Hurford and the narcotic pain medication prescribed by Dr. Huffstutler. Prior to August 3, 2011, Petitioner never had a surgical recommendation either with Dr. Raskas or anyone else.

Despite the improvement following surgery, Petitioner testified her pain was not as constant. It flares up periodically depending on her activity and movement of her neck. She still has migraines, which are less frequent, and does neck exercises on a daily basis to avoid stiffness. She testified to occasional numbness and tingling, which was not as frequent. She sleeps with 2 medical pillows, which supports her neck at an angle, so she can sleep comfortably. She testified that she uses a laptop both at home and in her car and notices pain in the back of her neck without support. She takes narcotic pain medication depending on her level of symptoms, and has to take breaks during her travels over a five county area.

Respondent had Petitioner examined by Dr. David Robson on September 12, 2012. Dr. Robson opined that he did not believe Petitioner's cervical condition was caused by the accident on August 3, 2011. Dr. Robson explained that the MRIs of the cervical spine taken on May 25, 2010, and August 12, 2011, were virtually identical and showed a herniated disc at C5-6 with bulging at C4-5. He noted that the films were virtually the same on the same machine, and he did not see any difference pre and post the August 3, 2011, incident. Dr. Robson opined that if anything, Petitioner sustained a minor escalation of symptoms after the motor vehicle accident. Dr. Robson pointed to Dr. Raskas' August 10, 2011, note, which was about a week after the accident where Petitioner reported that her symptoms had been escalating pre-accident and she did not feel she had any change in her cervical spine symptoms due to the August 3, 2011, accident. Dr. Robson did not believe the C4-6 fusion was in any way related to the August 3, 2011, motor vehicle accident. Dr. Robson explained that Petitioner had been released by Dr. Raskas in October 2011 and placed at maximum medical improvement. When she did return to him in February 2012, she reported increased symptoms. On cross-examination, however, Dr. Robson conceded that on October 25, 2010, ten months before the accident, Petitioner was doing very well clinically. He noted that her pain score was Zero, had no neck symptoms, and was taking no medication. He admitted that Dr. Raskas had never recommended surgery before the August 3, 2011 accident and had no indication that Petitioner sought any treatment between October 25, 2010 and August 3, 2011. He acknowledged that Petitioner was not prescribed any narcotic pain medication and was not having any symptoms in her cervical spine.

CONCLUSIONS OF LAW

1. Petitioner has met her burden of proof regarding the issue of causation. In this case, the question is whether the Petitioner's condition of ill-being is a continuation of her symptoms from her October 25, 2010 motor vehicle accident or whether her condition is the result of her August 3, 2011 motor vehicle accident. A review of the medical records and the Petitioner's testimony indicate that the Petitioner's symptoms from her earlier accident in 2010 were either non-existent or had reached a plateau. Petitioner's complaints of neck pain were clearly increased following the August 3, 2011 accident to the point where surgery was required. Although Respondent's IME, Dr. Robson refuted the question of causation, he could not offer an explanation as to why Petitioner's symptoms increased following the August 3, 2011 incident. The Arbitrator finds the Petitioner's treating physician, Dr. Raskas more persuasive on this issue. Accordingly, the Arbitrator finds that the Petitioner's condition of ill being is causally connected to her August 3, 2011 accident.

14IWCC0236

2. Based on the findings above, Petitioner's medical treatment has been both reasonable and necessary. Petitioner attempted to manage her symptoms conservatively through medication and injections. However, as noted by Dr. Raskas, after the accident of August 3, 2011, Petitioner's symptoms no longer responded amicably to same, which resulted in Petitioner ultimately undergoing a C4-C6 anterior cervical fusion. Even Respondent's examiner, Dr. Robson, believed that Petitioner's surgery was entirely appropriate. Petitioner's condition improved following surgery. Respondent shall therefore pay the medical expenses contained in Petitioner's group exhibit. Respondent shall have credit for any amounts previously paid. Respondent shall hold Petitioner harmless from any claim by any health care provider contained therein. If Petitioner's group health carrier requests reimbursement, Respondent shall indemnify and hold Petitioner harmless for the same.

3. As a result of Petitioner's August 3, 2011 accident, Petitioner sustained injuries requiring her to undergo conservative care, followed by a C4-C6 anterior cervical fusion. Petitioner continues to have residual complaints following the surgery. Accordingly, the Arbitrator finds that as a result of the Petitioner's accident, she sustained a 30% loss of use of her person as a whole. Respondent is therefore ordered to pay the sum of $695.78/week for a further period of 150 weeks in accordance with Section 8(d)(2) of the Act.

4. Respondent shall receive credit for any payments made or prospective payments to be made to Petitioner by Respondent, involving the accident of August 3, 2011, from any proceedings recovered by Petitioner in her 3rd party claim regarding the automobile accident of August 3, 2011, pursuant to §5(b) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Clore,

Petitioner,

vs.

NO: 11 WC 14236

14IWCC0237

Olin Corporation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under §19(b) by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 4, 2012, is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2014
TJT:yl
o 3/25/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

CLORE, JOHN
Employee/Petitioner

Case# **11WC014236**

OLIN CORPORATION
Employer/Respondent

14IWCC0237

On 6/4/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4620 ARMBRUSTER DRIPPS WINTERSCHEIDT
JOHN WINTERSCHEIDT
219 PIASA ST
ALTON, IL 62002

0299 KEEFE & DEPAULI PC
MICHAEL KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
) SS. 14IWCC0237
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John Clore
Employee/Petitioner

v.

Olin Corporation
Employer/Respondent

Case # **11** WC **14236**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Collinsville**, on **3/26/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0237

FINDINGS

On the date of accident, **5/12/10**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$56,129.32**; the average weekly wage was **$1,079.41**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **1** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove a work related accident or a causal relationship between work activities and his current condition of ill being. Petitioner failed to establish notice pursuant to the requirements under the Act. Petitioner's claim for benefits is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/25/12
Date

ICArbDec19(b)

JUN 4 - 2012

The Arbitrator finds the following facts as to all disputed issues:

Petitioner testified at the time of arbitration he was 47 years of age. On the day of the alleged accident, he was employed with respondent, Olin Corporation. He was hired in 2003. Petitioner was terminated from his employment on May 12, 2010 and that is the last day that he worked with respondent. Since that date, petitioner has worked as a bartender and is employed roughly 14 hours per week. He testified that job does not require repetitive use of the right upper extremity. While employed with respondent, petitioner worked as a machinist. As a machinist, he would fabricate parts and repair machines. He used a variety of hand tools including running a lathe, running grinders, wrenches, sockets, come-alongs, screwdrivers, pliers, pipe-wrenches and ratchets. Petitioner frequently installed blowers on manufacturing machines. These blowers weigh up to 500 pounds. The blowers would be placed on a metal cart using a jack or hydraulic winch, rolled to the machine in need of repair and then installed. On average, he would install 10-15 blowers per day. Petitioner testified his work with respondent required the repetitive use of the right arm.

Petitioner testified that in May 2010 his right elbow began to tingle and his fingers would go numb. He would experience right elbow pain especially when lifting. He also experienced a pull or tug in his right shoulder while lifting. Petitioner testified the pain and discomfort he is currently experiencing in his right elbow is the same that he had experienced in his left elbow back in 2008, for which Petitioner filed a workers compensation claim. That workers' compensation claim also resulted in a diagnosis of epicondylitis. Specifically, petitioner testified the pre-surgical symptoms in his left elbow are similar to the pre-surgical symptoms he is currently experiencing in his right elbow.

Petitioner agreed at hearing he did not report a right elbow injury to his supervisors while he was still employed with respondent. He agreed he had reported his injury to supervisors concerning the 2008 injury and knew reporting injuries was important. His 2010 supervisors and the 2008 supervisors were the same group of individuals and he was doing the same type of work.

Petitioner sought medical treatment with Dr. Michael Beatty on March 14, 2011. Dr. Beatty testified he also treated petitioner for his earlier injuries, including left epicondylitis. Dr. Beatty performed a left epicondylectomy and agreed petitioner offered no complaints consistent with right epicondylitis at the time of his release in December 2008. (Px. 7, p. 19). Dr. Beatty's physical examination revealed chronic right medial epicondylitis. X-rays revealed no fracture or effusion, but a possible loose body in the elbow joint. Dr. Beatty recommended surgery.

Dr. Beatty referred petitioner to Dr. Bicalho for his right shoulder complaints. The physical examination is several months later, July 8, 2011. On physical examination, Dr. Bicalho noted the right shoulder exam was fairly unremarkable although noted decreased strength and decreased range of motion secondary to subjective pain complaints. Orthopedic testing of the shoulder was normal. The right elbow examination revealed pain-free movement with active and passive maneuvers. The right elbow strength was also normal. Dr. Bicalho diagnosed right shoulder impingement and tendonitis.

On July 13, 2011 an MRI of the right shoulder was performed. The radiologist noted mild to moderate supraspinatus and infraspinatus tendinopathy without definite evidence of a rotator cuff tear.

Respondent arranged for an independent medical exam with Dr. Mitchell Rotman. The examination was performed October 17, 2011. After review of the medical records, taking a history from petitioner and performing a physical examination, Dr. Rotman opined there was no right elbow injury and in particular no injury to the medial epicondyle. Dr. Rotman opined there was no causal relationship between the work activities and the work related injury; right elbow or right shoulder. Dr. Rotman does agree the work activities as described by petitioner while employed with respondent could cause or aggravate a medial epicondylitis.

Dr. Beatty's deposition was also taken. The doctor testified that at the time of his examination March 14, 2011 petitioner had right medial epicondylitis and he was recommending surgery. He also opined that there was a causal relationship between the work activities and that condition.

Petitioner testified that he still experiences pain in the right elbow especially with lifting. He states that if he bumps his elbow he gets a funny feeling. He also feels his right arm is not as strong. He wants the surgery recommended by Dr. Beatty. Petitioner also testified that he experiences the same tugging sensation in his right shoulder. He also experiences a click when he lifts his arm above his shoulder. He states carrying items will also reproduce pain and the tugging feeling.

Petitioner testified that he did not do any significant work activities from the time he was terminated in May 2010, and when he first sought medical treatment in March 2011. For the most part, he simply rode his motorcycle and fished. He did not do any golfing. He testified that he simply lived with right elbow pain and right shoulder pain from May 2010 through March 14, 2011 without reporting the pain or seeking medical treatment. This is a period of 10 months. This is despite the fact he had an identical condition on the left arm roughly one and one half to two years earlier. He testified he did not know the diagnosis for his right elbow at that time. Dr. Beatty's records indicate no referral from another physician, but that petitioner simply returned after a period of two years.

Petitioner testified that he has no insurance at this point and that only method of payment for the surgery is through workers' compensation. His wife does have insurance.

Based on the foregoing, the Arbitrator makes the following conclusions:

1. Petitioner failed to prove a work accident led to an injury. Petitioner was diagnosed with right medial epicondylitis by Dr. Beatty on March 14, 2011. Petitioner was examined by two subsequent orthopedic surgeons, Dr. Bicalho and Dr. Rotman, who did not diagnose any injury to the right elbow. Petitioner did not seek any treatment for his right elbow or right shoulder for a period of 10 months after he had last worked for respondent; May 2010 to March 14, 2011. Petitioner failed to prove an accidental injury to the right upper extremity as a result of a work accident.

2. Petitioner failed to provide proper notice of his alleged accident to Respondent. Petitioner asserts he did not realize his right arm pain was the result of a specific diagnosis and therefore he did not give timely notice to his former employer pursuant to Section 6(c). Petitioner testified he had the same condition on his left elbow in 2008 and that he experienced the same symptoms in the right elbow for a period of 10 months but did not realize it was potentially a work injury. The Arbitrator does not find this testimony persuasive.

3. Based on the above, all prospective medical, outstanding medical bills and lost time are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LATISTE MARKS,

Petitioner,

vs.

NO: 10 WC 49552

14IWCC0238

PACE BUS – SOUTHWEST DIVISION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of Section 19(f) motion and being advised of the facts and law, affirms and adopts the Arbitrator's denial of Respondent's Motion.

On February 4, 2013, Respondent filed a Motion to Recall the Settlement Contract Pursuant to 19(f). The parties had previously entered into a settlement contract, which Arbitrator Carlson approved on January 7, 2013. Respondent received the approved Settlement Contract on January 17, 2013.

The Arbitrator denied Respondent's Motion on May 24, 2013. Respondent subsequently appealed the Arbitrator's denial to the Commission on May 28, 2013.

Upon consideration of said Motion, the Commission denies the Motion. The Arbitrator and Commission lacked jurisdiction to hear the Respondent's review as it was not filed within the time period allowed under Section 19(f). Furthermore, the Commission's authority under Section 19(f) is limited and the correction sought by Respondent is neither clerical nor computational in nature.

14IWCC0238

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's denial of Respondent's Motion to Recall Decision of Arbitrator filed February 4, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2014
TJT: kg
O: 2/10/14
51

Thomas J. Tyrrell

Michael J. Brennan

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Dodd,

Petitioner,

vs.

NO: 07 WC 37731

14IWCC0239

Menards/Mary M. Corp/Ricmar Corp/Ricmar Corp/Rick Pulciani, indv/ Mary M Pulciani, Nicolette Pulciani indv, Alex Giannoulias, Treas of the St of IL & Ex Officio of the Workers' Benefit Fund,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, employment relationship, causation, medical expenses, notice, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 25, 2013, is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 3 1 2014
TJT:yl
o 3/17/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DODD, MICHAEL
Employee/Petitioner

Case# **07WC037731**

MENARDS/MARY M CORP/RICMAR CORP/RIC-MAR CORP/RICK PULCIANI, INDV/MARY M PULCIANI, NICOLETTE PULCIANI INDV, ALEX GIANNOULIAS, TREAS OF THE ST OF IL & EX OFFICIO OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

14IWCC0239

On 2/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4703 LAW OFFICES OF SCOTT B SHAPIRO
218 N JEFFERSON ST
SUITE 401
CHICAGO, IL 60661

2731 SALVATO & O'TOOLE
CARL S SALVATO
53 W JACKSON BLVD SUITE 1750
CHICAGO, IL 60604

1296 CHILTON YAMBERT & PORTER LLP
BRAD BREJCHA
150 S WACKER DR SUITE 2400
CHICAGO, IL 60606

4886 ASSISTANT ATTORNEY GENERAL
NICOLE McNAIR
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

14IWCC0239

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

MICHAEL DODD
Employee/Petitioner

Case # **07** WC **37731**

v.

MENARDS/MARY M. CORP./RICMAR CORP/ RIC-MAR CORPORATION/RICK PULCIANI, INDIVIDUALLY/ MARY M. PULCIANI, NICOLETTE PULCIANI, INDIVIDUALLY, ALEXI GIANNOULIAS, TREASURER OF THE STATE OF ILLINOIS AND EX OFFICIO OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **August 17, 2011; August 29, 2011; September 26, 2011; March 28, 2012; June 20, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [x] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [x] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [x] What was Petitioner's age at the time of the accident?
I. [x] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [x] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

14IWCC0239

FINDINGS AND CONCLUSIONS

This matter was heard on numerous trial dates. The facts are well known to the parties and will be recited only to the extent necessary. Petitioner alleges that he was injured while working for a borrowing employer owned by Respondent, Rick Pulciani. Pulciani and all of his related businesses are uninsured. The alleged lending employer is Menard's. The State Treasurer represents the Injured Workers Benefit Fund. All issues are in dispute.

One of the highly disputed issues is whether or not an accident ever occurred. Petitioner alleged that he sustained an accident on August 11, 2007, which was witnessed by two Menard's employees, "Dave" and "Warren". Petitioner was impeached by a felony conviction of six counts of forgery. Petitioner did not call "Dave" or "Warren" as witnesses. Pulciani alleged that he had terminated Petitioner, Petitioner had left for Michigan, and then Petitioner had returned claiming an untruthful accident. Pulciani testified to a self serving "final check".

Petitioner has the burden of proof, but he was impeached. He did not establish a *prima facie* case with his testimony alone. In a case like this, where credibility is critical, corroboration of a "witnessed" accident would have been extremely helpful. However, no such corroboration was presented.

Based upon the foregoing, the Arbitrator finds that Petitioner has not carried his burden of proof , by a preponderance of the evidence, that an accident occurred on August 17, 2011, as alleged.

The remaining issues are moot.

ORDER

No benefits are awarded, because Petitioner has not carried his burden of proof that an accident occurred on August 17, 2011, as alleged.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

February 22, 2013
Date

FEB 25 2013

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Russell Eberhardt,

Petitioner,

vs. NO: 13WC 00089

Advantage Industrial Systems,

14IWCC0240

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAR 3 1 2014

DATED:

Charles J. DeVriendt

o031914
RWW/jrc
046

Daniel R. Donohoo

DISSENT

Petitioner injured his left shoulder in a work-related accident. He was released to one-handed work. While awaiting surgery he was assigned by Jim Griffith the duty of sweeping floors with a push broom. Petitioner testified that he could not maneuver the broom with one hand and that his arm hurt after he completed his day of sweeping. He also testified he informed Mr. Griffith that the sweeping hurt his arm and that he would accept work that was truly one-handed.

James Griffith, Vice President of Respondent, testified he assigned Petitioner to one-armed sweeping as light duty work. He observed Petitioner performing that light duty work two or three times a day. He never saw him use his left hand or have any difficulty performing that assignment. Petitioner never complained to the witness that the activity was hurting his shoulder. If Petitioner had complained they "could have him do a lesser job like filing or some office clerk work." Petitioner had not returned to work since February 15, 2013 and he did not tell the witness why he had not.

Respondent submitted into evidence surveillance video of Petitioner's activities. The video shows Petitioner performing various activities, some of which involve the use of his left hand. The most telling piece of the video shows several minutes of Petitioner shoveling snow with what appears to be a plastic shovel. It appears that he is pushing the snow with his right hand but at times uses his left hand to help guide the shovel.

In my opinion, Petitioner was not credible in his testimony that he was unable to adequately maneuver the broom with one hand, that he complained to Respondent about the light duty assignment, and offered to work as long as the light duty work was indeed one-handed. His testimony was completed rebutted by the testimony of Mr. Griffith. He testified credibly that he observed Petitioner use the push broom with one hand, that Petitioner never complained to him about the activity, and that other light duty work could have been assigned if Petitioner actually did complain about the particular assignment. In addition, the activities Petitioner was seen performing on the surveillance video, particularly the shoveling of snow, would be at least as strenuous a use of the left hand as using a push broom. Therefore, I would find that Petitioner refused a light duty assignment that he could have performed without further injury or pain.

Therefore, I do not believe Petitioner should be eligible for temporary total disability benefits for the subject period. I would have reversed the Arbitrator and denied those benefits. Accordingly, I respectfully dissent.

Ruth W. White

14IWCC0240

EBERHARDT, RUSSELL Case# 13WC000089
Employee/Petitioner

ADVANTAGE INDUSTRIAL SYSTEMS
Employer/Respondent

On 7/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

2985 PAUL A COGHLAN & ASSOC PC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

2999 LITCHFIELD & CAVO LLP
LAURA NALEWAY
303 W MADISON ST SUITE 300
CHICAGO, IL 60606

14IWCC0240

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Russell Eberhardt
Employee/Petitioner

v.

Advantage Industrial Systems
Employer/Respondent

Case # 13 WC 89

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **April 5, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **12/21/2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$86,361.60**; the average weekly wage was **$1660.80**.

On the date of accident, Petitioner was **54** years of age, *married* with **0** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$.00** for TTD, **$.00** for TPD, **$.00** for maintenance, and **$.00** for other benefits, for a total credit of **$.00**.

Respondent is entitled to a credit of **$.00** under Section 8(j) of the Act.

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **1107.20**/week for **7-1/7th** weeks, from **2/15/2013** through **4/5/2013**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
- The respondent shall pay the further sum of $ **N/A** for necessary medical services, as provided in Section 8(a) of the Act.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Greg Dollison

7/8/13
Date

ICArbDec19(b)

JUL 9 - 2013

FINDING OF FACTS:

On December 21, 2012, Petitioner was 54 years of age and employed by Advantage Industrial Systems. On said date Petitioner injured his left shoulder when he fell into hole in the floor. The accident is undisputed, and Petitioner continues to treat for injuries sustained. The sole issue in dispute is Petitioner's entitlement to TTD benefits from February 15, 2013 through the date of hearing, as well as prospective TTD through the date of surgery.

On the date of the accident, Petitioner presented to the Occupational Medicine Department at Ridge Road Immediate Care Center, part of Morris Hospital. Tenderness was noted over the greater tuberosity and x-rays noted mild central sclerosis in the shaft of the left humerus, which was indicative of a small enchondroma. Petitioner was diagnosed with a left shoulder strain and bone contusion. Petitioner was provided with a sling and advised to ice the area. Petitioner was prescribed physical therapy and placed on light duty work until he met with an orthopedic physician.

On December 28, 2012, Petitioner returned to Ridge Road Immediate Care. The records noted a limited range of motion in the shoulder. Petitioner reported his pain level at 8-10 out of 10 and described the pain as aching. Petitioner was referred to Hinsdale Orthopaedics for further evaluation as well as physical therapy.

Petitioner began a course of physical therapy at ATI in December of 2012.

On January 9, 2013, Petitioner presented to Dr. Leah Urbanosky at Hinsdale Orthopaedics in Joliet. Petitioner provided a consistent history of accident of injuring his left shoulder after falling at work. Petitioner reported that he had been in physical therapy for two weeks without improvement. Examination of Petitioner's cervical spine was normal. The left shoulder revealed subacromial tenderness, bicep tenderness and positive testing for Hawkins impingement. Dr. Urbanosky reviewed Petitioner's x-rays that were taken at the Immediate Care Center. The x-rays show mild marginal spur at the glenhumeral joint, subchondral cystic change at the prominent greater tuberosity, type 1 acromion, mild inferior AC spurring and subchondral cystic changes at AC joint. Petitioner was diagnosed with a left shoulder sprain. An MRI was ordered and physical therapy was suspended. Petitioner was released to right handed work only.

On January 23, 2013, Petitioner returned to Dr. Urbanosky. At that time, it was noted that the prescribed MRI had been denied by insurance. Dr. Urbanosky noted that Petitioner was in a lot of pain and was unable to lift his arm to the side. Petitioner was diagnosed with left shoulder syndrome impingement due to contusion injury at work on 12/21/2012. Dr. Urbanosky continued to recommend an MRI. Petitioner was placed on right arm work only.

Petitioner underwent the MRI on January 29, 2013. The MRI revealed a full thickness tear of the supraspinatus tendon, infraspinatus tendinosis, longitudinal interstitial split tear of the subscapularis tendon, and medial dislocation of the long head bicep tendon.

On February 12, 2013, Petitioner presented to Dr. Prasant Atluri for an IME per the request of the employer. Dr. Atluri opined that Petitioner's condition was work related and that Petitioner had suffered a full thickness tear to the rotator cuff at the distal supraspinatus and a tear to the anterior labram. Dr. Atluri opined that Petitioner should undergo a left shoulder arthroscopy with rotator cuff repair and possible labral tear repair. Dr. Alturi placed Petitioner on light duty work consisting of minimal overhead lifting, avoidance of repetitive

reaching and a 2 pound lifting restriction. The employer has offered one-handed work to Petitioner and authorized the proposed surgery.

Petitioner presented to Dr. Urbanosky on February 15, 2013 to review the MRI results. Dr. Urbanosky diagnosed Petitioner with arthritis of the acromioclavicular, bicep tendinitis, and rotator cuff tear. Dr. Urbanosky continued to recommend surgery via left shoulder arthroscopy with bicep tenodesis, spur excision or lesser tuberosity, subacromial decompression and rotator cuff repair. Petitioner was taken off work until after surgery was completed. It was noted that Petitioner's next appointment should be surgery.

Surgery was scheduled for April 18, 2013.

The employer's Vice President Jim Griffith testified that "one handed work" consisting of using a push broom to sweep floors was provided to Petitioner. Mr. Griffith testified that from December 22, 2012 until February 14, 2013 he had the opportunity to observe Petitioner perform light duty, one handed, sweeping. Mr. Griffith testified that he would observe Petitioner a few times per day and during those times, Petitioner performed his activities with one hand. He provided that at no time did Petitioner appear to be in any distress or exhibit any difficulty performing his tasks. Mr Griffith added that Petitioner never confronted him to complain that the activities he was being asked to perform were aggravating his pain. On cross examination, Mr. Griffith testified that he considered using a push broom one-handed work and that he had never seen a person use a push broom using 2 hands. Mr. Griffith further testified that the position of sweeping the floor was a "make work" position created temporarily for the purpose of providing light duty to the claimant.

Respondent offered into evidence a video of surveillance activities completed on February 21, 2013 through February 24, 2013. (Resp. Ex. 3) Petitioner is depicted driving an automobile. The video also shows Petitioner shoveling snow with use of his right hand. Finally, the video shows Petitioner performing household chores including rolling large tote garbage cans with one in each hand and picking up dog waste by carrying a large plastic bucket in his left hand and scoop in his right.

Petitioner acknowledged that Respondent provided light duty work between December 21, 2012 and February 15, 2013. Petitioner provided that he was "basically sweeping" during that period and that his arm hurt most of the time. Petitioner testified that he "used [his] left arm a little bit," as he could not sweep using his right arm exclusively. Petitioner provided that he took pain medications on daily basis after leaving work.

With respect to issue (L), What TTD benefits are due, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner is entitled to temporary total disability for the period from February 15, 2013 through the date of hearing, or April 5, 2013. Petitioner presented to Dr. Urbanosky on February 15, 2013 to review the MRI results. Petitioner reported that he continued with constant pain in his left shoulder, that he was still working and that his pain wakes him at night. Dr. Urbanosky continued to recommend surgery via left shoulder arthroscopy with bicep tenodesis, spur excision or lesser tuberosity, subacromial decompression and rotator cuff repair. Petitioner was taken off work until after surgery was completed. Just prior to his visit with Dr. Urbanoski, Petitioner presented to Dr. Prasant Atluri for an IME per the request of the employer. Dr. Atluri opined that Petitioner's condition was work related and that Petitioner had suffered a full thickness tear to the rotator cuff at the distal supraspinatus and a tear to the anterior labram. Dr. Atluri opined that Petitioner should undergo a left shoulder arthroscopy with rotator cuff repair and possible labral tear repair. Dr. Alturi placed Petitioner on light duty work consisting of minimal overhead lifting, avoidance of repetitive reaching and a 2 pound lifting restriction.

It is undisputed that Respondent has offered one-handed work to Petitioner and authorized the proposed surgery. It is also undisputed that video surveillance shows Petitioner can function to some degree using only his right arm. However, what cannot be appreciated by the surveillance is whether Petitioner can sweep one-

armed continuously for an eight-hour period. Also, the Arbitrator is not convinced that one can perform sweeping functions with a push broom using solely his right arm. The Arbitrator finds that being required to sweep using a push broom one armed only is not appropriate work within the restrictions imposed. Petitioner made a good-faith effort to return to work but was not given appropriate one-handed work by the employer.

Finally, the Arbitrator denies Petitioner's request for prospective TTD as the Arbitrator has no authority to award same.