STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Delana Bacon Williams,

Petitioner,

vs.

NO: 11 WC 12083

14IWCC0527

City of Rockford, Rockford, IL, a Municipal Corp., and The Board of Library Trustees of the City of Rockford,

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, medical expenses, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 6, 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.

14IWCC0527

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: JUL 0 1 2014
TJT:yl
o 6/24/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILLIAMS, DELANA L BACON
Employee/Petitioner

Case# **11WC012083**

CITY OF ROCKFORD, ROCKFORD IL, A MUNICIPAL CORPORATION AND THE BOARD OF LIBRARY TRUSTEES OF THE CITY OF ROCKFORD
Employer/Respondent

14IWCC0527

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:

0529 GREG TUITE & ASSOC
PO BOX 59
ROCKFORD, IL 61101

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST POB 1288
ROCKFORD, IL 61105

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

14IWCC0527

☐ 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

Delana L. Bacon Williams
Employee/Petitioner

v.

Case # **11** WC **12083**

Consolidated cases: _____

City of Rockford, Rockford IL, a municipal corporation, and The Board of Library Trustees of The City of Rockford
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Rockford**, on **1/19/2013**. 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 14IWCC0527

On **March 5,2011**, 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 $**39,603.20**; the average weekly wage was $**761.00**.

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

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

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

Respondent shall be given a credit of $**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**.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $203.07/week for 16 5/7 weeks, commencing 5/21/11 through 8/17/11 & 10/20/11 through 11/16/11, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $507.68/week for 12 6/7 weeks, commencing 3/5/11 through 5/20/11 & 10/7/11 through 10/19/11, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $3,707.67, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $40,606.63 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 benefits of $456.60/week for 66.8 weeks, because the injuries sustained caused the 40% loss of the right foot, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 3/5/11 through 1/19/13, 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.

Edwin Lee — Signature of Arbitrator

3/5/13 — Date

ICArbDec p. 2

MAR 6 - 2013

Delana L. Bacon-Williams vs. City of Rockford and the Board of Library Trustees of the City of Rockford
IWCC# 11 WC 12083

14IWCC0527

FINDINGS OF FACTS

On March 5, 2011, the Petitioner, Delana Bacon-Williams was employed by the Rockford Public Library. Petitioner testified that on that day she was working at the East Branch Library which occupied a former Barnes & Noble book store. Her job was that of a librarian assistant. She was required to check in and check out materials, do research for patrons, and provide general help for the library patrons.

Petitioner offered a number of photographs that portrays the library building. An aerial photograph (PX 2) shows that the library facility is a free-standing building on its own property. It is not part of a group of businesses such as a shopping or strip mall.

The photographs (PX 1 and 2) show that the store is surrounded by pavement. Approximately two-thirds of the pavement is devoted to parking spaces and one-third is a single lane drive to allow vehicles to drive around the back of the building. Ms. Bacon-Williams testified that shortly before the East Branch was open to the public, she and other employees were brought into the facility for an orientation. During that orientation she was instructed by maintenance supervisor Donnie Bergquist and her manager, Jean Mangan, to park in the back of the building by the employee entrance. The employees were also told to enter through a single door in the back of the building that leads into the private library offices. Petitioner identified this door in the photograph. (PX 1). The photograph shows an area near

the door marked off with yellow striping. Petitioner testified that this was an area where no vehicles were allowed to park. She indicated that any vehicle parked in this spot would be asked to move. The photograph also shows a dumpster located a few feet away from the employee entrance. Ms. Bacon-Williams testified that patrons of the library were not allowed to use the employee entrance as it lead into the private offices of the library. Petitioner also identified the series of parking spaces where employees were instructed to park. This was an area consisting of approximately 6 spaces located near the employee entrance to the library.

Petitioner testified that she had no prior injuries to her right foot or leg. On March 5, 2011, Ms. Bacon-Williams arrived at work and parked in the area designated for employees. She noted that the weather was a mixture of rain and sleet and that she could see Donnie Bergquist, the library maintenance manager, salting the area by the customer entrance. This entrance was located opposite the employee entrance. As Ms. Bacon-Williams was walking from her vehicle toward the employee entrance, she slipped and felt her feet go out from under her. As she fell, she twisted her right foot and landed on the ground. Mr. Bergquist came over to her and asked her if she needed assistance. Petitioner indicated she could not walk. Mr. Bergquist apologized to her for not having salted that area of the parking lot before she arrived. Mr. Bergquist and other employees assisted Petitioner into the building and an ambulance was called.

Petitioner was transported to the St. Anthony Hospital Emergency Room. X-rays taken showed an acute distal fibular fracture extending into the base of the lateral malleolus and with disruption of the ankle mortise. (PX 6). The emergency

room records also contain a history that the Petitioner twisted her right ankle "on ice". A short leg cast was applied and she was referred to Dr. Mark Carlson, an orthopedic surgeon.

Petitioner initially saw Dr. Carlson on March 7, 2011. Again, the records of Dr. Carlson contain a history of a slip and fall on ice. Dr. Carlson examined Petitioner's ankle and recommended an open reduction with internal fixation. (PX 8). Ms. Bacon-Williams underwent surgery at St. Anthony Hospital on March 8, 2011. Approximately five weeks later she began physical therapy and remained off work through May 20, 2011. On May 20, 2011, Dr. Carlson allowed Petitioner to return to work on a three day a week work schedule at seated work only. Petitioner testified that she did follow this schedule. Her normal work-week was five days a week and she was paid $19.04 per hour. Ms. Bacon-Williams continued to attend physical therapy during the period of part time work. She was then released to return to full duty as of August 18, 2011.

Approximately five weeks later Petitioner returned to Dr. Carlson, noting that she had an episode of swelling and redness in the ankle, but that it had improved. She requested that Dr. Carlson remove the hardware. This procedure was performed on October 7, 2011, again at St. Anthony Hospital. (PX 7). Subsequent to the procedure, Petitioner was taken off work from October 7, 2011 through October 19, 2011. Dr. Carlson then put her on the same three day a week work schedule as he had after the first surgery. She was released to full duty work as of November 17, 2011. Petitioner testified that during the periods of total and partial disability that she received no income from her employer. The request for

hearing form shows that Respondent is not claiming any credit for the periods of disability.

Petitioner underwent a second round of therapy from October 24, 2011 through November 14, 2011. On November 16, 2011 a nurse practitioner with Dr. Carlson's office performed a final evaluation. The nurse recommended a home program for wound massage, exercises of the foot, and possible use of an orthotic. Petitioner was released from care at that time.

On May 30, 2012 Ms. Bacon-Williams was seen by Dr. Jeffrey Coe at the request of her attorney. (PX 9). She was also examined by Dr. John Koehler, at the request of her employer. Ms. Bacon-Williams testified that she still experiences ongoing swelling in the foot. This occurs if she has to sit or be on her feet for extended periods of time. She also feels a catching and clicking sensation in the ankle. She also feels that the foot is unstable and it does not bend as well as it did before the accident. Finally, she also testified that she used to be physically active in activities with the family, but she is currently unable to perform these activities at the same level. She does try to perform exercises of the foot in a regular basis.

The Arbitrator notes that apparently there was an issue of employment as Petitioner filed an amended application naming both the City of Rockford and the Board of Library Trustees of the City of Rockford as joint employees. The parties entered into a stipulation indicating that the employees of the Rockford Public Library are joint employees of the library in the City of Rockford. It was further agreed that pursuant to the Local Library Act, the Rockford Public Library is a creation of the City of Rockford by municipal ordinance and is governed by a Board

of Trustees. It is further agreed that all property owed by the Rockford Public Library is held by the library's Board of Trustees.

The Arbitrator further notes that the joint employment issue was litigated in the context of a labor relations matter in the case of the City of Rockford v. Illinois State Labor Relations Board, 158 Ill.App.3d 66, 111 Ill.Dec. 196 (2nd Dist. 1987). Finally, the Arbitrator also notes that Petitioner offered two injury reports pertaining to the March 5, 2011 accident. Both of those reports clearly give a history that Petitioner slipped and fell on an icy surface. (PX 3 and 4).

CONCLUSIONS OF LAW

In regard to the issue of (C) ACCIDENT, the Arbitrator finds the following facts:

Clearly the main issue in the present case is whether Petitioner's slip and fall on ice in the library parking lot arose out of and in the course of her employment with the joint respondents. The evidence shows that the parking lot in question was part of a self-contained building used by the Rockford Public Library as its East Branch facility. The property is owed by the Library Board of Trustees and is maintained by library employees. Petitioner's unrebutted testimony was that on the date of injury, the parking lot pavement was slippery. She testified that Donnie Bergquist, the maintenance supervisor, was out salting the parking area when she initially saw him he was salting the area closest to the patron entrance to the library. Petitioner further testified that after she fell, Mr. Bergquist apologized for not salting the area surrounding the employee entrance. The Arbitrator notes that the leading case in cases involving similar facts is Mores-Harvey v. Ind. Comm., 345 Ill.App.3d

1034, 281 Ill.Dec. 791 (3rd Dist. 2004). In Mores-Harvey, the Petitioner was employed as a waitress at Respondent's restaurant. She parked her car in the employer's lot behind the restaurant. As she exited her vehicle, she placed one foot down and slipped and fell, striking her head on the car and landing on her back. Petitioner testified that the restaurant employees routinely parked in the employer's lot behind the restaurant. Employees were directed to either park on the sides or back of the restaurant so that customers could use the front.

The Arbitrator found the case compensable and awarded benefits. On review, the Commission reversed the Arbitrator, finding that the accumulation of snow was a natural hazard which the general public was equally exposed in all parking areas of the employer's restaurant. The circuit court then reversed the Commission and reinstated the Arbitrator's award. The court found that the Commission applied the wrong legal standard and that the Commission's decision was against the manifest weight of the evidence. The Appellate Court affirmed the finding of the Circuit Court.

The Appellate Court noted that there were two exceptions to the "general premises rule" that holds that off premises injuries are not compensable. The first exception applies where the employee has sustained injuries in a parking lot "provided by and under the control" of an employer. (Citing Illinois Bell Telephone Co. v. Ind. Comm., 131 Ill.2d at 484, 137 Ill.Dec. 658 (1989)). The second exception allows recovery when "the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons."

The court noted that the rationale for awarding compensation for slip and falls in an employer-provided parking lot is that the parking lot is considered an extension of the employer's premises. Once the parking lot is considered part of the employer's premises, compensation coverage attaches to any injury that would be compensable on the main premises. Therefore, for the first exception to apply Petitioner must show that the injury occurred in a parking lot "provided by and under control" of the employer and that the injury was caused by a hazardous condition present on the surface of the parking lot. The Arbitrator finds that those conditions have been met in this case. It is clear that the library owned and maintained the parking lot. The library allowed the library employees to park in its lot. The second requirement is that Petitioner must show that a hazardous condition caused the injury. The overwhelming weight of the evidence shows that Ms. Bacon-Williams slipped and fell on an icy surface. This is consistently noted in all of the documentary evidence as well as the medical records offered into evidence. Donnie Bergquist, the maintenance supervisor, was salting because of a hazardous situation. In addition, Ms. Bacon-Williams testified that Donnie Bergquist apologized for not salting the employee area. All of this testimony was unrebutted by Respondent. Therefore, the Petitioner has satisfied both the ownership and hazardous condition requirements of the exception.

Respondent argues that this exception should not apply due to the fact that the parking lot was open to the general public. The Arbitrator notes that a similar argument was raised in the Mores-Harvey case. The court stated:

> "We decline to read the earlier cases in such a limiting way. Whether a parking lot is used primarily by employees or the general public, the proper inquiry is whether the employer maintains and provides the lot of its employees use. If this is the case, then the lot constitutes part of the employer's premises. The presence of a hazardous condition on the employer's premises that causes claimant's injury supports a finding of a compensable claim." Mores-Harvey v Ind. Comm. 345 Ill.App.3d at 1040. (emphasis added).

The Mores-Harvey court also distinguished the cases of Caterpillar Tractor Co. v. Ind. Comm., 129 Ill.2d 52, 133 Ill.Dec. 454 (1989) and Wal-Mart Stores, Inc. v. Ind. Comm., 326 Ill.App.3d 1050, 262 Ill. Dec. 456 (2002). In regard to Caterpillar Tractor, the Mores-Harvey court distinguished stepping off a curb from slipping on snow and ice. The court noted: "[i]n contrast, here, as in earlier cases, a hazardous condition was present on the surface of the employer's parking lot--snow and ice--that caused the claimant's injuries." Mores-Harvey, 345 Ill.App.3d at 1040.

Although the Arbitrator finds that this case properly falls within the first exception to the general premises rule, the Arbitrator notes that the case would be compensable under the second exception as well. Even if the parking area was not provided by and under the control of the employer, the risk of injury to which Ms. Bacon-Williams was exposed was greater than that of the general public because she was directed to park her car in the rear portion of the lot and enter the building through the employee entrance. A direction to park in a specific area of a parking lot, even if owned by someone else, exposes an employer to a greater degree of risk than the general public. Bommarito v. Ind. Comm., 82 Ill.2d 191, 45 Ill.Dec. 197 (1980).

Wal-Mart Stores deals with a case involving the second exception to the general premises rule. The Mores-Harvey court noted:

> "We find Wal-Mart Stores distinguishable. There, the claimant was not walking to or from her parked car, but was being picked up by a friend. There was no evidence that anyone had asked the claimant's friend to park where she did. Thus, the claimant was, in a sense, not acting under the employer's control or restrictions when she left the store to go on break and so could not have faced any risks to a greater extent than those of the general public. In contrast, here, as in Homerding, claimant parked her car before the start of her shift in an area designated by employer for employee parking. Although the general public was free to park anywhere in the lot, claimant's choices were restricted. Therefore, claimant's exposure to risk was necessarily greater than that of the general public.
>
> We disagree with employer's contention that the presence of snow and ice in the entire lot compels the conclusion that claimant did not face any risks to a greater extent than other persons. By restricting where claimant could park her vehicle, the employer exercised control over its employees' actions. In this way, the employee faced risks to a greater extent than the general public." Mores-Harvey v. Ind. Comm., 345 Ill.App.3d at 1041-1042.

The Commission has also acknowledged injuries occurring on parking lots owed, controlled or designated by the employer for use of its employees are considered to be an integral part of the employer's premises. Williams v. Community Alternatives Unlimited, 08 IWCC 0112 (2008); Michalak v. Deepearth Technologies, 10 IWCC 0402 (2010); Gonzalez v. Farmland Foods, 09 IWCC 0815 (2009).

From PE 1 the Arbitrator also notes that the area within the parking lot where Petitioner fell appears to be reserved for the purpose of employee ingress and egress and trash removal.

Based on the above, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of employment with the joint respondents on March 5, 2011.

In regard to the issue of (F) CAUSAL RELATIONSHIP, the Arbitrator finds the following facts:

Petitioner sustained a severe injury to her right ankle when she slipped and fell in the parking lot. Ms. Bacon-Williams testified that she had no prior of history of injury to the right foot or right leg. There is no evidence of any intervening injury during the course of recovery from the work injury. The Arbitrator adopts the opinion of Dr. Jeffrey Coe contained on page five of his report dated May 30, 2012 (PX 9). In that report, Dr. Coe indicates that Ms. Bacon-Williams suffered a right ankle fracture dislocation in a slip and fall on ice at work for the City of Rockford on March 5, 2011. In the conclusion to his report, Dr. Coe indicated that he believed there was a causal relationship between the injury and the current right foot and ankle symptoms and state of impairment. Respondent presented no evidence to rebut the conclusion of Dr. Coe. Therefore, the Arbitrator finds that the condition of ill-being to Petitioner's right foot is causally related to the March 5, 2011 accident.

In regard to the issue of (J) MEDICAL, the Arbitrator finds the following facts:

Petitioner offered Petitioner's Exhibit 5, a group exhibit containing a number of medical charges related to treatment of the right foot. Having previously found in Petitioner's favor on the issues of accident and causal relationship, the Arbitrator awards the claimed unpaid medical totaling $44,606.63. Of that amount, $40,898.96 was paid by Petitioner's group insurance carrier, BlueCross BlueShield. Respondent requests a credit under Section 8(j) of the Act. The Arbitrator allows such a credit, but orders Respondent to hold Petitioner harmless from any reimbursement claim which may be made by BlueCross BlueShield for said amount. The Arbitrator awards the remaining $3,707.67 to Petitioner.

In regard to the issue of TEMPORARY TOTAL DISABILITY and TEMPORARY PARTIAL DISABILITY, the Arbitrator finds the following facts:

Respondent did not object to the periods of claimed disability, except on the basis of liability. Having already found in Petitioner's favor on the issues of accident and causal relationship, the Arbitrator awards 12-6/7 weeks of Temporary Total Disability. In addition, Petitioner testified to the two periods of Temporary Partial Disability for the periods she was limited to a three-day work week. Petitioner testified that she lost 16 hours a week at the rate of $19.04 an hour, for a total of $304.64. This would translate to a TPD rate of $203.07. Therefore, the Arbitrator awards 16-5/7 weeks of TPD at the rate of $203.07 per week.

In regard to the issue of NATURE AND EXTENT, the Arbitrator finds the following facts:

Petitioner testified that she continues to experience significant swelling in her right foot when she engages in extended periods of sitting or standing. She continues to note pain and stiffness in the ankle. She notes a clicking sensation when there is pressure on the foot. She also indicated a feeling of instability and weakness in the right foot. She also testified to an impairment in her physical activities, such as engaging in physical activities with her family. The Arbitrator has reviewed the medical records of Dr. Carlson as well as the physical therapy records and notes that they recorded complaints similar to those testified to by Ms. Bacon-Williams at the time of trial. Ms. Bacon-Williams was seen by Dr. Jeffrey Coe approximately six months after her release from care. Dr. Coe noted approximately one inch of swelling of the foot below the ankle bone, as well as crepitus with range of motion testing. He noted 5 degrees loss of dorsal flexion and 15 degrees loss of eversion. The Arbitrator found Ms. Bacon-Williams credible in her testimony.

Based upon her testimony, the records of the treating physician, as well as the findings of Dr. Coe, the Arbitrator finds that petitioner sustained 40% loss of use of the right foot as a result of the accident. The Arbitrator finds that the opinion of Dr. Coe is more credible than that of Dr. Koehler's description of Petitioner's current complaints is not consistent with Ms. Bacon-Williams's testimony at trial. For example, Dr. Koehler states that Ms. Bacon-Williams has no impediments to her daily work and home activities. This is contrary to Petitioner's testimony which the Arbitrator finds credible.

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 Other (explain) Improper Denial of Reinstatement	☐ Second Injury Fund (§8(e)18)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Albert Mitchell,

Petitioner,

14IWCC0528

vs.

NO: 10 WC 03015

Illinois State Toll Highway Authority,

Respondent.

DECSION AND OPINION ON REVIEW

Petitioner timely appeals the November 8, 2011 Order of Arbitrator Carlson denying Petitioner's Motion to Reinstate the Application for Adjustment of Claim filed in 10 WC 03015. The issues before the Commission are whether Petitioner's case was properly dismissed and whether the matter should be reinstated. The Commission, after having considered these issues, vacates the Arbitrator's October 16, 2013 Dismissal Order, and reinstates the Petitioner's Application for Adjustment of Claim for the reasons stated herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1). On January 26, 2010, Attorney Donald Kurasch filed an Application for Adjustment of Claim on behalf of Petitioner, alleging that on May 9, 2009 Petitioner injured his left arm and neck while working.

2.) On May 23, 2012, Attorney Ronald Sklare filed an Appearance of Representative as co-counsel for Petitioner.

3.) On July 9, 2013, Arbitrator Carlson entered an Order Dismissing Petitioner's Application for Adjustment of Claim.

4.) On August 20, 2013, Petitioner timely filed a Petition to Reinstate, arguing Petitioner had a valid claim, and that there was no prejudice to Respondent by granting reinstatement of Petitioner's claim. Petitioner motioned the matter for hearing on October 8, 2013.

5.) On August 30, 2013, Respondent filed an Objection to Petitioner's Request to Reinstate, arguing that Petitioner moved out of state, that Petitioner was not actively treating, the matter was disputed, and that Respondent would be prejudiced by reinstatement of the claim.

6.) On October 16, 2013, Arbitrator Carlson conducted a hearing on Petitioner's Motion to Reinstate. At the time of the hearing on the Motion to Reinstate, Petitioner argued that his failure to appear on July 9, 2013 was due to a docketing error, that the Petition to Reinstate was timely filed, and that matter should be reinstated. Respondent argued that the matter should not be reinstated based upon: the disputed nature of the claim; facts surrounding the injury; the issue of causal connection; the statute of limitations; Petitioner's own narrative medical opinion that causally related the treatment that had been rendered to an injury seven years prior; that Petitioner was residing in Tennessee; and, that Respondent would be prejudiced by reinstatement of the claim.

7.) At the time of the hearing on Petitioner's Motion to Reinstate the Arbitrator inquired as to the issue of causal connection raised by Respondent. During the Arbitrator's questioning, Petitioner admitted: Dr. Zelby initially declined to give a causal connection opinion, and when presented with additional records still declined to provide an opinion; Petitioner sent a letter to Dr. Shermer requesting a causal connection opinion, but Petitioner did not recall the date of the letter and did not have the information with him at hearing; Petitioner admitted he did not know the date he sent information to Dr. Michael for a causal connection opinion either, and that he did not have his file with him at the time of hearing on his Motion to Reinstate.

8.) Following the arguments by the party, the Arbitrator stated "If you had that information with you here and now, I'd be willing to consider granting your reinstatement, but based upon what I have heard, so far, it doesn't appear as though the case has been prosecuted diligently." Petitioner asked for additional time to get the information, and to obtain his file. The Arbitrator denied Petitioner's request for additional time, and advised Petitioner that the October 16, 2013 date was the date the matter was set for argument.

9.) At the conclusion of the hearing on October 16, 2013, the Arbitrator denied Petitioner's Motion to Reinstate based on the arguments presented.

10.) On November 9, 2013, Petitioner filed a Petition for Review of the Arbitrator's Denial of Petitioner's Motion to Reinstate.

The Commission finds the Arbitrator erred in denying reinstatement of Petitioner's claim. Commission Rule 7020.90(a), governing Petitions to Reinstate, provides that where a case is dismissed for want of prosecution, the parties shall have 60 days from receipt of the order to file a Petition to Reinstate, after which the Arbitrator must conduct a hearing to determine, applying standards of fairness and equity, whether to reinstate the case. 50 Ill. Admin. Code, Ch.II, Sec. 7020.90(a). Petitioner's counsel complied with Rule 7020.90, by timely filing a Petition for Reinstatement. Furthermore, Petitioner's counsel timely motioned the matter for reinstatement, and a hearing was held to determine whether to reinstated the case. However, the Arbitrator refused to reinstate the matter based upon potential evidence to be adduced at the time of trial in the matter. The record fails to indicate standards of fairness and equity were applied in deciding to whether to reinstate the matter, as required under Rule 7020.90. The Arbitrator's denial of the Motion to Reinstate was not based upon Petitioner's failure to timely appear or failure to prosecute, but instead on potential evidence to be adduced at the time of trial of the matter, as evidenced by the Arbitrator's questioning and statements on the record.

The Commission notes the Commission file and database indicate the July 9, 2013 Dismissal for Want of Prosecution was the first and only time this matter was dismissed. The Commission can find nothing in the record to indicate: that Petitioner delayed presenting a Motion to Reinstate; that Petitioner abandoned his claim; or that Petitioner was given ample opportunities to appear and failed to do so. The Commission finds there is sufficient evidence of due diligence on the part of Petitioner's counsel.

For all of the reasons noted above, the Commission concludes that the Arbitrator erred in denying reinstatement of Petitioner's case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Order dated October 16, 2013, denying reinstatement of Petitioner's claim, is hereby reversed, that Petitioner's Application for Adjustment of Claim is hereby reinstated, and that this case is remanded to the Arbitrator for further proceedings.

DATED: JUL 01 2014
KWL/kmt
O-06/24/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

14IWCC0529

STATE OF ILLINOIS)
) SS.
COUNTYOF 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

Joseph R. Eckert,

Petitioner,

vs. NO: 13WC6601

Evandy's Boatel LLC,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 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 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: JUL 07 2014
o06/25/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

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

14IWCC0529

ECKERT, JOSEPH R
Employee/Petitioner

Case# **13WC006601**

EVANDY'S BOATEL LLC
Employer/Respondent

On 11/22/2013, 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 0.10% 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:

2427 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0238 THE LAW OFFICES OF WOLF & WOLFE
MARGARET BENTLEY
25 E WASHINGTON ST SUITE 700
CHICAGO, IL 60602

14IWCC0529

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)

JOSEPH R. ECKERT
Employee/Petitioner

v.

EVANDY'S BOATEL, LLC
Employer/Respondent

Case # 13 WC 6601

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 **September 19, 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 **December 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 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 **$15,839.16**; the average weekly wage was **$494.99**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **2** dependent children.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$652.56** for other benefits, for a total credit of **$652.56**.

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

ORDER

Petitioner has not proven that he sustained an accident that arose out of and in the course of his employment in this matter, and benefits 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

11/18/2013
Date

ICArbDec19(b)

NOV 22 2013

14IWCC0529

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSEPH R. ECKERT
Employee/Petitioner

v. Case # 13 WC 6601

EVANDY'S BOATEL, LLC
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on December 27, 2012, he reached for a box of pork loins weighing between thirty and forty pounds. As he reached in to pick up the box and pulled it toward him and rotated it down to the ground, he testified that he felt a "pop" in his back. There were no witnesses to this alleged incident.

Petitioner presented to the emergency room of Passavant Area Hospital at approximately 10:00 a.m. on December 27, 2012. According to the history provided by Petitioner, he awoke at 6:00 a.m. with back pain with no indication of etiology. Those records noted a past history of back pain and fibromyalgia. Petitioner returned to the emergency room of Passavant Area Hospital on December 31, 2012, with complaints of back pain. According to the history provided by Petitioner, the onset/duration of his back pain was four days prior, and it was not noted as a recent injury. (Petitioner's Exhibit (PX) 2).

Petitioner underwent an MRI on January 3, 2013, which revealed a disc protrusion at L4-L5 with mild bilateral foraminal narrowing. (PX 3). Petitioner was examined by Dr. John Rollet at Chatham Family Practice on January 7, 2013, and the following was recorded: "[H]ad [MRI] on [T]hursday/current back pain about [a] week and [a] half/woke up with back tight-worse as day progressed /went to [P]assavant [emergency room] 12/27 and 12/30 /needs off work note." (PX 4).

Petitioner first presented to Dr. Paul Smucker on referral from Dr. Rollet on January 16, 2013, and gave a history of developing pain in his lower back after feeling a "pop" while rotating stock. (PX 1, pp. 7-8). Petitioner denied a history of significant lower back problems as well as being seen by a physical therapist, chiropractor, or medical doctor regarding low back problems. (PX 1, p. 9). Petitioner also denied a history of back pain. (PX 1, pp. 9-10). His diagnosis was low back pain, bilateral lower extremity pain or paresthesia, lumbar degenerative disc disease, and possible radiculopathy. (PX 1, p. 12). Dr. Smucker recommended an EMG and physical therapy. (PX 1, p. 15). He also recommended work restrictions of no lifting greater than five pounds with a sit/stand option. (PX 1, p. 15; PX 6).

Dr. Smucker testified that Petitioner's current condition of ill-being could have been caused in whole or part by the work incident of December 27, 2012, because Petitioner apparently did not have these symptoms prior to this event but he had them thereafter. (PX 1, pp. 18-21).

Dr. Smucker testified that prior to examining Petitioner, he did not review any of Petitioner's previous medical records. (PX 1, p. 22). He agreed that the history provided in the emergency room records at Passavant Area Hospital on December 27, 2012 was inconsistent with the history Petitioner provided to him on January 16, 2013. He agreed the history in those records indicated that Petitioner awoke with back pain and had a past history of back pain. He also agreed there was nothing in those records about Petitioner injuring his back rotating stock. (PX 1, p. 23).

Dr. Smucker saw Petitioner on February 13, 2013. (PX 1, p. 30). Petitioner had poor eye contact at that appointment and was hanging on to his wife and his cane, which implied Petitioner could be exaggerating his symptoms to the doctor. (PX 1, p. 32). He further testified that when he saw Petitioner on July 3, 2013, his treatment recommendations and restrictions remained the same. (PX 1, p. 34; PX 6). Dr. Smucker has never taken Petitioner completely off of work. (PX 6).

Petitioner denied any prior back injury or back treatment. Petitioner presented to the emergency room of Taylorville Memorial Hospital on February 26, 2011. According to those medical records, Petitioner reported a history of a sore back for the past five days and indicated he was moving a bed. (PX 9). Petitioner testified he did not recall injuring his low back in February 2011 after moving a bed, and he did not remember receiving treatment at Taylorville Memorial Hospital. There are no medical records in evidence that indicate any prior treatment of consequence to Petitioner's low back.

Petitioner testified he met Richard "Buddy" Fore downstairs in the parking lot at approximately 8:00 a.m. on the alleged date of accident, and told him he hurt his back at work moving something in the cooler and needed to go to the emergency room because it had gotten worse. He testified he gave a history of an accident that occurred at work at the emergency room of Passavant Area Hospital.

Petitioner testified that he spoke with Eric VanGundy, one of Respondent's owners, after his MRI. Petitioner testified that he reported to Mr. VanGundy that he was in the cooler follows and may have stepped off of something, but did not know the full extent at the time what caused the injury.

Petitioner testified he believed he was scheduled to work on January 28, 2013, but he did not work that day because he went to see an attorney. When he went into work the following week, Respondent handed him a letter with a list of his job duties. The records show Petitioner's job duties included administrative tasks related to his position as Executive Chef. (RX 4).

Petitioner testified did not show up for work at all the following week, but he spoke with Mr. Friesch, one of Respondent's managers, every day. The records show Mr. Friesch was not contacted by Petitioner on February 11 or 12, 2013, and Petitioner was a "no call, no show" for work from February 11, 2013 through February 15, 2013. (RX 5; RX 7).

Mr. Fore, Respondent's kitchen manager, testified he spoke with Petitioner the morning of December 27, 2012, and Petitioner advised he was going to get his back evaluated and that he had a previous back problem. Mr. Fore testified that Petitioner did not mention injuring his back at work. He testified Petitioner complained on two or three occasions prior to the alleged accident of pain running down his back; and he never mentioned a work injury to him and he was not aware of Petitioner ever being injured at work. Mr. Fore testified that he no longer is employed with Respondent, and works in a different restaurant now in a different town.

Mr. VanGundy testified that approximately one week prior to December 27, 2012, he noticed Petitioner was moving slow so he asked him how he was doing. Mr. VanGundy testified that he was advised from Petitioner that Petitioner was in severe pain. Mr. VanGundy was also advised from Petitioner on one occasion that Petitioner took a handful of pills in order to get out of bed in the morning.

Mr. VanGundy testified he spoke with Petitioner was on January 4, 2013, and Petitioner advised he was experiencing severe back pains, which was why he had not been to work. Mr. VanGundy testified that Petitioner advised him specifically that his injury was not a workers' compensation injury, and that he may have stepped wrong at some point and tweaked his back. According to Mr. VanGundy, Petitioner never mentioned this happened in the cooler. Mr. VanGundy spoke with Petitioner approximately two weeks later and Petitioner advised his doctor was recommending treatment. Petitioner also advised Mr. VanGundy that he had no insurance so his doctor would not do the treatment. Mr. VanGundy also testified that he learned Petitioner was seeking out an attorney. According to Mr. VanGundy, the fact that Petitioner indicated he did not have insurance for the proposed medical treatment and learning that Petitioner was seeking the services of an attorney "spooked" him, because he felt that Petitioner may be trying to make his injury a workers' compensation claim. In response this notion, Mr. VanGundy testified that he informed his insurance carrier of the possibility.

Mr. VanGundy testified that following Petitioner's absences from work, a letter was sent to Petitioner on February 15, 2013. The letter stated, in part: "This letter will serve as notification that your employment with our company Evandy's Boatel, officially ended as of February 15, 2013. You have multiple unexcused absences without contacting our management. Therefore, we accept these actions as your voluntary resignation from your position as Chef." (RX 5).

Danielle Arendt Schanke testified she notified Petitioner that he was scheduled to work Monday through Friday from 9:00 a.m. to 5:00 p.m. the week of January 28, 2013, but he did not return to work that week. The records also show Petitioner was notified of his return to work to perform administrative duties to begin on January 28, 2013, and he did show up for any scheduled workday during that week. (RX 5). Ms. Schanke testified she called Petitioner on Friday, February 1, 2013, and notified him he was scheduled to work Monday through Friday from 9:00 a.m. to 5:00 p.m. the following week. The records also show Mr. Schanke notified Petitioner of his work schedule on Friday, February 1, 2013, and Petitioner reported to work on February 5 and 6, 2013. (RX 5; RX 6). Ms. Schanke testified she called Petitioner on Friday, February 8, 2013, and notified him he was scheduled to work Monday through Friday from 9:00 a.m. to 5:00 p.m. He did not show up to work that week and she did not receive any calls from him. The records also show Mr. Schanke notified Petitioner on February 8, 2013 of his work schedule, and Petitioner was a "no call, no show" for work from February 11, 2013 through February 15, 2013. (RX 5; RX 6; RX 7).

When Petitioner worked in a light duty capacity during those two days in February 2013, he was sitting in a chair performing paperwork duties. Following his voluntary resignation/termination, Petitioner conducted a job search. (PX 10).

CONCLUSIONS OF LAW

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

Petitioner testified he was rotating a stock of pork loins when he felt a "pop" in his back. He testified that he notified Mr. Fore that morning as he was leaving work that he hurt his back in the cooler at work. He

denied a history of significant lower back problems, low back pain, and being seen by a doctor for his low back at his appointment with Dr. Smucker on January 16, 2013.

The history Petitioner provided to Dr. Smucker is contradicted by his medical records and by the credible testimony of Mr. Fore and Mr. VanGundy. The records from Taylorville Memorial Hospital show Petitioner presented on February 26, 2011, with a sore back after moving a bed. The records from Passavant Area Hospital note a past history of back pain. Mr. Fore testified Petitioner complained of sharp pain running down his back on at least two occasions prior to this alleged incident. Mr. VanGundy testified Petitioner complained of severe back pain and the need to take a bunch of pills in order to get out of bed prior to this alleged incident.

Petitioner's testimony that he injured his back at work is contradicted by the testimony of Mr. Fore and Mr. VanGundy. Mr. Fore testified Petitioner did not report a work injury to him on the morning of December 27, 2012. Mr. Fore is no longer an employee of Respondent, and has no personal or pecuniary interest in this matter. Mr. VanGundy testified Petitioner advised him that his back condition was not a workers' compensation injury and that he may have stepped wrong and tweaked his back, but not in the cooler at work. The Arbitrator finds that both Mr. Fore and Mr. VanGundy were credible witnesses at trial. Both testified in an open and forthcoming manner, and both appeared to be endeavoring to give the full truth.

Petitioner's testimony that he injured his back at work is also inconsistent with the medical records. On December 27, 2012, he provided a history of awaking at 6:00 a.m. with back pain with no indication of etiology. Four days later, Petitioner again presented to Passavant Area Hospital with back pain and indicated it was not a recent injury. He reported to Dr. Rollet that he woke up with a tight back that worsened as the day progressed. There is no mention of a work accident at any of these visits.

Petitioner testified that he advised either a nurse or a doctor at Passavant Area Hospital he injured his back at work. Medical records can be more reliable than later testimony because there is a presumption that a person will not falsify statements regarding his medical condition and the cause of the condition to physicians from whom he expects and hopes to receive medical aid over later inconsistent histories. *Shell Oil Company v. Industrial Comm'n*, 2 Ill.2d 590, 602, 119 N.E.2d 224, 231 (1954). The Arbitrator finds this is such a case whereby the initial medical records are more reliable than Petitioner's later testimony.

Based upon the preponderance of the credible evidence, the Arbitrator concludes Petitioner did not sustain a work-related accident that arose out of and in the course of his employment by Respondent on December 27, 2012.

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

For the reasons stated above, the Arbitrator concludes Petitioner's condition of ill-being is not casually related to any incident at work on December 27, 2012. The Arbitrator does not find the opinion of Dr. Smucker regarding causal connection dispositive or compelling. Petitioner was examined by Dr. Smucker via referral on January 16, 2013. Dr. Smucker opined that Petitioner's current condition could have been caused, in whole or part, by Petitioner rotating stock at work. Dr. Smucker based his opinion on his understanding that Petitioner was asymptomatic prior to December 27, 2012, and Petitioner's description of the incident. When confronted with contemporaneous medical records from Passavant Area Hospital, Dr. Smucker was forced to admit those records were silent with regard to a work place incident and that Petitioner had a history of back pain. Furthermore, Dr. Smucker was unaware of the testimony of Mr. Fore and Mr. VanGundy. Dr. Smucker's opinion was based upon incomplete information and is not reliable.

For the foregoing reasons, the Arbitrator concludes Petitioner's low back injury is not casually related to the work accident of December 27, 2012.

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 is seeking payment in medical and prescription bills for treatment rendered from December 27, 2012, through August 21, 2013. For the reasons stated above, the Arbitrator concludes Respondent has no responsibility to pay for the medical treatment claimed by Petitioner.

Issue (K): Is Petitioner entitled to prospective medical care?

For the reasons stated above, the Arbitrator finds Petitioner is not entitled to any prospective medical care, including but not limited to, physical therapy and the lower extremity EMG testing recommended by Dr. Smucker.

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

For the reasons stated above, the Arbitrator finds Petitioner is not entitled to temporary total disability benefits from December 27, 2012 through September 19, 2013. Further, Petitioner was offered light duty work beginning on January 28, 2013, and he only worked two days from January 28, 2013, through February 15, 2013. Respondent was accommodating the restrictions imposed by Dr. Smucker, but Petitioner continuously failed to show up to work or call-in between January 28, 2013 and February 15, 2013. Benefits may be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor. *Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n*, 236 Ill.2d 132, 146; 923 N.E.2d 266, 274 (2010).

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 Petition to Reinstate	Second Injury Fund (§8(e)18)
	PTD/Fatal denied
Modify	None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Javier Martinez,
Petitioner,

vs.

NO: 12 WC 4511

14IWCC0530

Source One Staffing,
Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appealed the decision of Arbitrator Dollison who denied Petitioner's Petition for Reinstatement. The Commission, after reviewing the entire record, reverses the Arbitrator's decision and grants Petitioner's Petition to Reinstate the above captioned claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On February 6, 2012 Petitioner filed an Application for Adjustment of Claim in which he contended that he sustained an accidental injury on April 13, 2010 that resulted in an injury to the right foot and toes.

2. On July 8, 2012 Petitioner passed away. On August 13, 2012 Respondent was notified of Petitioner's death. On October 30, 2012 Respondent made a demand to Petitioner 's attorney to produce a causation opinion linking Petitioner's death to his alleged April 13, 2010 work accident and to produce any documentation showing Petitioner had dependents as defined by the Act.

3. Respondent made a subsequent second and third demand for any documentation showing Petitioner had dependents as defined by the Act. On January 28, 2013, Respondent filed a Motion for Trial and indicated it would seek a dismissal for want of prosecution Order from the Arbitrator.

4. On May 9, 2013 Arbitrator Dollison issued an Order dismissing Petitioner's claim for want of prosecution.

5. Petitioner's attorney filed a defective Petition for Reinstatement and appeared before the Arbitrator on May 17, 2013. At that time the case was continued to June 19, 2013. On June 4, 2013 Respondent's attorney sent a letter to Petitioner's attorney which pointed out that Petitioner's attorney was wrong to appear before the Arbitrator on May 17, 2013 and was wrong in obtaining a continuation date of June 19, 2012 without consulting with him. Rather, Petitioner's attorney needed to proceed through the proper channels via filing a complete Petition to Reinstate the claim and by seeking a date on the Arbitrator's next trial cycle. Respondent's attorney further indicated that he would not be able to appear before Arbitrator Dollison on June 19, 2012 as he was previously scheduled to appear before Arbitrator Andros on a separate matter. Lastly, Respondent indicated that he would defend against any reinstatement of the case.

6. On June 13, 2013 a birth certificate for Heriberto Martinez , Petitioner's dependent, was tendered to the Respondent and was subsequently presented to the Arbitrator on June 19, 2013 and again on July 22, 2013.

7. On June 26, 2013 a Petition to Reinstate was filed with the Commission seeking a hearing date of July 22, 2013. The Petition indicated that Petitioner was prepared to present evidence as requested by the Arbitrator at the time of dismissal and presented on June 19, 2013 despite the Respondent's objection to notice.

8. On July 22, 2013 the parties appeared before Arbitrator Dollison. No record was taken at that time. A representation was made by Petitioner's attorney that Petitioner's dependent had been attending community college. The Arbitrator continued the case to an August 9, 2013 date.

9. On August 9, 2013 Petitioner's attorney provided a noncertified transcript dated August 7, 2013 showing Heriberto Martinez, Petitioner's dependent, had attended college in the fall. Settlement discussions were being had. The claim was continued to August 16, 2013. On August 13, 2013 Respondent filed an objection with the Commission regarding the Petition to Reinstate. On August 16, 2013 Petitioner's attorney advised Respondent that Petitioner's daughter, the administrator of the estate, opened the estate. Petitioner's case was continued to August 19, 2013.

14IWCC0530

10. On August 19, 2013 the parties appeared before Arbitrator Dollison and presented their respective arguments for and against Petitioner's Petition to Reinstate the case. On October 10, 2013, Arbitrator Dollison issued an Order denying Petitioner's Petition to Reinstate the case.

The Commission views this case differently than the Arbitrator and finds that Petitioner's Petition to Reinstate the case should be granted. The Commission finds that while the claim has not progressed as timely as it could have and while there were points in which the Petitioner's attorney did not follow the proper procedure in advancing a reinstatement of the claim, that Petitioner's attorney did timely file a Petition for Reinstatement and was progressing this matter. As such, the Commission grants Petitioner's Petition to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition to Reinstate is hereby granted.

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: JUL 07 2014
O:5/8/14
MB/jm

43

Mario Basurto

David L. Gore

Stephen Mathis

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

Mark Mifflin,

14IWCC0531

Petitioner,

vs.

NO: 10WC 36931

State of Illinois - Menard Correctional Center,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, incurred and prospective medical expenses, causal connection regarding the neck 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 23, 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.

DATED: JUL 0 7 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

MIFFLIN, MARK
Employee/Petitioner

Case# **10WC036931**

14IWCC0531

SOI/MENARD C C
Employer/Respondent

On 7/23/2013, 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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

JUL 23 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
19(b)

MARK MIFFLIN
Employee/Petitioner

v.

SOI/MENARD C.C.
Employer/Respondent

14IWCC0531

Case # **10** WC **36931**

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 **5/17/13**. 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 ___

14IWCC0531

FINDINGS

On the date of accident, **09/15/10**, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**54,765.50**; the average weekly wage was $**1,053.18**.

On the date of accident, Petitioner was **46** 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 $ 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

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

7/19/13
Date

ICArbDec19(b)

JUL 23 2013

14IWCC0531

FINDINGS OF FACT

This is a 19(b) decision. The issues in dispute are accident, notice, medical bills, prospective medical and prospective TTD as the issues relate to Petitioner's alleged neck injury.

Petitioner is a 46 year old employee of the State of Illinois at the Menard Correctional Center. Petitioner began working at Menard in February 1985.

Petitioner is alleging a cervical injury from the repetitive job duties for Respondent.

Petitioner works for Respondent as a Correctional Officer at the Menard Correctional Center. Petitioner works the 11:00 p.m. to 7:00 a.m. shift. Petitioner testified that his job duties are varied.

Petitioner signed his original application for adjustment of claim on September 20, 2010 alleging right and left arm, right and left hand, and right and left shoulder injuries. (Rx. 9) Petitioner was referred to Dr. George Paletta by his attorney on Thomas C. Rich.

Petitioner first saw Dr. Paletta on September 15 , 2010. (Px. 3) At that visit Petitioner complained of bilateral shoulder and elbow pain. (Id.) Dr. Paletta performed a physical exam and there was no mention of any positive findings with respect to the cervical region. Additionally, Petitioner did not have any complaints of neck or cervical pain.

Dr. Paletta ordered bilateral shoulder x-rays, nerve conductions studies and bilateral shoulder MRIs. Dr. Paletta ordered the nerve conduction study to determine whether or not Petitioner had cubital tunnel syndrome. The nerve study was not impressive for cubital tunnel bilaterally. However, there was an incidental finding of mild chronic C5 radiculopathy. Dr. Paletta then ordered a cervical MRI.

Petitioner had a cervical MRI on October 1, 2010. The MRI showed degenerative changes throughout the cervical spine with herniations at C6-7, C5-6 and C3-4. Dr. Paletta then referred Petitioner to Dr. Gornet.

Dr. Gornet first saw Petitioner on November 4, 2010. (Px. 8) However, even before being examined by a doctor for his cervical condition, on October 14, 2010 Petitioner Amended his application for adjustment of claim and the neck to the body part affected. (Arb. Ex. 1)

On cross-examination, Petitioner admitted that he filed his Amended Application for Adjustment of claim adding the neck to the claim even before seeing Dr. Gornet. (T-33-32)

At the November 4, 2010 visit with Dr. Gornet Petitioner complained of pain at the base of his neck to the left side into both shoulders. (Px. 8) Dr. Gornet order cervical injections. Petitioner's last visit with Dr. Gornet was on January 6, 2011 and additional injections were ordered.

A review of the medical records show that prior to November 4, 2010 Petitioner never had any neck complaints. At the November 4th visit Petitioner had pain at the base of the neck. The pain diagram Petitioner completed with Dr. Daniel Phillips on September 21, 2010 indicated pain at the elbows and hands and no neck pain.. At the September 15, 2010 visit with Dr. Paletta it was noted that Petitioner could work full duty because there was no loss of strength issues. However, the visit with Dr. Gornet noted Petitioner had arm weakness.

14IWCC0531

Finally, Dr. Phillips' exam on September 21, 2010 noted that Petitioner had cervical range of motion without neural foramina findings.

On July 26, 2011 Petitioner was examined pursuant to Section 12 by Dr. James P. Emanuel. Petitioner told Dr. Emanuel that he had a stiff shoulder, a stinging burning pain at the base of the neck and a sensation that his head is too heavy for his body. (Rx. 1)

Dr. Emanuel stated that Petitioner's shoulder condition was related to Petitioner's work activities and that Petitioner did not have carpal or cubital tunnel conditions. With regards to the neck, Dr. Emanual stated:

> In my medical opinion I believe the patient had pre-existing degenerative disk disease at multiple levels throught the cervical spine with the right paracentral disk herniation at C6-7 and C5-6. In my opinion the patient's work activities did not cause or substantially aggravate the underlying pre-existing degenerative changes of the neck. . . . This is a degenerative condition and not related to opening or closing heavy metal doors. At no time was there an injury to the head or neck directly. (Px. 1, pg. 4)

Additionally, Petitioner was examined by Dr. Timothy Vanfleet on July 11, 2012. (Rx. 2) Dr. Vanfleet testified by way of deposition. (Rx. 3) Dr. Vanfleet stated that Petitioner had degenerative disk disease and that Petitioner's job duties as a correctional officer including opening and closing of doors did not cause or aggravate Petitioner's degenerative neck condition without a specific incident. (Rx. 4, pg. 15) Dr. Vanfleet also did not believe that Petitioner needed any further treatment to his spine.

Dr. Gornet testified via deposition. (Px. 8) Petitioner told Dr. Gornet that his job duties consisted of opening and closing cell doors. (Px. 8, pg. 23) Dr. Gornet noted that Menard is an older facility and that he would attribute Petitioner's symptoms to his job duties described by Petitioner.

Petitioner testified on cross examination that for the last five years he worked in areas of the prison towers and roll call gate which did not require opening and closing of cell doors. (Rx. 4) Additionally, Petitioner worked the midnight shift in the cell house where there is less movement of the inmates.

This matter was set for hearing by Petitioner on February 14, 2012. A transcript of the proceedings were made at that time. (Rx. 8) At that time, counsel for Petitioner stated that Petitioner decided to forego treatment on his neck and was going to seek treatment for his elbows. (Rx. 8, pg. 4)

On April 26, 2012 Petitioner was examined by Dr. Luke Choi for his elbows. (Rx. 6) Petitioner failed to include said medical record in his exhibit packet. Dr. Choi stated that Petitioner had a normal physical exam and normal nerve conduction studies. According to Dr. Choi there was nothing wrong with his elbow and that Petitioner had no work related condition with regard to his elbows.. Following this visit with Dr. Choi, Petitioner took the deposition of Dr. Gornet, and sought treatment for his neck

CONCLUSIONS OF LAW

1. Based upon all the credible evidence, Petitioner has not proven that he suffered a work related condition to his cervical spine. A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. Orisini v. Industrial Commission, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). In cases involving the

repetitive trauma concept, the petitioner must show the injury arose out of and in the course of his employment and was not the result of a normal degenerative aging process. Peoria County Bellwood Nursing Home v. Industrial Commission, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec.235 (1987). Simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased to the petitioner. Id.

2. The Arbitrator also notes a claimant fails to prove a causal relationship through repetitive trauma where the medical opinion upon which they have relied is based upon incorrect or incomplete information about the claimant's job duties. See, e.g., Lon Dale Beasley v. Decatur Public School #61, 03 IIC 301; Jerry Wiser v. American Steel Foundries. 02 IIC 310; Vicki Staley v. BroMenn Lind Medical Hills Internists, 99 IIC 539. The Commission has determined a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. Gambrel v. Mulay Plastics, 97 IIC 238. In the present case, the evidence shows that Dr. Gornet believed that the Petitioner's job duties consisted of opening and closing cell doors multiple times daily. However, the evidence is that Petitioner worked several assignments that did not include opening cell doors, such as in the towers. Also, when Petitioner works the midnight shift, movement is limited. Thus, it is apparent that Dr. Gornet did not have a complete picture of Petitioner's job duties.

3. For the reasons set forth above, the Petitioner's claim for TTD, medical expenses and prospective medical care related to his neck/cervical condition is denied.

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

Cornelius L. Motton,

Petitioner,

vs.

NO: 13WC 9449

Rantoul Foods,

14IWCC0532

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 27, 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 $6,400.00. 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: JUL 07 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

MOTTON, CORNELIUS L
Employee/Petitioner

Case# 13WC009449

14IWCC0532

RANTOUL FOODS
Employer/Respondent

On 6/27/2013, 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:

2427 KANOSKI BRESNEY
KATHY A OLIVERO
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0734 HEYL ROYSTER VOELKER & ALLEN
TONEY L TOMASO
102 E MAIN ST SUITE 300
URBANA, IL 61801

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)

CORNELIUS L. MOTTON
Employee/Petitioner

v.

RANTOUL FOODS
Employer/Respondent

Case # 13 WC 9449

14IWCC0532

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 **Urbana**, on **April 19, 2013**, and in the city of **Quincy**, on **May 1, 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 **14IWCC0532**

On the date of accident, **March 1, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$28,622.36**; the average weekly wage was **$550.43**.

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

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

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

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 **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $366.95/week for 6 6/7 weeks, commencing March 15, 2013 through May 1, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay the further sum of $3,811.48 for necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from March 1, 2013 through May 1, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall authorize and pay for the surgery recommended by Dr. Li for Petitioner's right knee.

Penalties and attorneys' fees are not imposed on Respondent.

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

06/20/2013
Date

ICArbDec19(b)

JUN 27 2013

STATE OF ILLINOIS)
) SS
COUNTY OF ADAMS)

14IWCC0532

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CORNELIUS L. MOTTON
Employee/Petitioner

v. Case # 13 WC 9449

RANTOUL FOODS
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Respondent, Rantoul Foods, is a meat packing company. Petitioner, Cornelius L. Motton, had been employed by Respondent since August 16, 2011. Petitioner's application for employment by Respondent disclosed his conviction of a felony for delivery of a controlled substance, and Petitioner had also been convicted of a DUI and wore a home security bracelet as part of an incarceration program for the DUI. (See also Respondent's Exhibit (RX) 6-8).

Petitioner initially worked in the position of "backing heads," which required using a knife to trim meat off of the back of a slaughtered animal's head. He was then promoted to a team leader, which required him to supervise employees and fill positions as needed, including the position of dumping "inedibles." "Inedibles" is the term used in Respondent's parlance to describe byproducts of slaughtered animals, such as ears, snouts, stomachs, heads, and blood. Petitioner described the "inedibles room" where dumping inedibles occurred. In that room was an auger, step stool, push stick, "vacs" or vats of inedibles, totes, and a forklift, with blood, fat, and water on the floor. Petitioner testified that at times when dumping heads into the auger, he would have to stand on his tip toes while on the step stool. Petitioner explained that the inedibles go up the auger to a garage area, which is separated from the inedibles room by a wall and has two bays for trailers to collect the inedibles, where they are in turn hauled off. A video depiction of the inedibles room is shown in Respondent's Exhibit 1A.

Petitioner testified at trial that prior to March 1, 2013, he had never experienced any injuries, problems or symptoms concerning his right knee, right shoulder or chest wall. He further testified that prior to this date he has never had any problems performing his job duties or household and recreational activities.

On March 1, 2013, Petitioner was assigned the position of dumping inedibles and had dumped between 9-10 vacs and 15 totes before 11:47 a.m. As Petitioner was standing on the step stool on the east side of the auger in the inedibles room pushing heads down with the push stick, as shown in Petitioner's

Exhibit 6, he testified that the auger pushed into the right side of his chest, which caused Petitioner to be knocked off balance and the step stool to fall out from underneath him. Petitioner testified that he grabbed the auger with his hands so as not to fall to the floor, and twisted his body and struck his right leg. Before the auger pushed into his chest, Petitioner had not heard anything and had not seen anything, and understands the difference between being pushed as opposed to slipping.

As Petitioner let go of the auger, he testified that he saw through the gap in the wall above the auger as shown in Respondent's Exhibit 2A a Darling International company truck pulling forward out of the garage area. Petitioner was leaning against the back wall of the inedibles room when Aaron Williams, a maintenance employee, came into the inedibles room and asked Petitioner what happened while retrieving the step stool. Petitioner's helmet had fallen off. Petitioner noticed his right knee as well as his right arm and chest were hurting, and proceeded to the head room to inform his supervisor, Bruce Armstrong, of the accident. Petitioner told Mr. Armstrong the auger had hit him in the chest, the step stool had flipped over, his knee had crashed into something, and he thought the truck had hit the auger. Mr. Armstrong and Petitioner then went to the break room and completed an accident report, which described the accident as occurring when pushing inedible products into the auger, and a Darling truck driver backed his truck into the auger. (PX 9; RX 4). Mr. Armstrong then instructed Petitioner to be seen by the company nurse, who had Petitioner pull up his pants leg and take off his shirt, and provided Petitioner with ice and a wrap for his knee.

Petitioner waited in the break room and then returned to the inedibles room where Mr. Armstrong, the Darling truck driver, and Bill McCarty, superintendent of maintenance, were present. Petitioner informed the truck driver he had hit the auger, which in turn knocked Petitioner off the step stool while standing at the auger. Later that evening, Petitioner noticed he was barely able to bend his right leg. He went to the emergency room of Provena Covenant Medical Center the next morning, where Petitioner told the medical personnel he had been injured at work because a truck driver hit the auger and knocked him off a stool. Petitioner did not tell the medical personnel the truck had hit him.

The records of Provena Covenant Medical Center reported Petitioner was seen on March 2, 2013, with complaints of chest pain and radiating to right arm, rated as 8/10, right arm numbness, and painful right knee. (PX 1, pp. 2-3, 9). These records contain the history of a semi-truck backing up, hitting a conveyor belt and Petitioner, knocking Petitioner to the floor. (PX 1, pp. 9, 13). On physical examination, tenderness over the sternum was found and Petitioner was diagnosed with chest wall pain. (PX 1, pp. 14, 18). Lab work including a cardiac profile, an EKG, and a CT of the chest were prescribed for Petitioner, and Petitioner was given a Tramadol prescription and instructed to follow-up with his primary care physician. (PX 1, p. 18).

After Petitioner reported to work on March 4, 2013, he went to Mr. Armstrong about his complaints and was again instructed to be seen by the nurse, who sent Petitioner to SafeWorks. Petitioner informed the medical personnel at SafeWorks he thought the auger was hit by the semi-truck. The records of SafeWorks reported Petitioner was seen on March 4, 2013, for initial evaluation and treatment of his right knee and upper torso, and that Petitioner was injured on March 1, 2013, when he was pushing inedible into an auger, the auger got hit by a semi (Petitioner did not see it coming), and it pushed into the right side of his chest and shoulder. It also reported he injured his right knee. Petitioner complained of right sided chest pain, shoulder pain, tingling of right hand, and right knee pain. (PX 2, p. 2). The pain drawing completed by Petitioner for the March 4, 2013 visit identified moderate to severe pain at his right chest, right arm, and right knee. (PX 2, p. 16). On physical examination, findings included tenderness over the right pectoral muscle, tenderness around the right AC joint area, a slightly positive impingement test, swelling around the medial aspect of the knee, and tenderness along the medial collateral ligament

region. (PX 2, p. 3). Petitioner was diagnosed with right knee contusion, right shoulder contusion/sprain, and right chest wall contusion, and given work restrictions. (PX 2, p. 4).

Petitioner remained under the care of SafeWorks and was prescribed an immobilizer and crutches for the right knee, X-rays of the right knee and shoulder, a MRI of the right knee, physical therapy for the right knee and shoulder, a cane for the right knee, and a referral to Dr. Lawrence Li, an orthopedic surgeon. (PX 2). The records of Dr. Li reported Petitioner was seen on March 14, 2013, with a history that a truck driver hit his auger causing him to be knocked off, injuring his right knee and right shoulder. (PX 4, p. 1). Dr. Li recommended surgery for Petitioner's right knee (PX 4, p. 2), and Petitioner expressed he wants to proceed with the surgery for his right knee. SafeWorks records from March 14, 2013 indicate work restrictions of "sit down work only." (PX 2, p. 15). Petitioner received physical therapy at 217 Rehab & Performance Center, and the records of that facility reported Petitioner was putting inedible into an auger when a semi-truck hit the auger and Petitioner was struck by the semi-truck in his chest. (PX 5, p. 1).

Petitioner has not noticed any further complaints concerning his chest, but notices he cannot reach or lift with his right arm. Petitioner also expressed his right knee is not painful if he is not putting any weight on it, and he has to use the cane when walking.

Aaron Williams was working in floor maintenance for Respondent on March 1, 2013, when he went into the inedibles room and saw the step stool in the right hand corner of the room as depicted in Respondent's Exhibit 1A, and it was turned over on its side. Mr. Williams also saw Petitioner's helmet on the floor in the lower left area of the room as depicted in Respondent's Exhibit 1A, and Petitioner was along the back wall. Mr. Williams also saw blood, water, and animal fat on the floor, which he testified makes the floor slippery. Mr. Williams asked Petitioner what had happened and Petitioner said the truck hit the auger system and knocked him off the stool.

Michael Welu was the plant manager for Respondent on March 1, 2013, and heard on a 2-way radio that Petitioner had been injured when a truck backed into the auger. Mr. Welu proceeded to the area because he was concerned if the auger had been wrecked there would have been 120,000 pounds of product on the floor. Upon arriving at the area, Mr. Welu saw the auger was running. Mr. Welu looked in the inedibles room and the garage area to see if there were any scratches where the truck hit the auger and did not find any damage to the auger or the trailer, and did not need to use the ladder in the garage area during his inspection of the auger and truck.

Mr. Welu, the truck driver, Rod Shults, other personnel from Darling International, and Mr. McCarty, performed a re-enactment of the accident. Mr. Welu testified this re-enactment occurred about one month after March 1, 2013. Mr. Welu is not an accident reconstruction expert and does not hold any licenses or certifications in accident reconstruction but wanted to see if there were issues with the trucks and trailers backing into the garage area. An empty trailer similar to the one involved on March 1, 2013, was used during the re-enactment, which lasted about 10-15 minutes. During the third attempt in re-enacting the accident, the trailer impacted the chute of the auger in the garage area, which caused the auger in the inedibles room to move to the east 2-3 inches, which Mr. Welu described as a sliding movement and not a jarring movement. Mr. Welu also described the auger in the garage area as sturdy, but the auger in the inedibles room was easily moved.

Mr. Welu concluded the truck and trailer backing up could not move the auger system so as to have an adverse effect on a person in the inedibles room. There was no record made by Respondent of the trailer involved on March 1, 2013, the fullness of the trailer with inedibles on March 1, 2013, the location

of Petitioner in relation to the auger on March 1, 2013, and the speed of the truck involved. Mr. Welu inspected the trailer and auger after the impact during the re-enactment and again did not see any damage.

Mr. Welu stated the employee in the inedibles room usually stands south of the auger, somewhat to the east of center, but not on the east side of the auger. Mr. Welu explained the employee in the inedibles room needs access to the gray switch box shown in Respondent's Exhibit 1A, as this switch raises and lowers vats into the auger, and the employee has to have a hand on the gray switch box at all times. However, the worker depicted in Respondent's Exhibit 1A does not have one hand on the gray switch box at all times. Mr. Welu concluded the employee in the inedibles room could not do the essential functions of the job from the east side of the auger, but acknowledged the employee in the inedibles room does not have to be near the gray switch box to push down the inedibles into the auger and the employee shown in Respondent's Exhibit 1A was using both hands when pushing with the push stick, which is a device used to push inedibles down into the auger.

Rod Shults has been employed as a semi-truck driver for Darling International for several years, and described the trailers used by Respondent as dump trailers from different manufacturers that are basically the same length, width, and depth. Mr. Shults explained when he is assigned to haul byproducts from Respondent, he hauls an empty trailer from Mason City to Respondent, parks the empty trailer along the service road north of the garage area, and then checks the contents of the trailer being loaded in the garage area of Respondent using the ladder located between the bays. Mr. Shults described Respondent's Exhibit 2A as showing a trailer in the west bay that sits closer to the auger, and Respondent's Exhibit 2B as showing a trailer in the east bay. He stated he drives north and south when taking trailers in and out of the bays. Mr. Shults further explained that once a trailer is full, he pulls the trailer out of the garage area, parks the full trailer, hooks up the empty trailer, and then backs the empty trailer into the empty bay going at a very slow pace, which he estimated to be 1-2 miles per hour, so he does not hit anything. Once a trailer is in a bay, Mr. Shults spots the trailer so the inedibles can be loaded and then once the trailer is full, the trailer is tarped and taken back to Mason City. Mr. Shults noted there is a wall between the garage area and the inedibles room where an employee of Respondent is working the auger.

On March 1, 2013, Mr. Shults arrived at Respondent's facility sometime between 11:30 a.m. and noon, and checked to see how full the trailer in the west bay was by climbing the ladder, but did not look around the trailer to see if it had any scratches or dents. He testified that at that time the trailer was approximately half full. Mr. Shults had not placed that trailer in the west bay and did not look to see where the trailer was in relation to the truck stop on March 1, 2013, but said the trailers extend about a foot beyond the back tires. Mr. Shults then backed the truck up, intending to connect the truck with the trailer. He described the impact that occurred in connecting the pin into the fifth wheel as feeling resistance and estimated the trailer moved backwards 1-2 inches even though the brakes on the trailer are locked. Mr. Shults then pulled the trailer in the west bay forward at a fast pace approximately 25 feet so to shift the load, and then backed the trailer into the west bay at a speed of 1-2 miles per hour. Mr. Shults only moved the trailer in the west bay forward one time on March 1, 2013. Mr. Shults also testified that after parking the truck, the trailer is usually about 10 inches away from the auger.

Mr. Shults stated nothing unusual occurred when he was backing up the trailer on March 1, 2013. As he proceeded to get out of the truck and climb the ladder to see if the trailer was positioned correctly, he saw Mr. Welu come into the garage area and look behind the trailer, but did not see Mr. Welu inspecting anything. Mr. Shults returned to his truck and while looking in his mirror, saw several individuals gathered in the inedibles room, and he proceeded to the inedibles room and was told he had backed up and hit the auger. Mr. Shults then went behind the trailer and looked at it and did not see any scrapes or dents on the trailer, but did not inspect the auger. Mr. Shults did not believe that the accident

could have happened the way Petitioner described, but apologized to Petitioner if he did anything that caused Petitioner to fall off the stool. Mr. Shults described the resistance he feels when backing up into something and stated how quickly he stops depends on his reaction time. Mr. Shults prepared Respondent's Exhibit 11 with the assistance of his boss, Kevin Curry, and stated it accurately reflected what occurred on March 1, 2013, but it did not state Mr. Shults had checked the trailer to see how full it was on March 1, 2013, before he hooked the trailer to the truck, or that Mr. Shults checked the trailer for damage on March 1, 2013, after learning of the accident.

Mr. Shults took part in the re-enactment of the accident by Respondent and was not instructed to bring any specific truck or trailer but chose the ones he normally uses and stated they were similar to the ones used on March 1, 2013. While Mr. Welu testified the re-enactment occurred a month following March 1, 2013, Mr. Shults testified that it occurred about a week after that date. At the time of the re-enactment, the truck was already connected to the trailer and Mr. Shults only backed up the empty trailer during the re-enactment. Mr. Shults was asked to place the trailer at an angle to have it push the auger to see the reaction of the auger, and was able to have the trailer impact the auger, but Mr. Shults was operating at a speed less than what he described he was traveling on March 1, 2013 (which would have been less than 1-2 miles per hour based on his prior testimony). After the impact during the re-enactment, Mr. Shults saw no damage to the trailer and was told the auger system did not move. As stated *supra*, Mr. Welu confirmed that the auger did in fact move when the truck struck the auger during the re-enactment.

Bruce Armstrong was the "kill floor supervisor" for Respondent on March 1, 2013, and supervised Petitioner, who had been assigned dumping inedibles that day. On March 1, 2013, Petitioner came to Mr. Armstrong and told him a Darling truck driver backed a truck into the auger, and the two of them then completed the accident report shown in Petitioner's Exhibit 9 and Respondent's Exhibit 4. Mr. Armstrong has operated the auger system and noted the employee has to have access to the gray switch box to get the dumper to lift the vat up, but the employee does not have to have a hand on the gray switch box when pushing inedibles, and the position of the employee depends on what is being dumped and normally this is in the center of the auger system. Mr. Armstrong testified that when dumping inedibles into the auger and using the push stick, that both hands are used when utilizing the push stick. Mr. Armstrong also testified that nothing prohibits an employee working at the auger on the stool to from using the stick on the right side of the auger, and that in fact the stool can move around. He confirmed that there was no rule to the effect that an employee had to stay at the center of the auger.

Petitioner testified that at the time of his alleged accident, he was standing to the right (east) of the auger because a flap was present that interfered with his elbow room when he was using the push stick.

CONCLUSIONS OF LAW

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

Petitioner sustained an accident arising out of and in the course of his employment on March 1, 2013. The undisputed evidence showed while Petitioner was pushing heads down the auger in the inedibles room with the push stick, the auger pushed into the right side of Petitioner's chest, which caused Petitioner to be knocked off balance, the step stool Petitioner was standing on to fall out from underneath him, and Petitioner to grab onto the auger so as not to fall to the floor. While Petitioner did not hear or see the truck strike the auger, based on the circumstantial evidence of the auger pushing into his chest and seeing a truck pulling forward out of the garage area where the auger system was located, Petitioner concluded the truck struck the auger in the garage area, and reported this to his supervisor and all medical

personnel he saw thereafter. Another employee who came upon Petitioner in the inedibles room right after the accident occurred, Aaron Williams, identified physical evidence of the accident consistent with the testimony of Petitioner, in that the step stool used by Petitioner was on its side and in the eastern portion of the room, while Petitioner's helmet was on the floor. In addition, the medical records of Provena Covenant Medical Center and SafeWorks corroborated the testimony of Petitioner that his right chest area had been struck by the auger during the accident, as there were findings of tenderness over the sternum and tenderness over the right pectoral muscle.

Respondent disputed the accident occurred because there was no damage to the auger, but acknowledged the auger in the garage area was sturdy and the auger in the inedibles room was easily moved, and a re-enactment of the accident by Respondent with variables not entirely consistent with the accident of March 1, 2013, showed an impact between the trailer and auger caused the auger system in the inedibles room to move to the right several inches even though there was no visible damage to the auger in the garage area and the trailer. While Mr. Welu described this movement of the auger system during the re-enactment as a sliding motion rather than a jarring motion, a reasonable inference is that whatever the nature of the movement, it was unexpected by Petitioner who had both hands on the push stick pushing heads down into the auger at the time of the impact. The location of Petitioner at the east end of the auger system at the time of the accident and thus, in the direct path of the movement of the auger in the inedibles room after being struck by a trailer in the west bay of the garage area is consistent with Petitioner describing the contact to his chest as a push. It is noteworthy Petitioner told all medical providers of the impact to his right chest area and submitted a diagram of the inedibles room with the push stick in the east corner of the auger system, Petitioner's Exhibit 6, before Petitioner knew the re-enactment of the accident by Respondent would corroborate movement of the auger system in the inedibles room to the east where Petitioner was located. Finally, the impact between the trailer and the auger in the garage area most likely occurred when the truck driver backed the truck up to connect the truck to the trailer, as the undisputed evidence showed the truck driver had not determined the proximity of the trailer to the auger and had not considered any allotment for whatever movement of the trailer occurred during the connection, and Petitioner described the trailer as pulling forward after the accident when Petitioner saw the trailer through the gap in the wall above the auger. It is also of note that Petitioner answered all questions posed to him, including those on cross-examination, in a forthcoming manner.

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

Petitioner's conditions of ill-being in his right knee and right shoulder are causally related to the work accident of March 1, 2013. The sequence of events evidence supports this, as the undisputed evidence showed Petitioner had not sustained any injuries nor experienced any complaints, and received no treatment to his right knee and right shoulder before the accident of March 1, 2013, and had been able to perform his duties as a team leader without any complaints involving his right knee and right shoulder, until the accident on March 1, 2013. The medical records corroborated findings of injuries including tenderness around the right AC joint area, a slightly positive impingement test, swelling around the medial aspect of the knee, and tenderness along the medial collateral ligament region.

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 the medical services provided to Petitioner were reasonable and necessary in treatment of Petitioner's conditions of ill-being. The medical records support the services Petitioner received were reasonable and necessary, with the majority of services prescribed by

Respondent's own physician, SafeWorks. (PX 1-5). Accordingly, Respondent shall pay necessary and reasonable medical services of $3,811.48 (PX 8), subject to the medical fee schedule, Section 8.2 of the Act.

Issue (K): Is Petitioner entitled to any prospective medical care?

The recommended surgery for Petitioner's right knee is reasonable and necessary in treatment of Petitioner's condition of ill-being, and Respondent shall authorize this surgery and pay the reasonable and customary charges for the surgery, subject to the medical fee schedule, Section 8.2 of the Act. Dr. Li, an orthopedic surgeon, recommended a right arthroscopic knee surgery for Petitioner, and Petitioner expressed he wants to proceed with this surgery.

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

Petitioner was temporarily totaled disabled from March 15, 2013 through May 1, 2013, the date of the hearing, representing 6 6/7 weeks. Respondent had no objection to the period of temporary total disability, only its liability for these benefits. The medical records corroborated Petitioner was temporarily and totally disabled and had not reached maximum medical improvement for his injuries. Accordingly, Respondent shall pay temporary total disability benefits for the aforementioned period.

Issue (M): Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that Respondent's actions in the defense of the present claim are not unreasonable or vexatious. Accordingly, penalties and fees are not imposed upon Respondent.

14IWCC0532

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HORACIO MARTIN PEREZ,

Petitioner,

vs. NO: 11 WC 13255

METRO STAFF, INC.,

14IWCC0533

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

The Commission finds that Petitioner failed to prove that $4,758.00 in transportation charges were reasonable and necessary medical expenses. As such, we reduce the award for Marque Medicos Pain & Surgical Specialists by $3,908.00 and the award for Ambulatory Surgical Care Facility by $850.00. The remainder of the medical bills shall be paid pursuant to the medical fee schedule in Section 8.2 of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $264.70 per week for a period of 28-4/7 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 $238.23 per week for a period of 112.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 22.5% loss of use of the person as a whole.

14IWCC0533

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $303,997.95 for medical expenses under §8(a) of the Act pursuant to the medical fee schedule in Section 8.2 of the Act.

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

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

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

DATED: JUL 0 7 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 5/22/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PEREZ, HORACIO MARTIN
Employee/Petitioner

Case# **11WC013255**

14IWCC0533

METRO STAFF INC
Employer/Respondent

On 2/19/2013, 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 0.12% 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:

2553 McHARGUE, JAMES P LAW OFFICE
MATT JONES ESQ
100 W MONROE ST SUITE 1112
CHICAGO, IL 60603

0766 HENNESSY & ROACH PC
BRIAN H DRISCOLL ESQ
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

14IWCC0533

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

Horacio Martin Perez
Employee/Petitioner

v.

Metro Staff, Inc.
Employer/Respondent

Case # **11** WC **13255**

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 **George Andros**, Arbitrator of the Commission, in the city of **Geneva**, on **March 13, 2012& September 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 _____

FINDINGS

On **November 15, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$20,646.60**; the average weekly wage was **$397.05**.

On the date of accident, Petitioner was **26** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $264.70/week for 28 4/7 weeks, commencing May 27, 2011 through December 13, 2011, as provided in Section 8(b) of the Act.

Medical benefits

Respondent is liable to pay to Petitioner and his attorney the following amounts for reasonable and necessary medical services of: Elite Physical Therapy, $8.975.78; Dr. Robert Erickson, $112,991.00; Lake County Neuro., $27,000.00; Metro Anesthesia, $9,625.63; Prescription Partners, $245.50; Specialized Radiology, $55.00; Quest Diagnostics, $84.95; Marque Medicos, $26,418.70; Medicos Pain & Surgical Specialists, $12,706.20; Ambulatory Surgical Care Facility, $110, 653.19, as provided in Section 8(a) of the Act. All amounts to be awarded pursuant to the applicable IWCC Fee Schedule and adopted rules and regulations..

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $238.23/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.

#01 George J. Andros
Signature of Arbitrator

Feb 11, 2013
Date

FEB 19 2013

Findings of Fact & Conclusions of Law 11 WC 13255

On November 15, 2010, Petitioner, Horacio Martin Perez, was employed by Respondent, Metro Staff, Inc., where he had been so employed for a year and a half. (Tx. 8) During this entire period, Metro Staff had dispatched the Petitioner to work at a factory called Arthur Shuman. (Id.) Petitioner's position at this factory was that of a laborer. (Tx. 10) Petitioner was required to lift 45 pound blocks or boxes of cheese and place them on a conveyor belt. (Id.) These boxes were on the floor and Petitioner would have to lift them from the floor to the conveyor belt, which was at waist-level. (Id.) Petitioner was doing these work activities on November 15, 2010. (Id.) He was working his normal 5:00 AM to 4:00 PM shift that day, and at approximately 8:00 AM, Petitioner was lifting a 45 pound box and felt a pulling sensation and immediate pain in the central portion of his lower back. (Tx. 11) Petitioner reported the accident to his supervisor, Sergio Ramon Mibelli, immediately and filled out an accident report.

Petitioner was sent to Physicians Immediate Care by Respondent on November 15, 2010 during his shift. (Tx. 12) Petitioner was seen by Dr. Warren Wollin that day. (Tx. 13) The notes of Dr. Wollin indicate that on that date the Petitioner was experiencing severe low back pain with radiation down the right leg to the knee. Dr. Wollin provided Petitioner with some medications and a light duty work note and sent him back to work the rest of his shift. (Id.) Petitioner was placed in a light duty position where he was packing boxes and lifting no more than 25 pounds. (Id.) Petitioner continued to treat with Dr. Wollin following the date of accident. The Petitioner's radicular symptoms appeared intermittently, at times bilateral in nature, though his axial low back pain consistently remained the same, with Dr. Wollin noting negative Waddell's signs at every single visit throughout his care. The Petitioner began a physical therapy regimen per Dr. Wollin's recommendation on November 29, 2010. (Id.) Petitioner was kept at light duty restrictions until January 4, 2011, at which time, Dr. Wollin released him to work full duty, while continuing to treat the Petitioner. (Tx. 14) Petitioner testified that he continued to work the light duty packing position even after Dr. Wollin's full duty release.

Petitioner credibly testified at trial that he did not receive any benefit from the physical therapy that was completed at Physicians Immediate Care. (Tx. 14) Dr. Wollin recommended Petitioner undergo a lumbar MRI on January 11, 2011, and this was completed on January 22, 2011. (Tx. 14-15) While the Petitioner's radicular complaints largely subsided in January of 2011, they returned in February once again, worsening down his right leg while working. The lumbar MRI showed disc degeneration and small protrusions at L4-5 and L5-S1, as well as mild left lateral recess and neuroforaminal stenosis at L4-5 and borderline left neural frontal stenosis at L5-S1. (Pet. Ex. 2) Petitioner continued to treat with Dr. Wollin following the lumbar MRI. Dr. Wollin referred Petitioner to have a consultation with Dr. Babak Lami during Petitioner's February 17, 2011 visit. (Pet. Ex. 1) Petitioner was seen by Dr. Lami on February 23, 2011. (Tx. 15) Dr. Lami opined that Petitioner was not a surgical candidate and recommended home exercises and as needed anti-inflammatories. (Pet. Ex. 1) Dr. Wollin discussed this with Petitioner on March 17, 2011. (Id.) Petitioner stated that he was having more pain in his back and rated the pain at an 8/10 at that visit. (Id.) Dr. Wollin released Petitioner from care on March 17, 2011. (Id.)

The Arbitrator underscores the incongruity of Dr. Wolin finding the worker essentially at maximum medical improvement plus capable of full duty when 1) his pain waxes and wanes , the Petitioner rates his pain at 8/10 at that visit and by all doctor's accounts this worker is not a symptom magnifier. No typical distraction test or SLR resulted in any recordation of non anatomic pain distribution. As this unfolds the focus of the Respondent doctors' opinions turn on radiographic study and the ultimate surgeon in his deposition opinion on surgical remediation turns on the total clinical picture of the patient along with a highly sophisticated electrodiagnoistic SEEP .

This total clinical picture provides the tipping point for this Arbitrator to decide in the affirmative on the necessity of surgery by way of Dr. Robert Erickson explaining the benefit, usage and results of the SEEP electro diagnostic testing.

Petitioner testified that he continued to work in the light duty packing position following his discharge from Physicians Immediate Care. (Tx. 15) Petitioner was still feeling pain in his low back with radiation to his left leg at this time, and presented to Dr. Daniel Johnson at Marque Medicos on March 29, 2011. (Tx.16) Dr. Johnson placed Petitioner back in a physical therapy regimen of three times a week, and also gave Petitioner light duty restrictions of no lifting greater than 20 pounds. (Tx. 16-17) These restrictions were accommodated by Respondent. (Tx. 17)

Petitioner saw Dr. Andrew Engel a pain specialist at Marque Medicos for the first time on April 4, 2011. (Id.) Dr. Engel recommended medications and an EMG. (Id.) The EMG was completed April 8, 2011 and showed electrophysiologic evidence of acute denervation and reinnervation of the left S1 nerve root. (Pet. Ex. 2) The Arbitrator clearly realizes the interpretation of all tests and findings put the decision on surgery into the realm of judgment of physicians.

Following the EMG, Petitioner met with Dr. Engel on April 25, 2011. (Id.) Dr. Engel recommended Petitioner undergo a left L5 and S1 transforaminal epidural steroid injection to try to relieve Petitioner's 7/10 pain with radiation down his left leg into his left foot. (Id.) Petitioner received this injection on May 4, 2011. (Tx. 18) Petitioner testified at trial that he felt relief of the pain in his left leg for approximately four days following the injection. (Id.) Dr. Engel recommended Petitioner undergo a second epidural steroid injection on May 10, 2011, but Petitioner did not want to have another injection at that time. (Pet. Ex. 2) Thereafter,Dr. Engel also referred Petitioner to Dr. Robert Erickson, a neurosurgeon, at this visit. (Id.)

Petitioner first met with Dr. Erickson on May 27, 2011. (Tx. 18) the history shows that his leg pain had returned by that time. The utilization review doctor ignored that part of the record. Below are the conclusions of the admissibility of his opinion and weight of the same given his woefully inadequate credentials to deal with this very complex spine injury case.

Dr. Erickson recommended that Petitioner undergo somatosensory evoked potential testing, or SSEP testing, to determine whether a nerve impingement truly existed, noting the Petitioner's ongoing sciatica and low back pain. (Pet. Ex. 5) This test was completed on May 27, 2011, as well. (Id.) The SSEP test showed significant delay on the right side at L5 and S1, which Dr. Erickson explained to have been objectively positive in support of the existence of a neurological impingement requiring surgery. (Id.) Dr. Erickson presented the option of minimally invasive hemilaminectomy at L4-S1 on the right and left to treat Petitioner's symptoms on June 10, 2011. (Id.)

Petitioner agreed to undergo the surgical procedure, and it was completed on June 29, 2011. (Id.) Petitioner testified that his pain diminished greatly in the weeks following the surgery, and his lower extremity symptoms essentially disappeared altogether thereafter. (Tx. 20) Petitioner began a post-operative physical therapy regimen on July 14, 2011. (Tx. 20) Petitioner developed an area of fluid collection near the surgical incision in the weeks following surgery. (Tx. 20) Dr. Erickson ultimately decided to have Petitioner undergo a second surgical procedure to debride the wound and determine whether a more serious infection was developing at the wound site, which was performed on August 17, 2011 because the fluid was not dispersing on its own and was causing Petitioner discomfort. (Pet. Ex. 5) Following this second procedure, Petitioner had no other issues with the surgical site. (Tx. 21) Petitioner continued physical therapy beginning in early-September 2011. (Pet. Ex. 5)

Petitioner continued with physical therapy until September 26, 2011 when Dr. Engel recommended he complete a Functional Capacity Evaluation and begin work conditioning. (Tx. 21) The FCE was completed on October 13, 2011 and Petitioner began a work conditioning program at this time. (Id.) Petitioner completed this program and was discharged to full duty work on December 13, 2011. (Tx. 22) Petitioner reported his pain as 1/10 with no radiation into his left leg at his December 13, 2011 visit with Dr. Engel. (Pet. Ex. 2) Petitioner testified that prior to the work conditioning program, he did not have much confidence in his ability to lift. (Tx. 22) However, following the work conditioning program, Petitioner was able to lift more weight and had greater flexibility. (Id.) Petitioner saw Dr. Erickson once more on December 21, 2011. (Pet. Ex. 5) Dr. Erickson agreed with the decision to discharge to full duty work and released Petitioner from his care. (Id.)

Petitioner testified he is still working at the Arthur Shuman factory for Respondent doing packing work. (Tx. 23) This work requires that he assemble boxes and place them on a conveyor belt. (Id.) Petitioner testified that he still does not have the confidence to lift a lot of weight and feels pressure near the surgical site when turning or shifting the body rapidly. (Tx. 24) Petitioner also testified that he must change positions often during sleep, cannot play soccer or run, and cannot be seated for too long without discomfort. (Tx. 25) Finally, Petitioner stated that he feels pain near the surgical site in cold weather, and at times, must take Tylenol or Advil to manage this pain.

Also studied were the evidence depositions of: Dr. Robert Erickson, Petitioner's neurosurgeon; Dr. Ryon Hennessy, Respondent's Section 12 examiner; and Dr. Bart Olash, who completed a Utilization Review of Petitioner's medical records.

Arbitrator's Conclusions of Law

With regard to issue F, is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator concludes as follows:

Based upon the totality of the evidence, the Arbitrator finds as a matter of law and fact that a causal relationship does exist between Petitioner's injury at work on November 15, 2010 and his current condition of ill-being, specifically, successfully treated spinal pain with nerve impingement at the L4-5 and L5-S1 levels causing radiculopathy.

The Arbitrator bases this decision on Petitioner's credible testimony, the temporal relationship between the onset of symptoms and his activities at work as testified to by Dr. Erickson at pages 30 and 31 of his evidence deposition. Moreover the Arbitrator finds the complaints and findings of the doctors at Marque Medicos to be consistent with the worker's complaints and later findings by the neurosurgeon- a long time professor at the University of Chicago medical school. The
Arbitrator finds the opinions of Dr. Erickson to be highly persuasive.
This is in part due to his frank acknowledgement as to the "debate regarding the significance of change at L5-S1 and whether there is a true nerve compression. See Dep page 8, lines 17-20." I thought there was enough uncertainly here- he was not doing well". Lines 22-23.

Determinative of adopting his opinion is the above plus hs testimony at pages nine through 12. Dr. Erickson discusses the MRI , changes at l5-s1, the EMG, and on page 10:line one, the acute denervation.

Any reader of this Award needs to put in context all the treatment with Dr Erickson's use of the SEEP to corroborate the increase in pain to the lack of clarity of significant pathology on the radiographic MRI.
His long explanation of SEEP at page 10 is a mini treatise on sophisticated treatment of difficult low back cases. At page 12, lines 16-21 the neurosurgeon explains that the SEEP finds things not determinative in an EMG.

Again, the medical opinions of the neurosurgeon and former professor at University of Chicago were far more sophisticated than the circumspect, equivocal and seemingly unpreprepared or at least unfocused answers of Dr. Ryon Hennessey, Respondent's section 12 examiner. The testimony and medical sophistication expressed in print by Dr. Hessessy pales to that of Dr. Erickson, the neurosurgeon.

Yes, the Arbitrator acknowledges the cross examination of Dr. Erickson by a very well prepared defense counsel making every effort to cloud the opinions, motives and credibility of Dr. Erickson – simply because Marque Medicos referred him the patient. Dr. Erickson acknowledged he gets some referrals as well as other doctors referred to by Medicos.

Arbitrator does not find the opinions of or Dr. Ryon Hennessy to be r persuasive on the issue of causal connection. His answers were vague , fraught with generality and he seemed to fade from the questions rather than deal with the lack of clarity of this back condition, found in many circumstances.

Petitioner's treating physicians have all stated that his lumbar spine condition is causally related to his reported work injury. Petitioner testified credibly at trial that his pain began immediately with the work injury on November 15, 2010. Petitioner felt pain in the center of his low back on the date of the accident. There was an unbroken chain of consistent pain complaints from the date of accident through the surgery performed by Dr. Erickson on June 29, 2011. There has been no evidence presented to suggest an intervening accident. Petitioner also testified credibly that he had not experienced any low back injuries or pain prior to November 15, 2010.

While intermittent in nature, the Petitioner experienced radicular symptoms to his lower extremities immediately following the injury, and consistently thereafter, through the date of surgery. This radicular component was temporarily resolved with his epidural injection, which Dr. Engel and Dr. Hennessey have remarked to have been significant in demonstrating a spinal component in the Petitioner's condition. The overwhelmingly positive response to surgery further lends weight to this finding, as noted in the testimony of both Dr. Erickson and Dr. Hennessey, who very early on in the charts previously opined that the Petitioner suffered a lumbar strain.

Petitioner's neurosurgeon, Dr. Robert Erickson, testified to Petitioner's condition and the need for surgery in his evidence deposition. When he first met with Petitioner on May 27, 2011, Dr. Erickson reviewed the EMG test from April 8, 2011, which showed S1 abnormality on the left. (Pet. Ex. 5) Dr. Erickson also reviewed the lumbar MRI from January 22, 2011, which showed some lateral recess stenosis at L5-S1. (Id.) Dr. Erickson noted that there had been some discussion during the April 22, 2011 IME with Dr. Ryon Hennessy regarding the significance of a change at L5-S1 and whether or not there was true nerve compression. (Id.) In order to address this issue, Dr. Erickson sent Petitioner for an SSEP test to determine the true source of Petitioner's pain complaints. (Id.) Dr. Erickson stated that he uses the SSEP test in almost every spinal procedure and as a diagnostic test in many spinal procedures. (Pet. Ex. 13) He stated that the SSEP is more sensitive than an EMG test and provides immediate feedback, and testified that he finds it to be a highly reliable test. (Id.) The SSEP test was informative and showed significant delay on the right side at L5 and S1. (Pet. Ex. 5)

Based on Petitioner's complaints of right-sided sciatica, the MRI scan, which was not definitive in demonstrating nerve compression, and the SSEP, which correlated with Petitioner's pain complaints, Dr. Erickson decided to present Petitioner with the option of hemilaminectomy, otherwise known as nerve root decompression. (Pet. Ex. 13) Petitioner consented to this procedure and it was performed on June 29, 2011. (Id.) During the procedure, the nerves at L4-5 on the right and left and L5-S1 on the right were decompressed. (Id.) SSEP testing was done during the procedure and all evoked potentials returned to values of 0.8 standard deviations or less, from the pre-surgical level of 1.0 standard deviations. (Id.) Dr. Erickson stated during his deposition that evoked potentials of 1.0 standard deviations meant he was 95 percent sure something was wrong with the nerve at that level. (Id.)

When asked directly about a causal connection between Petitioner's symptoms and his mechanism of injury, Dr. Erickson stated that there was a direct association in time with the injury described and the onset of his pain. (Id.) A temporal relationship seemed clear. (Id.) Dr. Erickson went on to say that there was a disk abnormality at L5-S1 that probably occurred at the time of the lift injury. (Id.) This was the only abnormality seen on the MRI and during surgery. (Id.) This abnormality either directly or indirectly contributed to the narrowing of the nerve outlets on the right side of the spine and his condition at the time of surgery. (Id.)

The Utilization Review by Dr. Olash and all his testimony is stricken as a matter of law. Dr. Olash, despite some artful semantics trying to address the necessity of the surgery, does nothing but focus his Utilization Review report on the lack of causal connection. Utilization Review reports as a matter of law can not address that issue. Morever, his opinion is tainted by the use of a section 12 examination in formulating his opinion on causation.

Even if the law allowed a UR doctor to address causation in formulation of his opinion, the Arbitrator is shocked that Respondent would delegate the choice of experts to someone who picks an *internal medicine specialist* whose focus is rheumatology. The Arbitrator studied his CV over and over to find some nexus to the type of case at bar, a complex spine condition case, and found none.

Assuming his report was deemed admissible on Review, the doctor's lack of knowledge of the medical records is even to this Arbitrator, an embarrassment to his position.

Dr. Olash opined that Petitioner had presented with a consistent musculoligamentous injury without any evidence of radiculopathy resulting from the injury. (Olash Ev. Dep. 13) However, Dr. Olash admitted during his deposition that he was not aware of Petitioner's complaints of intermittent numbness and tingling down both legs to his feet reported on November 29, 2010 with Dr. Wollin. (Id. at 20) He also was not aware of those same complaints being reported on December 16, 2010 with Dr. Wollin. (Id. at 22)

Finally, Dr. Olash admitted that he was not aware that Petitioner was found to have a positive straight leg raise test bilaterally on March 29, 2011 with Dr. Engel. (Id. at 23) Dr. Olash agreed that radicular pain can wax and wane and be present some days and not others. (Id. at 30) Dr. Olash said he was not aware of any intervening accidents that could have occurred during his treatment period. (Id. at 24)
Finally, without any indication of an alternate cause of a later spinal injury at issue, Dr. Olash agreed that the injections and surgery were wholly appropriate and reasonable and necessary for the Petitioner's condition.

The opinions of Dr. Hennessy are not credible with respect to Petitioner's condition either. Dr. Hennessy completed an independent medical examination of Petitioner on April 22, 2011. Dr. Hennessy stated that Petitioner was at maximum medical improvement as of March 17, 2011 and had no disability or impairment that would prevent him from working. (Hennessy Ev. Dep. 12) Dr. Hennessy stated that Petitioner did not show any signs of symptom magnification during the examination on April 22, 2011. (Id. at 18) Petitioner reported pain of 7/10 at that visit. (Id.) Petitioner did not report radicular complaints at that visit, but he had reported them consistently in notes from other doctors' visits. (Id.) Dr. Hennessy said it was not unusual for a person to experience radicular pain some days and not others. (Id. at 19) Dr. Hennessy was not aware of the fact that Petitioner had undergone a nerve root decompression surgery on June 29, 2011 until it was mentioned to him during the deposition. (Id. at 22)

He admitted that if someone improves from a surgery, it is a fair indicator that the pathology that was operated on was symptomatic. (Id. at 28) Dr. Hennessy also was not aware of the epidural steroid injection that Petitioner received on May 4, 2011. (Id. at 30) He admitted that these injections can be diagnostic in nature if a patient shows improvement, even temporarily. (Id. at 30-31) Dr. Hennessy agreed that Petitioner's temporary relief after the epidural steroid injection may have changed his opinion on Petitioner's condition. (Id. at 31) Therefore, the Arbitrator also finds Dr. Hennessy's opinions regarding causality are not credible or persuasive.

The Arbitrator finds that, in light of the most persuasive and extremely medically sophisticated testimony of Dr. Erickson, as supported by the credible testimony of the Petitioner, the preponderance of the evidence presented at trial supports a finding as a matter of law that the Petitioner's current condition of ill-being is causally related to his accident at work, and that the Petitioner clearly sustained a spinal injury as opposed to a mere sprain/strain, as initially diagnosed.

With regard to issue J, were the medical services provided to the Petitioner reasonable and necessary, the Arbitrator concludes as follows:

Having found for Petitioner on the issue of causal connection, the Arbitrator also finds that the medical treatment provided to Petitioner was reasonable and necessary, and that Respondent is liable for all unpaid medical bills related to the injury the Petitioner sustained at work on November 15, 2010. The Arbitrator bases this decision on the credible testimony of Petitioner, along with the opinions of Petitioner's treating physicians.

Petitioner began his treatment with Dr. Wollin at Physicians Immediate Care, which is where Respondent sent him, on the date of the accident, November 15, 2010. Petitioner received medications and was placed on light duty initially. He then began a physical therapy regimen at Physicians Immediate Care. Petitioner underwent 20 sessions of physical therapy with this facility. These physical therapy sessions did not provide Petitioner with any relief. Petitioner also underwent an MRI of the lumbar spine on January 22, 2011, which showed disc degeneration and small protrusions at L4-5 and L5-S1, as well as mild left lateral recess and neuroforaminal stenosis at L4-5 and borderline left neural frontal stenosis at L5-S1. (Pet. Ex. 2) Petitioner was evaluated by Dr. Babak Lami on February 23, 2011 and told he was not a candidate for surgery or epidural steroid injections. Petitioner was discharged from care with Dr. Wollin to full duty work on March 17, 2011. Petitioner was discharged despite the fact that he reported 8/10 pain in his lumbar spine at this same visit. Petitioner also was still working in the same light duty position as he had been since the date of accident as of March 17, 2011.

Petitioner was still feeling significant pain in his low back that radiated down his left leg after his discharge from Physicians Immediate Care. Therefore, he sought treatment with Dr. Daniel Johnson at Marque Medicos on March 29, 2011. Dr. Johnson placed Petitioner back on a physical therapy regimen and gave him light duty restrictions of no lifting over 20 pounds.

Dr. Johnson referred Petitioner to Dr. Andrew Engel, who first saw Petitioner on April 4, 2011. Dr. Engel had Petitioner undergo an EMG to determine the cause of his lumbar pain and radicular complaints. This procedure was completed on April 8, 2011 and showed electrophysiologic evidence of acute denervation and reinnervation of the left S1 nerve root. (Pet. Ex. 2)

Given that Petitioner showed pathology on the EMG test and was still experiencing radicular pain down his legs, Dr. Engel administered left L5 and S1 epidural steroid injections on May 4, 2011. This injection provided Petitioner with relief of his radicular symptoms for four days. Petitioner decided not to undergo a second epidural steroid injection.

Following this course of conservative care, Dr. Engel referred Petitioner to Dr. Robert Erickson, a neurosurgeon. Dr. Erickson ordered an SSEP on May 27, 2011 to determine if there was a true nerve compression causing Petitioner's low back pain and radicular symptoms. The SSEP showed a significant delay on the right side at L4 and S1. These findings confirmed that there was a true nerve compression causing Petitioner's pain. Based on the subjective complaints, MRI findings, and SSEP findings, plus the fact that Petitioner had experienced his pain for over 6 months, Dr. Erickson determined that a hemilaminectomy would be an appropriate procedure. He discussed the procedure with Petitioner, who consented. The procedure was performed on June 29, 2011. Petitioner underwent a second necessary procedure on August 17, 2011, to resolve a spinal fluid leak that had collected under Petitioner's skin and was causing him discomfort. Petitioner felt a large amount of relief from the hemilaminectomy, saying that his back pain diminished, and his leg pain was now only occasional. Petitioner participated in a post-operative physical therapy regimen during July, August, and September of 2011.

On September 27, 2011, Dr. Engel recommended Petitioner undergo a Functional Capacity Evaluation. This was completed on October 13, 2011. Petitioner then began a work conditioning program. Petitioner successfully completed this program and was discharged by both Drs. Engel and Erickson to full duty work on December 13 and December 21, 2011, respectively. Petitioner reported that his pain level was down to 1/10 following the surgery and completion of the work conditioning program. Also, Petitioner was able to lift more weight and had greater flexibility.

Petitioner's treating physicians, Dr. Engel and Dr. Erickson, both opined in their records that the treatment provided was reasonable and necessary. The records from the treating physicians show that Petitioner's pain level decreased from 8/10 to 1/10 following his course of treatment. He appropriately progressed through conservative care to a surgical procedure, which was then followed by more physical therapy and a work conditioning program. Given this path, Petitioner was able to return to full duty work.

The Arbitrator does not find the opinions of Dr. Ryon Hennessy to be credible or persuasive regarding the reasonableness and necessity of Petitioner's treatment. Dr. Hennessy opined in his deposition testimony that Petitioner was at maximum medical improvement as of his discharge from Physicians Immediate Care on March 17, 2011. (Hennessy Ev. Dep at 14) However, Dr. Hennessy stated that Petitioner showed no signs of symptom magnification during his examination of Petitioner on April 22, 2011, at which time Petitioner had 7/10 pain complaints. (Id. at 18) Dr. Hennessy was not even aware of the surgical procedure Petitioner underwent until it was brought up during the evidence deposition. (Id. at 22) Dr. Hennessy said that he could not render an opinion regarding the reasonableness of this procedure given the fact that he had not seen the SSEP test results, nor the operative report from June 29, 2011. (Id. at 23-24) But, he did agree that generally speaking, when someone improves from surgery, it is a fair indicator that the pathology that was operated on was symptomatic. (Id. at 28) Dr. Hennessy was also not aware of the epidural steroid injection that Petitioner received on May 4, 2011 and the temporary relief Petitioner experienced. (Id. at 30) But, Dr. Hennessy did say that his opinion may have changed had he known that Petitioner experienced temporary relief of his radicular pain from the injection. (Id. at 31) Therefore, given Dr. Hennessy's complete lack of preparedness for the case, the lack of knowledge of Petitioner's later treatment and positive results, the Arbitrator does not find his opinions to be credible or persuasive in any way shape or form on the issue of reasonableness and necessity.

Petitioner's treating physicians, Dr. Engel and Dr. Erickson, each opined that the treatment rendered was reasonable and necessary. Respondent's IME physician stated that Petitioner was at MMI in March 2011, and was unaware that Petitioner continued to receive substantial benefit from the course of treatment that followed the examination.

Therefore, the Arbitrator awards as a matter of law under section 8 all of the bills for medical treatment rendered to date.

Specifically, this includes all treatment rendered from Elite Physical Therapy, Dr. Robert Erickson, Lake County Neurosurgery, Metro Anesthesia, Prescription Partners, Specialized Radiology, Quest Diagnostics, Marque Medicos, Medicos Pain & Surgical Specialists, and Ambulatory Surgical Care Facility. All dates of service noted in the records are awarded, pursuant to the Illinois Workers' Compensation fee schedule.

No medical evidence was presented from Dr. Hennessy that regardless of causation, the treatment modalities, frequencies or charges themselves were unreasonable. Thus, all bills admitted are Awarded to Petitioner and his attorneys under 8(a) subject to the fee schedule plus all adopted rules and regulations hereunder.

With regard to issue K, what is the amount of compensation due for temporary total disability, the Arbitrator concludes as follows:

Having found that the Petitioner's current condition of ill-being is causally connected to Petitioner's accident at work, the Arbitrator finds that the Petitioner is entitled to temporary total disability benefits for the period of May 27, 2011 through December 13, 2011, a period of 28 and 4/7 weeks. The Arbitrator bases this decision on the credible testimony of the Petitioner, along with the records of his treating physicians. Petitioner's treating physicians had him off work from the time the SSEP testing was done on May 27, 2011, through Petitioner's two surgical procedures and post-operative physical therapy, and Petitioner's participation in a work conditioning program. This course of treatment allowed Petitioner to return to full duty work as of December 13, 2011. Petitioner testified at trial that he would inform his supervisor with Respondent, Sergio Ramon Mibelli, each time he received a new off-work note throughout this entire period. (Tx. 27)

Dr. Wollin opined that Petitioner could return to full duty work on January 4, 2011. Dr. Wollin also opined that Petitioner could return to full duty work when he released Petitioner from his care on March 17, 2011. However, Petitioner credibly testified that even after these notes were provided, he continued to work the same light duty position with Respondent that he had been working since November 15, 2010. (Tx. 15) No physicians, other than Petitioner's treating physicians, commented on Petitioner's ability to work after the IME completed by Dr. Hennessy on April 22, 2011, which took place before Petitioner was ever taken off of work completely. It can be seen by Petitioner's later treatment and improvement that he was not close to MMI and capable of returning to full duty work as of his discharge from Physicians Immediate Care or his visit with Dr. Hennessy. Therefore, the Arbitrator does not find the opinions of Dr. Wollin or Dr. Hennessy to be credible in this regard.

Therefore, the Arbitrator orders the Respondent to pay to the Petitioner and his attorneys temporary total disability for the period of May 27, 2011 through December 13, 2011, a period of 28 and 4/7 weeks.

With regard to issue L, what is the nature and extent of the injury, the Arbitrator concludes as follows:

Having found for Petitioner on the issues of causal connection, medical treatment, and temporary total disability, the Arbitrator finds that Petitioner has been disabled to the extent of 22.5% of the person as a whole. The Arbitrator relies on the credible testimony of Petitioner, along with the credible opinions of Petitioner's treating physicians.

Petitioner was diagnosed with nerve compression at L4-5 and L5-S1. Petitioner underwent one epidural steroid injection, a nerve root decompression surgery, a necessary second surgery to resolve spinal fluid leakage at the original surgical site, and a work-conditioning program, in reasonable and necessary treatment of these injuries. Petitioner testified at trial that he is still working for Metro Staff, Inc. in the packing position that he has been working since November 15, 2010. This position requires that he assemble boxes, throw in some bags, and push them onto a conveyor belt.

Petitioner testified that compared with before the accident, he does not have the confidence or the trust to lift a lot of weight. He also stated that when he turns or shifts his body rapidly, he feels pressure at the surgical site as if it is stretching or might open. Petitioner stated that he has not attempted to lift more than 40 pounds in his current work for Metro Staff, Inc.

Petitioner has also experienced changes in his life outside of work since the accident on November 15, 2010. He stated that he cannot sleep well and must change positions often during sleep due to discomfort. Petitioner is unable to play soccer or run, as he did before the accident. He cannot remain seated for too long of a time period without discomfort. Petitioner also stated that he cannot remain standing for too long without having to sit and regroup.

Finally, Petitioner testified that he now has sensitivity to colder weather. When it is cold, Petitioner feels pain at the surgical site. He stated that when the weather is very cold, he has to continue taking Tylenol or Advil in order to manage his pain. (Tx. 26) The Arbitrator finds these anecdotes credible.

As to the five factors in section 8.1b , the Arbitrator records:

1) No impairment rating was offered and admitted;

2) The Petitioner is a young man:

3) He is a laborer in a factory:

4) The future earning capacity post spine surgery spans many years?

5) Evidence of disability is corroborated by the treating doctor's records as to surgery performed and the second procedure for fluid build up. Post surgical recovery is noted as is Petitioner's testimony.

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

Agustina Roa,
Petitioner,

vs.

NO: 11 WC 20597

K & L Looseleaf Products,
Respondent.

14IWCC0534

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability and additional compensation 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).

This case is before the Commission pursuant to Section 19(b) of the Act based on the fact that Petitioner contends that the Respondent has not paid either temporary total disability benefits or medical expenses. Petitioner placed at issue whether she was entitled to prospective medical expenses. The Arbitrator ordered "Respondent to pay for the electrodiagnostic studies prescribed by Dr. Madhav. Also, if needed, Respondent shall pay for the treatment of carpal tunnel syndrome, as well as the reasonable and associated treatment, as suggested by Dr. Carroll, which includes injections or carpal tunnel release of the right hand with reasonable and necessary rehabilitation". The Commission finds that the holding that Respondent is to pay for the electrodiagnoistic studies prescribed by Dr. Madhav is warranted under the issue of prospective medical expenses. However, since this is a 19(b) claim, which is not final, the Arbitrator's finding that Respondent shall pay for the treatments suggested by Dr. Carroll is too speculative in nature at this time and has not yet been provided to be causally related to the March 29, 2011 and April 8, 2011 work accident and/or has not been proven to be reasonable or necessary to cure and/or relieve Petitioner from the injuries sustained from the work accidents. Therefore, the

14IWCC0534

Commission strikes the Arbitrator's order, if needed, to pay for the treatment suggested by Dr. Carroll .

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $286.00 per week for a period of 107-4/7 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 $1,424,15 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is ordered to pay for the electrodiagnostic studies prescribed by Dr. Madhav under §8(a) of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $18,508.29 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 $13,800.00. 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: JUL 07 2014

Mario Basurto

MB/jm

O: 5/8/14

David L. Gore

43

Stephen Mathis

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

ROA, AGUSTINA
Employee/Petitioner

Case# **11WC020597**

11WC035893

K & L LOOSELEAF PRODUCTS
Employer/Respondent

14IWCC0534

On 11/22/2013, 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 0.10% 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:

2383 LAW OFFICE OF IVAN A RUEDA
TOD ALLSWANG
1217 N MILWAUKEE AVE 2ND FL
CHICAGO, IL 60622

0210 GANAN & SHAPIRO PC
BEN SCHROEDER
210 W ILLINOIS ST
CHICAGO, IL 60654

14IWCC0534

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

Agustina Roa
Employee/Petitioner

v.

K & L Looseleaf Products
Employer/Respondent

Case # **11 WC 20597**

Consolidated cases: **11 WC 35893**

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 28, 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other

14IWCC0534

FINDINGS

On the date of accidents, **3/29/11 & 4/8/2011**, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of the accidents ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$16,337.36**; the average weekly wage was **$314.18.**

On the date of accident, Petitioner was **51** 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 **$18,598.29** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$18,508.29**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $286.00/week for 107-4/7 weeks, commencing 8/8/11 through 8/28/13, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $1, 424.15, as provided in Section 8(a) of the Act, and to make payment to the service provider.

Respondent shall pay for the electrodiagnostic studies prescribed by Dr. Madhav. Also, if, needed, Respondent shall pay for the treatment of carpal tunnel syndrome, as well as the reasonable and associated treatment, as suggested by Dr. Carroll, which includes injections or carpal tunnel release of the right hand with reasonable and necessary rehabilitation,

Respondent shall be given a credit of $18,508.29

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.

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

Agustina Roa,
Petitioner,

vs.

NO: 11WC35893

K & L Looseleaf Products,
Respondent.

14IWCC0535

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability and additional compensation 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).

This case is before the Commission pursuant to Section 19(b) of the Act based on the fact that Petitioner contends that the Respondent has not paid either temporary total disability benefits or medical expenses. Petitioner placed at issue whether she was entitled to prospective medical expenses. The Arbitrator ordered "Respondent to pay for the electrodiagnostic studies prescribed by Dr. Madhav. Also, if needed, Respondent shall pay for the treatment of carpal tunnel syndrome, as well as the reasonable and associated treatment, as suggested by Dr. Carroll, which includes injections or carpal tunnel release of the right hand with reasonable and necessary rehabilitation". The Commission finds that the holding that Respondent is to pay for the electrodiagnoistic studies prescribed by Dr. Madhav is warranted under the issue of prospective medical expenses. However, since this is a 19(b) claim, which is not final, the Arbitrator's finding that Respondent shall pay for the treatments suggested by Dr. Carroll is too speculative in nature at this time and has not yet been provided to be causally related to the March 29, 2011 and April 8, 2011 work accident and/or has not been proven to be reasonable or necessary to cure

and/or relieve Petitioner from the injuries sustained from the work accidents. Therefore, the Commission strikes the Arbitrator's order, if needed, to pay for the treatment suggested by Dr. Carroll .

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $286.00 per week for a period of 22 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 is ordered to pay for the electrodiagnostic studies prescribed by Dr. Madhav under §8(a) of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $6,292.29 paid to or on behalf of Petitioner on account of said accidental injury.

No bond is currently owed once the credit is applied to the award. 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: JUL 07 2014

Mario Basurto

MB/jm

David L. Gore

O: 5/8/14

Stephen Mathis

43

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

ROA, AGUSTINA
Employee/Petitioner

Case# **11WC035893**

11WC020597

14IWCC0535

K & L LOOSELEAF PRODUCTS
Employer/Respondent

On 11/22/2013, 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 0.10% 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:

2383 LAW OFFICE OF IVAN A RUEDA
TODD ALLSWANG
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Agustina Roa
11WC20597 & 11WC35893

14IWCC0535

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)

Agustina Roa
Employee/Petitioner

v.

Case # **11 WC 35893**

Consolidated cases: **11 WC 20597**

K & L Looseleaf Products
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 28, 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

B. ☐ 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

14IWCC0535

FINDINGS

On the date of accidents, **3/29/11 & 4/8/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of the accidents ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$16,337.36**; the average weekly wage was **$314.18**.

On the date of accident, Petitioner was **51** 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 $6,292.29for TTD, $N/A for TPD, $N/A for maintenance, and $N/A for other benefits, for a total credit of $6,292.29.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $286 per week for 22 weeks, commencing April 9, 2011 through Jul 22, 2011, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $6,292.29 for temporary total disability benefits that have been paid.

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

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

14IWCC0535

STATEMENT OF FACTS

The disputed issues in 11 WC 20597 are: 1) causal connection; 2) medical bills; 3) temporary total disability benefits; 4) prospective medical treatment; 5) attorney's fees; and 6) penalties. *See,* AX1. The disputed issues in 11 WC 35893 are: 1) causal connection; and 2) prospective medical treatment. *See,* AX2.

K&L Looseleaf Products ("Respondent") employed Agustina Roa ("Petitioner") as a punch-press operator. It is undisputed that Petitioner suffered two (2) accidents while working for the respondent; the first on March 29, 2011, while the second occurred on April 8, 2011. Petitioner was 51 years of age, single with 2 dependents under the age of 18 at the time of both accidents.
Petitioner testified on cross-examination that she was walking when she tripped over boxes on March 29, 2011, causing her to fall on her right side. Although Petitioner testified on direct examination that she injured her right arm when she fell, on cross-examination Petitioner testified that she did not try to brace her fall with her right hand.

Petitioner initially sought medical treatment from Alexian Brothers on March 30, 2011. After a medical evaluation was performed, which included Petitioner complaining of pain to her right arm, right shoulder, right hand, and right ankle; she was diagnosed with a shoulder sprain/strain and ankle sprain. Petitioner complained of pain to her right arm and shoulder; the right hand showed pain along with swelling to the distal hand into the fingers. There was some ecchymosis throughout the fingers, as well. A right hand contusion was noted. Petitioner was returned to work with restrictions. *See,* PX2.

On April 1, 2011, Petitioner again presented to Alexian Brother and it was noted that she was having difficulty raising her right are above her head and had swelling in the fingers on her right hand.
On April 8, 2011, Petitioner was working in a light duty position when her right index finger was crushed by a machine at work. Petitioner immediately she reported to Alexian Brothers and underwent two (2) procedures: i.e., a right index finger radial, digital, artery-suture ligation procedure along with irrigation and debridement of skin and subcutaneous tissue of a traumatic wound' and a full thickness skin graft. Skin was harvested from her upper arm and grafted onto the tip of the right index finger. The harvesting left a disfigured spot of approximately two inches in diameter. Petitioner underwent therapy; a steroidal injection; and was given work restrictions until her full-duty release on July 21, 2011.

Petitioner testified that she currently has issues with bending the right index finger from the April 8, 2011 accident. She testified this is mostly when it is cold outside and it feels like "ants" when she tries to push something.

Upon the Arbitrator's evaluation of the right index finger at the hearing, it was noted that there was a dark spot approximately one inch in diameter, near the fingernail.

Petitioner testified that she was referred to a psychiatrist in April of 2011, due to her finger injury. Petitioner stated that she was unable to sleep and would wake up screaming because she imagined that she heard the noise from the machine at work. Dr. Madhav, Petitioner's treating doctor, recommended that she see a psychiatrist, which apparently, was not approved by Respondent.

Petitioner testified that she returned to Dr. Madhav on July 28, 2011, with complaints of pain in the right shoulder. An MRI was prescribed for the right shoulder. Although Dr. Madhav did recommend Petitioner undergo an EMG for numbness in both hands, with Petitioner stating the right hand was worse than the left hand, Petitioner received a full duty work release for the right hand and no apparent restrictions for the left hand. Petitioner testified on direct examination that the numbness and tingling she reported to Dr. Madhav on July 28, 2011 started after the March 29, 2011 accident. Petitioner had follow-up visits regarding her right index finger surgery on August 16, 2011, September 27, 2011; and November 21, 2011. Specifically, the November 21, 2011 medical record states restrictions for the right hand of 20 pounds lifting, carrying pulling and pushing; on a frequent basis up from 10 pounds, which was up, from no use of the right hand. *See,* PX3.

Petitioner testified that she does trust Dr Madhav and that she always mentioned to him that her right hand was hurting. Further, when questioned about the absence of her complaints in Dr. Madhav's medical records, Petitioner then testified that the substance in the medical records is accurate and correct.

Petitioner testified that during a visit with Dr. Madhav on December 13, 2011, she decided that she wanted to move forward with right shoulder surgery. Petitioner testified Respondent immediately authorized the surgery. Petitioner testified that she did not undergo right shoulder full thickness rotator cuff surgery until May 6, 2012, because she was diagnosed with diabetes in January of 2012. Petitioner also had bronchitis and elevated liver function tests between January of 2012 and her surgery on May 4, 2012. It was stipulated by Petitioner's counsel, at trial, that none of these issues are related to a work accident.

It was Petitioner's unrebutted testimony that her family has a history of diabetes and that she was frequently tested for the disease but was not diagnosed with it until January of 2012.
It is noted in the medical notes of Mid American Hand & Shoulder Clinic, from April 2, 2012, with that Petitioner was also diagnosed with asymptomatic sinus bradycardia. Also noted is that her diabetes was under control. The medical records do not mention any complaints by Petitioner of right hand pain.

Petitioner testified that she did not receive temporary total disability ("TTD") benefits from January 28, 2012 through May 3, 2012 and that her TTD benefits were reinitiated on the date of her right shoulder surgery, which was May 4, 2012. The surgery consisted of a right shoulder arthroscopy, rotator cuff repair, subacromial decompression and distal clavicle resection. Her benefits remained

ongoing until her release, by the physical therapist, to return to work in a full duty capacity, after work conditioning, on February 7, 2013.

Petitioner underwent a follow-up appointment with Dr. Madhav on May 7, 2012, wherein she was taking Norco and her pain was well controlled. She denied fevers, chills, numbness or tingling and had no other complaints.

Petitioner underwent a follow-up appointment with Dr. Madhav on June 8, 2012, where he returned her to work with the restrictions of use of the sling at all times and no use of the right hand. Petitioner made no comments about pain associated with her right hand.
During a visit to Dr. Madhav on July 12, 2012, the medical records state, "she denies numbness or tingling. She has no other complaints." There is no mention in the medical records showing any issues with Petitioner's right hand.

Petitioner did return to Dr. Madhav on August 13, 2012 at Mid American Hand & Shoulder Clinic and stated she was experiencing a throbbing pain in her shoulder as well as numbness and tingling in the right index, long, and ring fingers, which had progressively increased with the last two (2) months. Initially the pain was intermittent but now it was occurring more frequently. Petitioner did deny previous symptoms of numbness and tingling when questioned after her shoulder surgery and while on Norco. Dr. Madhav opined that Petitioner could have carpal tunnel syndrome and stated that if Petitioner had pre-existing symptoms then any increased edema of the right upper extremity with post-surgical changes for treatment related to either work accident, could have exacerbated or aggravated carpal tunnel syndrome. Dr. Madhav recommended an EMG for the right hand.

Petitioner did undergo a Functional Capacity Evaluation ("FCE") on January 15, 2013, at AthletiCo. It was considered to be a valid evaluation as Petitioner did pass twelve (12) of the thirteen (13) clinical and subjective evaluation tools. The FCE report does not mention any statements made by Petitioner with regards to tingling in the right hand and the technician opined that Petitioner could return to her pre-injury job as a punch-press operator, after completion of two weeks of work conditioning. Petitioner testified that she did complain during the FCE about issues with her right hand. The Arbitrator notes that the FCE does state that Petitioner reported post-test pain in the right hand, 3/10 and next-day pain as 4/10. Her worse, functional pain rating, over the previous 30 days, was 5/10 and the petitioner was noted to show no signs of discomfort during the EPIC Hand Function Sort test. *See,* PX6, pgs. 16-18.

During a visit to Dr. Madhav on February 4, 2013, Petitioner complained of numbness of her right thumb through the long finger and Dr. Madhav now stated that Petitioner did not have pre-existing symptoms and does not have left hand symptoms. He opined that Petitioner's numbness and paresthesias sensation may be secondary to increased post surgical and post-traumatic swelling associated with her right shoulder or right index finger injury.

Petitioner did complete work conditioning on February 7, 2013; and AthletiCo staff did opine, based on the FCE, that Petitioner could return to her work as a punch-press operator.

Petitioner's last appointment with Dr. Madhav was August 13, 2013; and the treatment records note that Petitioner is suffering from tingling and numbness in the right hand due to carpal tunnel syndrome. Petitioner testified that she provided Dr. Madhav with that history.

Respondent utilized the services of Dr. Charles Carroll for both a records review and independent medical evaluation ("IME". Dr. Carroll is an orthopaedic and hand surgeon, certified by the American Board of Orthopaedic Surgery. Dr. Carroll is also chief of the Hand and Upper Extremity Orthopaedic Surgery department at the Neurologic and Orthopaedic Institute of Chicago; and has an active practice. Dr. Carroll has received additional training in both hand and shoulder surgery and is presently a Professor at the Northwestern University Medical School. *See,* RXs 1 2 & 3.

Concerning the records review performed by Dr. Carroll on November 8, 2012: he reviewed the significant medical records in regards to both work accidents. Dr. Carroll did not see any mention of undue swelling or issues with the hand following the shoulder surgery. Dr. Carroll does opine that Petitioner's March 29, 2011 accident, might have caused a contusion to the right hand, but it did not cause or aggravate a pre-existing carpal tunnel condition. Dr. Carroll opines that Petitioner's immediate pain in the hand, after the March 29, 2011 accident, was more than likely radiating from the shoulder injury. Dr. Carroll stated that seventeen (17) months had passed from the time of the accident until symptoms developed showing carpal tunnel syndrome; and that he cannot relate those symptoms to either work accident. Dr. Carroll further opined that Petitioner's diabetes is the probable source of her carpal tunnel syndrome. Petitioner testified she was truthful to Dr. Carroll during the IME regarding her past symptoms, current symptoms, accident history, and treatment history.

Petitioner underwent the IME with Dr. Carroll on May 15, 2013; and she testified that an interpreter was used for the IME. Dr. Carroll performed a complete physical examination and reviewed a significant amount of medical records.
Dr. Carroll notes that Petitioner mentioned experiencing both numbness and tingling in her hands before either accident. Later in the examination, Dr. Carroll had further discussions with Petitioner about the pre-existing hand pain before either injury. Petitioner distinctly told Dr. Carroll that she told her treating physicians routinely about her hand complaints, and she stated if the treating records show differently, then they are incorrect. Dr. Carroll opined that although Petitioner does have carpal tunnel syndrome, neither accident caused nor aggravated the condition and he stated that "the records speak for themselves".

Dr. Carroll opines the most likely cause of Petitioner's carpal tunnel syndrome is her diabetes. In addition, Dr. Carroll opines that if Petitioner had symptoms of pain at the time of the initial accident, carpal tunnel would not have been aggravated; it was most likely a degenerative condition. Dr. Carroll

also found that there were no factors of swelling or post-surgical changes that would have caused carpal tunnel syndrome. He noted that swelling is a "common phenomenon" and there was no permanent aggravation in this case. Although Petitioner does need electro diagnostic studies, per Dr. Carroll, they would not be related to either work accident. Petitioner could return to work as a punch press operator as it relates to her work injuries, but her present unrelated carpal tunnel syndrome may prevent her from doing so. According the Dr. Carroll, Petitioner is at maximum medical improvement ("MMI") as to the work accidents and he notes Petitioner's medical records, history, and complaints during the examination, in arriving at his opinions.

CONCLUSIONS OF LAW

F. Is the Petitioner's current condition of ill-being causally related to the injury on either March 29, 2011 or April 8, 2011?

Petitioner bears the burden of proving all elements of her claim, including that her current condition of ill-being is casually related to the accident on either March 29, 2011 or April 8, 2011, by a preponderance of the credible evidence. *Hannibal v. Industrial Commission*, 38 Ill.2d 473, 231 N.E2d 409 (1967); *Illinois Institute of Technology v Industrial Commission*, 378 Ill.App.3d 113, 881 N.E.2d 523, 317 Ill.Dec. 355 (1st Dist. 1977). Having observed Petitioner's demeanor and testimony and upon review of all of the medical history, the Arbitrator finds Petitioner's current condition of ill-being is related to her work accident of March 29, 2011.

Petitioner first sought medical treatment from Alexian Brothers on March 30, 2011. After a medical evaluation was performed, which included Petitioner complaining of pain to her right arm, right shoulder, right hand, and right ankle; she was diagnosed with a shoulder sprain/strain and ankle sprain. Petitioner complained of pain to her right arm and shoulder; the right hand showed pain along with swelling to the distal hand into the fingers. There was some ecchymosis throughout the fingers, as well. A right hand contusion was noted.

The petitioner is still under the active medical care and treatment of Dr. Madhav as of the time of hearing and she is awaiting the approval of an EMG/NCV test that was first ordered on July 28, 2011, for numbness and tingling in her right fingers.

Petitioner was seen by Dr. Charles Carroll, at the request of the respondent. In the fourth paragraph of Dr. Carroll's report, the doctor notes Petitioner "went to see her present surgeon on or about July 28, 2011. An MRI was obtained, that showed evidence of a rotator cuff tear." Dr. Madhav's records from that day do confirm the initial consultation for the shoulder and prescription for the MRI. Dr. Carroll does not mention that Dr. Madhav also prescribed an EMG/NCV test on that first evaluation date nor does he mention that the test was ordered because of "numbness in her right hand ring and small finger, which started after her injury at work." Dr. Carroll writes in his report that Dr. Madhav

first recommended electro diagnostic studies on February 21, 2013, twenty months after it was actually prescribed. Dr. Carroll states in his report that the mention of numbness and tingling becomes prominent in the treating records after August 13, 2012. He concludes that Petitioner does have evidence of carpal tunnel syndrome, which could not be caused by the work accidents but instead more likely because Petitioner is slightly overweight and was diagnosed with diabetes in January of 2012.

Petitioner's treating surgeon discussed the Section 12 Exam with her and stated:

> Discussion is held with Agustina in regards to her independent medical evaluation. Her independent evaluation report is reviewed with the patient in the office today. Dr. Carroll performed the independent medical evaluation on May 15, 2013, and the report is available for review. He reviewed her clinical history, and physical examination as consistent. He does also have positive provocative examination findings for carpal tunnel syndrome. He does relate her right shoulder and right index finger crush injury to her occupational injuries, however subsequently attributes her carpal tunnel syndrome to her diabetes and non-occupational factors. It is of Dr. Carroll's medical opinion that the patient did not have an aggravation of an underlying condition and relates her carpal tunnel to be secondary to being mildly overweight and diabetes. It is notable that the patient has a BMI of 25.7, with medical definition of being overweight classified as a BMI of 25.0. Therefore, she is barely overweight. Additionally, he attributes diabetes to her development of carpal tunnel syndrome. It is notable that the patient initially reporting numbness and tingling of her right hand at the time of the initial evaluation for her right shoulder injury. She indicated that she has had numbness and tingling since the time of her fall. First documented subjective complaint of numbness and tingling is on the July 28, 2011 examination. This is in contrast to her initial diagnosis of diabetes by her primary care physician in January of 2012. Therefore, the patient was complaining of numbness and tingling, and had also been provided an EMG/NCV study prescription over six months prior to being diagnosed with diabetes. PX3a.

Dr. Madhav relates Petitioner's carpal tunnel to her work related injuries, as follow:

> It is my medical opinion, in a temporal fashion, that her numbness and tingling symptoms consistent with a possible carpal tunnel syndrome existed over six months prior to her being diagnosed with diabetes. As such, the patient's carpal tunnel syndrome is attributed to her work related injuries, as she reported at the time of her initial evaluation. Recommendation is for further evaluation of her symptoms with EMG/NCV study.

Petitioner underwent a follow-up appointment with Dr. Madhav on May 7, 2012, wherein she was taking Norco and her pain was well controlled. She denied fevers, chills, numbness or tingling and had no other complaints. The Arbitrator finds the opinions of Dr. Madhav to be more persuasive than those of Dr. Carroll.

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

Petitioner claims Respondent has not satisfied a medical bill from the University of Illinois Hospital, for a date of service of March 29, 2011; in the amount of $1,424.15. The Arbitrator notes proof was provided by Respondent's counsel in the proposed decision that the bill was approved on September 17, 2013 to be paid by Respondent based on the medical fee schedule. Therefore, the Arbitrator takes judicial notice and finds Respondent has arranged for payment of this medical bill.

K. Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that the petitioner is entitled to prospective medical care; and orders Respondent to pay for the electrodiagnostic studies prescribed by Dr. Madhav. Also, if, needed, Respondent shall pay for the treatment of carpal tunnel syndrome, as well as the reasonable and associated treatment, as suggested by Dr. Carroll, which includes injections or carpal tunnel release of the right hand with reasonable and necessary rehabilitation.

L. What temporary total disability benefits are in dispute?

It is undisputed that surgery was authorized by Respondent immediately after being recommended by Dr. Madhav on December 13, 2011. Further, it was stipulated to, during the hearing, that from December 13, 2011 to May 3, 2012 Petitioner was treated for non-work related conditions, which included menopause, diabetes, bronchitis, and elevated liver function tests; which resulted in an approximately five-month delay of the shoulder surgery.

The parties have stipulated that petitioner was off and unable to work from August 8, 2011 through January 27, 2012 and then again from May 4, 2012 through February 7, 2013; and was paid $286.00 per week. The disputed periods that petitioner claims to be entitled to benefits are from January 27, 2012 through May 3, 2012 and February 8, 2013 through the date of hearing, i.e., August 28, 2013. According to established case law the, dispositive test for determining claimant's entitlement to TTD, is whether petitioner's condition of ill being has stabilized or reached maximum medical improvement; and whether the petitioner is under active medical care. *See, Maggio v. Material Services Corp.* 07 IWCC 1633 (December 13, 2007).

During the period starting January 28, 2012, through May 3, 2012, Petitioner was totally off work, awaiting medical clearance for her shoulder surgery. While waiting medical clearance she developed a variety of well-documented medical issues, which delayed her surgery. As Dr. Madhav noted on April 2, 2012, Petitioner had numerous medical issues warranting a "definitive medical clearance" because of concerns "raised by anesthesia." These ailments included sweats and hot flashes associated with menopause, persistent bronchitis requiring antibiotics, a recent diagnosis of diabetes, a thyroid problem found by her primary care doctor; as well as elevated liver function tests. Petitioner was not malingering and these additional health problems are not intervening causes. Her condition had not stabilized and she was actively treating. The Arbitrator finds that Respondent does not have a basis

for not paying the petitioner during this period and therefore awards fourteen (14) weeks of TTD for this period or $4,004.00. *See,* PX3 office notes of April 2, 2012.

During the second period, February 8, 2013, through August 28, 2013, the same dispositive test applies. During this period, Petitioner always had restrictions regarding her right arm pursuant to Dr. Madhav. *See,* Tr. pgs. 28-29, Px3 & Px3a. Petitioner has testified that respondent, to date, has not accommodated her restrictions or taken her back to work. It is Respondent's position that the Functional Capacity Evaluation on January 15, 2013 found Petitioner capable of performing her pre-injury job functions, after undergoing work conditioning; and Dr. Carroll's IME supported the FCE results, as he opined Petitioner was at MMI and could work full duty in relation to either work accident.

The same rule of law applies to this period, during which Petitioner was under active medical care for a carpal tunnel condition that has been found causally related; and has been awaiting approval of electrodiagnostic studies that have been recommended since July 28, 2011. In that regard, she has satisfied the test for TTD and the Arbitrator awards 28-6/7 weeks for this period or $8,253.14. As the parties have stipulated petitioner was off and unable to work from August 8, 2011 through January 27, 2012 and then again from May 4, 2012 through February 7, 2013 and was paid $286.00 per week; the Arbitrator awards petitioner 107-4/7 weeks of TTD or $30,765.43. Respondent is entitled to a credit in the amount of $18,508.29 in TTD previously paid.

M. Should penalties or fees be imposed upon Respondent?

Petitioner requested penalties and fees for failure to authorize the diagnostic tests, recommended by Dr. Madhav, non-payment of TTD for the disputed periods; and non-payment of the University of Illinois Emergency Room bill, in the amount of $1,424.15.

Section 19(k) of the Illinois Workers' Compensation Act states that "[i]n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.

Section 19(l) of the Act states that "[i]f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Section 16 of the Act states that "[w]henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

The Arbitrator notes that "[s]pecific procedures or treatments that have been prescribed by a medical service provider are 'incurred' within the meaning of section 8(a) even if they have not been performed or paid for." *Bennett Auto Rebuilders, Inc. v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655-56 (1999). The claimant bears the burden of proving, by a preponderance of the evidence, his or her entitlement to an award of medical care under section 8(a). *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 546 (2007).

As to 19(l) penalties, "The test is not whether there is some conflict in medical opinion. Rather, it is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all circumstances presented. *Continental Distributing v. Industrial Comm'n*, 98 Ill.2d 407 (1983).

In this case, the Arbitrator denies an award of attorney's fees and penalties. It is Respondent's position that they immediately awarded shoulder surgery, when requested and that petitioner delayed said surgery for approximately five months, due to unrelated illnesses. It is also Respondent's position that Petitioner had been declared at maximum medical improvement, and their IME doctor supported this opinion. In addition, Respondent has paid TTD, in the amount of $18,508.29.

As to the medical bill, Respondent has sent to the Arbitrator, said bill approved for payment as of September 17, 2013, obviously after the hearing date. While payment was not made promptly, the Arbitrator takes judicial notice that the bill has been approved for payment. The Arbitrator finds that the respondent's actions do not rise to the level of unreasonable or vexatious delay.

14IWCC0535

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
Case # 11WC20597 & 11WC35893
SIGNATURE PAGE

L Thompson Smith

Signature of Arbitrator

November 22, 2013
Date of Decision

NOV 22 2013

14IWCC0536

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

Gary Border,

Petitioner,

vs. NO: 12WC33066

Southern Illinois Workers 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 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 June 27, 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 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: JUL 08 2014
o06/25/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

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

14IWCC0536

BORDER, GARY
Employee/Petitioner

Case# **12WC033066**

SOUTHERN ILLINOIS WORKERS INC
Employer/Respondent

On 6/27/2013, 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:

0246 HANAGAN & McGOVERN PC
STEVE HANAGAN
123 S 10TH ST SUITE 601
MOUNT VERNON, IL 62864

2593 GANAN & SHAPIRO PC
IAN M WHITE
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0536

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
19(b)

Gary Border
Employee/Petitioner

v.

Southern Illinois Workers, Inc.
Employer/Respondent

Case # 12 WC 33066

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 Mt. Vernon, on May 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 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 July 30, 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 $17,680.00; the average weekly wage was $340.00.

On the date of accident, Petitioner was 29 years of age, single with 5 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $1,980.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $1,980.00.

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

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation 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.

William R. Gallagher, Arbitrator
ICArbDec19(b)

June 24, 2013
Date

JUN 27 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 30, 2012. According to the Application, Petitioner sustained injuries to the head, neck, low back and legs as a result of a fall. Respondent disputed liability on the basis of accident and causal relationship. This case was tried as a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits. Petitioner also filed a petition for Sections 19(k) and 19(l) penalties and Section 16 attorneys' fees.

Petitioner testified that on July 30, 2012, he was working in Respondent's warehouse which contained playground equipment and unassembled bicycles in cardboard boxes. Petitioner estimated the dimensions of the boxes to be approximately four feet by three and one-half feet and 13 inches wide and that each of them weighed approximately 30 to 40 pounds. Petitioner was in the process of stacking these boxes at the time of the accident. The boxes were not to be stacked flat on the floor because stacking them in that manner could cause damage to the bicycles or bicycle parts contained in the boxes. Petitioner was required to stack the boxes with one of the sides (the one that was 13 inches wide) being in contact with the floor.

Petitioner testified that he had just finished working on what he described as the first layer of boxes and was working on the second layer and had four boxes in place. As Petitioner was in the process of turning to get the fifth box, the fourth box fell on him knocking him to the floor. At that time Petitioner noticed an immediate onset of pain to his low back, hip, neck and the back of his head, which he stated struck the concrete floor. Petitioner stated that another employee named Bill witnessed the accident and picked the box up off the floor as Petitioner was getting up. The Petitioner and Bill then attempted to find a supervisor so that the accident could be reported; however, they were unable to do so but while they were walking toward the office, another employee named Greg, came around the corner driving a forklift. Petitioner informed Greg of the accident and Greg then accompanied him to the office.

A document entitled "Employee Report of Injury or Illness" was received into evidence at trial (Respondent's Exhibit 6) which was completed by the Petitioner and stated that boxes fell over knocking Petitioner into other boxes and that he hit his back and head. Another document entitled "Employee First Report of Accident" was also received into evidence (Respondent's Exhibit 7). This was also completed by the Petitioner and it indicated that a box fell off of a stack of boxes, knocked Petitioner over causing him to hit his back on boxes that were behind him and that he hit his head on the floor.

Bill Meyers testified on behalf of the Respondent. Meyers was working near Petitioner at the time of the accident but he did not witness it. Meyers observed Petitioner laying on the floor and stated that there was one box laying in a flat position approximately two or three feet from the Petitioner. He also stated that he did not observe any other boxes that had fallen over and that Petitioner did not inform him as to what had occurred.

Greg Sutton testified on behalf of the Respondent and stated that he had worked for Respondent since 1991 and was a quality assurance technician. Sutton testified that initially Petitioner said

nothing about having sustained a fall; however, he also stated that he observed dirt on the Petitioner and he jokingly asked Petitioner if he had fallen and, Petitioner, at that point in time, informed him that he had. Sutton then accompanied Petitioner to the office so that the necessary reports could be completed.

Subsequent to the accident Petitioner went to the ER of Richland Memorial Hospital. The history contained in those records stated that Petitioner sustained an injury to his upper back when a box fell on him knocking him backwards and, when he landed on his bottom, he sustained a strong blow to the low back as well as the back of his head. The ER physician's impressions were: bilateral cervical muscle strain/sprain, right hip sprain, occipital contusion and sacral contusion. In a nursing record prepared in connection with that ER visit, the history was the boxes were falling over and that Petitioner put up his right arm to stop them and the boxes then knocked him over causing the Petitioner to fall striking the right side of his head on the concrete floor. Petitioner was instructed to remain off work for one week.

Petitioner testified that after he left the hospital, he contacted Respondent and was instructed to bring in his off-work slip. Petitioner stated that when he went to the office the next day, the lady who runs the office (her name was not provided) informed him that she did not believe that he had injured himself because she thought he had sustained a prior hernia injury. Petitioner stated he informed her that the prior injury was, in fact, a pulled groin muscle that happened in 2009.

Petitioner sought medical treatment from Horizon Healthcare on August 1, 2012, where he was seen by a Physician's Assistant, Kayla Bell. The record of that date stated that Petitioner had sustained a fall on July 30, 2012, and that Petitioner had neck and low back pain. In Bell's record of August 6, 2012, the history of injury stated that Petitioner had sustained a hard fall and that bikes at work had fallen on him. Bell saw Petitioner again on August 10, 2012, and ordered that an MRI be performed. An MRI was performed on August 11, 2012, which revealed a herniated disc at L5-S1. Bell saw Petitioner on August 15, 2012, and referred him to Dr. Don Kovalsky, an orthopedic surgeon.

Dr. Kovalsky saw Petitioner on September 19, 2012. According to the history provided to Dr. Kovalsky by the Petitioner "...a bunch of boxes fell on him landing on his upper back and pushing him forward. The boxes weighed about 50 to 75 pounds each, and approximately 5 boxes struck him." Petitioner denied any prior back injuries and Dr. Kovalsky examined Petitioner and reviewed the MRI opining that Petitioner had an acute disc herniation at L5-S1. Dr. Kovalsky authorized Petitioner to remain off work and prescribed some medication. Dr. Kovalsky saw Petitioner again on October 12, 2012, and, on examination the range of motion was limited, straight leg raising was positive on the left and there was a diminished Achilles' reflex. Dr. Kovalsky recommended that Petitioner have an epidural steroid injection but, if that did not help his symptoms, that surgery would be indicated.

At the direction of the Respondent, Petitioner was examined by Dr. Stephen Weiss on November 27, 2012. In connection with his examination, Respondent provided Dr. Weiss with information concerning the alleged accident. Dr. Weiss also obtained a history from the Petitioner, examined the Petitioner and reviewed various medical records provided to him by the Respondent. According to Dr. Weiss' report of December 6, 2012, Petitioner sustained an onset of low back

pain after some boxes fell on him knocking him into another series of boxes. Dr. Weiss opined that Petitioner had pre-existing degenerative disc disease and a possible temporary exacerbation of the degenerative disc disease which was a result of the incident. Dr. Weiss also noted on examination that there were signs of symptom magnification on the part of the Petitioner. Further, Dr. Weiss noted that there were two separate histories of the accident namely, the Petitioner's description of it and a witness account provided to him by the Respondent, which stated that Petitioner was found sitting on the floor without any boxes having fallen over.

While Dr. Weiss opined that the MRI did revealed a central disc herniation at L5-S1, he opined that this was a degenerative condition. In regard to causality, Dr. Weiss opined that if Petitioner's history of the accident was correct then he probably did experience a temporary exacerbation of the pre-existing degenerative disc disease at L5-S1. If, however, the witness report was accurate, then Petitioner's symptoms would be a normal progression of the degenerative condition.

Petitioner was seen by Dr. Kovalsky on January 2, 2013, and Dr. Kovalsky opined that Petitioner had not improved with epidural injections and that there were still positive findings on clinical examination. Dr. Kovalsky recommended that Petitioner undergo back surgery. At Dr. Kovalsky's direction, another MRI was performed on February 21, 2013, which was consistent with the prior MRI, revealing a central disc herniation at L5-S1, touching the L5 nerve root. Dr. Kovalsky performed surgery on March 11, 2013, the procedure consisting of a hemilaminotomy and discectomy at L5-S1 on the left side. Following the surgery, Petitioner remained under Dr. Kovalsky's care. When Dr. Kovalsky saw Petitioner on April 19, 2013, Petitioner's low back pain was relieved and straight leg raising was negative bilaterally. Dr. Kovalsky directed Petitioner to go to physical therapy. At trial, Petitioner testified that he only had minimal low back pain and that his left leg pain had resolved.

Dr. Kovalsky was deposed on April 9, 2013, and his deposition testimony was received into evidence at trial. In regard to the history provided to him by the Petitioner, Dr. Kovalsky testified that Petitioner informed him that approximately five boxes, each of which weighed 50 to 75 pounds, fell landing on his upper back which caused him to fall forward sustaining a popping sensation and pain in his low back. It was this forcible forward flexion that Dr. Kovalsky opined caused the disc pathology at L5-S1. Dr. Kovalsky further stated that when Petitioner fell forward he "...landed on other boxes, didn't specifically land on the floor. That's the way it was explained to me."

Dr. Weiss was deposed on January 25, 2013, and his deposition testimony was received into evidence at trial. In regard to the history provided to him by the Petitioner, Dr. Weiss testified that Petitioner was struck in the front by some 50 pound boxes that were falling which knocked him backwards into another stack of boxes and, at that time, he felt a painful pop in the low back. After Petitioner hit the boxes, he then fell to the floor.

Conclusions of Law

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

The Arbitrator concludes that Petitioner did not sustain an accidental injury arising out of and in the course of his employment for Respondent.

In support of this conclusion the Arbitrator notes the following:

There are multiple conflicting histories regarding the manner in which this alleged accident occurred.

Petitioner testified that as he was in the process of turning to get the fifth box, the fourth box fell on him knocking him to the ground and that he struck the back of his head on the floor. This clearly indicates that Petitioner fell backwards.

A portion of the ER record from Richland Memorial Hospital stated that boxes were falling over and that Petitioner put up his right arm to stop them and was then knocked over.

Dr. Kovalsky testified that Petitioner told him that approximately five boxes, each weighing between 50 to 70 pounds, fell on his upper back which caused him to fall forward and that Petitioner landed on some other boxes but that he did not specifically land on the floor.

Dr. Weiss testified that Petitioner informed him that he was struck from the front by 50 pound boxes that were falling which knocked him backwards into another stack of boxes.

Further, Bill Meyers testified that he did not witness the accident but that when he arrived at the scene of it, only one box was lying flat on the floor approximately two or three feet from the Petitioner.

In regard to disputed issues (F), (J), (L) and (M) the Arbitrator makes no conclusions of law because these issues are rendered moot because of the Arbitrator's conclusion in disputed issue (C).

William R. Gallagher, Arbitrator

14IWCC0537

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

Jerry Givan,

Petitioner,

vs. NO: 11WC3400

State of Illinois Big Muddy River Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, notice, statute of limitations 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 20, 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.

14IWCC0537

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: JUL 08 2014
o06/24/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

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

14IWCC0537

GIVAN, JERRY
Employee/Petitioner

Case# **11WC003400**

ST OF IL BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

On 5/20/2013, 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 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
AARON WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

MAY 20 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0537

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
19(b)

Jerry Givan
Employee/Petitioner

v.

State of Illinois, Big Muddy Correctional Center
Employer/Respondent

Case # 11 WC 03400

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 **Mt. Vernon**, on **January 10, 2013 and exhibits were completed on February 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. ☒ 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 _____

14IWCC0537

FINDINGS

On the alleged date of accident, **January 12, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$103,649.00**; the average weekly wage was **$1993.25**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

ORDER

The Petitioner testified that he had noticeable symptoms over a nine year period and that he had sought treatment for the symptoms during the nine year period. It is clear from his testimony and the medical records that he was aware that the symptoms he was experiencing were work related at the time, and a reasonable correctional officer in Mr. Givan's position would have known the symptoms were work related at that time, given the totality of the record in this case. Petitioner is time barred from bringing a case for right carpal tunnel. Based upon the testimony of the Petitioner, the medical records and the previous complaints of the Petitioner, benefits are denied. The statute of limitations for filing a Petition for Adjustment of Claim has expired for the injuries that the Petitioner is alleging in this case.

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

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

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

Deborah L. Simpson
Signature of Arbitrator

May 19, 2013
Date

ICArbDec19(b)

MAY 20 2013

14IWCC0537

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Givan,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 11 WC 03400**
	)	
State of Illinois, Big Muddy Correctional Center,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on January 12, 2011 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.

At issue in this hearing is as follows: (1) did the Petitioner sustain an accidental injury or was he last exposed to an occupational disease that arose out of and in the course of the employment; (2) did the Petitioner give the Respondent notice of the accident within the time limits stated in the Act; (3) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (4) is the Respondent liable for the unpaid medical bills set out in Petitioner's Exhibit #1; and (5) is the Petitioner entitled to any prospective medical care.

STATEMENT OF FACTS

The Petitioner is employed by and has been employed by the Respondent for almost 22 years as a correctional officer. The Petitioner began his employment at the correctional facility in Robinson where he worked for two years before transferring to the Big Muddy Correctional Center where he has remained. During his tenure as a correctional officer the Petitioner has been assigned as a control officer, wing officer, movement officer, tower officer, segregation officer, receiving officer, gym officer, yard officer and placement officer, as well as his current assignment as the dietary officer and housing unit officer. For the past three to four years he has worked primarily as the dietary officer supervising inmates in the kitchen, he has also, on occasion, been assigned to a housing unit. The Petitioner last worked on a housing unit in November of 2011. From November to May the Petitioner spent some of his time working in the placement office. From May until July of 2012 he worked only in dietary. The Petitioner has been off of work since July of 2012 because of an unrelated injury.

The Petitioner has been assigned to the first shift his entire career with the Department of Corrections. He described the work day on the first shift as hectic, with constant movement of the inmates around the facility. He testified that 80% of the movement in the correctional facility occurs on the first shift. He testified further that as a correctional officer on a wing the first 90 minutes of his shift is spent opening a minimum of 56 steel doors that are heavy and require force. He stated that in the summer the doors stick. Before the doors can be opened they must be keyed. He stated further that a correctional officer has to pull on the doors to make sure they are really closed and that the inmates have not stuffed anything in them. Other duties of a correctional officer described by the Petitioner include handcuffing and un-handcuffing inmates, escorting them around the facility, shaking down cells, lifting and moving property boxes and searching inmates. He testified that a large portion of the work involves his hands and arms. The Petitioner described his duties while working in the placement office as involving assigning inmates to cells, entering data in the computer, chow relief and making magnets with inmate's names on them.

With respect to the "video" it was shot on the second shift, and in the opinion of the Petitioner, it does not accurately depict the responsibilities of a correctional officer, especially one who works on the first shift. The video is only 30 minutes long and in the opinion of the Petitioner it does not accurately describe the frequency, difficulty or duration of the correctional officers' duties on the day shift. The Petitioner maintains that most of the inmates are locked up on the second shift, only the dietary inmates are moving around on that shift.

The Petitioner testified that in the past three to four years he has been assigned primarily as a dietary officer, supervising the inmates who work in the kitchen. His duties in this position include keying some doors, signing in and checking the inmates, opening the dish room door, signing out tools, watching to make sure that the inmates do not steal food, tools, or eating and cooking utensils, and making sure that the inmates do not get into fights. There is one feed on the day shift. If they are not being fed, the Petitioner is responsible for supervising the cooking and the clean up as well, especially making sure the tools and utensils are returned.

The Petitioner testified that currently he is experiencing constant tingling and numbness in his hands and pain in his elbows that causes him to lose sleep. He saw Dr. David Brown at the recommendation of his attorney Mr. Rich. Dr. Brown sent the Petitioner to Dr. Daniel Phillips, the same day for EMG / nerve conduction studies.

The Petitioner saw Dr. Brown for his first time on January 12, 2011. Dr. Brown took a history of the Petitioner's symptoms and noted that the Petitioner "explains to me that he has a long history of symptoms in his hands dating back to 2002, numbness and tingling in BOTH of his hands and decreased strength... [h]e explains to me he underwent a nerve conduction study in 2002 and was told he had carpal tunnel syndrome, possibly an ulnar neuropathy." (in the right hand only per the report) (P. Ex. 4). The Petitioner wrote in the personal questionnaire he filled out in answer to the question, [w]hen did you first notice your symptoms? : 2002. (P. Ex. 4) The Petitioner also treated with Dr. Watters at Southern Orthopedic Associates, in November of 2011. (P. Ex. 3). In that personal questionnaire Mr. Givans also wrote that the symptoms began in 2002 and in answer to the question "[w]here did this happen? He answered; "Big Muddy River Correctional Center". The Petitioner told Dr. Brown that he turned keys 30-50 times per

hour, and described his job as having hand-and-arm intensive duties. Dr. Brown diagnosed the Petitioner with carpal tunnel syndrome, and possibly cubital tunnel syndrome and sent the Petitioner to Dr. Phillips to confirm the diagnosis. (P. Ex. 4 & 5) Dr. Phillips indicated that the tests were positive for mild bilateral carpal tunnel syndrome and mild left cubital tunnel syndrome. Dr. Brown recommended two months of conservative treatment involving splinting and anti-inflammatory medication. Dr. Brown wrote in his first note that the Petitioner's job duties as described, along with his history of diabetes, would be an aggravating factor in the Petitioner's condition and need for treatment.

The Petitioner returned to Dr. Brown on 5/2/11 stating that he had no improvement in his symptoms. He reported pain in both hands, worse on the right, tingling in all fingers, and numbness in both arms. At that time the Petitioner provided a copy of his 2002 electro diagnostic study done by Dr. Fakre Alam, to Dr. Brown. (P. Ex. 4, R. Ex. 4) Dr. Brown noted that his 2002 study revealed findings of mild carpal tunnel syndrome on the right side. (P. Ex. 4) There was also evidence of mild ulnar sensory neuropathy with the right ulnar nerve. (R. Ex. 4) Based on the Petitioner's history of symptoms and his reported lack of improvement with conservative care, Dr. Brown decided that the Petitioner was a candidate for surgery. (P. Ex. 4)

The Petitioner was referred to Dr. Richard L. Morgan whom he saw for the first time on November 4, 2011. Dr. Morgan recommended a new nerve conduction study which was completed by Dr. Brent Newell, Nov. 18, 2011. (P. Ex. 6) The Petitioner returned to Dr. Morgan the same day complaining of numbness and tingling in his hands bilaterally and soreness in his forearms. (P. Ex. 6) The Petitioner's new nerve conduction study revealed bilateral carpal tunnel syndrome, consistent with the previous study, and right moderate cubital tunnel that was not present on the study conducted on January 12, 2011. According to Dr. Newell, "there is NO evidence of ulnar neuropathy at the left elbow." (P. Ex. 6) On December 2, 2011, after reviewing the results of the EMG/nerve conduction studies, Dr. Morgan's recommendation was to schedule the right carpal tunnel & cubital tunnel procedure and then a few weeks later schedule the left carpal & cubital tunnel releases. (P. Ex. 6) Dr. Morgan testified by way of deposition that he recommended Petitioner undergo combined right carpal and cubital tunnel decompression on his right side first, since it was the worst. He further testified that he was unable to proceed with the surgery because the Respondent has not approved the treatment. (P. Ex. 9)

In his deposition, Dr. Morgan testified that he believed that the Petitioner's job duties were a contributing factor to his repetitive injuries. (P. Ex. 9). He did not believe that Petitioner's controlled diabetes was the source of his carpal or cubital tunnel. Dr. Morgan also testified that the Petitioner's condition had gradually worsened, in addition to his duties as a wing and dietary officer, the Petitioner's duties as a Placement Officer (the assignment he began in November 2011, per the testimony of the Petitioner, involved a fair amount of clerical work and computer usage that would cause or contribute to the development of his condition. (P. Ex. 9, p.14-15).

During cross examination the Petitioner was questioned about an application of claim filed on February 6, 2006, with the Petitioner's signature dated January 6, 2006 for right hand/wrist carpal tunnel. (R. Group Ex. A.) The Petitioner denied that he had filed the claim or authorized his attorney to file the adjustment of claim, despite the fact his signature is on the application of claim and further more is on the Attorney Representation Agreement also filed

with the Illinois Worker's Compensation Commission the same date. (R. Group Ex. A) This case was then Dismissed for Want of Prosecution by Arbitrator Jennifer Teague on June 2, 2009. (R. Group Ex. A)

The Petitioner testified that he hired the attorney to file a complaint on his behalf because a chair had broken and he fell injuring his back. It was at this time that he had the nerve conduction studies done and he authorized the attorney to file a complaint for his injuries as result of the fall but not for his right hand/wrist carpal tunnel issue. The records of the IWCC do not support the Petitioner's testimony on this issue. The Attorney Representation Agreement, signed by the Petitioner and his Attorney, that was filed regarding the carpal tunnel issue is dated January 30, 2006, and was filed on Feb 6, 2006 according to the file stamp. The Application for Adjustment of Claim, also signed by the Petitioner [he admitted that this was his signature, but denied everything else (R. Ex. 5)] was also dated January 30, 2006. (R. Group Ex. A) Respondent's exhibit #5 is the application for adjudication with January 30, 2006 as the date and the second page is a signed, undated, authorization to disclose health information, a file stamped copy of the application (filed on February 6), is also the seventh page in Respondent's group exhibit A. The complaint that the Petitioner was referring to with respect to his fall from the collapsed chair and his neck and back injury was the subject matter of case 03 WC 24878, which was closed by way of settlement on June 3, 2005, a little more than six months before the complaint for carpal tunnel was filed in case number 06 WC 06457. (R. Ex. 7, R. Group Ex. A)

The Petitioner did admit on cross examination, that his attorney at the time sent him follow up letters on the issue of the carpal tunnel. He testified that he had complaints in the past for his hands and he had an EMG conducted after a work accident. Furthermore, he admitted that he had gone to a "state doctor" for what he thought was a pinched nerve in 2002 and was sent to Dr. Alam to have a nerve conduction study done. The Respondent proffered as evidence the aforementioned EMG as exhibit #4. Dr. Alam's findings in part were "[t]his electro diagnostic study is consistent with mild right carpal tunnel syndrome involving sensory fibers of the median nerve. There is also electrical evidence of a mild ulnar sensory neuropathy." This appears to have all arisen out of the same work related incident in 2002. (R. Ex. 4)

CONCLUSIONS OF LAW

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)

Section 6(c) of the Illinois Workers' Compensation Act states that notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. Section 6(c) (2) states that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *820 ILCS 305/6(c)* (West 2004)

The purpose of the notice provisions is to enable the employer to investigate promptly and to ascertain the facts of the alleged accident. *City of Rockford v. Industrial Commission,* 214 N.E.2d 763 (1966) The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. However, the legislature has mandated a liberal construction on the issue of notice. *S&H Floor Covering v. The Workers Compensation Commission,* 870 N.E.2d 821 (2007)

Notice is proper if given to an employee or coworker whom the claimant believes is his supervisor. *Ocon v. A & R Janitorial Services,17 IL WCLB 221 (Ill. W.C.Comm. 2009)*

Because repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work. *Oscar Mayer & Co. v. Industrial Commission,* 176 App.3rd 607, 610, 531 N.E. 2d 174.

An employee who suffers a repetitive trauma injury must meet the same standard of proof under the Act as an employee who suffers a sudden injury. See *AC & S v. Industrial Comm'n,* 304 Ill.App.3d 875, 879, 710 N.E.2d 837 (1st Dist. 1999)

An employee suffering from a repetitive trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Williams v. Industrial Comm'n,* 244 Ill.App.3d 204, 209, 614 N.E.2d 177 (1st Dist. 1993)

We decline to penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment. *Durand v. Industrial Commission,* 224 Ill.2d 53, 862 N.E.2d 918, 923 (2006)

Did the Petitioner sustain an accidental injury or was he last exposed to an occupational disease that arose out of and in the course of the employment?

The Petitioner testified that over the course of his career he began to notice symptoms in his hands and elbows. Upon his attorney's recommendation the Petitioner saw Dr. Brown on January 12th, 2011. Dr. Brown's report from the Petitioner's initial visit notes that the Petitioner described a long history of symptoms in his hands dating back to 2002, numbness and tingling in both of his hands and decreased strength... a nerve conduction study in 2002 which demonstrated

the possibility of mild carpal tunnel syndrome and possibly an ulnar neuropathy with respect to the right hand/wrist/elbow only. This information was repeated in the personal questionnaire filled out by the Petitioner wherein he stated the symptoms began in 2002. Additionally, when the Petitioner treated with Dr. Watters at Southern Orthopedic Associates, in November of 2011, he also filled out a personal questionnaire stating that the symptoms began in 2002. In answer to the question "[w]here did this happen? He answered; "Big Muddy River Correctional Center". The Petitioner filed his application of claim with a date of January 24th, 2011, with an alleged date of injury of January 12th, 2011.

The Petitioner indicated to Dr. Brown, on January 12, 2011, that he turned keys 30-50 times per hour, and described his hand-and-arm intensive duties. He testified at trial that he performs wing checks every half hour and must forcefully pull all doors to ensure they are securely shut. He cuffs and un-cuffs inmates on a daily basis, and has done so hundreds of times in the last 3-4 years. Petitioner performs cell shakedowns every morning, which involves pulling out property boxes that weight up to 100lbs, and checks for contraband. He also pats down inmates when they return from the yard or the gym. He testified that there is no part of his job that does not require the use of his arms or hands. This testimony relates to what he did in the past, he testified that the last time he worked as a unit supervisor was in November of 2011, that he was primarily assigned as the dietary officer since November of 2011, with different duties which are less hand and arm intensive, and that from November of 2011 until May of 2012 he spent some of his time in the placement .

During cross examination the Petitioner was questioned about an application of claim filed on February 6, 2006, with the Petitioner's signature dated January 6, 2006 for right hand/wrist carpal tunnel. He denied that he had filed the claim or that he had authorized his attorney to file the adjustment of claim on his behalf. He testified that he only hired the attorney to file a claim on his behalf from an injury he sustained when a chair broke and he fell in 2002. He admitted that his signature is on the application of claim which he was shown in court, but denied any of the other information was put there by him. The Petitioner did admit however, that his attorney at the time sent him follow up letters on this issue and that he had complaints in the past for his hands and that he had an EMG conducted after a work accident and when he thought he had a pinched nerve. He was adamant that this all happened around the time of the injury he sustained when the chair broke. The Petitioner's version of the events is not supported by the evidence however, since the complaint regarding the broken chair was filed as 03 WC 24878 and was closed by settlement agreement approved on June 3, 2005. The Attorney Representation Agreement signed by the Petitioner with respect to the Carpal Tunnel injury involving his right hand/wrist is dated January 30, 2006 as was the Application for Adjudication of Claim. The Arbitrator notes that the case was filed on February 6, 2006 and given number 06 WC 05467, the date of accident is listed as "unknown" on the petition. The case was dismissed for want of prosecution on June 2, 2009.

Did the Petitioner give the Respondent notice of the accident within the time limits stated in the Act?

An employee suffering from a repetitive trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work

became plainly apparent to a reasonable person. *Williams v. Industrial Comm'n*, 244 Ill.App.3d 204, 209, 614 N.E.2d 177 (1st Dist. 1993)

When the injury manifested itself is the date on which both the fact of the injury and the casual relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524 505 N.E.2d 1026 (1987). In *Peoria County*, the Illinois Supreme Court held that determining the manifestation date is a question of fact and that the onset of pain and the inability to perform one's job are among the facts which may be introduced to establish the date of injury. The Illinois Supreme Court in *Peoria County* determined that the manifestation date/date of accident in that case was the date that petitioner's pain, numbness, and tingling in her hands and fingers was so severe that she sought medical treatment.

The manifestation date is not the date on which the injury and its causal link to work became plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. *Durand*, 224 Ill.2d at 72. A formal diagnosis, of course, is not required. *Id.* In *General Electric Company v. Industrial Comm'n*, 190 Ill.App.3d 847, 857, 546 N.E.2d 987 (4th Dist. 1989), the appellate court held that the employee's injury and its connection to her employment would have been plainly apparent to a reasonable person on the date she noticed a "sharp pain" in her shoulder while working, not on the subsequent date when a physician opined that the employee's condition and her work were causally related.

In *Consuelo Castaneda v. Industrial Comm'n*, 231 Ill.App.3d 734, 596 N.E.2d 1281 (3rd Dist. 1992), the petitioner first began noticing hand problems in April 1985 when performing wiring and soldering for the respondent. On April 26, 1985, the petitioner saw Dr. Subbiah complaining of numbness in the hands and told Dr. Subbiah that she related her symptoms to work. The petitioner missed some work and then returned to work and continued to complain of soreness and stiffness of her wrists and hands until June 19, 1987, when her position was discontinued and she was unable to perform other positions offered because of her hand condition. On September 8, 1988, Dr. Delacruz issued a neurological report indicating right CTS. The petitioner filed her claim with the Industrial Commission on September 26, 1988. The arbitrator found that the petitioner's manifestation date/date of accident was June 19, 1987, and awarded benefits. The Commission reversed the arbitrator, finding that the petitioner's injury had manifested itself on April 26, 1985, and that the petitioner's claim filed on September 26, 1988, was barred by the three-year statute of limitations. The Circuit Court and the Appellate Court affirmed the Commission's decision.

The Petitioner answered on all the medical questionnaires that he first noticed the symptoms in 2002. He sought medical treatment at the time but was apparently not taken off of work. Dr. Brown's report from the Petitioner's initial visit notes that the Petitioner described a long history of symptoms in his hands dating back to 2002, numbness and tingling in both of his hands and decreased strength... a nerve conduction study in 2002 which demonstrated the possibility of mild carpal tunnel syndrome and possibly an ulnar neuropathy with respect to the right hand/wrist/elbow only. This information was repeated in the personal questionnaire filled out by the Petitioner wherein he stated the symptoms began in 2002. Additionally, when the Petitioner treated with Dr. Watters at Southern Orthopedic Associates, in November of 2011, he

also filled out a personal questionnaire stating that the symptoms began in 2002. He identified "Big Muddy River Correctional Center" as where the repetitive injury took place.

The Petitioner filed this application of claim with a date of January 24th, 2011, with an alleged date of injury of January 12th, 2011, however, Petitioner's own testimony was that he had noticeable symptoms over nine years before his alleged date of injury. It is clear that a reasonable officer in Mr. Givan's position would have known his symptoms were work related at that time given the totality of the record and Mr. Givan's testimony. Although he denies it, the Petitioner had previously filed a complaint in 2006, for carpal tunnel.

The Attorney Representation Agreement signed by the Petitioner with respect to the Carpal Tunnel injury involving his right hand/wrist is dated January 30, 2006 as was the Application for Adjudication of Claim. The Arbitrator notes that the case was filed on February 6, 2006 and given number 06 WC 05467, the date of accident is listed as "unknown" on the petition. Courts considering various factors have typically set the manifestation date on either the date on which the employee seeks medical treatment for the condition or the date on which the employee can no longer perform work activities. *Durand v. Industrial Comm'n*, 224 Ill.2d 53, 72, 862 N.E.2d 918 (2006). Mr. Givan is time barred from bringing a case for right carpal tunnel and cubital tunnel based upon both his prior complaints in the record, his own testimony and his prior application of claim. 06 WC 05467 was dismissed for want of prosecution on June 2, 2009, which is not an adjudication on the merits, however, the statute of limitations clock started running at the very latest on February 6, 2006, when the petition was filed, since the Petitioner had listed a date of "unknown" as to when the accident occurred.

The statute of limitations is three years, clearly January 12, 2011, is well beyond the three year statute of limitations from February 6, 2006. Although case number 06 WC 05467, was filed with respect to the right hand/wrist/arm only, the Petitioner complained of symptoms bilaterally since 2002. The Petitioner's claim for benefits is denied.

Is the Petitioner's current condition of ill-being causally connected to this injury or exposure? Is the Respondent liable for the unpaid medical bills set out in Petitioner's Exhibit #1? Is the Petitioner entitled to any prospective medical care?

Since the Application for Adjustment of Claim was filed beyond the Statute of Limitations the above listed issues are moot. No benefits are awarded.

ORDER OF THE ARBITRATOR

The Application for Adjudication of Claim was filed beyond the Statute of Limitations therefore the Petition is denied. No benefits are awarded.

Rebecah L. Simpson
Signature of Arbitrator

May 19, 2013
Date

14IWCC0538

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

DAVID HAMPTON,

Petitioner,

vs. NO: 07 WC 18400

MARK REYNOLDS INDIVIDUALLY & d/b/a REHEARSALS, INC.,
& ILLINOIS INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent, the Illinois Injured Workers' Benefit Fund ("IWBF") herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanent partial 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 claim was arbitrated on July 17, 2012. Mark Reynolds did not appear at the hearing either in his individual capacity or as doing business as Rehearsals, Inc. Petitioner made a preliminary *prima facie* showing that Mark Reynolds and Rehearsals, Inc. did not have workers' compensation insurance. The IWBF defended the action.

The Commission notes that the IWBF did not preserve the issue of the award of temporary total disability benefits in its Petition for Review. Nevertheless, Section 19(e) of the Workers' Compensation Act provides that upon filing of a petition for review, the "Commission shall promptly review the decision of the Arbitrator and all questions of law or fact from *** the transcript of evidence." In addition, the Illinois Appellate Court has held that the Commission has the obligation to address all issues on review that arise upon an evaluation of the record even if such issues are not technically preserved by the party seeking review. *Klein Construction/Illinois Guaranty Fund, v. IWCC*, 384 Ill. App. 3d 892 (1st Dist. 2008). Therefore, the Commission is not bound by the non-preservation of particular issues.

The Arbitrator awarded Petitioner 67 6/7 weeks of temporary total disability benefits from the date of the accident, April 18, 2007, to August 5, 2008, the date he was released from treatment by Dr. O'Keefe. However, the record reveals that Dr. O'Keefe released Petitioner to full duty work on September 21, 2007. In addition, Dr. O'Keefe's treatment record from September 18, 2007, indicated that he would ask the employer "work to comply with OSHA guidelines, if [Petitioner] has to carry more than 75 pounds, then two people need to assist in that effort." That notation certainly implies that Petitioner could actually have been working at that time. Accordingly, the Commission modifies the Decision of the Arbitrator to terminate temporary total disability benefits as of September 21, 2007.

The Arbitrator awarded Petitioner 100 weeks of permanent partial disability benefits representing loss of the use of 20% of the person as a whole. Petitioner testified that currently he sometimes has trouble sleeping, his hip bothers him in certain weather, and he has "problems having sex with [his] wife," and he cannot play basketball with his 13-year old son. The medical records show that on June 25, 2007, Petitioner told Dr. O'Keefe that he was doing well and taking only two Ultram tablets a day when he was told he could take up to six a day. On July 9, 2007, Petitioner told treaters at Centro Medicos that he was doing very well and hardly had any pain. On July 17, 2007, Petitioner told Dr. O'Keefe that he had full range of motion in the hip and only had an occasional pop that was not very painful. On September 18, 2007, Petitioner told Dr. O'Keefe that he no longer needed narcotics or anti-inflammatories.

Petitioner sustained a nondisplaced hip fracture that did not require surgery. He recovered virtually completely within about five months of the injury. His testimony about his current disability was not very persuasive. The fundamental basis for the permanent partial disability award is his permanent 75-pound lifting restriction, even though apparently he was able to return to full duty as a construction worker after the five months of treatment.

In looking at the factors to be applied to determine permanent partial disability pursuant to section 8.1b of the Act, the Commission notes that Petitioner was 42 years of age at the time of the injury, he was able to return to his previous heavy physical demand level job after five months and therefore did not suffer a reduced earning capacity, and his testimony and medical records suggest limited residual disability from his work accident. Therefore, the Commission finds that the permanent partial disability award of the loss of 20% of the person as a whole is excessive. Accordingly, the Commission modifies the Decision of the Arbitrator to reduce the permanent partial disability award to 10% of the person as a whole.

The Arbitrator awarded Petitioner penalties and fees and wrote extensively why such penalties and fees were justified. The Commission agrees that the actions of Respondent, Mark Reynolds, was indeed unreasonable and vexatious and that the award of penalties and fees are warranted in this case. However, the Commission has reduced the outstanding temporary total disability benefit award which in turn affects the penalties under section 19(k) and fees under section 16. In addition, the Commission notes that the imposition of penalties and fees would apply only to the respondents, Mark Reynolds and Rehearsal, Inc. and not the IWBF. *See, Walker v. Capitol Transport, Inc., and IBFW,* 08 IWCC 692 (filed June 12, 2008).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $266.66 per week for a period of 22 2/7 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 $240.00 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of the use of 10% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $19,288.25 for medical expenses under §8(a) and §8.2 of the Act, pursuant to the applicable medical fee schedule.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents Mark Reynolds and Rehearsals Inc. shall pay penalties in the amount of $10,000.00 pursuant to §19(l), penalties of $4,680.00 pursuant to §19(k), and fees in the amount of $4,793.65 pursuant to §16 of the Act.

The Illinois State Treasurer as *ex officio* custodian of the IWBF was named a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the IWBF to the extent allowed under §4(d) of the Act, in the event of the failure of Mark Reynolds and Rehearsals, Inc. to pay the benefits due and owing to Petitioner. Mark Reynolds and Rehearsals, Inc. shall reimburse the IWBF for any of their compensation obligations paid to Petitioner from the IWBF.

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

DATED: JUL 0 8 2014
O-6/18/14
RWW/dw
46

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

14IWCC0538

HAMPTON, DAVID
Employee/Petitioner

Case# **07WC018400**

REHEARSALS INC AND MARK REYNOLDS INDV AND D/B/A REHEARSALS INC AND DAN RUTHERFORD EX OFFICIO ILLINOIS STATE TREASURER AND CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 4/29/2013, 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 0.08% 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:

1922 SALK, STEVEN B & ASSOC LTD
ALEXANDRA BRODERICK
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

REHEARSALS INC
3939 N LAWNDALE AVE
CHICAGO, IL 60618

5058 ASSISTANT ATTORNEY GENERAL
MATTHEW HAMMER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

14IWCC0538

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

DAVID HAMPTON
Employee/Petitioner

v.

REHEARSALS, INC., , and MARK REYNOLDS, individually and d/b/a REHEARSALS, INC, and DAN RUTHERFORD ex officio, Illinois State Treasurer and Custodian of the Illinois Injured Workers' Benefit Fund
Employer/Respondent

Case # **07** WC **18400**

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 **Chicago**, on **July 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 **Was the Respondent, Rehearsals, Inc., and Mark Reynolds individually and d/b/a Rehearsals, Inc., an uninsured employer on the date of accident?**

14IWCC0538

FINDINGS

On **4/18/2007**, 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 $**20,800.00**; the average weekly wage was $**400.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**3,800.00** for TTD.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $266.66/week for 67 & 6/7 weeks, commencing April 18, 2007 through August 5, 2008, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $19,288.25, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $240.00/week for 100 weeks, because the injuries sustained caused the 20% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner penalties of $**6,716.74**, as provided in Section 16 of the Act; $**16,791.86**, as provided in Section 19(k) of the Act; and $**10,000.00**, as provided in Section 19(l) of the Act.

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

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

4-25-13 — Date

APR 29 2013

FINDINGS OF FACT

This case having proceeded to hearing on July 17, 2012, and the Respondent, Rehearsals, Inc. and Mark Reynolds individually and d/b/a Rehearsals, Inc., having been duly noticed and personally served with correspondence (PX 14, 15 A & B) that this case was proceeding to arbitration and that if the company failed to appear, that this matter would proceed ex parte and the Respondent, having been certified that there is no applicable insurance coverage (PX 12), and the Illinois State Treasurer and Custodian of the Injured Workers Benefit Fund having been added as a party, and having appeared being duly represented by counsel, the Arbitrator makes the following findings of fact based on the evidence presented.

The Petitioner, David Hampton, on April 18, 2007 was employed by the Respondent, Rehearsals, Inc. and Mark Reynolds individually and d/b/a Rehearsals, Inc. The Respondent was engaged in the business of demolition and construction. The Petitioner used sharp cutting instruments such as grinders, hammers, and cutters. On the date of the accident, the Petitioner was forty-two (42) years of age, and married with one (1) child under eighteen (18) years of age.

Petitioner started his employment with Rehearsals, Inc., and Mark Reynolds individually and d/b/a Rehearsals, Inc., approximately three (3) days before April 18, 2007. He was hired by Mark Reynolds at a rate of $10.00 per hour. The Petitioner was hired/agreed to work five (5) days per week, eight (8) hours per day; for a regular work week of forty (40) hours at $10.00 per hour or

$400.00 per week. The Petitioner was paid by personal check by Mark Reynolds.

Prior to April 18, 2007, Petitioner did not have a history of injury to his left hip, pelvis, or groin. Up through the date of the accident, the Petitioner was fully capable of performing his normal duties for the Respondent, which included regularly lifting up to seventy-five (75) pounds. On April 18, 2007, the Petitioner reported to work at 8:00 AM at a warehouse at Ogden and Fullerton in Chicago, Illinois, where Respondent instructed him to work. At approximately 11:00 a.m., the Petitioner was on a ladder securing a pipe with a strap, when the strap broke causing the Petitioner to be knocked off the ladder and fall twenty (20) feet onto the concrete floor. Petitioner was knocked unconscious by the fall. Immediately after the accident, Petitioner noted pain in his pelvis, left hip, and head. Petitioner reported the accident that same day to Mark Reynolds and Fred, Petitioner's Supervisor. Petitioner did not finish his shift that day. Fred took Petitioner to the Stroger Hospital Emergency Room.

Petitioner was seen that same day, April 18, 2007, at the Stroger Hospital Emergency Room (PX 1). Petitioner gave a consistent accident history, and complained of bilateral hip and pelvic pain, abdomen pain, and a facial laceration. The doctor stitched up Petitioner's facial laceration, prescribed Vicodin, and advised Petitioner to remain off work. Petitioner followed up with the emergency physicians at Stroger Hospital on April 23, 2007. At that time, his stitches were removed, and it was prescribed that Petitioner continue to use Vicodin.

Petitioner next sought treatment with Dr. John O'Keefe at Marian Orthopaedics beginning on May 4, 2007 (PX 2). On that date, Petitioner complained of groin pain and weakness in the left leg, and tenderness was noted in the hip and pubic bone. Dr. O'Keefe referred Petitioner for physical therapy, prescribed pain medication, and recommended that Petitioner continue to remain off work. Dr. O'Keefe diagnosed Petitioner with a probable acetabular non-displaced fracture, and possible hairline fracture of ischium. Petitioner commenced physical therapy on May 8, 2007 at Centros Medicos (PX 3). Petitioner underwent physical therapy about three (3) times a week, for about thirty (30) minutes to one (1) hour for each session.

Petitioner continued to follow up with Dr. O'Keefe, and on July 17, 2007, he referred Petitioner for a work conditioning program and recommended Petitioner remain off work. Petitioner commenced work conditioning at Elite Physical Therapy on July 25, 2007 (PX 4). Petitioner underwent work conditioning four to five (4-5) days a week, for four (4) hours each session. Petitioner next saw Dr. O'Keefe on August 27, 2007, at which time he diagnosed Petitioner with a left hip pelvic fracture, and recommended he remain off work (PX 2). On September 18, 2007, Dr. O'Keefe gave Petitioner permanent restrictions of no lifting more than seventy-five (75) pounds. Petitioner followed up with Dr. O'Keefe on January 8, 2008 and August 5, 2008, at which time the permanent restrictions remained in place.

On August 1, 2007, at the referral of Respondent's Nurse Case Manager Celeste Gamba, Petitioner was sent for a second opinion evaluation with Dr.

Stover at Loyola University (PX 5). Dr. Stover diagnosed Petitioner with a displaced acetabular fracture.

The Petitioner was off work from April 18, 2007 through August 5, 2008 for a total of 67 & 6/7^{ths} weeks. During the time that the Petitioner was off of work, he was under the care of Stroger Hospital or Dr. O'Keefe. During this same period of time, Petitioner was either off work completely or capable of light duty work restrictions that were never accommodated.

The Petitioner testified that he noted improvement from the treatment, including the physical therapy and work conditioning. The Petitioner testified that while his hip complaints have greatly improved from the treatment, he still has trouble sleeping, and when it rains it causes hip pain. He also now has trouble having sex with his wife, and can no longer play basketball with his son. The Petitioner returned to work for another company around June 2009 doing demolitions work within his restrictions. Petitioner testified that he received checks in the amount of $3,800.00 from Mark Reynolds for his time off work.

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

The Respondent, Rehearsals, Inc. and Mark Reynolds individually and d/b/a Rehearsals, Inc, was operating under the Illinois Workers' Compensation Act automatically without election pursuant to Section 3(8), in that the Petitioner used sharp edged cutting tools including grinders. Therefore, the Arbitrator finds that on April 18, 2007 the Respondent was operating under and subject to the Illinois Workers' Compensation Act.

B. Was there an employee-employer relationship?

The Arbitrator finds that based on the undisputed testimony of the Petitioner, on April 18, 2007, the Petitioner was employed by the Respondent to do demolitions.

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

The Arbitrator finds that on April 18, 2007 an accident occurred that arose out of and in the course of the Petitioner's employment with the Respondent as a demolition worker. On that date the Petitioner was securing a pipe with a strap, when the strap broke knocking Petitioner off his ladder, and causing him to fall twenty (20) feet onto a concrete floor. This was a risk connected to the Petitioner's employment, and the accident arose out of and occurred in the course of the same.

D. What was the date of the accident?

The Arbitrator finds based on the testimony of the Petitioner and the medical records, that the date of accident was April 18, 2007. The Arbitrator relies on the undisputed testimony of the Petitioner and the medical records.

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

The Arbitrator finds that timely notice of accident was given by the Petitioner to the Respondent. The Petitioner properly reported the accident to his supervisor Fred and Mark Reynolds, the owner of the company who hired him. Fred, Petitioner's supervisor, took Petitioner to the Stroger Hospital Emergency Room before Petitioner's shift ended that day. Accordingly, the Arbitrator finds that the Petitioner gave notice of accident within the time requirements of the Act.

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

The Arbitrator finds that as a result of the accident of April 18, 2007, the Petitioner suffered a left acetabular (hip) fracture that was diagnosed by X-ray on June 25, 2007. The Arbitrator relies on the unrebutted testimony of the Petitioner. He had no prior medical problems with respect to his hip, and was able to carry out the responsibilities of his employment without issue prior thereto. The chain of events demonstrate that immediately following the work related accident, the Petitioner had pain and discomfort in his hip. Based on the medical records and Petitioner's testimony, the Arbitrator finds that as a result of the accident in question on April 18, 2007, the Petitioner sustained a left acetabular (hip) fracture.

G. What were the Petitioner's earnings?

The Arbitrator finds that based on the undisputed testimony of the Petitioner, the Petitioner's average weekly wage, calculated pursuant to Section 10 of the Act, was $400.00 per week.

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

The Arbitrator finds that the Petitioner's age at the time of the accident was 42 years of age.

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

The Arbitrator finds based on the testimony of the Petitioner that the Petitioner's marital status at the time of the accident was that he was married, with one (1) child under the age of 18.

J. Were the medical services that were provided to Petitioner reasonable and necessary?

The Arbitrator finds that all the medical treatment rendered by Dr. O'Keefe of Marian Orthopaedics, Centros Medicos, Elite Physical Therapy, and Loyola Hospital was reasonable and necessary medical treatment. In doing so, the Arbitrator relies on the unrebutted testimony of the Petitioner, the record as a whole, and the credible opinions of Dr. O'Keefe. Respondent has failed to offer evidence to rebut their opinions. As such, the Arbitrator finds all of the charges as listed in accordance with the fee schedule of the Act and attached to the stipulation sheet, are reasonable and necessary and that the Petitioner has incurred said medical expenses pursuant to Section 8(a) of the Act in the amount of $19,288.25. All of said charges were reasonable and necessary to relieve the Petitioner from the effects of his accidental injuries.

K. What amount of compensation is due for temporary total disability?

Based upon the unrebutted testimony and credible opinions of Dr. O'Keefe, the Arbitrator finds that the amount of compensation due for temporary total disability is 67 and 6/7 ^{ths} weeks from April 18, 2007 through August 5, 2008 for a total of 67 & 6/7^{ths} at the TTD rate of $266.66 per week; to wit $18,095.46.

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

The Arbitrator finds that the Petitioner sustained a left acetabular (hip) fracture as evidence by x-ray. Accordingly, the Arbitrator awards the Petitioner 20% of a man pursuant to Section 8(d)2 of the Act or 100 weeks at the permanent partial disability Rate of $240.00, totaling $24,000.00.

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

The Respondent has done nothing to defend this case and has failed to pay the necessary benefits beyond the sum of $3,800.00. The Arbitrator finds that the Respondent's actions are unacceptable, and it did not act in good faith in failing to provide compensation. The Arbitrator further finds that Respondent's actions are indeed unreasonable, vexatious, and Respondent is without any defense whatsoever to its conduct. This is an appropriate case for penalties pursuant to Section 19(l), 19(k), and attorneys fees pursuant to Section 16 of the Act.

Section 19(l) penalties are appropriate if the Respondent fails, neglects, refuses, or unreasonably delays payment of benefits due. An employer withholding benefits has the burden of proving that its delay was reasonable. Jacobo v. Illinois Workers' Compensation Commission, 959 N.E. 2d 772 (2011). In McMahan v. Industrial Commission, the Supreme Court held Section 19(l) penalties are "mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." 183 Ill. 2d 499 at 515. When the Respondent' fails to meet its burden, the Petitioner is to be awarded thirty dollars per day ($30) per day with a maximum award of ten thousand dollars ($10,000.00).

Accordingly, the arbitrator finds Respondent in violation of Section 19(l) due to its failure to rely on a qualified medical opinion in its denial of benefits. Respondents denial of benefits was for more than 333 days, thus, the maximum penalty of $10,000.00 shall be awarded to Petitioner.

The Arbitrator likewise finds that this is an appropriate case for penalties pursuant to Section 19(k) and attorneys fees pursuant to Section 16 of the Act. Penalties under Section 19(k) and Section 16 are appropriate if the Respondent is guilty of delay or unfairness towards the employee in the payment of benefits, is unreasonable or vexatious in the delaying payment of benefits, or engages in frivolous defenses which do not present real controversy. Unlike Section 19(l) penalties, these penalties are not mandatory, they are discretionary and "intended to address situation where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose." Mechanical Devices v. Industrial Commission, 344 Ill.App.3d 752. Considering the record as a whole, the conduct of the Respondent in this case has been vexatious.

Arbitrator finds Respondent presented no defense other than an unwillingness to pay benefits. Such behavior is unreasonable and vexatious and in violation of Section 19(k). Petitioner is awarded 50% of the $18,095.46 awarded in TTD benefits. Taking into account the $3,800.00 credit, 50% of remaining $14,295.46 owed in TTD is equal to an award of $7,147.73. Also pursuant to Section 19(k), Petitioner is awarded an amount equal to 50% of the $19,288.25 in outstanding medical bills; to wit $9,644.13. The total award pursuant to Section 19(k) is $16,791.86.

Finally, Respondent's unreasonable and vexatious conduct is also in violation of Section 16; accordingly, Petitioner's attorneys, Steven B. Salk & Associates, Ltd., are awarded 20% of $14,295.46 in net TTD owed; an amount equaling $2,859.09. Petitioner's attorneys are also awarded 20% of the

$19,288.25 in outstanding medical bills; to wit $3,857.65. The total amount of penalties awarded to Petitioner's attorneys pursuant to Section 16 is $6,716.74.

N. Is the Respondent due any credit?

The Respondent, Rehearsals, Inc., and Mark Reynolds individually and d/b/a Rehearsals, Inc., and Dan Rutherford, ex officio, as Custodian of the Injured Workers Benefit Fund shall receive a credit of $3,800.00.

O. Was the Respondent, Rehearsals, Inc., and Mark Reynolds individually and d/b/a Rehearsals, Inc., an uninsured employer on the date of the accident?

Based on Exhibit 12, Certification of Lack of Insurance Coverage by the Commission Staff, the Arbitrator finds that the Respondent, Rehearsals, Inc. and Mark Reynolds individually and d/b/a Rehearsals, Inc., had no insurance coverage on the date of accident and that the Injured Workers Benefit Fund is the proper party.

14IWCC0539

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 Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Deborah Heck,

Petitioner,

vs. NO: 11 WC 07107

State of Illinois, Central Management Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent with respect to Petitioner's cervical 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 awarded 27.5% of the person as a whole pursuant to §8(d)2 of the Act and explained that the total award represented a 10% loss with respect to the neck and a 17.5% loss with respect to the right shoulder. After considering all of the evidence, the Commission modifies the Arbitrator's award because we do not find that Petitioner sustained serious and permanent injury to her cervical spine to the extent of 10% of the person as a whole. Dr. Payne diagnosed Petitioner with a "whiplash-type" causally related to the December 3, 2010 trip and fall accident. A cervical spine MRI failed to show any evidence of a neck injury. Dr. Payne recommended conservative care to address Petitioner's symptoms; he did not find any acute pathology. Dr. Payne released Petitioner from care without restrictions on May 17, 2012. Petitioner continued to complain of neck pain but was able to return to her pre-accident job duties; she testified that looking down while performing clerical work causes discomfort. Petitioner is disabled to the extent of 5% of the person as a whole as a result of her cervical condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated December 2, 1013 is modified as stated above and otherwise affirmed and adopted.

14IWCC0539

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $371.63 per week for a period of 112.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 22.5% loss of the person as a whole.

DATED: JUL 0 8 2014
RWW/plv
o-5/28/14
46

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0539

HECK, DEBORAH
Employee/Petitioner

Case# **11WC007107**

STATE OF ILLINOIS-CMS
Employer/Respondent

On 12/2/2013, 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 0.10% 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:

2934 BOSHARDY LAW OFFICE PC
JOHN V BOSHARDY
1610 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

0988 ASSISTANT ATTORNEY GENERAL
ANDREW SUTHARD
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 PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

DEC 2 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

Deborah Heck
Employee/Petitioner

Case # **11** WC **07107**

v.

State of Illinois-CMS
Employer/Respondent

14IWCC0539

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 **November 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 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 **December 3, 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 $ **32,308.00** ; the average weekly wage was $ **619.38** .
On the date of accident, Petitioner was **34** years of age, *single* with **1** dependent children.
Petitioner *has* received all reasonable and necessary medical services.
Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.
Respondent shall be given a credit for $**13,508.79** for TTD, $_____ for TPD, $_____ for maintenance, and $_____ for other benefits, for a total credit of $**13,508.79**.
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 $ **412.92**/week for **33 & 5/7** weeks, commencing **3/10/2010 to May 30, 2011; Ocotber 26, 2011 to October 29, 2011, and; from November 29, 2011** through **May 1, 2012** , as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ **371.63**/week for **137.50** weeks, because the injuries sustained caused **27.5** % loss of the person as a whole as provided in Section 8(d)2 of the Act.
Respondent shall pay Petitioner compensation that has accrued from **December 3, 2010** through **November 5, 2013** , and shall pay the remainder of the award, if any, in weekly payments.
Respondent shall pay $ _____ 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 $ _____ in penalties, as provided in Section 19(k) of the Act.

Respondent shall pay $ _____ in penalties, as provided in Section 19(l) of the Act.

Respondent shall pay $ _____ in attorneys' fees, as provided in Section 16 of the Act.

_____

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

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

D. Dylan McCarthy
Signature of arbitrator

November 25, 2013
Date

DEC 2 - 2013

14IWCC0539

Deb Heck vs. State of Illinois - Central Management Services
IWCC No. 11 WC 07107

Findings of Fact and Conclusions of Law

As a consequence of Petitioner's accidental injury, Petitioner notice the immediate onset of neck pain and right shoulder pain. Petitioner noted that her pain extended from her hand up to the right side of her neck. Shortly after the accident the Petitioner also developed right hand numbness. These problems were documented in her initial prompt care visit with Dr. Rishi Sharma. (P.X. 5, p. 47-8)

On examination on December 8, 2010 by Petitioner's primary care physician, Dr. Gary Shull, it was noted the movements of Petitioner's neck reproduced numbness in her hand and her right triceps jerks was completely reduced and very brisk on the left. (P.X. 5, p. 45) Dr. Shull felt the Petitioner's symptoms suggested radical pain and nerve impingement. (P.X. 5, p. 45) Petitioner was referred to Dr. David Gelber, her normal physician for her multiple sclerosis. (P.X. 5, p. 40-1) Dr. Gelber noted a decreased triceps jerk in the right arm. (P.X. 5, p. 41) An EMG/NCV study performed by Dr. Gelber on December 21, 2010 was negative for any nerve entrapments. (P.X. 5, p. 61-2)

An MRI of the cervical spine performed on December 23, 2010 revealed C6-7 left uncovertebral hypertrophy causing mild to moderate left neuroforaminal stenosis and areas of T2 hyper intensity of the cervical spinal cord from C2 down to C5 in keeping with the history of multiple sclerosis. (P.X. 5, p. 67-8)

MRI of the right shoulder revealed a type 2 acromium, tendinosis of the supraspinatous tendon and posterior/inferior para-labral cysts, small joint effusion and subacromial bursitis. (P.X. 5, p. 70)

Dr. Sharma order physical therapy. (P.X. 5, p. 36) On examination by the therapist on January 5, 2011, the Petitioner was noted to have pain on palpation on the right side of her neck in sub occipital region, a large knot at the insertion of the levator scapulae, which upon palpation of trigger points reproduced pain up to her ear and down to her hand. (P.X. 5, p. 90) Grip strength testing was shown to be 27 pounds on the right and 85 pounds on the left. The therapist also noted complaints of right hand, arm and shoulder pain. (P.X. 5, p. 90) Petitioner received physical therapy through the remainder of January and into February. (P.X. 5)

On February 10, 2011 Petitioner returned to Dr. Sharma noting improvement but that she continued to have pain in her neck, chest and right shoulder. On examination Dr. Sharma noted a positive Spurling's on the left and tenderness in the para-spinal region as well as her trapezius with multiple trigger points. Examination of the right shoulder showed signs of impingement. Dr. Sharma diagnosed Petitioner with right cervical degenerative disk disease with multiple trigger points and rotator cuff tendinopathy. (P.X. 5, p. 25-6) Dr. Sharma recommended trigger point injections, referral for surgical consultation and continued physical therapy. (P.X. 5, p. 26)

On February 17, 2011 Dr. Sharma administered 8 trigger point injections into the Petitioner's right trapezius and shoulder region. (P.X. 5, p. 24)

On February 28, 2011 Petitioner was seen by Dr. Darr Leutz for consultation regarding her right shoulder. Dr. Leutz examined the Petitioner's right shoulder, reviewed her prior medical treatment and the radiology studies performed. (P.X. 5, p. 22) Dr. Leutz felt the Petitioner had compression anthralgia of the right shoulder region, an anterior glenoid labrum lesion and possible brachial plexus nerve root injury. (P.X. 5, p. 23) Dr. Leutz recommended right shoulder arthroscopic surgery consisting of a subacromial decompression, labral repair and possible acromioclavicular joint resection. (P.X. 5, p. 23)

Petitioner was seen by Dr. William Payne for her cervical spine complaints on March 3, 2011. Cervical x-rays were performed that showed reversal of the expected cervical lordosis. P.X. 5, p. 73-4) Dr. Payne noted the Petitioner's complaints, her prior medical care and the radiographic studies. Dr. Payne felt the Petitioner had cervicalgia and had suffered a whiplash injury when she fell but did not recommend injections or surgery. (P.X. 5, p. 20)

Petitioner's right shoulder surgery was authorized and performed on March 10, 2011 at Passavant Area Hospital. (P.X. 5 & 6) Dr. Leutz performed a right shoulder arthroscopic posterior Bankhart repair and anterior/inferior capsular repair with subacromial decompression and AC joint resection. (P.X. 6) Petitioner underwent extensive physical therapy at Passavant Area Hospital but reported no lasting improvement from the surgery. (P.X. 5& 7) On March 28, 2011 Dr. Leutz saw the Petitioner in follow-up to her surgery and noted 10% improvement in her pain but that her shoulder was stiff and popping. (P.X. 5, p. 33)

Petitioner returned to Dr. Payne on April 14, 2011 at which time she told him that since her shoulder surgery she was noting increasing neck and shoulder pain. Dr. Payne reassured her and advised her to stretch her neck and take anti-inflammatory medication. (P.X. 5, p. 32)

Petitioner continued to receive physical therapy. Petitioner's physical therapy was transferred back to Springfield as of June 16, 2011 after she returned to work. (P.X. 5, p. 73)

On July 6, 2011 Petitioner was seen by Dr. Leutz who noted that Petitioner was 50% improved and had no radicular arm pain but Dr. Leutz injected the Petitioner's right shoulder with a cortico-steroid and advised the Petitioner to continue her physical therapy. (P.X. 5, p. 24-5) On July 8, 2011 at physical therapy Petitioner advised the therapist her shoulder was "killing" her. On examination the therapist noted positive impingement signs with constant pain and discomfort. (P.X. 5, p. 67) On July 22, 2011 the physical therapist reported the Petitioner continued to experience pain with poor sleep and neck pain and hand issues persisted. (P.X. 5, p. 64)

On August 3, 2011 Petitioner returned to Dr. Leutz where it was noted the Petitioner had radicular arm pain, pain in the right shoulder joint(s), right shoulder stiffness and a popping sound. (P.X. 5, p. 20) Dr. Leutz ordered an MRI.

MRI of the right shoulder was performed on August 29, 2011 and showed considerable metal artifact making the glenohumeral joint and labral portion "nondiagnostic".(P.X. 5, p. 41) The rotator cuff showed tendinopathy of the supraspinatous and infraspinatous without a discrete tear. (P.X. 5, p. 42)

On September 7, 2011 Petitioner returned to Dr. Leutz noting no improvement. Dr. Leutz noted the MRI did not provide a good view of the shoulder and he recommended a CT arthrogram. (P.X. 5, p. 17-9) Dr. Leutz injected the right shoulder with a corticosteroid again on September 7, 2011.

A CT arthrogram was performed on October 4, 2011 which showed a subtle tear of the posterior inferior aspect of the glenoid labrum with subchondral cyst formation. The findings were felt to be "posttraumatic in nature" leading to some osteoarthritis in the region. The CT arthrogram was also noted that only a small amount of contrast material was visualized in the joint space and that this might be due to adhesive capsulitis (P.X. 5, P. 39)

Dr. Leutz reviewed the CT arthrogram with the Petitioner on October 11, 2011 and recommended a right shoulder arthroscopic debridement and labara repair. (P.X. 5 p. 14-5)

On October 20, 2011 Petitioner returned to see Dr. Payne for worsening neck pain as well as stiffness and muscle spasm in her neck. Dr. Payne examined the Petitioner noting tightness and "fullness" in Petitioner's right prosperous muscles of her cervical spine. Dr. Payne recommended additional physical therapy and manual traction with an over-the-door neck traction
Device. (P.X. 5, p. 54)

On November 23, 2011 the Petitioner was seen by Dr. Leutz to discuss her upcoming surgery and on examination of her right shoulder noted a winged scapula in addition to previous shoulder findings previously made. (P.X. 5, p. 53)

Petitioner underwent a right shoulder arthroscopic Bankhart repair, posterior labral repair, posterior superior labral repair, SLAP repair, and rotator cuff interval closure capsulorraphy. (P.X. 8)

Petitioner was seen by Dr. Leutz in follow up to her second shoulder arthroscopic surgery and on December 14, 2011 D. Leutz noted continued pain in the shoulder, right shoulder stiffness and a popping sound in the right shoulder and that the shoulder seemed out of place. (P.X. 5, p. 40) Additional physical therapy was ordered.

On January 11, 2012 Dr. Leutz noted that Petitioner complained of right shoulder pain which was 9 out of 10 and was constant. Petitioner described her pain as sharp stabbing, aching, dull aching and burning. (P.X. 5, p. 37) These complaints continued to Petitioner's appointment with Dr. Leutz on February 14, 2012 where Dr. Leutz also noted her right hand numbness continued. Dr. Leutz ordered an EMG to evaluate the right hand complaints. (P.X. 5, p. 33)

A third EMG was performed by Dr. Gelber on March 31, 2012 and was read as being normal. (P.X. 5, p. 58) On April 11, 2012 Dr. Leutz reviewed the EMG and recommended additional physical therapy. (P.X. 5, p. 27-9)

Petitioner was seen by Dr. Payne on April 24, 2012 for continued neck and shoulder pain where Dr. Payne stated that the fall at work could have caused injury to the facet capsule and mild injury to the disk causing her neck pain but nothing that would be surgical. (P.X. 5, p. 25-6) Dr. Payne noted the Petitioner had a point of maximal tenderness and recommended a trigger injection. Dr. Payne injected Petitioner's trigger point with lidocaine and celestone, noting the Petitioner experienced immediate relief from the numbing medication. Dr. Payne released Petitioner from his care and advised her to return if needed. (P.X. 5, p. 25-6). Petitioner returned to Dr. Payne on May 29, 2012 noting continued neck pain and headaches when looking down. Dr. Payne noted her x-rays showed hyperlordosis and diagnosed Petitioner with neck pain and a whiplash injury. Dr. Payne recommended the Petitioner have chiropractic or acupuncture and released her from his care. (P.X. 5, p. 24)

On July 11, 2012 Petitioner was seen by Dr. Leutz. Dr. Leutz noted the Petitioner continued to complain of radicular arm pain, pain in the right shoulder, shoulder joint stiffness and popping in the right shoulder. Dr. Leutz advised the Petitioner to continue with home exercises and released the Petitioner from his care and to return if needed. (P.X. 5, p. 12)

Dr. Gelber order repeat MRI of the cervical spine which was performed on October 12, 2012 and showed no progression of her multiple sclerosis since her MRI in 2010. (P.X. 5, p. 95)

Petitioner returned to Dr. Leutz on November 26, 2012 complaining of continued right shoulder pain of 6 out of 10, pain in the right shoulder joint, stiffness and popping in the right shoulder. Petitioner also continued to complain of numbness and tingling in her little and ring finger of the right hand which had been present since her injury. (P.X. 5, p. 52) On examination Dr. Leutz noted a positive Tinels of the ulnar nerve on the right hand, positive Speed's test of the right shoulder, pain on palpation of the glenohumeral joint and bicipital groove and subacromial crepitus. (P.X. 5, p. 54) Dr. Leutz recommended another EMG for evaluation of peripheral nerve entrapment. (P.X. 5, p. 54)

An EMG of the right upper extremity was performed on December 20, 2012 and was again negative. (P.X. 5, p. 87)

On March 13, 2013 Dr. Leutz saw the Petitioner for the last time and noted the Petitioner had radicular arm pain at times, pain in the shoulder, joint stiffness and popping. Dr. Leutz' records indicate that these findings were on her left, however it appears to be a typographical error as Dr. Leutz records indicate the Petitioner was returning due to continued right shoulder pain. Petitioner described her pain was a level of 8 out of 10 and was dull, throbbing, aching and burning which would wake her at night. Petitioner took Aleve, Naproxen and Motrin for pain and inflammation.

Dr. Leutz also noted numbness in the fourth and fifth fingers of her right hand. (P.X. 5, p. 28) Dr. Leutz told Petitioner that she was at MMI and he could not help with her neck or numbness issues.(P.X. 5, p. 28-30)

Petitioner testified that she continues to have pain extending from her neck down through her shoulder and arm, shoulder joint pain, especially in the front of her shoulder and upper back pain on the right, neck pain. Petitioner notes that her pain disturbs her sleep. Petitioner also notices that she has stiffness in her neck for which she uses her cervical traction device two times per week. Petitioner sued to play softball but now cannot do so as she cannot throw a softball. Petitioner noted that before her work accident she never experienced any symptoms similar to her current complaints. Petitioner takes 800 mg of Naprosyn daily. Petitioner describes her current pain as 6 out of 10. Petitioner notes that her shoulder continues to pop and is tight. Petitioner notices that her right shoulder pain increases with movement.

Petitioner was promoted to a different position with the Respondent but notices that in her new job she must use a stamp and she develops a sharp pain in the front of her shoulder. Petitioner notices pain with reaching at work as well. Petitioner has taken days off from work due to the pain.

Mr. Thomas Shoaff, Petitioner's supervisor at the time of the accident through September 16, 2013 was called by Respondent to testify and stated that Petitioner does complain about pain in her right arm and Petitioner had taken time off of work due to her pain.

The evidence shows that the Petitioner suffered injuries to the right shoulder, cervical spine and nerves into the right shoulder as a result of her accident. With respect to the shoulder, she was found to have extensive tearing of the labrum requiring two surgical repairs. Despite extensive physical therapy and injections, she continues to have objective evidence of disability. Dr. Leutz found significant decreased motor strength with testing of flexion, extension, internal and external rotation during his final examination in March of 2013. He made similar findings during his examination in July 2012 when he released her to return as needed. Dr. Payne concluded that the Petitioner suffered injuries to the cervical spine, aggravating a disc and the facet capsule. She did not show much improvement with therapy, and he suggested chiropractic or acupuncture treatment going forward. X-ray's performed during his last examination showed a reversal of her normal cervical lordosis. On May 18, 2012, Dr. Gelber suggested that the Petitioner possibly sustained a mild stretch of the brachial plexus, though her electrical tests were normal.

The Petitioner's testimony concerning her current symptoms was credible and consistent with the histories she provided to all of her providers during the years following her accident.

The Arbitrator awards 17.5% Person As A Whole for the right shoulder injuries, and 10% Person As A Whole for the cervical and nerve injuries, for a total of 27.5% of the whole body.

In her proposed decision, the Petitioner raises for the first time questions concerning the Respondent's payment of temporary total disability and medical expenses. As those issues were not raised at arbitration or on the parties Request For Hearing, they are deemed waived.

With respect to medical, the Respondent is responsible for payment of all related bills pursuant to the Fee Schedule. Respondent Exhibit 3 represents a summary of the medical expenses paid by the Respondent. It appears that payments were made by their workers compensation provider, CMS. The Arbitrator is unclear as to why the Respondent claimed credit pursuant to Section 8 (j) on the Request For Hearing, as that credit only applies to payments made under a group plan. Accordingly, no 8 (j) credit is awarded.

14IWCC0540

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leigh D. Hinrichs,

Petitioner,

vs. NO: 04 WC 56424

Vactor Manufacturing,

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 treatment and expenses, temporary total disability and permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and awards benefits to Petitioner for accidental injuries sustained in the course of and arising out of her employment by Respondent on July 16, 2004.

On the date of accident Petitioner was 52-years-old. Petitioner testified that she was hired by Respondent in 1993 to work as a welder. She underwent a pre-employment physical and denied any prior back problems. The medical records indicate that lumbar x-rays were taken in 1993 and 1999 and that Petitioner had pre-existing degenerative disk disease in her spine. Petitioner also suffered from multiple chronic medical conditions unrelated to her back for which she regularly treated with her primary care doctor, Dr. McVay. Petitioner sustained an undisputed accidental injury on July 16, 2004 as she bent and twisted in order to weld a component. She experienced sharp pain in her back radiating down her left leg. The parties stipulated that timely notice was given to Respondent. Petitioner continued to work for several weeks before returning to Dr. McVay on August 23, 2004. She gave a history of several months of back pain related to specific tasks at work and recent episodes of severe pain occurring at work on July 16, 2004 and again one month later. Dr. McVay took Petitioner off of work until further evaluation. A lumbar MRI study was performed on August 27, 2004. The films showed

severe facet arthropathy without compromise of the spinal cord or nerve roots. Dr. McVay noted that Petitioner's back pain only marginally improved with rest. Dr. McVay continued to keep Petitioner off of work. Respondent sent Petitioner to Dr. Delheimer for an examination pursuant to §12 on October 28, 2004. Dr. Delheimer concluded that there was no clear-cut medical evidence that an actual injury occurred during the course of Petitioner's work on July 16, 2004 and he did not believe that Petitioner's back condition was work-related rather than pre-existing and chronic. Petitioner filed an Application for Adjustment of Claim on November 29, 2004. Also on that date, Dr. McVay released Petitioner to return to work on a light duty basis. Petitioner reported to Dr. McVay that she was unable to work light duty because it was not available. We note that at hearing however, Petitioner claimed entitlement to temporary total disability benefits from August 23, 2004 only through November 15, 2004.

In January of 2005 Petitioner requested a full duty release to return to work from Dr. McVay. Petitioner complained of continued difficulty with any walking, bending, or twisting, however she stated that she had no income and needed to be able to return to full duty work. Petitioner returned to her regular job duties on January 20, 2005 but continued to see Dr. McVay on a regular basis for management of her chronic medical problems. Due to continued complaints of back pain, Petitioner underwent a course of physical therapy beginning in September of 2004. Petitioner's coworker, Mr. Sokol, testified that Petitioner occasionally needed assistance to perform the physical aspects of her job. Petitioner was seen in the emergency room of St. Mary's Hospital on three occasions in February and March of 2005 seeks payment of the associated medical bills. Although Petitioner reported back complaints to the attending physicians, a review of the records clearly shows that these emergency room visits were related to acute instances of her unrelated medical problems and not her back condition. Petitioner was last seen by Dr. McVay on November 22, 2005.

On February 6, 2006, Petitioner was examined by Dr. Eilers, a board certified physical medicine and rehabilitation physician, at the request of Petitioner's attorney and pursuant to §12. Dr. Eilers testified via deposition on June 7, 2006. Dr. Eilers relied on his examination, Petitioner's history, and the medical evidence to find that Petitioner's L5-S1 facet osteoarthritis was aggravated by the injury sustained on July 16, 2004. He opined that due to pain with the performance of her job duties as a welder, Petitioner would be better suited to light or medium work with a thirty-five pound lifting limitation and the avoidance of any twisting and turning activities that could further aggravate her condition. He did not believe that Petitioner was a surgical candidate and he did not recommend any additional medical treatment. Despite Dr. Eiler's recommendations, Petitioner continued to perform her regular job duties for Respondent. We rely on the treating records of Dr. McVay and the opinion of Dr. Eilers with respect to the July 16, 2004 accidental injury and its causal connection to Petitioner's current condition of ill-being and we reverse the decision of the Arbitrator denying Petitioner's claim. We note that Dr. McVay's records in evidence include several years of treatment pre-dating the accident; these records do not indicate any significant prior back complaints. We find that Petitioner proved by a preponderance of the evidence that the undisputed accident of July 16, 2004 caused a serious and permanent injury to her low back resulting in chronic pain and difficulty performing the activities of her job as a welder and entitling her to compensation for medical expenses, temporary total disability and an award of 20% of the person as a whole pursuant to §8(d)2.

14IWCC0540

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator dated November 5, 2012 is hereby reversed for the reasons set forth above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $486.93 per week for a period of 12 and 1/7 weeks from August 23, 2004 through November 15, 2004, 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 $438.24 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 20% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the costs of reasonable and necessary medical treatment provided by Dr. McVay from August 23, 2004 through November 22, 2005, by Dr. Singh on August 24, 2004, by Ottawa Regional Hospital on August 24, 2004, August 27, 2004 and from September 8, 2004 through December 24, 2004, all according to §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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $61,200.00. 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: JUL 08 2014
RWW/plv
o-4/22/14
46

Ruth W. White

Daniel D. Donohoo

Charles J. DeVriendt

14IWCC0541

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leigh D. Hinrichs,

Petitioner,

vs. NO: 06 WC 53771

Vactor Manufacturing,

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, medical expenses, temporary total disability and permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and vacates the Arbitrator's award of benefits.

Petitioner was 54-years-old on the date of accident, September 1, 2006. Petitioner testified that she began working for Respondent as a welder in 1993. In a companion case, 04 WC 56424, Petitioner alleged injuries to her low back arising out of an undisputed accident on July 16, 2004. On review, the Commission reversed the Arbitrator's denial of the claim and awarded medical benefits, temporary total disability and permanent partial disability benefits to the extent of 20% of the person as a whole pursuant to §8(d)2. On September 1, 2006, a Friday, Petitioner was working full duty in her regular job capacity as a welder. Although she had been working without restrictions since January of 2005, Petitioner testified that she had persistent pain in her low back and left leg for which she took medications; occasionally she would need to miss work due to the pain. She testified that she was able to perform her usual job duties but became increasingly less productive and would ask for assistance from her coworkers more often.

On September 1, 2006, while bending and reaching forward to weld a seam, Petitioner

alleged that she felt intense pain in her low back. She explained that the pain was similar to that which she experienced previously, but that it was more intense. Petitioner testified that she sat down for the rest of her shift, but she did not testify that she made any report of injury to Respondent before leaving work. We note that Petitioner's testimony with respect to the alleged accident was vague. Petitioner did not return to work after September 1, 2006 and claimed entitlement temporary total disability benefits beginning on September 2, 2006.

Petitioner testified that she saw her primary care doctor, Dr. McVay, on Monday, September 4, 2006, but no corresponding record is in evidence. Petitioner testified that Dr. McVay took her off of work and that she presented the off-work slip to Ms. Barr "who does all the FMLA" for Respondent. Petitioner was asked on direct examination whether she explained to Ms. Barr why she needed to be off of work. Petitioner testified that she told Ms. Barr she had been in a lot of pain and had a "bad day" on "Saturday." The records show that Petitioner was seen by Dr. McVay on September 8, 2006. She denied any recent injury but complained of increasing back pain for the past ten days. Dr. McVay assisted Petitioner in applying for short term disability benefits.

Petitioner filed an Application for Adjustment of Claim on December 14, 2006. On December 28, 2006 Dr. McVay noted that Petitioner continued to have a stable level of low back pain although she had been off of work since September 4, 2006. He diagnosed advanced degenerative disk disease of the spine. Dr. McVay continued to keep Petitioner off of work and again he noted that there had been no recent injury. Dr. McVay's subsequent office notes from January, March and April of 2007 indicate that Petitioner had complaints now involving her upper back and shoulder as well as her low back, and increasingly significant complaints with respect to her unrelated chronic medical and psychological conditions. On May 12, 2007 Dr. McVay issued a narrative letter that fails to mention any alleged injury on September 1, 2006. Instead, Dr. McVay stated that Petitioner presented to his office on September 8, 2006 with complaints of steadily increasing mid and lower back pain. Dr. McVay noted that Petitioner had been off of work since September 4, 2006 and he elected to keep her off of work. He noted that having observed Petitioner for several months he no longer believed that Petitioner's spinal condition would permit her to do any job that requires lifting, bending, or twisting. He noted that Petitioner's condition remained unchanged for the prior three years "aside from the progression that one would expect from aging." He did not find her fit for employment due to the nature of the restrictions that would be required to accommodate her back condition and also because of her "bad days" that frequently result in lost time from work. Dr. McVay opined that he expected Petitioner's condition to worsen due to the degenerative and progressive nature of her problems. Dr. McVay was not deposed. On September 11, 2007 Dr. McVay noted that Petitioner's attorney wanted an additional orthopaedic referral, to Dr. Lorenz.

Dr. Lorenz examined Petitioner on October 4, 2007 and Petitioner gave a history of a 2004 back injury with continued problems, but no mention of any injury occurring on September 1, 2006. Dr. Lorenz diagnosed lumbar discogenic pain with intermittent radiculitis. He agreed that Petitioner was unable to work due to her pain and disability. Dr. Lorenz testified via deposition on February 25, 2009; again he did not mention any history of injury occurring on September 1, 2009. Petitioner never returned to work for Respondent and was granted Social Security Disability benefits applied retroactively to September of 2006.

We find that Petitioner failed to prove she sustained a compensable injury on September 1, 2006. We find Petitioner's claim for workers' compensation benefits to be inconsistent with the credible and contemporaneous evidence showing that Petitioner voluntarily left her employment on September 1, 2006 without corroborating evidence of any injury and without timely notice to Respondent. The records show that while Dr. McVay supported Petitioner's request for disability, it was without the knowledge of any injury having occurred on September 1, 2006. Furthermore, Dr. McVay noted several times that Petitioner did not in fact sustain a new injury and instead suffered from progressive degenerative problems. He found that Petitioner's symptoms were unmitigated by remaining off of work but were also too severe to allow her to perform her regular job duties. Dr. McVay's opinion was based on his long history of treating Petitioner for her chronic medical problems. Petitioner's own testimony with respect to the September 1, 2006 accident is vague and unreliable. After considering all of the evidence including the opinions of Dr. McVay and Dr. Lorenz, we reverse the decision of the Arbitrator and deny Petitioner's claim for benefits under the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator dated November 5, 2012 is hereby reversed and the Arbitrator's award of benefits is vacated for the reasons set forth above.

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

DATED: JUL 08 2014
RWW/plv
o-4/22/14
46

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

14IWCC0542

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SUSAN BUTLER,

Petitioner,

vs. NO: 12 WC 19873

SOUTH BERWYN SCHOOL DISTRICT #100,

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, causation, temporary total disability, permanent partial disability, and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds Petitioner sustained her burden of proving accident and awards benefits.

Findings of Fact and Conclusions of Law

1. Petitioner testified she is employed by Respondent as a teacher and had been for 26 years. She felt "great" when she arrived at school on May 3, 2012. While she was walking from one classroom to another she missed a step on a stair and twisted her ankle. Her right ankle was in excruciating pain.

2. Petitioner also testified she had three minutes to get to the second classroom. While going to the classroom she "had to take care of some urgent business." She was using her cell phone sending a text message to a co-worker when she learned their computers were in the process of being reimaged. She had to let them know to back up all the data on the computers. Besides her responsibility of teaching students, Petitioner also spends 50% of her time working with teachers to help them use new computer technology.

3. After the accident she was led to the nurse's station and then taken to the emergency room. She was diagnosed with a closed fracture of the lateral malleous in the right ankle. She was given a splint and crutches. She later saw Dr. Park who recommended she not keep wearing the splint and to bear weight as tolerated.

4. In the days following her initial visit to Dr. Park, Petitioner noticed her right leg turned purple and was swollen from the knee down. She was diagnosed with deep vein thrombosis. She was referred to Dr. Virant for that condition. She was admitted to hospital she believed on May 17 and stayed there two nights. She was given a CAM boot. Dr. Park prescribed physical therapy.

5. Petitioner saw Dr. Weiss on June 4 and he recommended an MRI of her ankle. She continued to see the therapist and use the CAM boot through mid September. She continued to take Coumadin until the first week in October. She stopped seeing Dr. Weiss because it was denied by both the workers' compensation carrier and her group insurance.

6. Petitioner testified she works for Respondent about 37 weeks a year, but is paid throughout the 52-week year. Working during the summer is always an option. She has worked in the summer "a while back." She could have pursued such employment in the summer of 2012, but she did not because she "couldn't."

7. Petitioner also testified that currently she has "pain pretty much on a daily basis." She was "into running" but can no longer do that because of the pain it provokes. She was "an avid cyclist but had to really curtail that." She accomplishes tasks at a much slower pace. She feels worse because she cannot exercise every morning like she used to. She feels fatigue because of her lack of exercise. She uses a heating pad, which seems to work better than ice, and takes Advil three times a week almost every week for the pain. Sometimes she wears the brace.

8. On cross examination, Petitioner testified she was a classroom teacher for the first 25 years of her career. She estimated the two classrooms she was traveling between were about a block apart. It takes about three minutes to walk between the classrooms. There was a penalty for students being late to class, "it's just unprofessional" if she were late because she was "supposed to be modeling what [she's] working on."

9. She was probably walking at a fast pace, but was not "rushing." The lighting was good at the time of the accident. She was wearing "some sort of like sneakers" at the time. There were probably 16 stairs in the staircase and she missed the last step. She was probably looking at her phone because she was texting. In a statement she made to the adjuster she stated that she was "scurrying" between the classrooms. The text message she was sending was urgent because the computers could be turned off at any time of the day and if the data was not backed up first, all the data would have been lost. She normally does not text while walking down stairs. She had to send the message to six "teams" at the school and she did not believe she could wait.

10. Petitioner testified that currently, she rides her bike on a "trainer." She tried to ride outside a few times but there were too many stops and starts which required her to turn her ankle to "clip in" and "clip out," of the pedals, which hurts her ankle. When she rides on the trainer, she simply has to clip in and out once. She had to cancel all of the several bicycle trips she planned. Her ankle was currently achy "probably because of the snow." She receives no current treatment for her ankle.

11. On redirect examination, Petitioner testified the text she was sending was related to her school activities. She is not back to where she wants to be in her cycling, but she was "still working on it."

12. On re-cross, examination Petitioner testified she thought texting did increase her risk of falling. However, she thought that she "had 180 seconds to deliver a critical message" increased her "risk a lot more than the actual texting."

13. The medical records show that on May 5, 2012, Petitioner presented to the emergency department with "moderate" pain after turning her ankle "when she missed the last step on a stair." X-ray findings were "suspicious for nondisplaced fracture of the lateral malleous." Petitioner was given Vicodin, a splint, and crutches.

14. On May 7, 2012, Petitioner presented to Dr. Virant on referral by Dr. Park for orthopedic consultation for "left ankle pain." Petitioner reported missing the last step on stairs while texting. Dr. Virant noted that the x-rays from MacNeal showed no fracture or dislocation. Dr. Virant recommended weight bearing as tolerated and encouraged ankle range of motion exercises. Petitioner did not want supervised physical therapy and Dr. Virant thought a home exercise program would be alright. Petitioner had a 500 mile bike race in seven weeks and Dr. Virant would evaluate her to see if she were ready.

15. A bilateral venous Doppler ultrasound taken on May 10, 2012 showed acute occlusion thrombosis within one of the right peroneal veins. Test showed no signs of pulmonary embolism.

16. On May 30, 2012, Petitioner presented to Dr. Park reporting a slight improvement. Her hemarthrosis seemed to be subsiding. She had returned to work the previous day. Dr. Park encouraged weight bearing and she would resume physical therapy the next day.

17. On June 4, 2012, Petitioner presented to Dr. Weiss for a consultation. She reported a history of one-month ankle pain since the May 3, 2012 accident. She developed a deep vein thrombosis and was admitted to hospital for two days for bleeding into the right ankle. Her ankle hurts with every step but had improved. She had never had an ankle sprain in the past "is a big time biker." Dr. Weiss diagnosed ankle pain and edema after sprain. He ordered an MRI to rule out bone contusion, prescribed medication, and directed Petitioner to start using her CAM again. He would wait on physical therapy.

18. An MRI of the right foot taken on June 13, 2012 showed "marrow edema most likely secondary to bone contusions. An MRI of the right ankle showed mild marrow edema

consistent with bone contusion and a probably sprain of the posterior talofibular ligament."

19. On June 28, 2012, Petitioner returned to Dr. Virant and noted that she had seen Dr. Weiss for a second opinion who took an MRI. She wanted to know if she was going to be taken off Coumadin. She really wanted to ride in the Iowa bike race.

20. On July 31, 2012, Petitioner was initially evaluated by physical therapy for ankle sprain and bone contusion. Initially, she was diagnosed with a fracture, and placed in a cast. 2 weeks later the diagnosis was changed to sprain and she was encouraged to walk on her ankle unrestricted. About a week later she developed a deep vein thrombosis. A week after that she diagnosed with a bleed into the bones of her ankle. There was now no sign of thrombosis.

21. On September 10, 2012, Petitioner was discharged from physical therapy to a home exercise program after apparently 12 sessions. Petitioner had completed therapy and "met all therapy goals returning to previous functional status."

22. On December 12, 2012, Petitioner was interviewed by a workers' compensation claims adjuster and a transcript was made. Petitioner stated she was an "instructional coach in which she coaches "teachers, and kids, and curriculum, and technology." She has no source of income other than what she earns from Respondent. She explained that she was "scurrying" between classrooms sending a professional e-mail to "a team at the other middle school" on her phone and missed a step on the stairs and rolled her ankle. She did not fall. A couple of students asked whether she wanted a wheelchair, but she declined because she is "kind of tough and everything." They walked with her to the nurse's station. She treated with an orthopedist who offered physical therapy but she wanted to do it on her own.

23. Petitioner also stated she did not normally text while "scurrying" between classes when on stairs. She thought the e-mail she was sending was pretty important. She was currently injecting herself with Coumadin. She had a previous WC claim for a cut finger that required six stitches; "it was a quick sew up" and she did not miss any work. This was the first trauma to her foot.

In finding Petitioner did not sustain her burden of proving her accident arose out of her employment, the Arbitrator concluded she did not show that she was at greater risk of the injury because of her employment. She also noted that Petitioner put herself at greater risk because she was texting while descending the stairs and although her text was work related she was not ordered to send the message at that time. The Arbitrator cited *Vin v. Industrial Commission*, 351 Ill. App. 3d 798 (2004) in which a security guard parked in a tight parking space in a lot in which she was required to park, but which was also open to the public. She alleged she twisted her knee when her foot got caught in a crack in the concrete. The Court found Petitioner had not proven defect in the parking lot and that simply parking in a tight parking space did not put the claimant at greater risk due to her employment.

Petitioner argues the Arbitrator erred and actually asserts that the fact that she was texting at the time of the accident supports the conclusion that the accident arose out of her employment. She cites *Knox County YMCA v. Industrial Commission*, 331 Ill. App. 3d 880 (3rd Dist. 2000) in which Petitioner fell down stairs while carrying a can of soda and purse while descending stairs going to a mandatory CPR class. Because there was no time between the end of her shift and the class, carrying those items was in furtherance of her duties, as was carrying the cell phone and texting was in this case.

The Commission finds the *Knox County YMCA* case more applicable to the instant claim than the *Vin* case. In addition, the Commission notes that in *Anderson v. Community Unit School District #200*, 14 IWCC 430 (filed June 5, 2014) this panel recently held compensable an injury sustained by a 55-year old teacher, who was not a physical education instructor, when she demonstrated gymnastic techniques on a balance beam to students. The Commission stresses that contributory negligence on the part of a claimant is not a defense to a workers' compensation claim. In the case now before the Commission, the Commission finds that the accident arose out of Petitioner's employment because she was sending a work related text of significant importance which she thought was temporally urgent in nature. Whether or not her subjective believe of the urgency of sending the message was reasonable, is really not relevant.

Petitioner seeks temporary total disability benefits from the date of accident to August 14, 2012. The Commission finds awarding TTD benefits during school summer break to be inappropriate. Petitioner testified that at some time in the past she worked during the summer break, but apparently had not for some time. Assuming Petitioner would have found employment in the summer absent her injury is purely speculative. The record indicates school recessed for the summer on May 31, 2012. Therefore, the Commission awards temporary total disability benefits from May 3, 2012 to May 31, 2012 for a total of four 1/7 weeks. The Commission finds that all treatment Petitioner received was related to her work injury and were necessary and reasonable. Petitioner requests medical expenses in the amount of $1,962.80 based on the credit Respondent should receive for medical expenses paid thus far.

Petitioner suffered a sprained ankle and bone contusion. She needed two hospital stays due to development of deep vein thrombosis and bleeding in the ankle. In evaluating the factors to be applied in awarding permanent partial disability benefits, the Commission notes that Petitioner was 53 years of age at the time of accident, her injury does not currently interfere with her performing her normal job activities, she suffered no loss of earning capacity, and the medical records indicate limited functional impairment. In particular, on her discharge from physical therapy, it was noted that Petitioner had "met all therapy goals returning to previous functional status." Taking the record as a whole, the Commission concludes that a permanent partial disability award of the loss of 10% use of the right foot is appropriate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,334.99 per week for a period of 4 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

14IWCC0542

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 16.7 weeks, as provided in §8(b)2 of the Act, for the reason that the injuries sustained caused the loss of the use of 10% of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,962.80 for medical expenses under §8(a) and §8.2 of the Act, pursuant to the applicable medical fee schedule.

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

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

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

DATED: JUL 08 2014
o-6/18/14
RWW/dw
46

Daniel R. Donohoo

Charles J. DeVriendt

White Special Concurring Opinion

I concur with this decision of the Commission. I write a separate concurrence to explain why I believe this case is different than the *Anderson* case cited by the Commission above, in which I dissented. In *Anderson*, the claimant did not provide any evidence that she had engaged in gymnastics since college, which was likely about 30 years before the accident. She was not endorsed to teach physical education. The principal testified that she was unaware of even physical education teachers demonstrating maneuvers on a balance beam because of the inherent dangerousness of the activity and that the claimant's action was completely unacceptable and unforeseeable. I found the claimant's actions there to be reckless and her injury did not arise out of her employment. In the case now before the Commission I believe Petitioner's actions in texting while descending stairs was negligent. Nevertheless, she was sending a work-related text which she thought was of utmost importance. In addition, in my opinion somebody being injured because of sending a work-related text while on stairs is clearly more foreseeable than a middle aged teacher climbing on a balance beam to show off her gymnastic prowess. Therefore, I agree that this Petitioner's injury arose out of her employment while I believe the claimant's injury in *Anderson* did not.

Ruth W. White

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 DOWN	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA AXTELL,

Petitioner,

vs.

NO: 08 WC 54865

14IWCC0543

BAXTER,

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, medical expenses, and the nature and extent of Petitioner's permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission agrees with the findings of the Arbitrator regarding accident, causal connection, temporary total disability, and the award of medical expenses. Therefore the Commission affirms and adopts those portions of the Decision of the Arbitrator.

The Arbitrator awarded Petitioner 12.5% loss of the person as a whole. Petitioner had right shoulder arthroscopy with extensive debridement of the glenohumeral joint, bicipital labral complex, repair of bicipital labral complex, subacromial decompression, and arthroscopic resection of the distal clavicle for bicipital labral complex tear, impingement tendinitis of the rotator cuff, and degenerative arthritis of the AC joint.

Petitioner testified she returned to her previous job, but had to perform it differently. She could no longer perform her job with her arm raised and had to keep it lower. Currently, she cannot lift her right arm up as far as she used to. She has to move off her right side when she sleeps. She has problem moving her arm to the back but not in front of her. She does not have the strength in her arm as she did previously.

The work-related accident occurred on July 27, 2008 and surgery was performed on January 15, 2009. Petitioner testified that subsequent to the work-related accident and surgery, she suffered a subsequent injury to her right shoulder in May of 2009 when an object fell off a shelf onto her right shoulder. Petitioner complained to her general practitioner, Dr. Martinez, of increased pain in her shoulder after that incident. He ordered an MRI which showed callus formation around the inferolateral portion of the clavicle, suggestive of subacute injury.

In evaluating the factors to determine permanent partial disability under section 8.1b of the Act, the Commission notes that Petitioner was 58 years of age at the time of the injury and so has to work with her disability for a relatively short period of time. She was able to return to her previous job and therefore she experienced no diminution of her earning capacity. Her job was physical in nature but it required only a light physical demand, and she testified to some ongoing limitations because of the shoulder injury.

However, the Commission also notes that Petitioner's subsequent unrelated injury to her right shoulder was sufficiently serious to warrant an MRI which showed new pathology. Therefore, the subsequent unrelated injury contributed to her permanent partial disability because of the condition of ill being of her right shoulder. Assessing the record as a whole, the Commission finds a permanent partial disability award of 10% loss of the person as a whole is appropriate in this case, and modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $357.07 per week for a period of 40 5/7 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 $321.36 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 10% loss of the use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $79,757.15 for medical expenses under §8(a) of the Act pursuant to the applicable medical fee schedule.

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

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

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 proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: JUL 0 8 2014

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-6/19/14
46

14IWCC0544

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

Rachel Jefferson,

Petitioner,

vs. NO: 12WC21647

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 issue(s) of accident, temporary and total 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 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.

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: JUL 08 2014
o7/2/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0544

JEFFERSON, RACHEL
Employee/Petitioner

Case# 12WC021647

CHICAGO TRANSIT AUTHORITY
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:

2194 STROM & ASSOCIATES
LIDSEY STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
ANDREW ZASUWA
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

14IWCC0544

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

Rachel Jefferson
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **12** WC **21647**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **05/31/13**. 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 _____

14IWCC0544

FINDINGS

On **06/17/12**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 $**46,259.20**; the average weekly wage was $**889.60**.

On the date of accident, Petitioner was **48** years of age, *single* with **no** dependent children.

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

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

Respondent shall be given a credit of $**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

Petitioner has not proven, by a preponderance of the evidence, that an accident occurred which arose out of and in the course of her employment by Respondent 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.

L. Thompson-Smith

Signature of Arbitrator

July 24, 2013

JUL 24 2013

Rachel Jefferson
12 WC 21647

14IWCC0544

FINDINGS OF FACT

Petitioner is a 49-year-old female who has been employed by the respondent, Chicago Transit Authority ("CTA"), as part time Bus Operator since December of 2008. (Tr. 10)

On June 17, 2012, petitioner was operating a CTA bus northbound on Harlem Avenue. A man wanted to get off the bus and petitioner stopped the bus at the corner of North and Harlem Avenues. Two riders got off the bus. (Tr. 15) Petitioner testified that she looked in her rearview mirror and saw three men standing up surrounding another man in the back of the bus. Petitioner closed the bus doors and crossed North Avenue to the service stop. (Tr. 15) Petitioner testified that pulled into the bus stop and opened her door and the rest of the passengers ran off the bus. (Tr.15)

Petitioner pressed the alarm on the bus, which she testified alerts the police. She stood up in her seat area and looked back and saw that one of the men in the back of the bus had burst past the three others and exited the bus. (Tr. 17-19)

Petitioner then stepped off the bus and called 911. She testified that she could not recall exactly what she said. (Tr. 19)

Petitioner testified got back on the bus and noticed a woman who was still sitting on the bus with her left arm extended with her elbow away from her. Petitioner testified that the woman was cupping her left fist with her right hand applying pressure. (Tr. 20) She testified that the woman's arm and hand were both cut open and that she saw blood, tendon, and bone. (Tr. 22) Petitioner testified that she felt unreal and felt sorry that this had happened to the woman. Petitioner testified the she kept apologizing but that the woman did not speak to her. (Tr. 23)

Petitioner called control to tell them what happened and an ambulance arrived. The paramedics wrapped the woman's hand in gauze, and walked her off the bus. Petitioner testified she did not see the woman again and had no knowledge of what happened to her after that day. (Tr. 25)

Petitioner testified that the police arrived and she spoke to them for approximately 5 to 10 minutes. The officer wrote down what she told him. (Tr.

26) Petitioner testified that she spoke with the Street Supervisor and drove her bus back to the garage. (Tr. 28) She reported the incident to Mark Stubblefield, her supervisor, once she arrived back at the garage. (Tr. 28) Petitioner testified that she was instructed that Mark Stubblefield would not let her leave the garage. She told Mark Stubblefield that she wanted to go home and testified that she became upset and went into the ladies' room. (Tr. 29) Petitioner testified that she was at the garage for approximately an hour to an hour and a half, thirty minutes of which she was in the ladies' room. (Tr. 32)

Petitioner testified she sought medical treatment with Dr. Daniel Kelley on June 20, 2012. She treated with him 2 to 3 times a week. She testified that Dr. Kelley referred her to Dr. Beck who prescribed Zoloft and Ambien to her. She was released to return to work in September of 2012. (Tr. 33)

Petitioner testified that she had been assaulted by a passenger, at work, on November 2, 2011. She sought treatment with Dr. Kelley for her resulting psychological injury. She testified that at the time of the incident on June 17, 2012, she had been released from Dr. Kelley's care. (Tr. 34) Petitioner testified that she had no anxiety issues and had never been on anxiety medication prior to the first claim in 2011. (Tr. 35)

Petitioner testified that she had a conversation with her general manager Marcia approximately three (3) days after the incident on June 17, 2012. Petitioner testified that she was depressed, nervous and withdrawn after her conversation with the general manager. (Tr. 40-41)

Petitioner testified that she is back at work and she is more cautious and nervous when she works. She testified that she does not go out as much. (Tr. 42)

On cross-examination petitioner testified that after the incident she drove her bus back to the garage from Harlem and North Avenue to the Forest Hills Garage. She testified it took approximately 10 to 15 minutes. (Tr. 43, 44)

Petitioner testified that she treated with Dr. Kelley for a prior work-related incident until April 18, 2012, at which time she was released to full duty and worked until June 17, 2012; when the altercation occurred on her bus. (Tr. 54) She testified that while treating with Dr. Kelley for the June 17, 2012 incident, she had flashbacks about the 2011 incident. (Tr. 58)

Petitioner testified that she was in her driver's seat driving her bus when she became aware of the altercation. (Tr. 60) She testified that the altercation was in

the back of the bus. Petitioner testified that the bus is supposed to be about 40 feet bumper to bumper. (Tr. 61)

Petitioner testified that she was not physically assaulted on June 17, 2012. (Tr. 58) and did not see a gun or a weapon. (Tr. 64) She testified she observed three men surrounding another man in a loud argument. (Tr. 64)

Petitioner testified that the injured woman who she attended did not tell her what had happened to her. Petitioner testified that he injured woman did not speak to anyone else while she was sitting on the bus. (Tr. 66) Petitioner testified that after she encountered the injured woman she did not leave the bus again. Petitioner testified that she only went to her bag behind her bus seat to grab napkins, and never left the woman (Tr. 67)

Petitioner testified that after the incident she drove back to the Forest Glen garage and was at the clerk's window for a minute or two. She testified that after that she went to the ladies' restroom. (Tr. 70) Petitioner testified that she is required to fill out paperwork when she reports an incident. (Tr. 70, 71) Petitioner testified that she filled out some paperwork at the scene of the incident. (Tr. 71)

Petitioner testified that after she left the bathroom she went to the manager's office to see Mr. Stubblefield. She testified that he told her she could not go home because she had to fill out a report. (Tr. 74) Petitioner testified that she was permitted to leave the garage after she filled out the paperwork with Mark Stubblefield. (Tr. 75)

The bus video hard-drive footage was admitted into evidence depicting the event that occurred on June 17, 2012. It shows different views of the bus and Petitioner identified herself as being in the video footage. (Tr. 81)

Petitioner testified that the video showed the incident that occurred on June 17, 2012. (Tr. 91) Petitioner testified that she saw passengers walking off the bus. (Tr. 82) Petitioner testified that the injured woman on the bus never slumped over or passed out. (Tr. 91) Petitioner testified that the injured woman remained seated from the time she approached her until the ambulance arrived. (Tr. 93) Petitioner testified that the injured woman was not bleeding out to the extent that there would be a possibility she would expire on the bus. (Tr. 94) Petitioner testified that she knew that the injured woman did not speak English, and that at no time while on the bus did the injured woman make any noises or grunts to indicate pain or discomfort. (Tr. 102)

The video footage of the incident on June 17, 2012 shows four (4) views of the bus and runs from 17:00:02 to 18:30. Camera 1 shows a view above the bus driver and the front door of the bus. Camera 2 shows a rear view of the bus interior from the mid-point of the bus. The back of the bus is visible. Camera 3 shows an interior view of the front of the bus. Camera 4 shows an interior view of the back door of the bus and its immediate surroundings. *See,* RX1.

The relevant portion of the video footage on all camera angles begins at 17:31:02. At 17:31:02, four (4) men are standing up in the back of the bus, and a woman in a striped shirt is sitting in an aisle seat to the left of them. (R.X.1, Camera 2) On cross-examination, petitioner identified this woman as the injured woman she encountered. (Tr. 82) The bus is moving and petitioner is in the operator's seat driving the bus. (R.X.1, Camera 2, Camera 3 @17:31:02) From 17:31:02 to 17:31:55 the four (4) men in the back of the bus are involved in an altercation. (R.X.1, Camera 2) The woman sitting in the aisle seat moves over to the window seat. (R.X.1, Camera 2@17:31:55) From 17:31:02 to 17:31:55, the petitioner is behind the wheel of her bus. (R.X.1, Camera 3) At 17:31:45, the petitioner stops the bus and two passengers get off out of the front door. (R.X.1 Camera 3) At 17:32:42, Camera 1 and Camera 3 show the petitioner stopping her bus and one (1) male passenger exiting the bus through the front door. (R.X.1) At 17:32:42, Camera 2 and Camera 4 show the bus stopping and one (1) male passenger exiting the bus through the back door.

The bus does not move again after 17:32:42, as evidenced by all camera angles, until 18:27:30. (R.X.1) At 17:32:47 the petitioner turns around to look behind her, gets out of her seat, and steps off the bus. (R.X.1, Camera 3) At this time, the four (4) men in the back of the bus are still involved in an altercation and there are still passengers sitting on the bus. (R.X.1, Camera 2@17:32:47)

From 17:32:57 to 17:33:10 petitioner is off of the bus. During this time, one of the four (4) men in the back of the bus is pushed into the woman wearing the striped shirt. (RX1, Camera 2@17:32:57). Petitioner is on the sidewalk at that particular moment. (RX1, Camera 1@17:32:57-17:33:10) At 17:32:58, the man who pushed the other man exits the bus. (RX1 Camera 2, Camera 4) At 17:32:59, the woman in the striped shirt is seen sitting and holding her left arm. (RX1 Camera 2)

At 17:33:10, the petitioner steps back onto the bus. (RX1 Camera 3) At 17:33:13, the passengers exit the bus in an orderly fashion. The Arbitrator notes that none of the passengers appear to be running off the bus. (RX1 Camera 2, Camera 3) At 17:33:30, the injured woman in the striped shirt gets up out of her seat and walks down the stairs to another seat that is closer to the midpoint of the bus and

sits back down. (RX1 Camera 4). At 17:33:30, the man who was pushed into the woman is at the front of the bus near petitioner and points to the back of the bus. (RX1 Camera 3). At 17:33:51, he walks back toward the injured woman and he places his left hand over his chest at 17:33:52. (RX1 Camera 4) At 17:33:53, the man who was pushed into the woman is seen with the woman. The Arbitrator notes that it appears that the man is speaking to the woman. (RX1 Camera 2) At 17:34:15, the man walks away and exits the bus at 17:34:21. (RX1 Camera 2, Camera 3).

At 17:35:28, the bus is now empty except for the injured woman and the petitioner is seen stepping back onto the bus. (RX1 Camera 2, Camera 3). At 17:35:32, the petitioner is seen approaching the injured woman and her left arm is visible. The injured woman is holding her left hand with her right hand. The Arbitrator notes that no large amount of blood is visible. The Arbitrator further notes that no exposed bones or tendons are visible on any of the camera angles. (RX1 Camera 2, 4@17:35:32). At 17:36:51, the petitioner steps off the bus onto the sidewalk. (R.X.1, Camera 1) At 17:37:11 petitioner steps back on the bus, she remains in the driver's area of the bus until 17:37:43 when she steps back off the bus. (RX1 Camera 1). At 17:38:03, Petitioner steps back onto the bus. (RX1 Camera 1) The petitioner remains at the front of the bus until 17:40:00 when Petitioner walks back to the injured woman and puts a white object on the woman's left arm. (RX1 Camera 2@17:40:07). At 17:40:30, petitioner is off the bus again and at 17:40:50, petitioner is back on the bus and attending to the injured woman. Petitioner attends to the woman. (RX1 Camera 2@17:30:50-17:44:50) At 17:44:50 the EMS personnel show up. (RX1 Camera 3) At 17:45:22, the EMS personnel wrap the injured woman's upper left arm and left hand in gauze. (R.X.1, Camera 2) and she is walked off the bus at 17:47:55. (RX1 Camera 3) Petitioner begins driving the bus again at 18:27:30. (RX1 Camera 3)

Petitioner treated with Dr. Daniel Kelley, a clinical psychologist, from June 20, 2012 until September 10, 2012. Background information in Dr. Kelley's initial report indicates that petitioner told Dr. Kelley that on June 17, 2012 there was a fight on her bus, passengers ran off the bus, and she found a female passenger on the bus, who had been stabbed and was bleeding profusely. She reported providing first aid until the paramedics arrived. Petitioner told Dr. Kelley that passengers were yelling and screaming to let them off the bus and that she saw a man yelling at the other men with his hand in his pocket as if he had a gun. She told Dr. Kelley that after getting off the bus to call 911 she got back on and saw a woman on the bus holding out her hand. Petitioner told Dr. Kelley the woman had been stabbed and that there was blood everywhere; and her arm and hand had been split open to the bone. Petitioner told Dr. Kelley that "blood was

gushing". Petitioner told Dr. Kelley that she was afraid the woman was going to bleed to death. She called control. Petitioner told Dr. Kelley she got napkins out and applied pressure to control the bleeding. Petitioner told Dr. Kelley the woman was in shock and was muttering but that she could not understand her. The police arrived followed by an ambulance. *See,* PX1.

Treatment records from the initial visit with Dr. Kelley on June 20, 2012 state that petitioner reported symptoms of sleep disturbance, crying, tremors, irritability, headaches, fatigue, agitation, and hyperarousal. Petitioner told Dr. Kelley she had been crying and shaking in the bathroom of the bus garage. She reported that she had not been eating or sleeping and that her family was "all over me because they think I'm a basket case." The Arbitrator notes that petitioner's responses to the Minnesota Multiphasic Personality Inventory -2 resulted in a valid profile interpreted with caution. Dr. Kelley diagnosed petitioner with acute stress disorder. He referred her to a psychiatric consultation for medication and planned for her to undergo cognitive-behavioral therapy. *See,* PX1.

Treatment records from Dr. Joseph Beck, a psychiatrist, indicate that petitioner was prescribed Zoloft and Ambien. *See,* PX4.

The discharge report from Dr. Daniel Kelley indicates a revised diagnosis of Post-Traumatic Stress Disorder. Dr. Kelley quoted petitioner as telling him "when the passengers started screaming and passengers started fighting on the bus I became so scared. I felt I was in danger. A passenger had recently attacked me (11/01/11 work incident) on the bus. It was reported that petitioner angrily shared "I'm really a small person and I'm all alone. Someone attacks me I'm in trouble." Petitioner told Dr. Kelley that she kept playing over the injured woman on the bus, telling him "she couldn't talk, like she was in shock. I was afraid she was going to die." Dr. Kelley noted in his September 11, 2012 report that Dr. Beck had discontinued her medication regimen given her progress. Dr. Kelley noted that over the course of treatment petitioner evidenced progress in her emotional/psychological functioning and reported a decrease in anxiety and depressive symptoms from severe to mild/minimal levels. Dr. Kelley cited petitioner's progress and released her to return to work at bus operations, with no restrictions. *See,* PX1.

There are bills from Dr. Kelley's office indicating an outstanding balance of $4,671.00 (not adjusted to the fee schedule reduction). There are bills from Dr. Beck's office indicating an outstanding balance of $618.00 (not adjusted to the fee schedule reduction).

Dr. Kelley testified on February 20, 2013 and also had an opportunity to view the bus video which was presented at trial, admitted into evidence; and was authenticated by petitioner as showing the events of June 17, 2012 Dr. Kelley testified that petitioner's result on the MMPI-2 diagnostic test was valid but interpreted with caution. He indicated that "with caution" connotes atypical responding and possibly inconsistent responding. After viewing the bus video Dr. Kelley testified that he did not see blood everywhere in the video. Dr. Kelley testified that he did not see the injured woman's arm and hand split open to the bone. Dr. Kelley testified that he did not see gushing blood. Dr. Kelley testified that he felt the video was compromised, as it was in black and white and only showed certain angles of the bus. *See,* PX2, PX3, 40-41 & PX4.

Dr. Kelley testified that he viewed the bus video and saw a "group of people, racing, running off the bus." He believed that this event validated petitioner's story. *See,* PX3, 48:6. Dr. Kelley testified that post-traumatic stress disorder must involve an extreme incident, but also a sense of perceived threat to one's safety and life. *See,* PX3, 23.

Dr. Kelley believed the post-traumatic stress disorder was caused by the June 17. 2012 work incident. *See,* PX3, 24:18-21. Dr. Kelley testified that the treatment period from June 21, 2012 to September 10, 2012 was a "pretty brief treatment period for PTSD" and he considered her treatment successful given the diagnosis. *See,* PX3, 27:10-13.

Dr. Kelley testified that prior trauma is a significant predictor for post-traumatic stress disorder and that the petitioner could have perceived the June 17, 2012 work incident as being more threatening than the situation would be for another passenger on the bus. *See,* PX3, 29-32:3-6. Dr. Kelley cited research indicating that subjective perception of risk of danger may play an etiological role in subsequent mental health symptoms. He testified that the research indicated that perceived threat over and over again, day in and day out, can be emotionally and psychologically cumulative. Dr. Kelley cited a British study that indicated that one particular stressor in a study of British bus drivers was negative passenger interaction, and that the highest reported stressor was the risk of physical assault from passengers. *See,* PX3, 32,33.

CONCLUSIONS OF LAW

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

Petitioner has alleged that she sustained psychological injuries as a result of observing an altercation on her bus and coming to the aid of an injured woman on the bus. Petitioner testified that she was not physically assaulted on June 17, 2012. Her claim is what is known as a "mental-mental" case. In Illinois, the standard for proving a "mental-mental" case is quite stringent. *See, Pathfinder v. Industrial Comm'n,* 62 Ill.2d 556, 563 (1976) was the first case in which the Illinois Supreme Court allowed recovery for psychological injury in the absence of physical trauma. Under *Pathfinder,* a claimant must suffer a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm." *Id, at* 563. In *Pathfinder* the claimant went to the aid of a coworker whose hand was caught in a punch press. The claimant reached into the machine and found that her coworker's hand had been severed up to her wrist. The claimant pulled the severed hand out of the machine and fainted at the sight of it. *Id,* at 559. The claimant treated with a psychiatrist who diagnosed her with peripheral neuritis and residual anxiety. The Supreme Court noted that the event was a "gruesome experience".

In *General Motors Parts v. Industrial Comm'n*, 168 Ill.App.3d 678 (1988), the First District Appellate Court concluded that *Pathfinder* was limited to a narrow group of cases, in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychological injury. And is caused by an uncommon non-physical traumatic work-related event of significantly greater proportion or dimension than to that which the employee would otherwise be subject to, in the normal course of employment. *Id.* at 678, 687.

The Arbitrator finds the testimony of the petitioner and her statements to Dr. Kelley to be inconsistent with the actual event on June 17, 2012, as depicted in the bus video. Petitioner's testimony and statements made to Dr. Kelley are clearly exaggerated. As Dr. Kelley was presented with an inaccurate or exaggerated account of the incident on June 17, 2012, his medical opinions and general conclusions for the purposes of this case are not persuasive.

The Arbitrator finds that the altercation had ended by the time that the passengers exited the bus. Petitioner's account of the incident is not credible. At no point in the bus video, do the rest of the passengers run off the bus or otherwise act in a hurried, frantic, or panicked manner. Petitioner testified that

she encountered a woman on her bus who had her left hand and left arm cut open and that she saw blood, tendon, and bone. Petitioner reported to Dr. Kelley that when she encountered the woman there was "blood everywhere" and that her arm and hand had been split open to the bone. She told Dr. Kelley that blood was gushing to the point that she believed the woman might bleed to death.

The Arbitrator has viewed the bus video of the incident and notes that at no point in the video is there any hint of "gushing blood" to the extent to which petitioner has testified. The Arbitrator takes note of the fact that the video is in black and white, and finds that a dark red substance such as blood would still be visible in a black and white photo or video. The Arbitrator notes that the injured woman's left arm shows no evidence of exposed bone or tendon at any point in the video.

Furthermore, on cross-examination, petitioner testified that the injured woman was not bleeding out to the extent that there would be a possibility that she would expire on the bus. Petitioner also testified on cross-examination, that the woman remained seated from the time she approached her until the time the paramedics came; and that she never slumped over or passed out, nor did she moan or make verbal sounds to indicate that she was in pain or discomfort. The Arbitrator finds petitioner's testimony and statements to Dr. Kelley not credible in that they are grossly inconsistent with the events as they occurred in the bus video.

Petitioner reported to Dr. Kelley on June 20, 2012 that the injured woman was in shock and was muttering but that she could not understand her. The Arbitrator takes note of the fact that petitioner testified at hearing that she knew that the injured woman did not speak English. The Arbitrator takes note on direct examination petitioner testified that the woman did not make any noises at the time she was sitting on the bus and holding her arm. The Arbitrator finds petitioner's testimony and statements to Dr. Kelley on this regard to be contradictory and not credible.

The Arbitrator finds that Dr. Kelley's medical opinions are not persuasive in light of the lack of credibility of the petitioner's statements made to him for the purpose of treatment. Dr. Kelley diagnosed petitioner with post-traumatic stress disorder and opined that it was caused by the incident on June 17, 2012. Dr. Kelley viewed the bus video taken on June 17, 2012. It was his opinion that petitioner's report of the incident was validated as the video showed a group of people racing or running off the bus. The Arbitrator has also viewed the bus video and notes that at no point in the video is there a group of people racing or running off the bus.

Dr. Kelley testified that prior trauma is a significant predictor for post-traumatic stress disorder, and that petitioner could have perceived the June 17, 2012 work incident as being more threatening than the situation would be for another passenger on the bus. He felt that someone's perception would not be objectively seen on a videotape, and that as petitioner had a prior trauma, she might have perceived the event on June 17, 2012 differently than someone else on the same bus, who was viewing the event.

The Arbitrator finds Dr. Kelley's opinion concerning whether petitioner had a "perceived threat" unconvincing as a perceived threat will not constitute a compensable accident, where there is no physical injury. In *Robin Flock v. Yellow Transportation*, Inc., 07 IL.WC 8541, 08 I.W.C.C. 0255 (2008), the claimant was denied benefits where she had testified that she witnessed an automobile accident between two other cars and thought that the gas tank of one of the vehicles was going to explode. The Arbitrator found that the claimant had been testifying to a perceived threat, and "not one that existed in reality from an objective standpoint." *Robin Flock*, at pg. 6. In a mental-mental claim, the definite time, place and cause from which the sudden, severe emotional shock is traceable, must exist in reality from an objective standpoint. In order to recover, petitioner must prove that a real, sudden and severe shocking event occurred.

Dr. Kelley cited a British study that indicated that one particular stressor in a study of British bus drivers was negative passenger interaction, and that the highest reported stressor was the risk of physical assault from passengers. The Arbitrator finds this citation irrelevant as the determination of whether a worker has suffered the type of emotional shock sufficient to warrant recovery, uses an objective, reasonable person standard, rather than a subjective standard that takes into account the workers' occupation and training. [1]

Petitioner's statements made to Dr. Kelley during treatment, are contradicted by the video evidence of the June 17, 2012 event; and Petitioner's own testimony. Dr. Kelley viewed the bus video and testified to seeing passengers running off the bus. He believed this validated the petitioner's account of the incident. The Arbitrator has viewed the entire video and finds that there is no point in which the passengers are seen running off the bus. The Arbitrator finds Dr. Kelley's testimony, concerning petitioner's, perceived threat, to be irrelevant for workers' compensation purposes, as the cause of a claimant's psychological injuries, where

[1] Most recently, the Second District Appellate Court held that the issue of whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable person standard, rather than a subjective standard that takes into account the claimant's occupation and training. *Diaz v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120294WC.

there is no physical injury, must exist in reality from an objective standpoint. Based upon the entire volume of evidence in this case, the Arbitrator does not find Dr. Kelley's testimony or medical opinions to be persuasive. And that the facts of this case do not rise to the level of a compensable mental-mental claim; involving a real, sudden and severe shocking event. The injuries, in the subject case, do not appear to be gruesome in nature and there was no real threat to petitioner at any time. While medical records do reflect valid findings of all her psychological testing, under the evidence and testimony of the circumstances with no real shock value, petitioner has failed to present sufficient evidence to meet the criteria set out in *Pathfinder* and its progeny.

As petitioner has failed to prove, by preponderance of the evidence that she sustained an accident that arose out of and in the course of her employment, no benefits shall be awarded, pursuant to the Act. As the Petitioner has not proven an accident, all other issues are moot and will not be addressed.

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

Victor Pratt,

Petitioner,

vs.

14IWCC0545

NO: 08 WC 26256

James Henderson & the Illinois Injured 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, temporary total disability, medical expenses, prospective medical expenses, causal connection, permanent partial disability, employer-employee relationship, evidentiary rulings of the Arbitrator, 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 8, 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.

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: JUL 0 9 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gaf
O: 6/26/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PRATT, VICTOR
Employee/Petitioner

Case# **08WC026256**

14IWCC0545

JAMES HENDERSON AND ILLINOIS INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 10/8/2013, 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 0.06% 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:

1437 DARRELL DUNHAM & ASSOC
ATTORNEY AT LAW
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CARBONDALE, IL 62901

2364 KIBLER LAW OFFICE
KEITH W KIBLER
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MARION, IL 62959

CHARLES J KOEN
ATTORNEY AT LAW
PO BOX 544
CAIRO, IL 62914-0544

4948 ASSISTANT ATTORNEY GENERAL
BILL PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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 14IWCC0545

Victor Pratt
Employee/Petitioner

v.

Case # 08 WC 26256

Consolidated cases:

James Henderson and 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **2-15-13 and 8-16-13**. 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

14IWCC0545

On **10-13-07**, Respondent *was not* operating under and subject to the provisions of the Act.

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

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

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

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

Petitioner failed to provide sufficient evidence of his earnings to accurately assess his average weekly wage.

On the date of accident, Petitioner was **45** years of age, with **0** children under 18.

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

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes the following findings:

See Attachment to Arbitration Decision

ORDER

Petitioner failed to prove he was an employee of the Respondent. Therefore, Petitioner's claim 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

10/7/13
Date

OCT 8 - 2013

14IWCC0545

FINDINGS OF FACT

Petitioner asserts that he was employed by Respondent, James Henderson (hereinafter Mr. Henderson) on October 13, 2007, and that he sustained accidental injuries arising out of his employment. Mr. Henderson denies the existence of any employee/employer relationship and has presented no evidence that he possessed Workers' Compensation insurance at any time. The Injured Workers' Benefit Fund was named as a party and was represented by the Attorney General's Office at both the February 15, 2013 and the August 16, 2013 hearing.

Petitioner testified that he met Mr. Henderson at a restaurant in Mounds, Illinois approximately six months prior to his injury. He testified that Mr. Henderson hired him to clean up and improve a building that Mr. Henderson had recently purchased in Mounds, IL. He began working for Mr. Henderson approximately fifteen days after they met. At Mr. Henderson's request, Petitioner assembled a crew of workers to work on Mr. Henderson's projects whenever he came to town. Mr. Henderson did not instruct Petitioner on whom he could recruit, and many of the workers recruited by Petitioner were his friends and relatives. Petitioner testified that he was working to improve Mr. Henderson's property by sweeping, shoveling, dumping, and moving lumber. Petitioner testified that he was allowed to collect and sell salvage from Mr. Henderson's property which he valued at approximately 10-15 dollars.

Petitioner testified that he used sledgehammers, shovels, brooms, drills, nails, wheelbarrows, concrete, bricks, and a generator, and indicated that these materials were all provided by Mr. Henderson. On direct examination, Petitioner testified that he did not have access to any tools either at his home or as an employee of Mounds. Petitioner later admitted that he did bring a rope to the worksite on one occasion. On cross examination, Petitioner admitted that he does in fact possess various tools which he keeps at his house.

Petitioner indicated that his work for Mr. Henderson was done sporadically, and only when Mr. Henderson was in town. Petitioner testified that Mr. Henderson would arrive at the worksite in the morning to assemble the crew, in the afternoon to review the progress of the work, and in the evening to pay the workers. Petitioner testified that he was paid every day he worked once his work was concluded. Petitioner testified that he never entered into a written agreement with Mr. Henderson, but there was an oral agreement that Mr. Henderson would pay him 7 dollars per hour. Petitioner testified that he was paid by Mr. Henderson directly and was never paid by anyone else. Petitioner testified that he never received any IRS documents such as a W-2 from Mr. Henderson.

Petitioner testified that he was working on the roof of Mr. Henderson's property with a two handed scraper on October 13, 2007, when a section of the roof gave out causing him to fall approximately 20 feet onto concrete. Petitioner's Hospital records differ from his account by indicating that he fell approximately 12 feet and was holding an ax at the time. (Px 2) Petitioner sustained a large laceration on his right knee and a fractured left femur. (Px 2) He was taken via ambulance to St. Francis Hospital where his wound was closed and he underwent surgery on his fractured left femur. (Px 2, 4) He underwent a course of physical therapy at Chiro rehab and attended some post-operative visits with Dr. Richard Morgan of Southern Orthopedic Associates. (Px 3, 5) Petitioner denied leg or knee injuries prior to his October 13, 2007 fall, and indicated that he was an active runner prior to his fall. Petitioner testified that he takes hydrocodone for pain and sometimes utilizes a cane.

Petitioner testified that he began working for the City of Mounds in 2003 and worked for the City up until his October 13, 2007 accident. He worked for the City of Mounds thirty-two hours a week from Monday through

Thursday. Petitioner testified that he has not applied for any jobs since his accident, but attributes his unemployment to his PTSD induced Social Security Disability instead of his October 13, 2007 fall.

Petitioner called Christopher Barnett as a witness. Mr. Barnett testified that he has been friends with Petitioner for approximately 10 years and had dated one of Petitioner's daughters. Petitioner recruited Mr. Barnett to work on Mr. Henderson's properties. Mr. Barnett testified that all of the workers at Mr. Henderson's properties were either relatives or friends of Petitioner and indicated that individual workers would show up to work whenever they were inclined, without any regular schedule. Mr. Barnett indicated that he worked at two locations for Mr. Henderson, but only one with Petitioner. Mr. Barnett testified that he was always paid by Mr. Henderson and was paid 7 dollars per hour. Mr. Barnett testified that Mr. Henderson always visited the worksite during the middle of the day and always appeared at the end of the day to issue payment. Mr. Barnett testified that Mr. Henderson provided all of the tools used at the worksite.

Petitioner called his son. Brandon Pratt, as a witness. Petitioner's son indicated that he worked on several of Mr. Henderson's properties in 2007. Petitioner's son testified that all tools and building materials used on Mr. Henderson's properties were provided by Mr. Henderson, as the workers did not own any tools. Brandon Pratt testified that he was paid daily in cash by Mr. Henderson. Brandon Pratt indicated that Petitioner would "check-up" on Mr. Henderson's properties where work was being done. Petitioner's son testified that his father was not the "boss" of the project, and that Mr. Henderson was in charge of the work.

Petitioner called Jerel Pilgram, a friend of Brandon Pratt and a member of Petitioner's crew, to testify. Mr. Pilgram testified that he was paid by Mr. Henderson every day he worked, and that he worked three to four days a week for three to four weeks consecutively. Mr. Pilgram testified that he was hired by Mr. Henderson in person sometime between June 18 and June 20 of 2007. Mr. Henderson's telephone records make it clear that he was in Las Vegas on June 18 through June 20, 2007. (Px 11, 12)

Mr. Henderson testified that he is retired from his position as the associate director of facilities management of the University of Illinois at Chicago. Mr. Henderson testified that he is not, and never has been, in the construction business. Mr. Henderson indicated that he has known Petitioner for several years and knew both his father and mother. Mr. Henderson testified that he hired Petitioner to clean out some newly acquired property as a side job when he wasn't working for the city of Mounds. Mr. Henderson informed Petitioner he could assemble a crew to perform the required work and that he would be paid 10 dollars per hour. Mr. Henderson indicated that lives in Chicago and came down to Mounds no more than three times while the work was being completed on his properties. Mr. Henderson did not dictate which days or hours the crew would work or which members of the crew would work on any specific day. Mr. Henderson testified that he hired Petitioner and his crew to tear the roof off of one of his properties, but did not issue instructions for how the work was to be done or who was to do it.

Mr. Henderson testified that he did not consider Petitioner or his crew to be employees and did not take any withholding money out of their pay. Mr. Henderson testified that he never issued a 1099 form to Petitioner for tax year 2007. Mr. Henderson testified that he may have paid the workers directly once or twice, but usually the money was distributed by Petitioner to his crew. Mr. Henderson also testified that Willie Eason, his cousin's husband, also disbursed money to the crews. Mr. Eason and Mr. Henderson had a checking account in Mounds, which facilitated payments to the crews while Mr. Henderson was in Chicago. Mr. Henderson stated that he paid Petitioner and his crew whatever Petitioner told him was owed and no invoice or accounting system was utilized.

14IWCC0545

Mr. Henderson indicated that he provided a generator for use at the work sites, but the remainder of the tools were acquired by Petitioner from the Village of Mounds. Mr. Henderson denied purchasing or owning the tools Petitioner described using during the course of the job and denied owning a truck or other vehicle capable of transporting the ladders, shovels, and wheelbarrows utilized in Petitioner's work. Mr. Henderson testified that he drives a Cadillac which he felt was incompatible with moving tools to a worksite. Mr. Henderson testified that Petitioner moved all of the tools to and from the worksites in his truck. Mr. Henderson recalled allowing Petitioner to collect and sell salvage from his properties.

CONCLUSIONS OF LAW

1. Mr. Henderson is found to be more credible than the witnesses presented by Petitioner. Petitioner's credibility is adversely affected by his initial statement that he never owned tools which was later contradicted by his testimony on cross examination. Mr. Pilgram's testimony was impeached by the impossibility of his meeting with Mr. Henderson on June 18 through June 20, 2007. Christopher Barnett has been Petitioner's friend for over 10 years and Brandon Pratt is Petitioner's son.

2. Various factors are employed to determine whether an employee/employer relationship exists including whether the employer may control the manner in which the person performs the work, whether the employer dictates the person's schedule, whether the employer pays the person hourly, whether the employer withholds income and social security taxes from the person's compensation, whether the employer may discharge the person at will, and whether the employer supplies the person with materials and equipment, and whether the employer's general business encompasses the person's work. *Szczepanski v. IWCC* 2012 WL 6861367 (1st Dist. 2012) (unpublished), *Robertson v. Industrial Commission* 225, Ill.2d 159, 174-5, 310 Ill.Dec. 380, 866 N.E.2d 191, 200 (2007).

3. As in the vast majority of employee/employer cases, the factors here are numerous and divided.

    a. Control. Mr. Henderson did not control the day to day operations at the sites Petitioner worked. Petitioner had the ability to decide who he wanted on his crew and regularly checked up on the progress of the crews at various sites. Furthermore, Petitioner's work experience gave him knowledge of construction and renovation work which Mr. Henderson simply did not have. Finally, all the testimony indicates that Mr. Henderson did not remain on site even when he was in town, so he was unable to direct crew members what specific activities they were to perform throughout the workday. This strongly suggests an independent contractor relationship.
    b. Schedule. The evidence does not suggest that the work performed by Petitioner or his crew was done on a schedule set by Mr. Henderson or anyone else. Mr. Barnett specifically testified that members of Petitioner's crew worked whenever they were so inclined. Mr. Henderson did not take the crew to worksites, nor did he utilize any time system to track when various crew members were working. This factor suggests an independent contractor relationship.

14IWCC0545

c. Hourly. All parties agree that Petitioner was paid hourly. This factor weighs in favor of an employment relationship.

d. Withholding. All parties agree that no taxes or withholding was ever taken out of Petitioner's pay. This factor suggests and independent contractor relationship.

e. Discharge. The issue of discharge was not addressed directly by testimony; however the duration of the work was tied directly to the renovation of the properties owned by Mr. Henderson. Work tied directly to a specific job or finite series of jobs indicates an independent contractor relationship.

f. Materials and equipment. While there is contradictory testimony in evidence, the most credible testimony suggests that Mr. Henderson did not supply the materials and equipment utilized in Petitioner's work. Neither party admitted to owning the tools used in the project, however Petitioner did admit to owning some household tools. Petitioner has a history of similar labor and reported to the jobsites in his truck. To the contrary, Mr. Henderson lives in Chicago and drove a Cadillac to the worksites. The most likely scenario is that Petitioner did in fact supply the worksite either with his personal tools or with tools he requisitioned from the City of Mounds. This factor indicates an independent contractor relationship.

g. Employer's general business. In 2007, Mr. Henderson was a retired University of Illinois employee looking to make some improvements to his personal property. He had not started a company. He was not acting as a general contractor bidding out construction work and there is no indication that Petitioner or his crew ever did work on any property other than that owned by Mr. Henderson. This factor strongly indicates an independent contractor relationship.

4. When examined as a whole, the factors do not indicate that an employee/employer relationship existed between Petitioner and Respondent Henderson.

5. Because no employee/employer relationship exists between Petitioner and Respondent Henderson, Petitioner's claim for benefits under the Illinois Workers Compensation Act is denied, and no remedy is available under the Injured Workers' Benefit Fund.

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

Angie Lane,

Petitioner,

14IWCC0546

vs.

NO: 13 WC 5691

Supreme Radio,

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, 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 December 23, 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.

14IWCC0546

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 $43,000.00. 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: JUL 0 9 2014

David L. Gore

DLG/gal
O: 6/25/14
45

Daniel R. Donohoo

Mario Basurto

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

14IWCC0546

LANE, ANGIE
Employee/Petitioner

Case# **13WC005691**

SUPREME RADIO
Employer/Respondent

On 12/23/2013, 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:

0192 CUSACK FLEMING GILFILLAN ET AL
DANIEL P CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602

0264 HEYL ROYSTER VOELKER & ALLEN
VINCENT M BOYLE
124 S W ADAMS ST SUITE 600
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
19(b)

14IWCC0546

ANGIE LANE
Employee/Petitioner

v.

SUPREME RADIO
Employer/Respondent

Case # 13 WC 5691

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 **Peoria**, on **August 24, 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 _____

14IWCC0546

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,181.68**; the average weekly wage was $**657.34**.

On the date of accident, Petitioner was **34** 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.

Respondent shall pay Petitioner temporary total disability benefits of $437.78/week for 73 1/7 weeks, commencing April 30, 2012 through September 24, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $623.00 to Proctor First Care, $2,784.00 to Yibing Li, M.D., $362.00 to Great Plains Orthopaedic and $7,222.40 to Injured Workers Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay for Petitioner to see Dr. Kevin Henry for a consultation pursuant to the recommendations of Dr. Yibing Li.

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

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

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

Signature of Arbitrator

12-13-13
Date

ICArbDec19(b)

DEC 23 2013

STATEMENT OF FACTS

Petitioner, Angie Lane, testified that she resides in Creve Coeur, Illinois. She stated that she began working for Respondent, Supreme Radio, in January 2011, as a dispatcher. Petitioner testified that she has reviewed the job description submitted in evidence and that it is mostly accurate. Petitioner described her job duties as mainly answering phones, taking notes, hand writing tickets, cleaning duties, hand writing invitations and stuffing envelopes. She stated that she would handwrite, fold and stuff anywhere from 1,000 to 5,000 envelopes, 3-4 times a year. Around Christmas of 2011, she noticed that her fingers and thumb were going numb and that she was dropping things. She attempted to work through the pain, but in April 2012, she informed her employer of the pain and numbness. She was told by the company to see a doctor at Proctor First Care, which she did. The doctor at Proctor First Care referred her to Dr. Yibing Li, a board certified pain specialist. Dr. Li performed both an EMG and an NCV and gave her an injection. Unfortunately, this measure did not help. She also tried, under Dr. Li's direction, physical therapy and different prescription medications. She was prescribed a tens unit; however, she was only able to use the unit for a short period because she was told to return it by the workers' compensation carrier nurse. Dr. Li had referred Petitioner to Dr. Daniel Mahoney, an orthopedic surgeon specializing in hands, who told her that he thought she had Reflex Sympathetic Dystrophy (RSD) and not carpal tunnel. Dr. Li then referred her to Dr. Kevin Henry, a pain specialist, for further treatment and possibly a spinal cord stimulator. The visit to Dr. Kevin Henry was not approved by the Respondent and she has not seen him.

Petitioner testified that her pain got worse for a time, but then plateaued and that she currently taking medications prescribed by Dr. Li to help with the pain. She testified that she has never had any problems with either her right or left arm. On cross examination, it was brought out that in November of 2011, Petitioner was lifting an antenna into a truck and had a sharp pain in her arm. Her employer required her to go to Proctor First Care and have the arm looked at. She only went once because the pain resolved and there was no further treatment. I note that this incident did not result in a workers' compensation claim.

Dr. Yibing Li testified that she is board certified in physical medicine rehabilitation and in pain medicine. (Petitioner's Exhibit No. 1, page 5). Dr. Li first saw Petitioner on May 21, 2012, and performed an EMG test which was negative for carpal tunnel syndrome. (Petitioner's Exhibit No. 1, page 7,8). Dr. Li stated that she ordered prescriptions and physical therapy for Petitioner as well as performed injections. (Petitioner's Exhibit No. 1, page 9). She stated that she performed another EMG in January 2013 which was again negative. (Petitioner's Exhibit No. 1, page 12). At that time, she referred Petitioner to Dr. Mahoney, a local orthopedic surgeon. (Petitioner's Exhibit No. 1, page 12). Dr. Li stated that the orthopedic physician recommended Petitioner continue pain management. (Petitioner's Exhibit No. 1, page 14). Dr. Li testified that she began to explore other possibilities for the cause of her pain and concluded that she had Reflex Sympathetic Dystrophy (RSD). (Petitioner's Exhibit No. 1, page 14). Dr. Li then recommended that Petitioner see Dr. Henry about the possibility of a spinal cord stimulator trial. (Petitioner's Exhibit No. 1, page 18, 19). With regard to causation, Dr. Li testified that Petitioner's repetitive over-use of her hands probably caused the RSD symptoms. (Petitioner's Exhibit No. 1, page 27).

Dr. Lawrence Li testified on behalf of the respondent. Dr. Lawrence Li testified that he does not have an opinion as to what is causing Petitioner's pain. (Respondent's Exhibit No. 1, page 18).

FINDINGS:

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

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

Based on the above testimony, I find Dr. Yibing Li, the treating physician, persuasive in her opinion that the repetitive motion of Petitioner's job caused the RSD syndrome. It was Petitioner's uncontradicted testimony that she performed the duties of folding, stuffing, hand addressing and mailing 1,000 to 5,000 flyers quarterly.

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?

I find Petitioner's medical services to date to be reasonable and necessary. Pursuant to Petitioner's Exhibit No. 6, I hereby order Respondent to pay the following outstanding medical bills pursuant to the Illinois Workers' Compensation Fee Schedule:

Proctor First Care $623.00
Yibing Li, M.D. $2,784.00
Great Plains Orthopedic $362.00
IWP $7,222.40

K. Is Petitioner entitled to any prospective medical care?

I find that Respondent shall pay for Petitioner to see Dr. Kevin Henry pursuant to the recommendations of Dr. Yibing Li.

L. What temporary benefits are in dispute? TTD

Based on Petitioner's testimony, as well as the medical records, I find that Petitioner was taken off work on April 20, 2012, by Dr. Montefolka at Proctor First Care. As of the date of this hearing, Petitioner has remained off work pursuant to Dr. Yibing Li's testimony. I find that Respondent shall pay Petitioner temporary total disability payments from April 20, 2012 thru September 24, 2013, totaling 73 1/7 weeks.

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

Lori Schrader-Sanders,

Petitioner,

vs.

State of Illinois/ Shawnee Correctional Center,

Respondent.

14IWCC0547

NO: 10 WC 36438

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, temporary total disability, medical expenses, notice, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 23, 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.

DATED: JUL 0 9 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 6/25/14
45

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

SCHRADER-SANDERS, LORI
Employee/Petitioner

Case# **10WC036438**

14IWCC0547

SOI/SHAWNEE C C
Employer/Respondent

On 10/23/2013, 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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

OCT 23 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
19(b)

14IWCC0547

LORI SCHRADER-SANDERS
Employee/Petitioner

v.

SOI/SHAWNEE C.C.
Employer/Respondent

Case # **10** WC **36438**

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 **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. ☒ 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, **09/3/10**, 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 $**47,483.80**; the average weekly wage was $**913.15**

On the date of accident, Petitioner was **50** 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**.

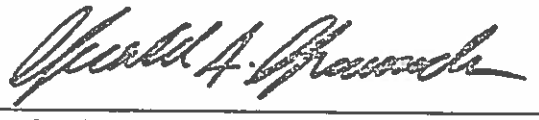
Respondent is entitled to a credit of $ **if any** under Section 8(j) of the Act.

ORDER

No benefits are awarded.

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

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



Signature of Arbitrator

10/10/13
Date

ICArbDec19(b)

14IWCC0547

FINDINGS OF FACT

This is a 19(b) decision on a repetitive trauma claim. The issues in dispute are accident, notice, causation, TTD and prospective medical care.

Petitioner is a 50 year old employee of the State of Illinois at the Shawnee Correctional Center. She began working at Shawnee in October 2006. Petitioner works as a Correctional Officer.

On September 15, 2010, Petitioner completed her employee notice of injury. (Px. 18) On said form reported numbness in her right hand and arm.

Petitioner testified that during her 4 years and 11 months prior to her alleged injury, she worked various jobs throughout the facility including working in the housing units, healthcare and visiting rooms.

A report entitled "Demands of the Job" was completed and submitted into evidence. Said form states that Petitioner uses her hands for gross manipulation for zero to two hours a day and for fine manipulation for zero to two hours a day.

A Job Site Analysis (JSA) was performed by Corvel. (Rx. 3) The JSA noted that wrist turning was done related to opening doors and chuckholes was done occasionally which is defined as zero to two and a half hours a day. Additionally, the JSA showed it required 1.2 pounds to initiate pull of door in the healthcare unit and .09 pounds to sustain opening the door.

A medical records review was done by Dr. Anthony Sudekum at the request of Respondent. (Rx. 5, Rx. 18) Dr. Sudekum reviewed the DVD of a Shawnee Correctional Officer (Rx. 2), the Job Site Analysis (Rx. 3), Employee's Notice of Injury (Px. 18) and the CMS Demands of the Job. Dr. Sudekum also review the medical records of Dr. Brown, Dr. Phillips and Dr. Paletta. Dr. Sudekum testified via deposition. (Rx. 18) Dr. Sudekum stated that Petitioner's job duties would not cause or aggravate the conditions in Petitioner's hand, elbow and shoulder. (Rx. 18, pg. 10-11, 29, Rx. 5)

Petitioner's attorney, Thomas C. Rich, referred Petitioner to Dr. David Brown. (Px. 5) Dr. Brown examined the Petitioner on November 10, 2010. Dr. Brown then referred the Petitioner to Dr. George Paletta regarding her shoulder complaints. (Px. 6) Dr. Brown also referred Petitioner to Dr. Daniel Phillips for nerve conduction testing. (Px. 7) Petitioner was diagnosed as having carpal and cubital tunnel syndrome with regards to her right hand and elbow. (Px. 5) In addition, Petitioner was diagnosed as having SLAP tear in her right arm. (Px. 6) Petitioner ultimately underwent surgery for these conditions on May 24, 2011. (Px. 11)

On January 27, 2012 Dr. Paletta's deposition was taken in this matter. (Px. 14) With regards to Petitioner's carpal tunnel and cubital tunnel surgery, Dr. Paletta stated that he never saw Petitioner for her carpal and cubital symptoms. (Rx. 14, pg. 54) In addition, Dr. Paletta testified that he did not perform the carpal tunnel and cubital tunnel surgery on May 24, 2011. Further, on direct examination, Dr. Paletta testified as follows:

Q: Did Dr. Brown do any surgeries at that time?

A: It's my recollection that he [Dr. Brown] did a carpal tunnel release and I think an ulnar nerve transposition on her. (Px. 15, pg. 14, ln. 15-19 – emphasis added)

14IWCC0547

Following the January 27, 2012 Dr. Palleta deposition, Dr. Paletta authored a letter indicating that it was he – Dr. Paletta – that performed the carpal and cubital tunnel surgery. (Px. 6)

Petitioner took Dr. Paletta's deposition again on April 5, 2013. (Px. 15) During that deposition, Dr. Paletta admitted that he prepared the surgical report for the Petitioner subsequent to his testimony in his first deposition. He further admitted that he did not know what shift Petitioner worked. (Id. pg. 20) Further, he was told by Petitioner that there were no automatic doors at Shawnee. Dr. Paletta also stated that Petitioner did not report to him about any of the keying activities at Shawnee and because he did not know whether or not Petitioner used keys at Shawnee, he could not state whether keying played a role in this case. (Id., pg. 20-21)

Lieutenant Austin Laster was also called to testify as a witness in this case. He confirmed that he was the person depicted in the job video admitted into evidence. He also confirmed the description of the Petitioner's job duties as set forth in the JSA, including the fact that the prison facility where Petitioner works has automatic doors.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. This finding is based primarily on the issue of credibility. The Arbitrator notes that the Petitioner bases her claim on the opinions of causation provided by Dr. Paletta. The Arbitrator finds that Dr. Paletta's opinions are not credible in light of his contradictory testimony. Of particular note is Dr. Paletta's efforts to cover up the change in his testimony by preparing both a letter to the Petitioner's attorney and an operative report soon after the contradiction in his testimony was brought to light by Respondent's counsel. Instead of simply admitting to a mistake regarding the question whether Dr. Paletta performed carpal tunnel and cubital tunnel surgery on the Petitioner, Dr. Paletta created a paper trail that clearly runs counter to his initial testimony that he had not been involved in the treatment of either of these conditions. Dr. Paletta's credibility is further brought into question by his defensive narrative responses during his cross examination, in which he makes reference to his own credibility instead of simply answering counsel's questions with a "yes" or a "no." And although the Petitioner has causation opinions from Dr. Brown, to whom Petitioner was directed by her attorney, Dr. Paletta's incredible testimony overshadows these other opinions and casts a large shadow of doubt on the Petitioner's claim as a whole. Even Dr. Brown's opinion is cast into doubt as both he and Dr. Paletta rely on the Petitioner's description of a job where there are no automatic doors. However, the evidence at trial show that there are automatic doors as indicated in both the JSA and confirmed by Respondent's witness. In light of this questionable evidence, the Petitioner's claim for benefits is denied.

2. The Arbitrator finds that the Petitioner has failed to meet her burden of proof regarding the issue of causation. In cases relying on the repetitive trauma concept, the petitioner must show the injury arose out of and in the course of his employment and was not the result of a normal degenerative aging process. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co.* v. *Industrial Commission*, 414 Ill.2d 326 (1953). Simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased risk to the petitioner. *Id.* The Arbitrator also notes a claimant fails to prove a causal relationship through repetitive trauma where the medical opinion upon which they have relied is based upon incorrect or incomplete information about the claimant's job duties. See, e.g., *Lon Dale Beasley* v. *Decatur Public School* #61, 03 IIC 301; *Jerry Wiser v. American Steel Foundries*. 02 HC 310; *Vicki Staley v. BroMenn Lind Medical Hills Internists*, 99 IIC 539. The Commission has determined a claimant fails to prove causation

from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. *Gambrel* v. *Mulay Plastics*, 97 IIC 238. The Commission decision Clay v. Hill Correctional Center, 11 I.W.C.C. 0038, is instructive to this case. In Clay, the Commission noted that testimony of locking and unlocking hundreds of doors was unpersuasive testimony to show that those job duties aggravate carpal tunnel syndrome when there is no mention of the force required to do these activities. (Id.) Likewise, in this case there is no testimony about the force to perform any of the activities listed by Petitioner. Furthermore, as mentioned above, it is apparent from the evidence that the Petitioner's treating physicians did not have a complete and accurate picture of Petitioner's work conditions.

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

Robert Sanders,

Petitioner,

14IWCC0548

vs.

NO: 11 WC 21421

Boyd Brothers Transportation, Inc.,

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 temporary total disability, causal connection, medical expenses, prospective medical expenses, permanent partial disability, average weekly wage, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

14IWCC0548

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,400.00. 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: JUL 0 9 2014

DLG/gaf
O: 6/25/14
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SANDERS, ROBERT
Employee/Petitioner

Case# **11WC021421**

14IWCC0548

BOYD BROTHERS TRANSPORTATION INC
Employer/Respondent

On 12/2/2013, 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 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1295 SMITH AMUNDSEN LLC
LES JOHNSON
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

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

14IWCC0548

Robert Sanders
Employee/Petitioner

v.

Boyd Brothers Transportation, Inc.
Employer/Respondent

Case # 11 WC 21421

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 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. ☒ 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 _____

14IWCC0548

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 $3,061.32; the average weekly wage was $612.26.

On the date of accident, Petitioner was 50 years of age, single with 0 dependent child(ren).

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 $25,216.70 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $25,216.70.

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 $408.17 per week for 49 4/7 weeks commencing March 16, 2011, through February 29, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $367.36 per week for 41.75 weeks because the injury sustained caused the 25% loss of use of the right 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.

William R. Gallagher, Arbitrator

November 25, 2013
Date

DEC 2 - 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 March 16, 2011. According to the Application, Petitioner fell and sustained injuries to the right heel and right lower extremity. There was no dispute in regard to either accident or causality; however, there was a dispute in regard to the computation of the average weekly wage as well as the duration of Petitioner's temporary total disability.

Petitioner worked for Respondent as an over-the-road truck driver and he began working for Respondent on January 13, 2011. For the first four weeks of his employment with Respondent, Petitioner was a "trainee" and he testified that his wages were $400.00 per week. Petitioner testified that beginning his fifth week as an employee, he began driving a truck. Part of Petitioner's job duties as a truck driver included "tarping" which consisted of placing/securing a tarp over the loads in the trailer. At that time, Petitioner testified that the wages he earned were based on $0.38 per mile, some extra bonus pay for mileage and $50.00 for "tarping."

Petitioner's wage records were tendered into evidence and his earnings for the first four weeks were as follows:

$400.00 for the week ending January 20, 2011.
$450.00 for the week ending January 27, 2011.
$350.00 for the week ending February 3, 2011.
$400.00 for the week ending February 10, 2011.

Total wages for the four week period were $1,600.00.

After Petitioner began driving trucks and "tarping," his earnings were as follows:

$550.00 for the week ending February 17, 2011.
$811.28 for the week ending February 24, 2011.
$386.44 for the week ending March 3, 2011.
$524.40 for the week ending March 10, 2011.
$789.20 for the week ending March 17, 2011.

Total wages for the five week period were $3,061.32.

For the nine week period, Petitioner's total wages were $4,661.32. (Petitioner's Exhibit 13).

On March 16, 2011, Petitioner was in the process of pulling on a tarp when he fell, landing primarily on the heel of his right foot. Petitioner went to the ER of St. Anthony's Memorial Hospital in Effingham. X-rays of Petitioner's right foot were taken which were negative.

Petitioner was subsequently treated by Dr. Brian Hamm, a podiatrist, who saw Petitioner on March 24, 2011. Petitioner complained of significant pain/swelling of his right foot/heel. X-rays obtained at that time revealed an anterior process fracture and a possible fracture of the

calcaneus. Dr. Hamm ordered an MRI scan. An MRI scan was performed on April 5, 2011, which revealed a comminuted fracture of the calcaneus and thickening of the spring ligament without a distinct tear.

Dr. Hamm authorized Petitioner to be off work and provided conservative treatment including a cam boot, medications and physical therapy. In his record of July 8, 2011, Dr. Hamm noted that he anticipated Petitioner would increase his range of motion and that he would be able to return to work without restrictions in a short period of time.

Sometime in July, 2011, Petitioner moved to Florida. On November 9, 2011, Petitioner was seen by Dr. Jeremy Schwartz, an orthopedic surgeon. Dr. Schwartz diagnosed Petitioner with right ankle synovitis and peroneal tendinitis. Dr. Schwartz's clinical examination of the right ankle revealed a normal range of motion. Dr. Schwartz gave Petitioner's right ankle an injection. Dr. Schwartz saw Petitioner again on November 22, 2011, and while there was some minimal swelling, the range of motion of the right ankle was normal.

Dr. Schwartz saw Petitioner on December 23, 2011, and Petitioner's condition was essentially the same. Dr. Schwartz suspected that there may have been a non-union of the calcaneus fracture so he ordered a CT scan. A CT scan of Petitioner's right foot was performed on January 19, 2012, which revealed some sclerosis and an old fracture of the calcaneus. Dr. Schwartz saw Petitioner again on January 27, 2012, reviewed the CT scan and opined that it showed no abnormalities. Dr. Schwartz's findings on clinical examination were benign.

Dr. Schwartz ordered a functional capacity evaluation (FCE) of Petitioner which was performed on February 4, 2012. The FCE report stated that Petitioner cooperated with the test and that he could return to work in the heavy work demand capacity but subject to restrictions of extra safety handles to assist him climbing in and out of the truck, a stepstool to assist with the first step, limitations of frequent carrying to only level surfaces and 20 pounds weight and limitations to above shoulder lifting of 35 pounds. Dr. Schwartz saw Petitioner on February 29, 2012, and reviewed the FCE. He agreed with the work restrictions and opined that Petitioner was at MMI.

Subsequent to his release from Dr. Schwartz, Petitioner did not contact Respondent and continued to draw TTD benefits. Petitioner obtained employment with Vanguard Utility Company. In his employment application dated March 26, 2012, Petitioner stated he left the employment of Respondent because of his relocation to Florida. Petitioner testified that he began working for Vanguard on April 27, 2012, and that his job duties consisted of switching power meters. He worked for Vanguard for four months and made approximately $15,000.00.

While Petitioner was working for Vanguard, he continued to be paid TTD benefits. Petitioner did not inform either his attorney or Respondent that he was working. Petitioner continued to be paid TTD benefits up to September 29, 2012, when Respondent discovered that Petitioner had, in fact, returned to work.

In July, 2012, Respondent put Petitioner under surveillance and a DVD video and narrative report of the surveillance were received into evidence at trial. (Respondent's Exhibits 2 and 3). The Arbitrator watched the video and reviewed the report. Video surveillance of Petitioner of

approximately one-half hour was obtained and Petitioner was observed walking, loading items into the back of a pickup truck, bending, kneeling, carrying a ladder and walking while pushing a shopping cart in Wal-Mart. Petitioner did not walk with any type of altered gait or limp.

At trial Petitioner testified that he still experiences aches/pains in his right heel and that he still has to elevate his foot daily and he continues to do some therapeutic exercises. Cold weather aggravates his symptoms.

Conclusions of Law

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

The Arbitrator concludes that Petitioner had an average weekly wage of $612.26.

In support of this conclusion the Arbitrator notes the following:

Petitioner was employed by Respondent as a trainee and, for the first four weeks of his employment, Petitioner was paid $1,600.00. For the remaining five weeks of his employment by Respondent, Petitioner worked as a truck driver and was paid for performing duties of a truck driver which included tarping. During that period of time, Petitioner's gross earnings were $3,061.32. (For reasons unknown to the Arbitrator, Petitioner's net earnings exceeded gross earnings for the weekly periods ending March 10 and March 17 – Petitioner's Exhibit 13).

"The compensation shall be computed on the basis of the 'Average weekly wage' which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury..." as provided in Section 10 of the Act.

The position of Petitioner's counsel was that because Petitioner worked as a trainee for the first four weeks of his employment for Respondent and as a truck driver for the last five weeks, that there was a change in his employment status and that the first four weeks should thereby be excluded.

The position of Respondent's counsel was that Petitioner's average weekly wage should be determined by considering all nine weeks of Petitioner's employment for Respondent.

The Arbitrator reviewed the Appellate Court Opinions and Commission Decisions cited by counsel.

In the case of Cook v. Industrial Commission, 596 N.E.2d 746 (Ill. App. 3rd Dist. 1992), the Appellate Court dealt with the issue of a laborer who worked 24 weeks for the employer, but during that time period he only worked three full 40 hour work weeks and usually worked less than five days per week. The Appellate Court affirmed the Commission's computation of the average weekly wage as not being against the manifest weight of the evidence; however, there was not an issue as to any sort of change in the Petitioner's employment in that case.

In the case of Sylvester v. Industrial Commission, 756 N.E.2d 822 (Ill. 2001), the Illinois Supreme Court dealt with the computation of the average weekly wage for an employee who worked as a roofer but had a significant number of weeks in the 52 weeks preceding the date of accident in which he worked less than a full five day work week. The Supreme Court upheld the Appellate Court ruling that, for determination of the average weekly wage, it was necessary to exclude weeks or portions of weeks in which the employee did not work when computing the average weekly wage. Again, this is not the issue in the instant case.

The issue in the instant case is whether the Petitioner's change from trainee to truck driver constitutes a change in the employment of that employee as contemplated by Section 10 of the Act. There are no Appellate Court Opinions that directly address this precise issue.

In the case of Walter v. Jacksonville Development Center, 99 IIC 1031 (1999), the Illinois Workers' Compensation Commission ruled that when Petitioner changed from being a part-time employee to a full-time employee, this constituted a change in her employment status. Accordingly, the Commission computed the average weekly wage based solely on her earnings as a full-time employee.

In the case of Rios v. United Parcel Service, 01 IIC 860 (2001), the Commission determined that the average weekly wage should be based on the employee's earnings as a full-time employee and excluded earnings and weeks that the Petitioner worked as a part-time employee. This was based on its determination that the employment in which Petitioner was engaged at that the time of the injury was Petitioner's specific full-time job.

Based on the preceding, the Arbitrator concludes that Petitioner's employment at the time he was injured was that of a truck driver and not a trainee and that his earnings as a trainee should be excluded from the computation of the average weekly wage.

The Arbitrator thereby finds that the average weekly wage is $612.26, $3,061.32 divided by five weeks.

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

The Arbitrator concludes that Petitioner was temporarily totally disabled for 49 4/7 weeks, commencing March 16, 2011, through February 29, 2012.

In support of this conclusion the Arbitrator notes the following:

On February 29, 2012, Petitioner was examined by Dr. Schwartz who reviewed the FCE and opined that Petitioner was at MMI and could return to work with restrictions.

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

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 25% loss of use of the right foot.

In support of this conclusion the Arbitrator notes the following:

Petitioner sustained a comminuted fracture of the calcaneus which required conservative treatment. No surgical procedures were recommended or performed. While Petitioner had numerous complaints, Dr. Schwartz's findings on clinical examination were, for the most part, benign.

The FCE indicated that Petitioner could return to work but subject to a number of restrictions; however, Petitioner's activities observed in the surveillance video casts some doubt on the validity of all of those restrictions.

Petitioner's credibility is questionable. It is undisputed that Petitioner continued to receive TTD benefits even after he returned to work. The activities Petitioner engaged in, as noted in the surveillance video, also tend to cast some doubt on the veracity of his complaints.

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

JUAN M. RODRIGUEZ,

Petitioner,

14IWCC0549

vs.

NO: 12 WC 37519
12 WC 37520

BUFFALO WILD WINGS,

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, medical expenses and prospective medical care, and being advised of the facts and law, clarifies its finding of accident, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that Petitioner's medical treatment records were consistent throughout, with the exception of Dr. Hussein's initial treatment record. Two days after the September 2012 accident in question, Petitioner presented to Dr. Hussein complaining of back pain. Petitioner also informed Dr. Hussein of back pain due to previous injury occurring in July of 2010. In his records, Dr. Hussein characterized Petitioner's back pain as chronic, and noted that his previous back pain had occurred after an accident 15 months prior.

However, at trial, Petitioner testified that he did not characterize his pain as chronic upon treating with Dr. Hussein, and that the previous back pain he spoke of was related to the July 2010 accident, which was 2 months prior to the accident in question, rather than 15 months prior. The Arbitrator found Petitioner's explanation of the perceived inconsistency to be credible, and thus found accident.

14IWCC0549

The Commission defers to the Arbitrator's credibility finding, as she was in the best position to gauge Petitioner during his testimony. Accordingly, the Commission affirms the Arbitrator's finding of accident, and also affirms the temporary total disability award, the medical expenses award and the recommended prospective medical care.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 30, 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 $22,300.00. 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: JUL 0 9 2014
O: 5/8/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIQUEZ, JUAN M
Employee/Petitioner

Case# **12WC037519**

12WC037520
14IWCC0549

BUFFALO WILD WINGS
Employer/Respondent

On 9/30/2013, 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 0.05% 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:

1993 ROMANUCCI & BLANDIN LLC
BRUNO R MARASSO ESQ
33 N LASALLE ST 20TH FL
CHICAGO, IL 60602

0560 WIEDNER & MCAULIFFE LTD
TIMOTHY S McNALLY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0549

Juan M. Rodriguez
Employee/Petitioner

v.

Buffalo Wild Wings
Employer/Respondent

Case # 12 WC 37519

Consolidated cases: 12 WC 37520

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 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. ☐ 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 & Extent**

14IWCC0549

FINDINGS

On the date of accident, **7/21/10**, 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 not*** causally related to the accident. SEE DECISION

In the year preceding the injury, Petitioner earned **$40,300.00**; the average weekly wage was $775.00.

On the date of accident, Petitioner was 31 years of age, ***married*** with 2 dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner 7.5 weeks at the PPD rate of $465.00 per week as Petitioner sustained 1.5% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act as a result of his injuries.

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

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

Carolyn D Kendy
Signature of Arbitrator

9/30/13
Date

ICArbDec19(b)

SEP 30 2013

FINDINGS OF FACT

Petitioner, a 31 year old restaurant cook, testified that he was first hired by Respondent in 2004. Petitioner was hired as a cook and worked in that capacity on 7/21/10. Petitioner worked as a cook for Respondent at two restaurant locations in Naperville and Woodridge, Illinois. As a cook for Respondent Petitioner's duties included cooking, frying, grilling chicken wings and occasionally stocking food in the coolers and freezers. Petitioner was also required to carry food items around the kitchen.

At trial, the parties stipulated that on 7/21/10, Petitioner sustained a work related accident while loading cases of chicken wings into a freezer. This accident is the subject of case 12 WC 37519. ARB EX 1. Petitioner testified that he did not have any problems or injuries to his low back prior to the accident of 7/21/10. On that date, Petitioner was at work loading chicken wings into a freezer when approximately 8 cases fell on Petitioner striking his lower back and both legs. Petitioner testified that each box of chicken wings weighed from 35 to 45 pounds.

Petitioner testified that he felt immediate pain in his lower back and right leg after he was struck by the boxes and notified his supervisors Lori and Jeff about the accident. The Arbitrator notes that Respondent accepted the accident and paid Petitioner's medical expenses. ARB EX 1. On 7/22/10, Petitioner went to Concentra in Aurora. Petitioner complained of midline low back pain and was diagnosed with a lumbar strain, contusion of the lumbar region and lower leg contusion. Petitioner denied any radiating right leg pain. PX 7. Petitioner was referred for physical therapy which he attended at Concentra through 8/9/10. PX 7. Petitioner was also given pain medication and light duty during this period of treatment. Petitioner was released to full duty work on 8/9/10. PX 7. The treatment record of 8/9/10 indicates Petitioner reported that the "pattern of symptoms is better with no pain. Petitioner has been working their regular duty. Patient has been taking medications and has noted improvement. Patient has had physical therapy 6 times and feels better. He does not have any pain. The pain did not radiate. He cannot identify any exacerbating factors." PX 7. Petitioner was released with all diagnosed conditions listed as resolved. PX 7.

At trial, Petitioner testified that when he was released on 8/9/10, he continued to have strong pain in his low back that was only controlled by medication. Petitioner testified that he did not seek any additional treatment after 8/9/10 because he "would have to pay for it." Petitioner lost no time from work as a result of the first accident.

Petitioner continued to work for Respondent for the next two years (August 2010 to September 2012). He testified that his lower back pain continued during that two year period with periods of waxing and waning pain. Petitioner testified that he continued to take Naproxen for pain three days per week and that the pain would increase with lifting at work. Petitioner testified that he initially received the prescribed medication from Concentra in August 2010. However, Petitioner's testimony on whether he continued to take prescribed medication and from where he received the prescriptions over this two year period was unclear. On redirect, Petitioner testified that he took over the counter medication during this period and not prescription medication.

Petitioner alleges a second work accident on 9/28/12 which is the subject of case 12 WC 37520. ARB EX 2. In that case, Respondent disputes the issue of accident, notice, causal connection, TTD and medical expenses, as well as Petitioner's request for prospective medical. ARB EX 2.

Petitioner testified that on 9/28/12, he was working at Respondent's restaurant in Woodridge putting away frozen food containers. Petitioner testified that he picked up a box of chicken and felt a pinch in his lower back. Petitioner testified that he had difficulty when he tried to straighten up. Petitioner testified that he reported the accident to his manager Mark. Petitioner testified that he lifted 45 to 150 boxes weighing 35 to 40 pounds each before he felt the pinch in his low back. Petitioner testified that he was moving around the kitchen putting products away and lifting boxes when he felt a pinch in his low back. Petitioner testified that he went to work on 9/28/12 walking and left work that day due to very strong pain in his low back.

Petitioner testified that he sought treatment the same day with his family doctor, Dr. Hussein. Dr. Hussein's records indicate an initial visit of 9/30/12. The history indicates a present complaint of lower back pain and "3 months of lower back pain not radiating to lower extremities. Worse with movement." Petitioner reported right leg weakness without paresthesias. Dr. Hussein also noted "15 months ago work accident heavy object fell over lower back (x-rays negative for fracture)." Petitioner was prescribed Ultram and Flexeril under the diagnosis of "low back pain chronic." PX 1. Dr. Hussein was to obtain the prior x-rays and ordered a lumbar MRI.

The 10/2/12 MRI showed a disc herniation at L2-3 and a 5 mm left central disc herniation at L5-S1 without foramen compromise or thecal sac stenosis. However, the PLL was noted as elevated and there was impression on the dural sac. PX 1. On 10/5/12, Dr. Hussein noted these results and indicated no spinal cord compression per the MRI. He diagnosed lumbar pain and disc herniation. He noted that Petitioner was to "avoid lifting greater than 15 pounds when returning to work." Petitioner was to follow up in 1 month.

In the interim, Petitioner was seen at Concentra on 10/1/12. He reported an injury to his back at work on 9/28/12 when he was lifting a box of chicken and felt pain in his lower back. PX 2. Specifically, the noted history indicates, "C/o lbp. Pt was at work on Friday 9/28/12 repeatedly lifting 30 lbs boxes of chicken. Later that evening he felt pain in his lower back. Pain has worsen [sic] and is now 10/10 constant, and increases with twisting of back. Pt was seen at Walmart urgent care clinic yesterday evening and received Flexeril and Tramadol. Patient states he injured his lower back 1 year ago- lumbar strain. Treated at Concentra. Denies paresthesias... radicular symptoms." PX 2. Limited lumbar range of motion was noted on exam with "positive Waddells, overreaction, stimulated test, regional disturbances" also noted. Petitioner's medication was continued and he was placed on restricted duty of no lifting, pushing or pulling over 35 pounds. PX 2. The medication and restrictions were continued at his next visit on 10/12/12 pending receipt of the MRI on 10/2/12.

Petitioner began physical therapy at Concentra as of 10/15/12 with the therapist noting the disc herniations at L2-3 and L5-S1 and the complaints of low back and right leg pain. The therapist further noted that the exam was consistent with the diagnosis of herniated disc at these levels. PX 2. Petitioner attended 2 weeks of PT and on 10/30/12 reported no improvement in his symptoms other than temporary relief after PT for a few hours following the session. Petitioner continued to work light duty during this

period. PX 2. Petitioner's last visit to Concentra was on 11/6/12 where he again advised no improvement in his condition. Modified work status was continued.

Petitioner next saw Dr. Lorenz at Hinsdale Orthopedics on 11/8/12. PX 3. The patient history on that date indicates, "He was at work several years ago when he initially injured his back. The patient recovered from that. He has some very minor back discomfort. At that time, he did not undergo an MRI. He was at work lifting some boxes about 2 months or so ago. At that time, while he was doing a lift, he had a significant increase in low back pain with radiation toward to the right buttock but not down the leg. The pain he places at a fairly high level of a VAS score which is a 9. The patient is currently working unrestricted on 2 jobs. He did have physical therapy which he says did not help him. However at this point in time, his pain is at such a level that he occasionally has no pain. Sometimes, his pain comes back. The pain is always in the lower back." PX 3. Dr. Lorenz examined Petitioner noting some limited back range of motion. He reviewed the 10/2/12 MRI noting the asymptomatic L2-3 disc herniation and the L5-S1 disc herniation with mild dural sac compression, and without radiculopathy. Dr. Lorenz diagnosed "small disk herniation at L5-S1 without radiculopathy, probably related to the second lifting incident, but he appears to be spontaneously improving." PX 3.

Due to continued complaints of radiation toward the right leg, Petitioner was sent for epidural injections at L5-S1 to improve the pain symptoms. Dr. Lorenz wrote, "he wishes to return to work full duty. I have no objections to that. We will see him back after the epidural injection." PX 3. Dr. Lorenz in fact returned Petitioner to regular duty work as of 11/9/12.

Petitioner followed up on 12/19/12 with Dr. Lorenz after having 2 injections with Dr. Alzoobi with only minimal partial relief reported. PX 3, PX 5. Petitioner reported primary pain in his lower back. Dr. Lorenz placed Petitioner on light to sedentary duty and sent him for an FCE to evaluate his activity level. Dr. Lorenz noted, "The patient should only consider surgery if he is unable to live with this. Prior to any surgical intervention, the patient will need discographic studies. ... we will see him back after the FCA for further recommendation." PX 3.

On 1/15/13, Petitioner underwent an FCA at Provena per Dr. Lorenz. Petitioner was assessed as capable of working at or below medium physical demand level with the most difficulty bending forward, backward and side to side. PX 3. He could occasionally lift up to 45 lbs from floor to bench but only 25 lbs from floor to shelf. The results were deemed valid. As of the 2/13/13 visit, Petitioner still demonstrated difficulty and pain with bending forward and complained of pain radiating into the left buttock but not left leg following the third injection. PX 5. Petitioner continued to complain of severe pain in his lower back with interference in his daily activities at home and at work. Petitioner did not want to continue living with the restrictions so Dr. Lorenz sent him for discography at L4-5 with a control of L5-S1. Petitioner was taken off work. PX 3.

The discogram was denied following a Section 12 exam by Dr. Mather. On 2/19/13, Dr. Mather wrote a report following his exam of Petitioner on 2/14/13. Dr. Mather noted a normal exam with negative straight leg raise with lower back pain somewhat to the left side noted on flexion, extension and simulated axial rotation and axial compression. Dr. Mather read the 10/2/12 MRI to show mild disc degeneration of L5-S1 and a small left L5-S1 bulge measuring 3 mm. Dr. Mather diagnosed lumbar strain on 9/28/12 based on the consistent mechanism of injury. He placed Petitioner at MMI as he opined the condition had resolved itself and that he could return to work full duty without the need for additional care. With regard

to the disc protrusion at L5-S1 he opined that it was a common finding in asympmtomatic patients of Petitioner's age given Petitioner's lack of radicular symptoms and negative straight leg raise. None of the pain diagrams in his opinion indicate findings to support a left sided disc herniation. RX 1.

At the visit with Dr. Lorenz on 3/27/13, he noted Petitioner's "pure mechanical low back findings" at the L5-S1 level. Dr. Lorenz reiterates that his surgical recommendation was based on the herniated disk at L5-S1 as seen on the MRI and as the suspected pain generator. Dr. Lorenz recommended the discogram to evaluate L4-5 and its involvement with L5-S1. Dr. Lorenz did not suspect Petitioner's pain was coming from L4-5. He further stated that Petitioner's mechanism of injury was consistent with back pain production as well as disk herniation at the time of the injury. Petitioner's low back pain secondary to inflammatory changes in the L5-S1 interval have not responded to conservative care so he recommended surgery. Dr. Lorenz goes on to state that surgery to address the L5-S1 disc in the form of a diskectimy and fusion would be appropriate even without a discogram but he would prefer to have the diagnostic test before surgery. He again prescribed the discogram and restricted Petitioner to lifting 25 pounds which prevented Petitioner from returning to his prior job. PX 3.

Dr. Alzoobi performed the discogram on 4/12/13. L4-5 was negative for concordant pain. L5-S1 was positive for concordant pain. The post CT scan indicated "left posterior annular fissure at L5-S1 with posterior leakage of contrast material. There is an associated left paracentral disc protrusion possibly impinging the left S1 nerve root in the lateral recess." PX 5.

On 4/29/13, Dr. Mather authored a second report after viewing the discogram. He determined that the discogram showed degenerative changes at L5-S1 with leakage to the left side near left S1 root. He noted that the procedure report of Dr. Alzoobi indicated that the L4-5 disc was pressurized to 121 psi and L5-S1 was pressured to 85 psi. HE concluded "this far exceeds the standard maximum which is 50 psi. This rendered the test invalid." He opined that lumbar discography does not improve the results of lumbar fusion. Furthermore, he opined that Petitioner has nonspecific complaints of lower back pain and that the results of lumbar fusion for nonspecific back pain are "exceedingly poor." He did not believe Petitioner should have surgery. RX 2.

As of 5/14/13, Dr. Alzoobi indicated that based on the objective results of the MRI and the discogram, Petitioner sustained discogenic pain and herniation with impingement of the S1 nerve root on the left side. PX 5. Dr. Alzoobi deferred to Dr. Lorenz for a surgical opinion. As of 5/14/13, Dr. Alzoobi took Petitioner off work. PX 5. Dr. Alzoobi continued his opinions with regard to Petitioner's objective condition and the propriety of the discogram procedure and results in response to the opinion of Dr. Mather. He opined that Dr. Mather's opinions were based on studies that did not reflect Petitioner's current condition. As of July 30, 2013, Dr. Alzoobi continued Petitioner off work pending surgery. PX 6.

On 6/5/13, Dr. Lorenz addressed the articles relied on by Dr. Mather in a peer to peer review report. Again, Dr. Lorenz concludes that the discogram was not the only basis for his surgical recommendation but rather was used to determined the involvement of L4-5 prior to surgery. He determined that the articles and studies used by Dr. Mather were not applicable to the medical decision making and treatment of Petitioner in this case. PX 4.

On June 24, 2013, Dr. Mather authored a third report reiterating his belief that the discogram results were rendered invalid based on the excessive pressure used during testing. Dr. Lorenz responded on 7/10/13

stating that "once again, this is a completely moot point. The discography was not the reason for performing and recommending the surgical intervention. The MRI with the central disk herniation at L5-S1 is the primary reason for surgical intervention. The discography only was helpful to exclude the L4-5 interval which in spite of increased pressure did not produce the patient's pain." Dr. Lorenz stated that the discography were not contributory to the decision to proceed with surgery. PX 4.

Petitioner's last appointment with a physician was on 7/30/13 with Dr. Alzoobi. Petitioner had another appointment scheduled at the time of trial. Petitioner testified that he wants the recommended surgery. He testified that he is unable to work or work due to the back pain and that the pain was greatly affected his life. He ranked his pain at a 10 while sitting at trial.

Finally, Petitioner testified that he returned to work 11/9/12 following his first visit with Dr. Lorenz and that when he returned his back pain was strong. Petitioner worked until 11/11/12 when he was fired by Respondent. Petitioner has not worked since 11/11/12. Respondent paid Petitioner TTD from 12/1/12 through 2/25/13 when TTD was terminated following his visit to Dr. Mather.

CONCLUSIONS OF LAW

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

CASE 12 WC 37519 DOA 7/21/10

F. Is Petitioner's current condition of ill-being causally related to the injury of 7/21/10?

The parties stipulated that the Petitioner sustained a work related accident on 7/21/10 when he was struck on the back by falling boxes. Petitioner's history of accident is consistently recorded in the Concentra treatment records following the accident. The Arbitrator notes that Petitioner was diagnosed with a lumbar strain following the 7/21/10 accident and underwent a 2 week period of physical therapy. At his last physical therapy appointment of 8/9/10, Petitioner is documented as reporting that the "pattern of symptoms is better with no pain. Petitioner has been working their regular duty. Patient has been taking medications and has noted improvement. Patient has had physical therapy 6 times and feels better. He does not have any pain. The pain did not radiate. He cannot identify any exacerbating factors." PX 7. Petitioner was released with all diagnosed conditions listed as resolved. PX 7.

Based on these medical records and Petitioner's return to full duty, the Arbitrator finds causal connection for Petitioner's lumbar strain and contusion sustained in the uncontested accident of 7/21/10 through his last date of conservative treatment on 8/9/10. The Arbitrator finds Petitioner was at MMI as of 8/9/10 for these conditions.

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

At trial, Petitioner testified that when he was released on 8/9/10, he continued to have strong pain in his low back that was only controlled by medication. The medical record of 8/9/10 indicates that Petitioner reported no pain at that time. Petitioner testified that he did not seek any additional treatment after 8/9/10 because he "would have to pay for it." Petitioner lost no time from work as a result of the first accident

and continued working full duty as of 8/9/10. At best, Petitioner continued to take over the counter medication for complaints of continued back pain thereafter.

Based on the foregoing, and on the record as a whole, the Arbitrator finds that Petitioner sustained 1.5% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act as a result of the injuries sustained on 7/21/10.

The conclusions of law in case 12 WC 37520 date of accident 9/28/12 are contained in a separate Decision in these consolidated matters.

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

14IWCC0549

RODRIGUEZ, JUAN M
Employee/Petitioner

Case# **12WC037520**
12WC037519

BUFFALO WILD WINGS
Employer/Respondent

On 9/30/2013, 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 0.05% 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:

1993 ROMANUCCI & BLANDIN LLC
BRUNO R MARASSO ESQ
33 N LASALLE ST 20TH FL
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
TIMOTHY S McNALLY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

14IWCC0549

Juan Rodriguez
Employee/Petitioner

v.

Buffalo Wild Wings
Employer/Respondent

Case # **12** WC **37520**

Consolidated cases: **12 WC 37519**

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 **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. ☒ 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 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 $**46,608.12**; the average weekly wage was $**896.31**.

On the date of accident, Petitioner was **34** 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 $**7,426.57** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**7,426.57**.

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 $597.54/week for 37 and 1/7 weeks, commencing November 27, 2012 through August 13, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner all reasonable and necessary medical services incurred in the care and treatment of the causally related injuries pursuant to Sections 8 and 8.2 of the Act.

Respondent shall authorize and pay for prospective reasonable and necessary medical services, including surgery and post-surgical attendant care as prescribed by Dr. Mark Lorenz pursuant to Sections 8(a), 8 and 8.2 of the Act.

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

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

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

Carolyn Doherty
Signature of Arbitrator

9/30/13
Date

ICArbDec19(b)

SEP 30 2013

14IWCC0549

FINDINGS OF FACT

Petitioner, a 31 year old restaurant cook, testified that he was first hired by Respondent in 2004. Petitioner was hired as a cook and worked in that capacity on 7/21/10. Petitioner worked as a cook for Respondent at two restaurant locations in Naperville and Woodridge, Illinois. As a cook for Respondent Petitioner's duties included cooking, frying, grilling chicken wings and occasionally stocking food in the coolers and freezers. Petitioner was also required to carry food items around the kitchen.

At trial, the parties stipulated that on 7/21/10, Petitioner sustained a work related accident while loading cases of chicken wings into a freezer. This accident is the subject of case 12 WC 37519. ARB EX 1. Petitioner testified that he did not have any problems or injuries to his low back prior to the accident of 7/21/10. On that date, Petitioner was at work loading chicken wings into a freezer when approximately 8 cases fell on Petitioner striking his lower back and both legs. Petitioner testified that each box of chicken wings weighed from 35 to 45 pounds.

Petitioner testified that he felt immediate pain in his lower back and right leg after he was struck by the boxes and notified his supervisors Lori and Jeff about the accident. The Arbitrator notes that Respondent accepted the accident and paid Petitioner's medical expenses. ARB EX 1. On 7/22/10, Petitioner went to Concentra in Aurora. Petitioner complained of midline low back pain and was diagnosed with a lumbar strain, contusion of the lumbar region and lower leg contusion. Petitioner denied any radiating right leg pain. PX 7. Petitioner was referred for physical therapy which he attended at Concentra through 8/9/10. PX 7. Petitioner was also given pain medication and light duty during this period of treatment. Petitioner was released to full duty work on 8/9/10. PX 7. The treatment record of 8/9/10 indicates Petitioner reported that the "pattern of symptoms is better with no pain. Petitioner has been working their regular duty. Patient has been taking medications and has noted improvement. Patient has had physical therapy 6 times and feels better. He does not have any pain. The pain did not radiate. He cannot identify any exacerbating factors." PX 7. Petitioner was released with all diagnosed conditions listed as resolved. PX 7.

At trial, Petitioner testified that when he was released on 8/9/10, he continued to have strong pain in his low back that was only controlled by medication. Petitioner testified that he did not seek any additional treatment after 8/9/10 because he "would have to pay for it." Petitioner lost no time from work as a result of the first accident.

Petitioner continued to work for Respondent for the next two years (August 2010 to September 2012). He testified that his lower back pain continued during that two year period with periods of waxing and waning pain. Petitioner testified that he continued to take Naproxen for pain three days per week and that the pain would increase with lifting at work. Petitioner testified that he initially received the prescribed medication from Concentra in August 2010. However, Petitioner's testimony on whether he continued to take prescribed medication and from where he received the prescriptions over this two year period was unclear. On redirect, Petitioner testified that he took over the counter medication during this period and not prescription medication.

Petitioner alleges a second work accident on 9/28/12 which is the subject of case 12 WC 37520. ARB EX 2. In that case, Respondent disputes the issue of accident, notice, causal connection, TTD and medical expenses, as well as Petitioner's request for prospective medical. ARB EX 2.

Petitioner testified that on 9/28/12, he was working at Respondent's restaurant in Woodridge putting away frozen food containers. Petitioner testified that he picked up a box of chicken and felt a pinch in his lower back. Petitioner testified that he had difficulty when he tried to straighten up. Petitioner testified that he reported the accident to his manager Mark. Petitioner testified that he lifted 45 to 150 boxes weighing 35 to 40 pounds each before he felt the pinch in his low back. Petitioner testified that he was moving around the kitchen putting products away and lifting boxes when he felt a pinch in his low back. Petitioner testified that he went to work on 9/28/12 walking and left work that day due to very strong pain in his low back.

Petitioner testified that he sought treatment the same day with his family doctor, Dr. Hussein. Dr. Hussein's records indicate an initial visit of 9/30/12. The history indicates a present complaint of lower back pain and "3 months of lower back pain not radiating to lower extremities. Worse with movement." Petitioner reported right leg weakness without paresthesias. Dr. Hussein also noted "15 months ago work accident heavy object fell over lower back (x-rays negative for fracture)." Petitioner was prescribed Ultram and Flexeril under the diagnosis of "low back pain chronic." PX 1. Dr. Hussein was to obtain the prior x-rays and ordered a lumbar MRI.

The 10/2/12 MRI showed a disc herniation at L2-3 and a 5 mm left central disc herniation at L5-S1 without foramen compromise or thecal sac stenosis. However, the PLL was noted as elevated and there was impression on the dural sac. PX 1. On 10/5/12, Dr. Hussein noted these results and indicated no spinal cord compression per the MRI. He diagnosed lumbar pain and disc herniation. He noted that Petitioner was to "avoid lifting greater than 15 pounds when returning to work." Petitioner was to follow up in 1 month.

In the interim, Petitioner was seen at Concentra on 10/1/12. He reported an injury to his back at work on 9/28/12 when he was lifting a box of chicken and felt pain in his lower back. PX 2. Specifically, the noted history indicates, "C/o lbp. Pt was at work on Friday 9/28/12 repeatedly lifting 30 lbs boxes of chicken. Later that evening he felt pain in his lower back. Pain has worsen [sic] and is now 10/10 constant, and increases with twisting of back. Pt was seen at Walmart urgent care clinic yesterday evening and received Flexeril and Tramadol. Patient states he injured his lower back 1 year ago- lumbar strain. Treated at Concentra. Denies paresthesias… radicular symptoms." PX 2. Limited lumbar range of motion was noted on exam with "positive Waddells, overreaction, stimulated test, regional disturbances" also noted. Petitioner's medication was continued and he was placed on restricted duty of no lifting, pushing or pulling over 35 pounds. PX 2. The medication and restrictions were continued at his next visit on 10/12/12 pending receipt of the MRI on 10/2/12.

Petitioner began physical therapy at Concentra as of 10/15/12 with the therapist noting the disc herniations at L2-3 and L5-S1 and the complaints of low back and right leg pain. The therapist further noted that the exam was consistent with the diagnosis of herniated disc at these levels.

PX 2. Petitioner attended 2 weeks of PT and on 10/30/12 reported no improvement in his symptoms other than temporary relief after PT for a few hours following the session. Petitioner continued to work light duty during this period. PX 2. Petitioner's last visit to Concentra was on 11/6/12 where he again advised no improvement in his condition. Modified work status was continued.

Petitioner next saw Dr. Lorenz at Hinsdale Orthopedics on 11/8/12. PX 3. The patient history on that date indicates, "He was at work several years ago when he initially injured his back. The patient recovered from that. He has some very minor back discomfort. At that time, he did not undergo an MRI. He was at work lifting some boxes about 2 months or so ago. At that time, while he was doing a lift, he had a significant increase in low back pain with radiation toward to the right buttock but not down the leg. The pain he places at a fairly high level of a VAS score which is a 9. The patient is currently working unrestricted on 2 jobs. He did have physical therapy which he says did not help him. However at this point in time, his pain is at such a level that he occasionally has no pain. Sometimes, his pain comes back. The pain is always in the lower back." PX 3. Dr. Lorenz examined Petitioner noting some limited back range of motion. He reviewed the 10/2/12 MRI noting the asymptomatic L2-3 disc herniation and the L5-S1 disc herniation with mild dural sac compression, and without radiculopathy. Dr. Lorenz diagnosed "small disk herniation at L5-S1 without radiculopathy, probably related to the second lifting incident, but he appears to be spontaneously improving." PX 3.

Due to continued complaints of radiation toward the right leg, Petitioner was sent for epidural injections at L5-S1 to improve the pain symptoms. Dr. Lorenz wrote, "he wishes to return to work full duty. I have no objections to that. We will see him back after the epidural injection." PX 3. Dr. Lorenz in fact returned Petitioner to regular duty work as of 11/9/12.

Petitioner followed up on 12/19/12 with Dr. Lorenz after having 2 injections with Dr. Alzoobi with only minimal partial relief reported. PX 3, PX 5. Petitioner reported primary pain in his lower back. Dr. Lorenz placed Petitioner on light to sedentary duty and sent him for an FCE to evaluate his activity level. Dr. Lorenz noted, "The patient should only consider surgery if he is unable to live with this. Prior to any surgical intervention, the patient will need discographic studies. ... we will see him back after the FCA for further recommendation." PX 3.

On 1/15/13, Petitioner underwent an FCA at Provena per Dr. Lorenz. Petitioner was assessed as capable of working at or below medium physical demand level with the most difficulty bending forward, backward and side to side. PX 3. He could occasionally lift up to 45 lbs from floor to bench but only 25 lbs from floor to shelf. The results were deemed valid. As of the 2/13/13 visit, Petitioner still demonstrated difficulty and pain with bending forward and complained of pain radiating into the left buttock but not left leg following the third injection. PX 5. Petitioner continued to complain of severe pain in his lower back with interference in his daily activities at home and at work. Petitioner did not want to continue living with the restrictions so Dr. Lorenz sent him for discography at L4-5 with a control of L5-S1. Petitioner was taken off work. PX 3.

The discogram was denied following a Section 12 exam by Dr. Mather. On 2/19/13, Dr. Mather wrote a report following his exam of Petitioner on 2/14/13. Dr. Mather noted a normal exam with negative straight leg raise with lower back pain somewhat to the left side noted on flexion,

extension and simulated axial rotation and axial compression. Dr. Mather read the 10/2/12 MRI to show mild disc degeneration of L5-S1 and a small left L5-S1 bulge measuring 3 mm. Dr. Mather diagnosed lumbar strain on 9/28/12 based on the consistent mechanism of injury. He placed Petitioner at MMI as he opined the condition had resolved itself and that he could return to work full duty without the need for additional care. With regard to the disc protrusion at L5-S1 he opined that it was a common finding in asympmtomatic patients of Petitioner's age given Petitioner's lack of radicular symptoms and negative straight leg raise. None of the pain diagrams in his opinion indicate findings to support a left sided disc herniation. RX 1.

At the visit with Dr. Lorenz on 3/27/13, he noted Petitioner's "pure mechanical low back findings" at the L5-S1 level. Dr. Lorenz reiterates that his surgical recommendation was based on the herniated disk at L5-S1 as seen on the MRI and as the suspected pain generator. Dr. Lorenz recommended the discogram to evaluate L4-5 and its involvement with L5-S1. Dr. Lorenz did not suspect Petitioner's pain was coming from L4-5. He further stated that Petitioner's mechanism of injury was consistent with back pain production as well as disk herniation at the time of the injury. Petitioner's low back pain secondary to inflammatory changes in the L5-S1 interval have not responded to conservative care so he recommended surgery. Dr. Lorenz goes on to state that surgery to address the L5-S1 disc in the form of a diskectimy and fusion would be appropriate even without a discogram but he would prefer to have the diagnostic test before surgery. He again prescribed the discogram and restricted Petitioner to lifting 25 pounds which prevented Petitioner from returning to his prior job. PX 3.

Dr. Alzoobi performed the discogram on 4/12/13. L4-5 was negative for concordant pain. L5-S1 was positive for concordant pain. The post CT scan indicated "left posterior annular fissure at L5-S1 with posterior leakage of contrast material. There is an associated left paracentral disc protrusion possibly impinging the left S1 nerve root in the lateral recess." PX 5.

On 4/29/13, Dr. Mather authored a second report after viewing the discogram. He determined that the discogram showed degenerative changes at L5-S1 with leakage to the left side near left S1 root. He noted that the procedure report of Dr. Alzoobi indicated that the L4-5 disc was pressurized to 121 psi and L5-S1 was pressured to 85 psi. HE concluded "this far exceeds the standard maximum which is 50 psi. This rendered the test invalid." He opined that lumbar discography does not improve the results of lumbar fusion. Furthermore, he opined that Petitioner has nonspecific complaints of lower back pain and that the results of lumbar fusion for nonspecific back pain are "exceedingly poor." He did not believe Petitioner should have surgery. RX 2.

As of 5/14/13, Dr. Alzoobi indicated that based on the objective results of the MRI and the discogram, Petitioner sustained discogenic pain and herniation with impingement of the S1 nerve root on the left side. PX 5. Dr. Alzoobi deferred to Dr. Lorenz for a surgical opinion. As of 5/14/13, Dr. Alzoobi took Petitioner off work. PX 5. Dr. Alzoobi continued his opinions with regard to Petitioner's objective condition and the propriety of the discogram procedure and results in response to the opinion of Dr. Mather. He opined that Dr. Mather's opinions were based on studies that did not reflect Petitioner's current condition. As of July 30, 2013, Dr. Alzoobi continued Petitioner off work pending surgery. PX 6.

On 6/5/13, Dr. Lorenz addressed the articles relied on by Dr. Mather in a peer to peer review report. Again, Dr. Lorenz concludes that the discogram was not the only basis for his surgical recommendation but rather was used to determined the involvement of L4-5 prior to surgery. He determined that the articles and studies used by Dr. Mather were not applicable to the medical decision making and treatment of Petitioner in this case. PX 4.

On June 24, 2013, Dr. Mather authored a third report reiterating his belief that the discogram results were rendered invalid based on the excessive pressure used during testing. Dr. Lorenz responded on 7/10/13 stating that "once again, this is a completely moot point. The discography was not the reason for performing and recommending the surgical intervention. The MRI with the central disk herniation at L5-S1 is the primary reason for surgical intervention. The discography only was helpful to exclude the L4-5 interval which in spite of increased pressure did not produce the patient's pain." Dr. Lorenz stated that the discography were not contributory to the decision to proceed with surgery. PX 4.

Petitioner's last appointment with a physician was on 7/30/13 with Dr. Alzoobi. Petitioner had another appointment scheduled at the time of trial. Petitioner testified that he wants the recommended surgery. He testified that he is unable to work or work due to the back pain and that the pain was greatly affected his life. He ranked his pain at a 10 while sitting at trial.

Finally, Petitioner testified that he returned to work 11/9/12 following his first visit with Dr. Lorenz and that when he returned his back pain was strong. Petitioner worked until 11/11/12 when he was fired by Respondent. Petitioner has not worked since 11/11/12. Respondent paid Petitioner TTD from 12/1/12 through 2/25/13 when TTD was terminated following his visit to Dr. Mather.

CONCLUSIONS OF LAW

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

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? D. What was the date of accident? E. Was timely notice of the accident given to Respondent?

Petitioner testified that he was at work on 9/28/12 lifting boxes when he felt a pinch in his low back and was unable to straighten without difficulty. Petitioner testified that prior to lifting the box and feeling the pinch in his back, he was lifted 45 to 150 boxes weighing 35 to 40 pounds each. Petitioner testified that he reported this incident to his manager Mark. Respondent presented no evidence in rebuttal to Petitioner's claim of notice to Mark. Petitioner sought treatment 2 days later on 9/30/12 and reported present complaints of lower back pain in addition to a history of prior lower back pain for three months.

Based upon Petitioner's testimony and on the initial treated records, the Arbitrator finds Petitioner sustained accidental injuries to his low back on 9/28/12 either as a specific trauma or as a result of repetitive lifting at work which aggravated the prior back pain to the point where treatment became necessary. It is unrebutted that Petitioner was able to perform his work duties

despite some prior back pain up to 9/28/12 when he lifted boxes at work. He left that day and sought continuous treatment thereafter. Further, Petitioner's testimony that he gave notice to Mark on 9/28/12 is unrebutted. The Arbitrator finds that timely notice was provided.

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

The Arbitrator again initially notes that Petitioner was able to perform his job for Respondent prior to 9/28/12. Following the accident of that date, Petitioner sought medical care two days later and has continued the consistent care thereafter through trial. Petitioner's symptomology clearly increased subsequent to 9/28/12. Furthermore, the Arbitrator notes that 10/2/12 MRI showed a disc herniation at L2-3 and a 5 mm left central disc herniation at L5-S1 without foramen compromise or thecal sac stenosis but with impression upon the dural sac. Each of Petitioner's treating physicians including Drs Hussein, Lorenz and Alzoobi diagnosed lumbar pain and disc herniation. The only opinion contrary to this diagnosis was set forth by Dr. Mather as the Section 12 exam. Dr. Mather agreed Petitioner sustained an injury at work on 9/28/12 but determined that Petitioner sustained a lumbar strain based upon his reading of the MRI and his disregard for the discogram.

In finding causal connection for Petitioner's disc herniation at L5-S1, the Arbitrator places greater weight on the diagnosis and opinions of Petitioner's treating physicians than on the opinion of Dr. Mather. The treating opinions are supported by the reported objective MRI results. Dr. Lorenz' opinion on the disc herniation and the need for surgery was made based on the MRI. He clearly reported that the surgical recommendation would have been made with or without the discogram results. Accordingly, the Arbitrator finds that Petitioner's current disc herniation and lower back pain is causally related to the accident of 9/28/12.

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?

Respondent dispute as to medical expenses was based on liability. Based on the Arbitrator's findings on the issue of causal connection, the Arbitrator further finds that Respondent is to pay Petitioner the reasonable and necessary medical expenses incurred to date in the care and treatment of the causally related injuries pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any. Further, based on the findings on the issue of causal connection, the Arbitrator finds that Respondent shall authorize and pay for the prospective medical treatment including surgery and the attendant care as prescribed by Dr. Lorenz pursuant to Sections 8(a), 8 and 8.2 of the Act.

L. What temporary benefits are in dispute? TTD

Petitioner was returned to full duty work by Dr. Lorenz at his own request on 11/8/12. Dr. Lorenz also gave Petitioner a recommendation for injections due to ongoing complaints of leg pain. Petitioner was told to follow up after the injections. It is clear from these records that Petitioner was still treating and that he had not reached MMI at the time his employment was terminated by Respondent on 11/11/12. Dr. Alzoobi took Petitioner off work on 11/27/12 when

the injections began and Petitioner was continued off work or under significant restrictions through the time of trial on 8/13/13 per his treating physicians, Drs. Alzoobi and Lorenz.

Petitioner began receiving TTD from Respondent as of 12/1/12 and continued receiving TTD through his February 2013 exam with Dr. Mather.

Based on the foregoing, and on the Arbitrator's findings on the issue of causal connection, the Arbitrator further finds Petitioner is entitled to temporary total disability for a period of 37-1/7 weeks commencing 11/27/12 through 8/13/13. Respondent shall receive credit for amounts paid. SEE ARB EX 2.

M. Should penalties or fees be imposed upon Respondent?

Based on the foregoing and on record as a whole, the Arbitrator finds that Respondent's conduct and/or was not unreasonable or vexatious so as to justify the imposition of penalties or fees under Sections 19(k), 19(l) or 16 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

John Morris,

Petitioner,

vs. NO. 09WC44510

Illinois Department of Healthcare & Family Services, **14IWCC0550**

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, 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 27, 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.

DATED: JUL 10 2014
SM/sj
o-5/29/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORRIS, JOHN
Employee/Petitioner

Case# **09WC044510**

IL/DEPT OF HEALTHCARE & FAMILY SERVICES
Employer/Respondent

14IWCC0550

On 8/27/2013, 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:

2427 KANOSKI BRESNEY
KATHY A OLIVERO
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

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

4993 ASSISTANT ATTORNEY GENERAL
ANDREW SUTHARD
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

AUG 27 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

14IWCC0550

□ 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

JOHN MORRIS
Employee/Petitioner

Case # 09 WC **044510**

v.

Springfield

IL/DEPARTMENT OF HEALTHCARE AND FAMILY 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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **08/06/13**. 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. X Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. □ What was the date of the accident?
E. X Was timely notice of the accident given to Respondent?
F. X Is Petitioner's current condition of ill-being causally related to the injury?
G. □ What were Petitioner's earnings?
H. □ What was Petitioner's age at the time of the accident?
I. □ What was Petitioner's marital status at the time of the accident?
J. X Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. □ What temporary benefits are in dispute?
□ TPD □ Maintenance □ TTD
L. □ What is the nature and extent of injury?
M. □ Should penalties or fees be imposed upon Respondent?
N. □ Is Respondent due any credit?
O. □ Other _____

FINDINGS

On the date of accident, 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 N/A causally related to the accident.

In the year preceding the injury, Petitioner earned **$69,228.12**; the average weekly wage was **$1,336.31**.

On the date of accident, Petitioner was **60** years of age, **Single,** with **0** dependant child under 18.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services through its group medical plan in the amount of **$22,631.65**.

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

ORDER

All claims for compensation 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.

D. Dale McGinty
Signature of Arbitrator

Aug 22, 2013
Date

AUG 27 2013

ICArbDec19(b)

THE ARBITRATOR FINDS:

At arbitration Petitioner testified he was employed by the State of Illinois, Department of Healthcare & Family Services as a computer programmer. Petitioner claims an injury to his right knee/leg occurring on December 23, 2008, when he slipped on the ice walking to his car after work.

Petitioner testified his car was parked in the handicapped parking spot located on the street immediately in front of the HFS building at 422 S. 5th Street in Springfield. He stated he parked his car in that same street spot nearly every day since he starting work in that building. Petitioner testified about the various parking options for employees; the north side lot, the Secretary of State parking lot across the street, and the parking garage one block away on 4th and Capitol. He was not entirely certain how the parking in those lots was allocated. He stated he asked about handicapped parking at his interview with HFS because he "was looking for some kind of free parking, because he didn't want to have to pay downtown [parking rates]." (Transcript, pg. 15). He testified he was told there was a handicapped spot right in front of the building. He stated there were also four or five metered parking spots in front of the building which are free to those possessing a valid handicapped placard or license plate. (RX #3).

Petitioner was asked to describe his accident. Petitioner testified he slipped on ice walking to his car after work on December 23, 2008 causing him to fall on his right knee and break his femur at his knee. He stated the weather turned inclement sometime after the lunch hour on that day and by the time he left work at approximately 4:30 the sidewalks and streets were wet and ice had begun to build up in some areas. He did indicate he was performing any duties or carrying any work related materials to his car.

Petitioner testified he walked out the front door of the building and traversed the sidewalk, avoiding the ice, to the bricked area between the sidewalk and the curb, when he heard a co-worker, Gail Austin, call out asking if he needed any help. At that time he stated he turned and lost his balance and fell on his right knee. He stated Gail Austin's husband, Jim, then came over and attempted to help him up to his car, but he had to scoot on his backside to his car because he could not support himself on either leg.

On cross exam Petitioner denied being helped across the sidewalk by anyone, and stated he was not at his car when he fell. Petitioner was confronted with a witness narrative report written and signed by Gail Austin on January 29, 2010. Petitioner admitted he asked Gail Austin to fill out the form in January of 2010, over a year after the accident, and authenticated her signature. Petitioner read Gail Austin's narrative into evidence. (Transcript, pgs. 48-49). Ms. Austin's statement revealed she was

standing outside the doorway waiting for her husband to pick her up from work. Petitioner exited the building and Jim Austin, upon seeing Petitioner using a cane on the ice, held Petitioner's free arm and assisted him to his car. Mr. Austin released Petitioner at his car. At that time, while standing at the curb, Petitioner lost his balance on the ice while attempting to unlock his car. Mr. Austin helped Petitioner into his car.

Petitioner testified Gail Austin's version was not how he remembered it, but admitted he specifically requested her witnessed version. He also admitted he received a copy at the time it was completed and never brought up any discrepancies to anyone in the three years since Gail Austin filled out the form.

Petitioner testified he has used a cane to ambulate at least since the time of his job interview in 2007 due to numerous non-occupational medical issues including: post-polio syndrome related leg weakness, a May 2008 left total knee replacement, and degenerative disc disease in his lumber spine. He stated the handicapped street spot was approximately 18 feet from the front door of the office building. (see RX #2). Petitioner testified he received his handicapped parking placard in 2003 because of his leg weakness and knee replacement, but on cross exam stated he originally received it due to his getting out of breath easily. Petitioner also testified he had been experiencing leg spasms bilaterally in the week prior to his accident. (PX # 1).

Petitioner testified prior to the accident he had full use of his legs despite the effects of polio. He stated he had not employed leg braces or a built up shoe since he was a child. He stated prior to the accident he only used the cane for support his left knee. He stated he only continues to use the cane now because of the resulting injury to his right leg.

Petitioner was asked about his medical treatment. On December 26, 2008 Petitioner saw Dr. Maurer for right leg pain. Dr. Maurer's records were entered into evidence as Respondent's Exhibits #4 and Petitioner's Exhibits #1. Dr. Maurer ordered x-rays, which initially were deemed undiagnostic. It should be noted prior to Petitioner's accident Dr. Maurer's notes indicate right leg atrophy secondary to polio, and a built-up right shoe as early as May 2008.

On January 5, 2009 Petitioner saw Dr. Olysav, an orthopedic surgeon. Dr. Olysav's records were entered into evidence as Petitioner's Exhibit #3. He repeated x-rays which revealed an undisplaced fracture at Petitioner's distal femur which likely would require operative intervention. He also noted Petitioner complained of pain at the distal femur. He further noted marked atrophy in Petitioner's right leg, thigh, and calf muscle, and an inability to move his left leg due to polio.

On January 7, 2009 Dr. Olysav performed an open reduction with internal fixation (ORIF) of Petitioner's right distal femur at the knee. Petitioner's femur was mended with one plate and eight screws.

Petitioner returned for a post-op follow up on January 13, 2009. Dr. Olysav noted Petitioner was doing fairly well. He noted Petitioner's flexion contraction motion was a little short of normal, likely secondary to post-polio syndrome. He ordered suture removal in two weeks and to continue weight bearing as tolerated.

On January 26, 2009 post-op x-rays showed an uncomplicated ORIF, hardware placement was good. Petitioner's sutures were removed.

Petitioner returned to Dr. Olysav on February 12, 2009. Further x-rays showed proper alignment and no evidence of hardware loosening. Dr. Olysav noted Petitioner was doing well and cleared him to put weight on it. The next follow up was scheduled for May.

On February 20, 2009 Petitioner underwent a non-occupational low back surgery. Dr. Frietag performed an L5-S1 arthrodesis with discectomy. Petitioner returned to work from back surgery on April 14, 2009.

Petitioner followed up with Dr. Olysav on May 7, 2009. X-rays on that date showed stable hardware. Petitioner was noted to have the same range of motion as he did before the ORIF. Overall, Petitioner was noted to doing well with no complaints, but was noted to have significant wasting due to post-polio syndrome.

On June 22, 2009 Petitioner followed up with Dr. Maurer who noted Petitioner's right leg was weaker due to Petitioner's history of polio and Petitioner's recent low back surgery.

On May 6, 2010 returned for a follow up with Dr. Olysav. X-rays taken on that date confirmed the distal right femur fracture was stable. Petitioner was to follow up in one year.

Petitioner last saw Dr. Olysav for his right leg on May 5, 2011. He noted Petitioner now having neurologic problems radiating from low back and hips into right lower extremity. X-rays taken on that day revealed the fracture had healed, hardware was in place, no evidence of any complicating factors. The plan was to see Petitioner once a year, or follow up on an as needed basis if there are any problems.

Petitioner testified he continues to have right leg weakness and he occasionally experiences sharp pain from his leg to his spine. He testified he had no right leg complaints before his December 23, 2008 accident. He also testified Dr. Olysav placed no restrictions on him, nor is he prescribed pain medication specifically for his right leg. He testified Dr. Maurer, his primary care physician prescribed narcotic and neuropathic pain medication, but it is for all his ailments in general, including his low back

and hips. Petitioner stated he has not returned to see any doctor regarding his broken leg since May of 2011.

Lori Williams testified for Respondent. Her complete testimony is contained in the record. (Transcript, pgs. 61-72). Ms. Williams stated she is the Traffic Engineer for the City of Springfield, and her job duties include, *inter alia*, designating and administering handicapped parking for the City of Springfield. She testified South 5th Street is a public roadway and the handicapped parking spot in front the building located at 422 South 5th Street is owned and maintained by the City of Springfield. She stated it is open to the public for parking for anyone possessing a valid handicapped placard or license plate. She testified no person or business can assign a street spot, nor can any individual or business reserve it for personal use. She further testified the City of Springfield is responsible for maintaining the "streetscape," the bricked area between the curb and sidewalk containing the streetscape elements such as benches, signs, and trees. (See also, RX #3). She testified it is the City's responsibility to clear the streetscapes and sidewalks of snow and ice over 2 inches, otherwise it is generally the responsibility of the property owner to clear those areas as a continuation of their frontage when snow and ice accumulation is below two inches. Ms. Williams stated she reviews plans for private property off street parking, but is not responsible for administering off-street handicapped parking. She stated downtown Springfield is zoned as S3, which does not require property owners to provide any parking, but she was not sure how the building in this case was zoned. She was unsure if the 422 S. 5th Street building provided off-street parking at that location.

Mark Woloshyn testified for Respondent. His complete testimony is contained in the record. (Transcript, pgs. 72-81). Mr. Woloshyn testified he is Petitioner's supervisor and has been since Petitioner was hired in 2007. He stated he does not explicitly remember interviewing Petitioner, but was aware that Petitioner used a cane to walk and the handicapped spot in front of building to park his car. He testified he never directed Petitioner to park in the handicapped spot. He described the other parking options around the building. He stated the lot on the north side of the building was owned by Firestone and employees could pay on a monthly basis to park. He stated he did not pay to park there, but knew other employees who did. He also stated the Secretary of State parking lot across the street, and the parking garage on 4th and Capitol were assigned to upper management and employees with seniority. He stated the Secretary of State parking lot and parking garage were leased out, but he did not know who owned them.

The Arbitrator Concludes:

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

Based on all the evidence presented, the Arbitrator concludes Petitioner did not sustain an accidental injury that arose out of and in the course of his employment with Respondent on December 23, 2008. In support thereof the Arbitrator finds at the time of the accident Petitioner was not on Respondent's property and not subjected to a greater risk beyond that faced by the general public.

In order for accidental injuries to be compensable under the Workers' Compensation Act, a claimant must show such injuries arose out of and in the course of his employment. *Illinois Consolidated Telephone Company v. Industrial Comm'n*, 314 Ill.App.3d 347, 732 N.E.2d 49 (2000). Accidental injuries "arising out of" the course of employment, as an element for compensability under the Act, refers to the requisite causal connection between the employment and the injury; in other words, the injury must have had its origins in some risk incidental to the employment. 820 ILCS 305/1 et seq. Accidental injuries "in the course of" employment, as an element for compensability under the Act, refers to the time, place, and circumstances under which the accident occurred. 820 ILCS 305/1 et seq.

The parties agree that this accident occurred off the Respondent's premises, on a public boulevard between the public sidewalk and the street. The general rule is that when an employee slips and falls off the employer's premises while traveling to or from work, his injuries are non-compensable. Illinois Bell Telephone Co. v. The Industrial Commission, 131 Ill. 2d. 478 (1989) There is an exception to the rule when two conditions are met. These conditions deal with both arising out of and in the course of the employment.

First of all, the accident needs to have occurred at a place where the employee was required to be as part of his employment. If so, the accident is deemed to have been in the course of his employment. Secondly, if the accident occurs as a result of a neutral risk, there must be some special hazard causally related to the fall. If that is shown, then it would represent an increased risk by virtue of the employment, and the accident would have arisen out of the employment.

In this case, if the Petitioner had fallen on the public sidewalk just outside the door of his building, he would have been in the course of his employment. The walk would have been his only way out of the building. Here, however, the Petitioner fell after he had walked out of the building, down a small stretch of sidewalk, and across a boulevard, next to his car. His car was parked on the street in a publicly accessible handicapped spot. He was not required to park there. If someone else was in the spot, he could have parked one spot down at a metered space, which he testified he did on an occasional basis. Under the circumstances, the Arbitrator does not believe that the Petitioner' accident occurred in the course of his employment.

The facts are distinguishable from the Bommarito case, cited by the Petitioner. In that case, a petitioner fell while walking down an alleyway which led to the only entrance to her employment. She could have parked anywhere, but in order to get into the building, she had to walk down a particular alley. She was not able to choose her route to work, unlike the Petitioner in the instant case. Bommarito V. The Industrial Commission, 82 Ill. 2d. 191 (1980)

The Arbitrator also does not believe the Petitioner's accident arose out of his employment. In Bommarito, the alleyway was obstructed by trucks and cars making deliveries to the Respondent's business, along being covered with debris and containing at least one hole in which the Petitioner fell. The Court found that those factors created an increased risk to the Petitioner. (id)

Here the Petitioner fell on a public walkway. While it was covered with ice, his risk was no greater that someone parking in the metered spaces along the street. The evidence as to who had the responsibility to clear the ice is not really relevant. As the Court in the Reed decision points out, an employer clearing snow off a public walkway does not equate to owning and maintaining a private parking lot. Reed v. The Industrial Commission, 63 Ill. 2d. 247 (1976)

The Arbitrator concludes Petitioner was not exposed to risk either distinctly associated with the employment, or risk of a purely personal nature. The Arbitrator concludes Petitioner was exposed to a neutral risk, one to which the general public is equally exposed. The Arbitrator further concludes Petitioner was not exposed to any greater risk than the general public by way of his employment with Respondent. The handicapped street parking spot, the sidewalk and streetscape areas are all public property. Because those areas are public property, by definition, the general public is exposed to these areas, and the associated risks that go with them, on a daily basis. No evidence was presented to

indicate the 18 foot route from the front door to his car was defective, or exposed Petitioner to any increased danger the general public did not confront. Respondent did not own or maintain the street parking spot. Respondent did not direct or require Petitioner to park in the street. Petitioner choose to park in the street because it was the cheapest, and being immediately outside the front door, the singular best parking option for him, or any other employee working at that location for that matter.

In summary, the Arbitrator rules that the Petitioner's accident did not arise out of or occur in the course of his employment. Accordingly, the claim is denied and the additional issues become moot.

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

Shawn Dakin,

Petitioner,

vs. NO. 12 WC 32906

Tamms Correctional Center,

Respondent.

14IWCC0551

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, causal connection and 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 24, 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.

DATED: JUL 10 2014
SJM/sj
o-5/28/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAKIN, SHAWN
Employee/Petitioner

Case# **12WC032906**

TAMMS CORRECTIONAL CENTER
Employer/Respondent

14IWCC0551

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:

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

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

0558 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

JAN 24 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

14IWCC0551

SHAWN DAKIN
Employee/Petitioner

v.

TAMMS CORRECTIONAL CENTER
Employer/Respondent

Case # 12 WC 32906

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 **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 **Credit for prior settlement**

FINDINGS

14IWCC0551

On **July 1, 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* ***in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$59,628.00**; the average weekly wage was **$1,146.69**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator finds Petitioner's current condition of ill-being in his left shoulder not to be causally related to the accident of July 1, 2012. Therefore, the credit in Case No. 09 WC 52672 for the left arm previous credit is not applied to this case.

The Arbitrator finds that Petitioner's current condition of ill-being in his right knee to be causally related to the accident of July 1, 2012. Respondent shall pay Petitioner the sum of **$688.02**/week for a further period of **26.875** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **12.5% loss of use of a right leg.** Respondent shall pay Petitioner compensation that has accrued from **07/01/2012** through **11/13/2012**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent has paid or will pay the medical bills submitted into evidence pursuant to the medical fee schedule contained in the amendment to the Illinois Workers' Compensation Act, Section 8.2. Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of 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.

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

1/15/13
Date

JAN 24 2013

14IWCC0551

Findings of Fact

Petitioner was and is employed as a Correctional Officer for Tamms Correctional Center. On July 1, 2012, Petitioner was on an elevated platform while pulling wires from the ceiling that an inmate had attached to the crack in the concrete and slipped off the platform, injuring his right knee and left shoulder.

Petitioner presented to Saint Francis Medical Center on July 1, 2012 with complaints of right knee and left shoulder pain. Radiograph views of the right knee showed no effusion, fractures, dislocations or other significant bony abnormalities. Petitioner was discharged with follow-up care instructions. (Pet. Ex. 3).

Petitioner presented to Dr. George Paletta on August 1, 2012 with complaints of discomfort and giving way in his right knee. Dr. Paletta had previously surgically treated Petitioner's left knee in 2008. A physical examination of the right knee on August 1 revealed no soft tissue swelling, no residual effusion, normal patellofemoral exam with minimal peripatellar tenderness, and minimal patellofemoral crepitance, range of motion of 0 to 140 degrees, and no ligamentous instability. Dr. Paletta reviewed radiographs of the right knee, which were entirely normal. Dr. Paletta's assessment was hyperextension injury of the right knee with resultant patellofemoral pain and probably posterior capsular pain. He recommended an MRI to rule out an injury to the posterior horn of the lateral meniscus. (Pet. Ex. 4).

Petitioner followed-up with Dr. Paletta on August 15, 2012 for his right knee, and additionally complained of pain in his left shoulder. A physical examination of the left shoulder was normal, with no tenderness, full range of motion with pain about the horizontal, positive O'Brien test, good cuff strength, 5/5 supraspinatus strength, internal and external rotational strength of 5/5, and no instability on load or shift testing. After reviewing the MRI of the right knee, Dr. Paletta's assessment was a medial meniscus tear with a meniscus cyst, and left shoulder strain with possible associated SLAP lesion. Dr. Paletta recommended an MR Arthrogram with respect to the left shoulder, and arthroscopy of the right knee. (Pet. Ex. 4).

On August 20, 2012, Dr. Paletta reviewed the MR Arthrogram of Petitioner's left shoulder. He stated that it was "entirely normal", as it failed to "demonstrate any significant structure abnormality or obvious pain generator for this patient's complaints of the left shoulder." Dr. Paletta opined that there was no need for additional orthopedic treatment as to the left shoulder. (Pet. Ex. 4).

On September 11, 2012, Petitioner underwent an arthroscopy of the right knee with partial medical meniscectomy and debridement of meniscal cyst. (Pet. Ex. 6). During his post-op follow-up, Dr. Paletta noted that Petitioner was doing "extremely well", and noted that Petitioner reported his "knee feels back to normal. Denies pain. Denies any limitations. He is back to full activities. He was extremely pleased with how the knee is feeling." (Pet. Ex. 4). At that time, Dr. Paletta released Petitioner to return to work full duty with no restrictions, and placed him at maximum medical improvement.

Petitioner testified that his right knee, following surgery, is significantly better. He testified that he still notices swelling in it, and he takes over-the-counter medications on a daily basis for his residual knee pain. He testified that his hobbies of hiking, hunting and biking have been affected because of the extra weight applied to his knee. He insinuated during direct examination that he may need a knee brace, however, he acknowledged on cross examination that Dr. Paletta never prescribed a knee brace for him. He testified that his sleep is affected by the pain. Petitioner stated that Dr. Paletta apprised him that his right knee would continue to improve.

Regarding his left shoulder, he testified that he continues to have pain and "glitches" when lifting objects, moving property boxes, and shaking down cells. He testified that due to the symptomology in his left shoulder, his hobby of archery has been adversely affected.

14IWCC0551

In 2008, Petitioner testified before the Illinois Workers' Compensation Commission regarding a 2007 accident, in which he testified that his hobbies of hunting, running and weight lifting had been curtailed by that injury. He testified that he was compensated for that injury. In 2009, Petitioner suffered an injury to his left shoulder in Case No. 09 WC 52672, which was settled. The Settlement Contract Lump Sum Petition and Order in that case was submitted as an exhibit regarding the issue of a credit for a left arm to Respondent for the percentage reflected therein.

Based on the foregoing, the Arbitrator makes the following conclusions:

1. The Arbitrator finds that Petitioner's current condition of ill-being in his right knee to be causally related to the accident of July 1, 2012, as evidenced by Petitioner's medical records. However, the Arbitrator finds Petitioner's current condition of ill-being in his left shoulder is not causally related to his accident of July 1, 2012. The objective medical records, including the records of Dr. Paletta and the MR Arthogram of the left shoulder, evidence a normal shoulder with no abnormalities or reasons for Petitioner's subjective pain complaints. Petitioner had one treatment visit with Dr. Paletta regarding his left shoulder and underwent one imaging study. Petitioner did not undergo any injections and Dr. Paletta did not recommend any further treatment for the left shoulder. Further, Petitioner testified that he injured the same left shoulder in an accident in 2009, which is further corroborated by the Settlement Contract Lump Sum Petition and Order in Case No. 09 WC 52672, which enumerates that Petitioner sustained a left shoulder injury with a date of accident of September 6, 2009. There exists no testimony in the record as to whether Petitioner's left shoulder injury from 2009 had resolved prior to his current accident. Without more, Petitioner has failed to sustain his burden of proof that his current subject complaints in his left shoulder are causally connected to his accident of July 1, 2012.

2. In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a) [obtained through the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. 820 ILCS 305/8.1b(b). The Arbitrator finds no percentage of impairment pursuant to the AMA in the record. Petitioner is 44 years old. As a result of the accident, Petitioner sustained a medial meniscal tear, which was surgically repaired. Petitioner was released to return to work full duty without restrictions, and he testified that he is performing his job as a correctional officer satisfactorily. He was able to return to his pre-accident position as a correctional officer. As such, Petitioner has sustained no impairment in his future earning capacity. Petitioner testified as to subjective minor complaints following his return to work and limitations in his recreational pursuits of hunting, hiking, and biking. However, Petitioner's complaints do not entirely comport with the objective medical records of his treating physician, Dr. Paletta, of September 24, 2012, which indicate that Petitioner was doing exceedingly well and had no functional limitations. Further, Petitioner previously testified in 2008 before the Commission as to his lessened ability to hunt, run and weight lift as a result of an accident in 2007, and was compensated for same. The Arbitrator finds Petitioner has sustained 12.5% loss of use of his right leg, as provided in Section 8(e).

3. Because the Arbitrator finds that Petitioner has failed to prove that his current condition of ill-being in his left shoulder to be causally related to his accident of July 1, 2012, the issue of permanent partial disability and any applicable credit regarding the injury to the left shoulder is moot.

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

Mary Shepard,

Petitioner,

vs.

NO. 10WC00063

First Baptist Church of Anna,

14IWCC0552

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, causal connection, medical expenses, permanent partial disability, penalties and 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 March 22, 2012 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.

14IWCC0552

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: JUL 10 2014
SM/sj
o-5/28/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHEPARD, MARY
Employee/Petitioner

Case# **10WC000063**

14IWCC0552

FIRST BAPTIST CHURCH OF ANNA
Employer/Respondent

On 3/22/2012, 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:

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2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903

14IWCC0552

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mary Shepard,
Employee/Petitioner

v.

First Baptist Church of Anna,
Employer/Respondent

Case # **10** WC **00063**

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 **Andrew Nalefski**, Arbitrator of the Commission, in the city of **Herrin**, on **October 12, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 28, 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 **$27,830.40**; the average weekly wage was **$535.20**.

On the date of accident, Petitioner was **69** 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 **$19,267.20** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$19,267.20**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 356.80/week for 84-1/7 weeks, commencing 09-29-09 through 05-11-11, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services in the amount of $ **175,822.64**. Respondent shall be given credit for all medical payments made pursuant to Sections 8 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ **321.12** per week for **250** weeks, because the injuries sustained caused the **50** % loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner penalties of $ **87,911.32** (50% of the outstanding medical bills), as provided in Section 19(k) of the Act. Additionally, Respondent shall pay $ **5,402.97**. (50% of outstanding TTD benefits)

Respondent shall pay to Petitioner penalties of $ **6,360.00**, ($30.00 per day multiplied by 212 days for unpaid TTD) 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

03-19-12

MAR 22 2012

The Petitioner, MARY SHEPARD, sustained an undisputed work injury arising out of and in the course of her employment with Respondent, FIRST BAPTIST CHURCH OF ANNA, on September 28, 2009. (Arb. Ex. No. 1) This injury occurred when the then 69 year-old church treasurer was assaulted during a robbery at the church. (PX19) The Petitioner was rendered unconscious during the assault; when she came to, she noticed she was covered in blood and had excruciating pain in her face, head, right arm and chest. Moreover, when emergency medical personnel and investigators arrived on the scene shortly after the assault, the Petitioner's injuries were documented both in writing and by photograph. According to the paramedics' report, findings included "...red whelps on the underside of pt's R forearm which appeared to (be) possibly consist. w/pressure marks that may have been left by fingers if someone had grabbed her arm." The Petitioner was placed in "full spinal immobilization" with a "C-Collar, head blocks secured with tape, and straps." The Petitioner was described as having "multiple facial/head/BUE injuries..." The Petitioner was also said to have a swollen and bloody area to the back of her head, and complained of pain in her right arm and left eye. (PX2) These injuries were also documented in pictures, including a picture of the Petitioner's right arm with what appear to be finger marks where the Petitioner was grabbed, as well as a picture of bloody footprints on the Petitioner's shirt. (PX18)

The paramedics took the Petitioner to Massac Memorial Union County Hospital by ambulance on September 28, 2009. (PX4) Tests were performed, including a CT of the facial bones which revealed anterior nasal spine deformities bilaterally suggesting fractures, a possible non-displaced left zygomatic arch fracture and left temporal skull fracture; a CT of the cervical spine performed due to the history of injury and pain, which revealed degenerative disc disease of the mid-cervical spine; and a CT of the brain which revealed a left temporoparietal skull fracture, a small subdural hematoma and a small amount of subarachnoid blood in the left temporal lobe. Due to the severity of her condition, especially the subdural hematoma combined with altered mental status and disorientation, the Petitioner was air-lifted to St. Francis Hospital in Cape Girardeau, Missouri, with what was described as severe trauma to the head, spinal cord or extremities. (PX5).

The Petitioner was admitted to the ICU at St. Francis on September 28, 2009 with findings including left cephalohematoma, left periorbital bruising, and right anterior upper tenderness of the neck. Testing on September 28, 2009 included flexion/extension x-rays of the cervical spine which revealed multilevel degenerative disc disease; a CT of the head which revealed small areas of subarachnoid hemorrhage along the left parietal cortex and small subdural hemorrhage seen along the left temporal lobe, along with stable appearance of a mildly depressed fracture involving the left temporal and left frontal calvarium; and CT of the orbits revealing a depressed fracture involving the left frontal left temporal bone. Findings on September 29, 2009 included headache, facial ecchymosis, swelling, and neck tenderness and pain at the occipital cervical joint. Testing on September 29, 2009 included a CT of the head revealing stable appearance of a small amount of subdural hemorrhage seen overlying the left temporal lobe, and a small amount of subarachnoid hemorrhage seen along the parietal cortex; and X-rays of the cervical spine for a "post traumatic neck injury", which revealed multilevel degenerative disc disease. (PX5)

Upon discharge from the hospital the Petitioner was directed to follow up with numerous physicians, including: Dr. Franklin Hayward (neurosurgeon, PX6), Dr. Mark H. Kinder (psychologist, PX5), Dr. John Kinder (eyes, PX11) Dr. George Henry Livermore (otolaryngologist, PX10), Dr. Kara Lemmon (dentist, PX3), and Dr. R. L. Stahly (neurologist, PX6 & 7). She followed all recommendations for treatment, seeing Dr. Hayward on October 13, 2009 (PX6); Dr. John Kinder on October 19, 2009 for her eyes (PX11); Dr. Livermore on October 20, 2009 for complaints of vertigo, throat pain and headaches (PX10); and Dr. Lemmon on October 28, 2009 for denture repair - her dentures were broken when she was hit in the mouth during the assault at work. (PX3)

The Petitioner then saw Dr. Stahly for post-traumatic vertigo, parethesias and right submandibular mass on November 5, 2009. After recording a history of the September 28, 2009 incident with numerous face, head and neck injuries as well as what appeared to be trauma to the upper extremity, a right frontal and temporal skull fracture and subarachnoid bleeding, Dr. Stahly diagnosed post-traumatic aural vertigo, r/o upper extremity bilateral nerve entrapment syndromes, and degenerative spondylosis with post-traumatic cervical strain with cervical somatic dysfunction. Dr. Stahly recommended an ENG and audiogram; an EMG of the upper extremities, (performed on November 23, 2009, revealing moderate right carpal tunnel syndrome and moderate to severe left carpal tunnel syndrome); physical therapy for the neck; and an ENT evaluation for a small lipoma of the right mandible. (PX6)

The Petitioner followed Dr. Stahly's recommendations, undergoing an initial evaluation for physical therapy on November 6, 2009. The physical therapist recorded a history of the work related assault on September 28, 2009, with a report of "neck pain since the injury". The diagnosis as of November 6, 2009 was said to be cervicalgia, with limited cervical range of motion, pain in the neck, and radicular symptoms of pain and tingling in the bilateral arms and right leg. (PX5)

Continuing to follow Dr. Stahly's recommendations, the Petitioner saw Dr. Linda Hurt of Audiology Assoc. on November 9, 2009. (PX7) Dr. Hurt recorded the Petitioner's complaints of lightheadedness and off balance sensation as well as occasional tinnitus, noting these symptoms began with the work assault in September, 2009, with no prior history of similar complaints. After testing revealed vestibular involvement and deficit, Dr. Hurt diagnosed left BPPV in the posterior canal. She performed a reposition maneuver on the left, and placed the Petitioner on vestibular exercises.

The Petitioner continued to follow treatment recommendations, attending a neuropsychiatric evaluation with Dr. Mark Kinder on November 10, 2009. Dr. Kinder reported that the Petitioner was seen for evaluation and possible psychological treatment related to an unprovoked assault on September 28, 2009. After diagnosing adjustment disorder/mixed anxiety and depressed mood with possible PTSD and also with a traumatic brain injury from the September 28, 2009 assault, Dr. Kinder recommended anxiety management and supportive treatment. Dr. Kinder recommended an EEG, which was performed on November 16, 2009, and revealed abnormal focal disturbance in cerebral function in the left frontotemporal region, compatible with the patient's history of cerebral contusion. By February 1, 2010, with the Petitioner complaining of worsening sleep and increased anxiety, Dr. Kinder confirmed the diagnosis of PTSD and post-traumatic headaches, and stated that the Petitioner needed more frequent sessions and more aggressive treatment. (PX5 & 8)

The Petitioner's follow up care also included evaluation by Dr. Jan Seabaugh (upon referral from Dr. Stahly) on November 12, 2009 for the residual from injuries to her lips sustained in the September 28, 2009 assault. Dr. Seabaugh thereafter performed excisions of the post-traumatic lesions on Petitioner's mid upper and lower lip on January 5, 2010 at Saint Francis Medical Center. (PX5 & 9) Of note is the pre-admit chest X-ray on December 30, 2009 which indicates the Petitioner was status post-assault with persistent chest pain. (PX9)

The Petitioner's returned to see Dr. Hayward on February 1, 2010 with multiple complaints of bilateral shoulder pain and numbness and tingling in the arms, along with complaints of headaches and difficulty sleeping. Dr. Hayward recommended an MRI of the cervical spine, which was performed on March 13, 2010 and revealed mild cervical spondylosis, mild facet arthropathy, multilevel disc disease, multilevel central canal stenosis and multilevel foraminal stenosis. Noting the extensive levels of involvement, Dr. Hayward recommended that the Petitioner's care be transferred to someone more experienced in multilevel disc involvement. (PX5 & 6)

Respondent then sent the Petitioner to Dr. Donald A. deGrange for a Section 12 evaluation on April 27, 2010 relative to the condition of ill-being of the Petitioner's neck/cervical spine. (RX4) Dr. de Grange agreed that there was no history of chronic or recurrent neck pain prior to the work related injury of September 28, 2009; that there was no history of treatment for neck pain prior to the work injury; and there was no history of accident involving the neck prior to September 28, 2009. Dr. deGrange further agreed that "...it appears that the incident in question has served to aggravate the underlying previous degenerative disc condition of her cervical spine." Dr. deGrange then, however, opined that: "Most of her pain behavior that I observed today is a direct consequence of the psychological and not the trauma. It is therefore unlikely that any further treatment directed at the physical pathology would be effective." Dr. deGrange concluded: "The diagnostic studies performed around the time of the injury show substantial and severe degenerative disc disease throughout the cervical spine which was without question in place prior to this trauma. It is highly unlikely in this examiner's opinion that the patient was completely asymptomatic as she claims prior to the assault. Be that as it may it appears as the assault has aggravated this existing condition."

The Petitioner thereafter came under the care of Dr. Matthew Gornet of Orthopedic Center of St. Louis per Dr. Hayward's referral. At his first examination on June 28, 2010, Dr. Gornet documented the Petitioner's main complaints as neck pain, headaches, pain into both shoulders, bilateral arm pain to her hands with numbness in her hands, and weakness and loss of control of her right hand. The Petitioner said these complaints began with the assault at work on September 28, 2009, and that she did not recall any similar prior problems. Dr. Gornet stated: "It is my opinion within a reasonable degree of medical certainty that Ms. Shephard's (sic) symptoms are causally connected to her work related injury. The history details no significant spinal problems in the past and while Ms. Shephard (sic) does clearly have some anatomic findings which are preexisting there is no indication that these were symptomatic prior to her injury date." Dr. Gornet questioned Dr. deGrange's opinions, stating: "...in spite of the large magnitude of trauma this woman has undergone he (Dr. deGrange) feels that the patient has some signs of functional overlay and in fact states that she has 'significant pain behaviors and non-organic manifestations'." After pointing out that all of the Petitioner's symptoms date to the September 2009 work injury, Dr. Gornet concluded: "The patient clearly at minimum suffered aggravation of

a pre-existing anatomic condition, but I suspect she also suffered new disc injuries which made her very symptomatic from a cervical radicular and myelopathic standpoint." Dr. Gornet continued the Petitioner's restriction from all work, and recommended diagnostic studies and likely surgery. (PX13)

The Petitioner underwent the recommended diagnostic studies and returned to see Dr. Gornet in July, 2010. Dr. Gornet stated that the new MRI revealed three levels of disc pathology with cord compression, and opined that the Petitioner's symptoms were clearly related to her work injury, that she remained restricted from all work and needed surgery. (PX13) The Petitioner thereafter underwent surgery performed by Dr. Gornet on August 10, 2010: disc replacement at C4-5, C5-6 and C6-7. (PX13, 14)

Respondent then sent the Petitioner for another Section 12 evaluation, now with Dr. Wayne A Stillings, a psychiatrist, on August 26, 2010. (RX5) While Dr. Stillings agreed that the Petitioner's psychiatric care to date was reasonable and appropriate for her work related condition, he opined that she was at MMI from a psychiatric standpoint for the work injury.

The Petitioner saw Dr. Gornet post-operatively in the fall of 2010. By November 8, 2010, Dr. Gornet noted the Petitioner's neck pain and headaches dramatically improved post-operatively, however the Petitioner continued with right shoulder and arm pain. Opining that the Petitioner may have also injured her right shoulder in the September, 2009 assault, Dr. Gornet referred the Petitioner to his associate Dr. Mark Miller, also with the Orthopedic Center of St. Louis. Dr. Gornet also continued the Petitioner's restriction from all work. (PX13)

The Petitioner thereafter saw Dr. Miller on November 8, 2010. Dr. Miller recorded a history of the Petitioner's work related assault, and further noted that the Petitioner had bruising on her right upper arm following this robbery from being grabbed by the robber, and that she now had shoulder pain in that same right arm. Dr. Miller also noted that the Petitioner recently underwent cervical surgery which had resolved other symptoms, but her right shoulder complaints continued. Dr. Miller prescribed an MRI arthrogram of the right shoulder, restricted the Petitioner to no lifting more than 2-5 lbs. with the right upper extremity and no reaching, pushing, pulling or overhead work; and opined: "The patient's current symptoms are consistent with a rotator cuff tear. This certainly may have been caused by the assault." (PX13)

The Petitioner underwent the prescribed testing at Imaging Partners of Missouri (PX16), and returned to see Dr. Miller on November 24, 2010. Noting that the testing showed a rotator cuff tear, Dr. Miller stated the Petitioner's options were to live with the pain knowing the rotator cuff tear wouldn't heal, or undergo surgery – which surgery Dr. Miller specifically stated was for a torn rotator cuff causally related to the assault that occurred on September 28, 2009. (PX13)

The Petitioner opted for the surgery, which she underwent on December 10, 2010 at Timberlake Surgery Center performed by Dr. Miller. The surgery included arthroscopic long head biceps tenolysis/tenodesis/superior labral debridement; arthroscopic subacromial decompression; distal clavicle excision and rotator cuff repair. The post-operative diagnosis was Type II SLAP tear, rotator cuff tear, impingement syndrome and AC joint degenerative joint disease. (PX13, 14)

The Petitioner underwent physical therapy post-operatively. At the evaluation on December 23, 2010, the therapist noted the Petitioner's history of an assault at work, following which fingerprints were found on her right arm, probably due to being grabbed and held by the right arm during the assault. (PX13)

The Petitioner then returned to see Dr. Gornet for her neck on January 17, 2011. Dr. Gornet opined that the Petitioner was able to return to work full duty for her neck, however, she was still disabled from work relative to her shoulder. Dr. Gornet therefore deferred to Dr. Miller for the Petitioner's work status. (PX13)

Post-operative care for the shoulder continued with Dr. Miller during the spring of 2011. This included aggressive physical therapy per Dr. Miller's recommendation in the hopes of avoiding a frozen shoulder, and an ultimate release to activities as tolerated and return to regular duty as of 5/11/11. (PX13)

The Petitioner then saw Dr. W. Chris Kostman on May 31, 2011 for yet another Section 12 evaluation. (RX3) Dr. Kostman, evaluating the Petitioner's right shoulder, not only agreed with Dr. Miller's diagnosis but further agreed that the treatment provided by Dr. Miller was reasonable and necessary. He did not, however, agree that the Petitioner's condition was caused or aggravated by the work injury of September 28, 2009. In support of this opinion, Dr. Kostman stated: "Although the patient relates that she described to the evaluators, since the time of her presentation at St. Francis Medical Center on the day of the injury (9/28/09) symptoms in the right upper extremity including shoulder pain and weakness, these findings were not documented till Dr. Gornet's evaluation on the date of 6/28/10... . I believe it is possible that the patient could sustain a right shoulder injury at the time of her assault with her loss of consciousness and head injury however medical records do not support complaints of right shoulder symptoms until the date of 6/28/10, nine months following the date of injury." Dr. Kostman also opined that the Petitioner was at MMI with no restrictions.

The Petitioner thereafter returned to see Dr. Miller on June 6, 2011. Noting that the Petitioner had done well for her age and pathology, but that she still had residual symptoms and deficits, Dr. Miller confirmed that the Petitioner was able to return to work full duty. (PX13)

The Petitioner remained off work pursuant to the recommendations of her treating physicians during her course of medical care, receiving TTD benefits from the date of assault in the fall of 2009 through October, 2010. No TTD benefits were paid, however, after October 11, 2010 in spite of the ongoing restrictions from all work. (PX21 & Arb. Exh. No. 1)

The Petitioner ultimately returned to work for Respondent as a secretary/receptionist on August 1, 2011. While she was paid the same hourly rate, her hours were reduced from full time to part time, 28 hours per week. The Petitioner recently entered into a retirement severance agreement with Respondent.

The Petitioner returned to see both Drs. Miller and Gornet on August 15, 2011. Dr. Miller released the Petitioner for activities as tolerated, stating that he preferred the Petitioner not do a lot of overhead lifting, repetitive pushing or pulling, or lifting over 20 lbs. Dr. Gornet noted that the Petitioner had returned to full duty work but at part time hours. He indicated he wanted to see the Petitioner again in one year, but stated that she was at MMI. (PX13)

The Petitioner testified that she awakens with a headache in the morning, and experiences problems with headaches throughout the day. She usually takes over the counter medication for this, but if it's really bad she takes

Tylenol with codeine. She has lost hearing in her left ear. She experiences noise that is like static in her ear, making it difficult to talk on the phone. She continues to experience problems with balance; for instance, she climbs up the stairs, but she takes the elevator down because of fear of falling due to balance issues. Her bottom lip, where she underwent surgery, is numb.

Her dominant right arm is now so weak that it takes two hands to hold the coffee pot. She can't hold her hair dryer long enough to get her hair dry. She can comfortably lift only about 3-4 pounds – she needs help lifting more than that. It's also now very painful for her to reach overhead for anything. She can no longer reach the top shelf in her cabinet, both due to pain and also as her right arm won't go that high. The Petitioner had no such problems prior to her work injury.

Before her injury the Petitioner mowed her own three acre yard using a small riding lawn mower. She tried to mow it herself since her injury, but was unable to do so due to pain. The Petitioner also began pistol shooting in 2007. As she is right handed, however, her right hand now isn't strong enough to release the slide on her Glock automatic. She therefore hasn't done any pistol shooting since her injury.

Ongoing neck and right arm pain impact her ability to do household chores. Her right arm gives out when she tries to wash windows, and both her neck and right arm hurt when she tries to vacuum. The Petitioner just got permission to drive in June, 2011. After 20-30 minutes of driving, however, her neck and right arm become painful.

Ongoing right arm pain is also interfering with the Petitioner's ability to sleep. If she rolls onto her right side and hits her shoulder, she instantly has pain and awakens. She is then up for hours. Right arm pain is also interfering with the Petitioner's use of her computer, or basically any repetitive activity, like scrapbooking. After 15-20 minutes, her right arm tenses up, and then goes numb.

The Petitioner never injured her head, neck, right shoulder or right arm prior to September 28, 2009. She has had no intervening occurrences to those parts of her body since September 28, 2009.

CONCLUSIONS OF LAW

With regard to "F", is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

Respondent's causation dispute is limited to whether there is a causal connection between the Petitioner's condition of ill-being of her neck, right shoulder, and the Petitioner's psychological treatment/condition and the undisputed work injury. (Arb. Exh. No. 1 & statements at trial)

With regard to whether there is a causal connection between the condition of ill-being of the Petitioner's neck/cervical spine and the work injury, the Arbitrator first notes that when the emergency medical personnel arrived on the scene after the Petitioner's injury, the Petitioner was placed in "full spinal immobilization" with a "C-Collar, head blocks secured with tape, and straps." The Petitioner was described as having "multiple facial/head/BUE injuries…", as well as a swollen and bloody area to the back of her head. (PX2) The Petitioner's injuries were documented in pictures,

including not only pictures of the Petitioner's bloodied head, but also a picture of bloody footprints on the Petitioner's shirt. (PX18)

The Arbitrator notes that testing at Massac Memorial Union County Hospital where the Petitioner was taken immediately after the incident on September 28, 2009 included a CT of the cervical spine performed due to her history of injury and pain, which revealed degenerative disc disease of the mid-cervical spine. (PX4) At St. Francis Hospital, her complaints included right anterior upper tenderness of the neck. Testing performed on September 28, 2009 included flexion/extension x-rays of the cervical spine which revealed multilevel degenerative disc disease. Findings as of September 29, 2009 included neck tenderness and pain at the occipital cervical joint. Testing on September 29, 2009 included X-rays of the cervical spine for what was described as "post traumatic neck injury", and which revealed multilevel degenerative disc disease. (PX5)

The Arbitrator notes that when the Petitioner saw Dr. R. L. Stahly on November 5, 2009 (PX6), the doctor diagnosed, among other things, degenerative spondylosis with post-traumatic cervical strain with cervical somatic dysfunction. Dr. Stahly recommended physical therapy for the neck, which the Petitioner underwent beginning on November 6, 2009. The physical therapist recorded a history of the September 28, 2009 work injury with "neck pain since the injury", and a diagnosis of cervicalgia, with limited cervical range of motion, pain in the neck, and radicular symptoms of pain and tingling in the bilateral arms. (PX5)

The Arbitrator notes that when the Petitioner saw Dr. Hayward on February 1, 2010 with multiple complaints of bilateral shoulder pain and numbness and tingling in the arms, along with complaints of headaches and difficulty with sleeping, Dr. Hayward recommended an MRI of the cervical spine. This test, performed on March 13, 2010, revealed mild cervical spondylosis, mild facet arthropathy, multilevel disc disease, multilevel central canal stenosis and multilevel foraminal stenosis. (PX5 & 6)

The Arbitrator notes that when the Petitioner saw Dr. Matthew Gornet per Dr. Hayward's referral on June 28, 2010, with complaints including neck pain, headaches, pain into both shoulders, bilateral arm pain to her hands with numbness in her hands, and weakness and loss of control of her right hand, all of which the Petitioner said began with the assault at work on September 28, 2009 with no history of similar prior problems, Dr. Gornet opined that: "...within a reasonable degree of medical certainty ... Ms. Shephard's (sic) symptoms are causally connected to her work related injury. The history details no significant spinal problems in the past and while Ms. Shephard (sic) does clearly have some anatomic findings which are preexisting there is no indication that these were symptomatic prior to her injury date." Noting that all of the Petitioner's symptoms dated to the September 2009 work injury, Dr. Gornet concluded: "The patient clearly at minimum suffered aggravation of a pre-existing anatomic condition, but I suspect she also suffered new disc injuries which made her very symptomatic from a cervical radicular and myelopathic standpoint." (PX13) After a new MRI revealed three levels of disc pathology with cord compression, Dr. Gornet stated the Petitioner, needed surgery, and again opined that the Petitioner's symptoms were clearly related to her work injury. (PX13) The Petitioner thereafter underwent disc replacement at C4-5, C5-6, and C6-7, performed by Dr. Gornet on August 10, 2010. (PX13, 14)

Based upon the foregoing, the Arbitrator finds that there is a consistent history of cervical complaints, testing and treatment, beginning with the Petitioner's undisputed work injury of September 28, 2009 and continuing thereafter. Moreover, the Petitioner's treating surgeon, Dr. Gornet, clearly and unequivocally related the condition of ill-being of the Petitioner's cervical spine, including the surgery performed on August 10, 2010, to the Petitioner's September 28, 2009 assault at work.

Respondent, however, denied causation, relying on the opinion of Dr. Donald A. deGrange. Dr. deGrange performed a Section 12 evaluation at Respondent's request on April 27, 2010 relative to the Petitioner's neck/cervical spine. (RX4) In his report, Dr. de Grange agreed that there was no history of chronic or recurrent neck pain prior to the work related injury of September 28, 2009; he agreed that there was no history of treatment for neck pain prior to the work injury; and he agreed there was no history of accident involving the neck prior to September 28, 2009. Dr. deGrange even agreed that "...it appears that the incident in question has served to aggravate the underlying previous degenerative disc condition of her cervical spine." Dr. deGrange then, however, found that the Petitioner had significant pain behavior, and that: "Most of her pain behavior that I observed today is a direct consequence of the psychological and not the trauma. It is therefore unlikely that any further treatment directed at the physical pathology would be effective."

Dr. Gornet questioned the reliability of Dr. deGrange's opinion regarding pain behavior, stating: "...***in spite of the large magnitude of trauma this woman has undergone*** he (Dr. deGrange) feels that the patient has some signs of functional overlay and in fact states that she has 'significant pain behaviors and non-organic manifestations'." (emphasis added) The Arbitrator agrees with and adopts Dr. Gornet's opinion.

The Arbitrator also notes Dr. deGrange's highly speculative and inconsistent conclusion: "The diagnostic studies performed around the time of the injury show substantial and severe degenerative disc disease throughout the cervical spine which was without question in place prior to this trauma. *It is highly unlikely in this examiner's opinion that the patient was completely asymptomatic as she claims prior to the assault.* Be that as it may it appears as the assault has aggravated this existing condition."

The Arbitrator finds that there is no evidence of any history of complaints or treatment to the Petitioner's cervical spine prior to the September 28, 2009 work injury. There is, therefore, no support whatsoever for Dr. deGrange's speculation. Just as liability cannot rest on mere speculation or conjecture, nor should speculation and conjecture support a denial of benefits. See dissent of Justice Rarick in Chicago Park District v. Industrial Commission, 263 Ill. App. 3d 835, 635 NE2d 770 (1994)

Moreover, Dr. deGrange admitted that the condition of ill-being of the Petitioner's cervical spine was aggravated by the work related assault. As stated by the Illinois Supreme Court, even though a workers' compensation claimant has a pre-existing condition which may make him more vulnerable to injury, recovery for accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. An accidental injury need not be the sole causative factor, nor even the primary causative factor, in order to obtain workers' compensation benefits, as long as it was a causative factor in the resulting condition of ill-being. Sisbro v. Industrial Commission, 207 Ill. 2d 193 (2003) An

employee is entitled to recover for all consequences of an aggravation to a pre-existing condition or where he sustains an accidental injury which aggravates a diseased condition. Danly Machine Corp. v. Industrial Commission, 172 Ill. App. 3d 154 (1988)

Based upon the foregoing, the Arbitrator finds that the condition of ill-being of the Petitioner's cervical spine is causally related to her undisputed work injury.

With regard to whether there is a causal connection between the condition of ill-being of the Petitioner's right upper extremity and the work injury, the Arbitrator notes that according to the report of the paramedics on the scene shortly after the Petitioner's assault, their findings included "...red whelps on the underside of pt's R forearm which appeared to (be) possibly consist. w/pressure marks that may have been left by fingers if someone had grabbed her arm." The Petitioner was described as having "multiple facial/head/BUE injuries..." The Petitioner was also said to have a swollen and bloody area to the back of her head, and complained of pain in her right arm and left eye. (PX2) These same injuries were documented in pictures, including a picture of the Petitioner's right arm with what appear to be finger marks where the Petitioner was grabbed. (PX18)

The Arbitrator notes that when the Petitioner saw Dr. Stahly on November 5, 2009, he recorded a history of injury September 28, 2009 with not only numerous face, head and neck injuries, but also what appeared to be trauma to the upper extremity. Included among the tests Dr. Stahly recommended was an EMG/NCV of the upper extremities, which was performed on November 23, 2009 and revealed moderate right carpal tunnel syndrome and moderate to severe left carpal tunnel syndrome. (PX6)

The Arbitrator notes that when the Petitioner thereafter underwent an initial evaluation for physical therapy on November 6, 2009, the diagnosis was said to be cervicalgia, with limited cervical range of motion, pain in the neck, and radicular symptoms of pain and tingling in the bilateral arms and right leg. (PX5) Similarly, when the Petitioner returned to Dr. Hayward for follow up care on February 1, 2010, her complaints included bilateral shoulder pain and numbness and tingling in the arms (PX5 & 6); and when the Petitioner thereafter came under the care of Dr. Matthew Gornet of Orthopedic Center of St. Louis on June 28, 2010, Dr. Gornet documented the Petitioner's main complaints as neck pain, headaches, pain into both shoulders, bilateral arm pain to her hands with numbness in her hands, and weakness and loss of control of her right hand – all of which the Petitioner related to the assault at work on September 28, 2009. (PX13)

The Arbitrator notes that after the Petitioner underwent cervical disc replacement surgery performed by Dr. Gornet on August 10, 2010, her neck pain and headaches dramatically improved post-operatively. Her right shoulder and arm pain, however, continued, leading Dr. Gornet to opine that the Petitioner may have also sustained an injury to her right shoulder in the September, 2009 assault. Dr. Gornet therefore referred the Petitioner to his associate Dr. Mark Miller, who saw the Petitioner on November 8, 2010 and recorded a history of the Petitioner's work injury, noting that the Petitioner had bruising on her right upper arm following this robbery from being grabbed by the robber, and that she now had shoulder pain on that same right arm. Dr. Miller also noted that the Petitioner recently underwent cervical surgery which had resolved other symptoms, but her right shoulder complaints continued. Dr. Miller then opined: "The patient's current symptoms are consistent with a rotator cuff tear. This certainly may have been caused by the assault."

After testing confirmed a torn rotator cuff and surgery was recommended (and performed on December 10, 2010), Dr. Miller again specifically stated the Petitioner's condition was causally related to the assault that occurred on September 28, 2009. (PX13)

Based upon the foregoing, the Arbitrator finds that there is a consistent history of right arm complaints, beginning with the Petitioner's undisputed work injury of September 28, 2009 wherein the Petitioner's right arm appears to have been grabbed by her attacker. Moreover, the Petitioner's treating surgeon, Dr. Miller, clearly and unequivocally related the condition of ill-being of the Petitioner's right shoulder/arm to the Petitioner's September 28, 2009 assault at work.

Respondent, however, denied causation, relying on the opinion of its Section 12 evaluator, Dr. W. Chris Kostman, who conducted an evaluation of the Petitioner on May 31, 2011. (RX3) While Dr. Kostman agreed with both Dr. Miller's diagnosis and the treatment provided, he did not agree that the Petitioner's right shoulder condition was caused or aggravated by the work injury of September 28, 2009. In support of this opinion, Dr. Kostman stated in relevant part: "I believe it is possible that the patient could sustain a right shoulder injury at the time of her assault with her loss of consciousness and head injury however medical records do not support complaints of right shoulder symptoms until the date of 6/28/10, nine months following the date of injury." Dr. Kostman, therefore, denied there was a causal connection because of a purported lack of right shoulder complaints until the date of Dr. Gornet's examination on June 28, 2010.

The Arbitrator finds that based upon the foregoing analysis of the evidence relative to the Petitioner's right arm complaints, Dr. Kostman's assessment of the purported lack of right upper extremity complaints until Dr. Gornet's June 2010 examination is patently incorrect. In fact, both the paramedics and the police - on the scene immediately following the assault - documented marks on the Petitioner's right arm, apparently from where she was grabbed by her assailant. Moreover, the paramedics specifically stated that the Petitioner complained of right arm pain immediately following the assault. Dr. Kostman's analysis of the evidence being incorrect, the Arbitrator further finds his causation opinion to be unreliable.

The Arbitrator finds that the condition of ill-being of the Petitioner's right upper extremity is causally related to her undisputed work injury.

Finally, with regard to whether there is a causal connection between the Petitioner's psychological condition and treatment and the work related assault of September 28, 2009, the Arbitrator notes the paramedics' description of their findings immediately after the assault, the pictures of the Petitioner immediately after the assault, and the Petitioner's treating medical records following the assault. Based upon all of this evidence, the Arbitrator finds that this was a vicious assault resulting in significant injury to the Petitioner, including but not limited to a traumatic brain injury.

The Arbitrator further finds that this is fully consistent with Dr. Mark Kinder's opinions and recommendations beginning with his neuropsychiatric evaluation of the Petitioner on November 10, 2009. Dr. Kinder reported at this time that the Petitioner was seen for evaluation and possible psychological treatment related to an unprovoked assault on September 28, 2009. After diagnosing adjustment disorder/mixed anxiety and depressed mood with possible PTSD and

also with a traumatic brain injury from the September 28, 2009 assault, Dr. Kinder recommended anxiety management, supportive treatment, and an EEG. The EEG, performed on November 16, 2009, revealed abnormal focal disturbance in cerebral function in the left frontotemporal region, compatible with the patient's history of cerebral contusion. By February 1, 2010, with the Petitioner complaining of worsening sleep and increased anxiety, Dr. Kinder confirmed the diagnosis of PTSD and post-traumatic headaches, and stated that the Petitioner needed more frequent sessions and more aggressive treatment. (PX5 & 8)

Based upon all of the evidence, the Arbitrator finds that the Petitioner's post-assault psychological treatment and condition of ill-being is all causally related to her work injury of September 28, 2009. The Arbitrator further notes that Respondent's own Section 12 evaluating psychiatrist, Dr. Wayne A Stillings, agreed that the Petitioner's psychiatric care – at least to the date of his examination on August 26, 2010 - was reasonable and appropriate for her work related condition. (RX5)

In conclusion, therefore, the Arbitrator finds that the Petitioner's present condition of ill-being – including, but not limited to the disputed conditions of ill-being of her cervical spine, her right upper extremity and her psychological condition – is causally related to the undisputed work injury of September 28, 2009.

With regard to "J", were the medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services; the Arbitrator finds the following:

The compensability of the Petitioner's September 28, 2009 work injury was not in question. Rather, Respondent's dispute, based upon Arbitrator's Exhibit #1 and statements made at trial by Respondent's counsel, was whether there was a causal connection between the Petitioner's cervical condition, right arm condition, and psychological condition, and the work related assault of September 28, 2009. Following therefore, Respondent disputed liability for certain medical bills.

Based upon the Arbitrator's causation findings *supra*, all of which are incorporated herein by reference, the Arbitrator finds that the Respondent is liable for all of the Petitioner's medical bills related to her work injury of September 28, 2009 as set forth in PX1. Those bills are as follows:

Provider	Billed	F/S	WC	Other	w/o	Balance
Air Evac	$5,765	--	$5574.17		$190.83	$0
Cap Lab	$504	---		$20.95 (M) $.25 (Ins)	$482.20 (M)	$20.95 (M) HH
Cape Rad.	$1,082 (pd) 547 (disp)	-- $415.72	$973.80 $0	$0	$108.20 $0	$0 $415.72
CT Partners Tx:	$8,551 (disp)	$6,311	$0	$0	$0	$6311

Provider	Billed	F/S	WC	Other	w/o	Balance
Dr. Hayward	$1037	$788.12	$779.99	$0	$257.01	$0
Dr. Henry	$243	$184.68	$184.68	$0	$58.32	$0
Dr. Seabaugh	$1511	$1,148.36	$1,117.96	$0	$393.04	$0
Dr. Lemmon	$1,350	$1,026	$1,350	$0		$0
Dr. Hurt	$1,490		$1,132.40	$0	$357.60	$0
Dr. Gornet Tx:	$86,548.27	$65,784.17	$0	$0	$0	$65,784.17
Dr. Cerny	$285	---	$209.25	$0	$79.5	$0
Dr. Stahly	$115	$87.40	$87.40	$0	$27.60	$0
Dr. John Kinder	95	--		$45.18 (M) 11.29 (Ins)	$38.53	$45.18 (M) HH
Dr. Mark Kinder	1809	$1374.84	$0	$455.09 (M) 113.77 (Ins)	1240.14	$455.09 (M) HH
Imaging Part	$5185	$3940.60	$0	$0	$0	$3940.60
Kinex Med	$920	$699.20	$0	$9.87 UWL 39.46 DMERC	$125.67	$699.20
KS Medical	$6,293.50	$4,783.06	$0	$0		$4,783.06
Mem Hosp	$16,438	$6,883.39	$0	$0		$6,883.39
Midw. Rad.	$232		$0	$152.16 (M) 79.84 (Ins)		$152.16 (M) HH
Miss. Bapt.	$5,024.60	$3818.70		$862.99 (M) $236.54 (Ins)	$3,925.07	$862.99 (M) HH
MRI Part. Tx:	$2,150	$1634	$0	$0		$1634
Premier Anes	$4,165	$3,165.40	$0	$0		$3,165.40

Provider	Billed	F/S	WC	Other	w/o	Balance
St. Francis	$43,418.01		$32,987.42		$10,430.59	$0
St. Louis Ortho Tx:	$33,687.50	$25,602.50	$0	$0	$0	$25,602.50
Stella Maris	$1,830	$1,390.80	$0	$0	$0	$1,390.80
Ortho Center	$29,148.27	$22,126.12	$0	$0	$0	$22,126.12
Timberlake	$41,006.34	$31,164.82	$0	$0	$0	$31,164.82
Union Amb.	$358.50	$350.84	$0	$259.98 (M) $65 (Ins)	$33.52 (M)	$259.98 (M) HH
Union Hosp	$8,799		$4,012.24		$4786.76	$0
Yates ER Phys	$907		$471.42		$435.58	$0
Dr. Harris	$566			$125.51 (M)		$125.51 (M)

Respondent is liable for the above unpaid medical bills pursuant to Sections 8 of the Act. The Respondent is obligated to reimburse Medicare for all payments or $1,921.86. (PX #1) The Respondent is further ordered to hold the Petitioner harmless from any claims for reimbursement by any provider who has made payments on her behalf as a result of this work injury.

Respondent, furthermore will be given credit for all paid medical bills paid pursuant to Section 8.

With regard to "K", what temporary benefits are in dispute, is the Petitioner entitled to TTD and in what amount; the Arbitrator finds the following:

Respondent agreed that the Petitioner was temporarily totally disabled following this injury for the period from 9/29/09 through 10/11/10. (Arb. X. # 1) Respondent, however, thereafter denied TTD benefits, apparently based upon Respondent's causation disputes. (PX21, Arb. X. #1)

The Arbitrator, as previously set forth herein, rejects Respondent's causation arguments. The Arbitrator, therefore, finds that the Petitioner is entitled to TTD benefits for the entire period she was authorized off work by her treating physicians, i.e. the period from September 29, 2009 through May 11, 2011 when the Petitioner was ultimately released for regular duty by Dr. Miller. (PX13)This represents 84-1/7 weeks at the Petitioner's TTD rate of $356.80.

With regard to "L", what is the nature and extent of the Petitioner's disability; the Arbitrator finds the following:

Based upon the records of medical treatment rendered to the Petitioner following her work injury of September 28, 2009, the Petitioner was diagnosed with the following conditions of ill-being throughout her course of care: CT scans of the Petitioner's facial bones, brain and cervical spine performed upon admission to Massac Memorial Union County Hospital on September 28, 2009 revealed anterior nasal spine deformities bilaterally suggesting fractures, a possible non-displaced left zygomatic arch fracture and left temporal skull fracture, a left temporoparietal skull fracture, a small subdural hematoma and a small amount of subarachnoid blood in the left temporal lobe, and degenerative disc disease (PX3); upon admission to the ICU at St. Francis on September 28, 2009, the Petitioner was diagnosed with left cephalohematoma, left periorbital bruising, right anterior upper tenderness of the neck with multilevel degenerative disc disease, small areas of subarachnoid hemorrhage along the left parietal cortex and small subdural hemorrhage seen along the left temporal lobe, along with stable appearance of a mildly depressed fracture involving the left temporal and left frontal calvarium, and a depressed fracture involving the left frontal left temporal bone (PX5); during follow up care, the Petitioner underwent denture repair - her dentures were broken when she was hit in the mouth during the assault at work (PX3); she saw a neurologist, Dr. Stahly for post-traumatic vertigo, parethesias and right submandibular mass on November 5, 2009, which was diagnosed as post-traumatic aural vertigo, moderate right carpal tunnel syndrome and moderate to severe left carpal tunnel syndrome per EMG/NCV, and degenerative spondylosis with post-traumatic cervical strain with cervical somatic dysfunction (PX6); additional diagnoses and complaints as of physical therapy on November 6, 2009 included cervicalgia, with limited cervical range of motion, pain in the neck, and radicular symptoms of pain and tingling in the bilateral arms and right leg (PX5); the Petitioner was seen by Dr. Linda Hurt of Audiology Assoc. on November 9, 2009 for complaints of lightheadedness and off balance sensation as well as occasional tinnitus (PX7); the Petitioner was seen by a psychologist, Dr. Mark Kinder on November 10, 2009, for disorder/mixed anxiety and depressed mood with PTSD and a traumatic brain injury from the September 28, 2009 assault; an EEG recommended by Dr. Kinder on November 16, 2009, revealed abnormal focal disturbance in cerebral function in the left frontotemporal region, compatible with the patient's history of cerebral contusion; as of February 1, 2010, Dr. Kinder confirmed the diagnosis of PTSD as well as post-traumatic headaches (PX5 & 8); the Petitioner underwent surgery performed by Dr. Jan Seabaugh on January 5, 2010 for excisions of post-traumatic lesions on Petitioner's mid upper and lower lip (PX5 & 9); the Petitioner followed up with neurosurgeon Dr. Hayward on February 1, 2010 with multiple complaints of bilateral shoulder pain and numbness and tingling in the arms, along with complaints of headaches and difficulty with sleeping; an MRI of the cervical spine performed on March 13, 2010 revealed mild cervical spondylosis, mild facet arthropathy, multilevel disc disease, multilevel central canal stenosis and multilevel foraminal stenosis (PX5 & 6); the Petitioner thereafter saw Dr. Matthew Gornet in June, 2010 with complaints of neck pain, headaches, pain into both shoulders, bilateral arm pain to her hands with numbness in her hands, and weakness and loss of control of her right hand (PX13); the doctor thereafter sent the Petitioner for another MRI which revealed three levels of disc pathology with cord compression and performed disc replacement at C4-5, C5-6 & C6-7 on August 10, 2010 (PX13, 14); when the Petitioner continued with right shoulder and arm pain post-operatively, Dr. Gornet referred the Petitioner to his associate Dr. Mark Miller, for care of the right shoulder (PX13); the Petitioner ultimately underwent additional surgery on December 10,

2010 performed by Dr. Miller: arthroscopic long head biceps tenolysis/tenodesis/superior labral debridement; arthroscopic subacromial decompression; distal clavicle excision and rotator cuff repair, with a post-operative diagnosis of Type II SLAP tear, rotator cuff tear, impingement syndrome and AC joint degenerative joint disease. (PX13, 14)

Based upon the Arbitrator's causation findings, which are incorporated herein by reference, the Arbitrator finds that all of these conditions of ill-being are causally related to the Petitioner's work injury of September 28, 2009. Moreover, the Arbitrator finds that the Petitioner's testimony regarding on-going problems to date is credible and consistent with the conditions of ill-being diagnosed by the doctors and outlined herein. These complaints include: the Petitioner awakens with a headache in the morning, and experiences problems with headaches throughout the day. She has lost hearing in her left ear. She experiences noise that is like static in her ear, making it difficult to talk on the phone. She continues to experience problems with balance; for instance, she climbs up the stairs, but she takes the elevator down because of fear of falling due to balance issues. Her bottom lip – where she underwent surgery – is numb. Her dominant right arm is now so weak that it takes two hands to hold the coffee pot. She can't hold her hair dryer long enough to get her hair dry. She can comfortably lift only about 3-4 pounds – she needs help lifting more than that. It's also now very painful for her to reach overhead for anything. She can no longer reach the top shelf in her cabinet, both due to pain and also as her right arm won't go that high. Ongoing neck and right arm pain impact her ability to do household chores. Her right arm gives out when she tries to wash windows, and both her neck and right arm hurt when she tries to vacuum. The Petitioner just got permission to drive in June, 2011. After 20-30 minutes of driving, however, her neck and right arm become painful. Ongoing right arm pain is also interfering with the Petitioner's ability to sleep. If she rolls onto her right side and hits her shoulder, she instantly has pain and awakens. She is then up for hours. Right arm pain is also interfering with the Petitioner's use of her computer, or basically any repetitive activity. After 15-20 minutes, her right arm tenses up, and then goes numb. The Petitioner, however, did return to work with no restrictions.

As a result of the above, the Arbitrator finds that in light of the serious injuries sustained by the Petitioner on September 28, 2009, she has sustained a 50% of the use of the person pursuant to Section 8(d)2.

With regard to "M", should penalties or fees be imposed upon Respondent, the Arbitrator finds the following:

In Ford Motor Co. v. Industrial Commission, 140 Ill. App. 3d 401 (1986), the Appellate Court provided an analysis of the penalty sections of the Act applicable to the instant case:

> The Act provides an income stream to an injured worker, who is typically left without income while he is disabled. (Avon Products, Inc. v. Industrial Com. (1980), 82 Ill. 2d 297, 45 Ill. Dec. 117, 412 NE2d 468.) The penalty sections attempt to prevent bad faith and unreasonable withholding of compensation benefits from employees. (Board of Education v. Industrial Com. (1982) 93 Ill. 2d 1, 66 Ill. Dec. 300, 442 NE2d 861.) If an employer acts in reliance upon qualified medical opinion, penalties are not usually imposed. (O'Neal Brothers Construction Co. v. Industrial Com. (1982), 93 Ill. 2d 30, 66 Ill. Dec. 334, 442 NE2d 895.) But the employer's withholding of compensation is unreasonable when the evidence that an employer has, or should reasonably have, in its possession discloses the absence of any substantial grounds for challenging liability. (Board of Education v. Industrial Com.) The test is whether the employer's reliance was objectively reasonable under the circumstances. (Consolidated Freightways, Inc. v. Industrial Com. (1985), 136 Ill. App. 3d 630, 483 NE2d 652.)

Respondent relied on the opinions of Drs. deGrange, Kostman and Stillings for its denial of benefits to the Petitioner for injuries to the cervical spine and right shoulder, as well as for its dispute regarding psychological care. The Arbitrator, as stated herein, rejects Respondent's causation arguments relative to the opinions of these doctors. The remaining question is whether Respondent's reliance upon the opinions of these doctors for denial of benefits was objectively reasonably under the circumstances. The Arbitrator finds that it was not.

Dr. deGrange, in spite of his acknowledgement that the Petitioner had no history of chronic or recurrent neck pain prior to the work related injury of September 28, 2009, still speculated that it was "highly unlikely in this examiner's opinion that the patient was completely asymptomatic as she claims prior to the assault." While this Petitioner was the victim of a vicious assault resulting in significant injuries, including a traumatic brain injury, Dr. deGrange inexplicably stated that in his opinion, the Petitioner exhibited functional overlay and pain behavior. The Arbitrator finds that this alone warrants a finding that reliance on this opinion was not objectively reasonable.

Dr. deGrange also, however, admitted that the Petitioner's work injury aggravated the underlying degenerative disc condition of her cervical spine. As such, any reliance upon this doctor's opinion for a denial of benefits is not reasonable.

Dr. W. Chris Kostman, evaluating Petitioner's right shoulder at Respondent's request on May 31, 2011, agreed with both the treating surgeon's diagnosis and course of care. (RX3) His only disagreement was causation, based upon the fact that, according to Dr. Kostman, there was no history of right shoulder/arm complaints prior to Dr. Gornet's examination of 6/28/10. As set forth herein, the paramedics who were first responders following the Petitioner's assault documented not only right arm/bilateral upper extremity complaints, but indicated there were red welts on the Petitioner's right arm that likely resulted from the perpetrator grabbing the Petitioner by the right arm. These same marks are seen on pictures taken by investigators on the scene immediately after the assault. The entire basis of Dr. Kostman's opinion was faulty; Respondent's reliance on this faulty opinion was not reasonable.

Photographs of the Petitioner's clothing were taken soon after the assault and battery. While inspecting the right sleeve photos, it appeared to the Arbitrator that bloody prints of the perpetrator's shoe were left embossed on the sleeve. It is likely that the assailant kicked or stepped on the Petitioner's right arm while she was down. (PX #18 p.12-17)

As for the psychiatric opinion of Dr. Stillings following his examination on August 26, 2010, he did not say the treatment to date was not related. Rather, he opined the Petitioner was at MMI from a psychiatric standpoint. There is, therefore, no support for denial of care prior to that date. Moreover, in light of the brutality of this assault as evidenced by the medical records and photographs, the resulting conditions – including but not limited to the traumatic brain injury, the Arbitrator finds denial of any psychological care to this Petitioner to be unreasonable.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Boblitt,

Petitioner,

vs.

NO. 11WC13036

14IWCC0553

Labor Ready,

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 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 24, 2012 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: JUL 10 2014
SM/sj
o-5/28/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

BOBLITT, ROBERT
Employee/Petitioner

Case# **11WC013036**

14IWCC0553

LABOR READY
Employer/Respondent

On 4/24/2012, 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:

1189 WOLTER BEEMAN AND LYNCH
RANDALL A WOLTER
1001 S SIXTH ST
SPRINGFIELD, IL 62703

2593 GANAN & SHAPIRO PC
MELINDA ROWE-SULLIVAN
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0553 14IWCC0553

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
19(B) ARBITRATION DECISION

Robert Boblitt
Employee/Petitioner

v.

Labor Ready
Employer/Respondent

Case # **11 WC 13036**

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 **Urbana**, on **February 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.

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

FINDINGS

On **October 8, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

On the date of accident, Petitioner was **39** 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 is entitled to a credit of $ **to be determined without credit waiver** under Section 8(j) of the Act.

Respondent shall be given a credit in the amount of $2,354.00 for TTD benefits paid.

ORDER

As the Arbitrator finds that Petitioner *did not* sustain an accident that arose out of and in the course of employment and that Petitioner's current condition of ill-being is not causally related to the alleged accident, no benefits are awarded.

Respondent shall pay reasonable and necessary medical services of **$ 0.00**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit for medical benefits that have been paid as reflected on Respondent's Exhibit 5 entered into evidence at the time of arbitration.

Respondent shall be given a credit for permanency advancements paid as reflected on Respondent's Exhibit 6 entered into evidence at the time of arbitration.

Respondent is entitled to a credit of $ **to be determined without credit waiver** under Section 8(j) of the Act.

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

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

Signature of Arbitrator

April 20, 2012
Date

APR 24 2012

Petitioner's Testimony

Petitioner testified that prior to October 8, 2010, he was an over the road truck driver for sixteen years. Petitioner testified that he began working for Respondent approximately one week before his accident. During that first week of employment, he was contacted by a woman working for Respondent who inquired as to whether Petitioner would be interested in working with anhydrous ammonia. Petitioner indicated interest and passed a qualification test. He was to report to work at Ag-land FS in Hartsburg on October 8, 2010.

At arbitration Petitioner testified that October 8, 2010 was his first day filling tanks with anhydrous ammonia. Petitioner reported to Ag-land in Hartsburg, where he met with Gary Fields and Josh Wilson. They showed him how to fill the tanks. They gave him gloves and goggles to wear. Petitioner testified that he was told he did not need to wear a respirator unless he was downwind. Petitioner started his work day checking tire pressures, gauges, and greasing. Right before lunch, Petitioner started filling the tanks. Petitioner testified that he told "a guy there" that there were some leaky tanks because Petitioner could smell anhydrous ammonia. Petitioner spoke with both Fields and Wilson at lunch. He worked with Wilson during the day. Petitioner testified that between 1:00 and 2:00 in the afternoon a "guy" spun around and sprayed anhydrous ammonia right in his face. Petitioner continued to work and clocked out at the end of the day. Before leaving, Petitioner smoked a cigarette and discussed the day's work with Wilson. According to Petitioner, he was in fresh air and not feeling too bad. He had ammonia on his clothes. The ammonia contacted his jeans and shirt. Petitioner denied receiving any burns from the ammonia. While driving home, Petitioner testified he began experiencing cold chills and turned the heater on. When he arrived in Springfield, he stopped by Respondent's office and turned in his time card. According to Petitioner, he then ran some errands and afterwards, while driving home, Petitioner felt nauseous and called 911 to ask about his symptoms. The 911 dispatcher instructed Petitioner to get out of the house and into fresh air. An ambulance was dispatched. According to Petitioner he gave the phone to his girlfriend because he thought he was going to pass out. Ambulance personnel arrived, stripped Petitioner down to his boxers, and transported him to the emergency room. Petitioner testified he passed out and was in Intensive Care for seven days.

On cross-examination Petitioner acknowledged that he did not report an accident with anhydrous ammonia on October 8, 2010. He also acknowledged that he wore the gloves and goggles issued to him. Petitioner admitted that he had issues with asthma (or asthma-like symptoms), acid reflux, and a history of seizure disorders before October 8, 2010, and that he had smoked cigarettes for an extensive period of time.

Petitioner testified that prior to the alleged accident he had no issues with breathing, anxiety, or speech. Petitioner further testified that he currently weighs 305 lbs. which is an increase over his pre-accident weight of 265 lbs.

Petitioner testified that since his release from Memorial Medical Center he has undergone additional treatment for his breathing problems and has also undergone cardiac and sleep disorder testing. Petitioner has frequently had to go to the hospital for his breathing problems. He has difficulty walking. He is scheduled to see a seizure disorder doctor in March. Petitioner testified he needs to schedule another appointment with Dr. Steedhar. Petitioner also testified that he has been seen by Dr. Paul for examinations at Respondent's request and during the second examination Dr. Paul stuck a needle in his arm that was dirty and resulted in cellulitis in his right arm.

Petitioner testified that he has not returned to work as Dr. Streedhar has taken him off work entirely. On cross-examination Petitioner admitted that he requested that Dr. Streedhar keep him completely off work. Petitioner acknowledged that he attended Dr. Streehar's deposition on August 18, 2011, and heard the doctor's testimony regarding Petitioner's ability to return to work on a modified basis as long as he was not exposed to hazardous chemicals or chemical cleaners.

Regarding wages, Petitioner testified that he was supposed to have been paid $9.00 per hour and his work schedule was Monday through Friday, 7:30 a.m. through 3:30 p.m. According to the wage statement entered into evidence (RX 4), Petitioner earned a total of $308.00 in two weeks.

Other Witnesses

The witness statement of Josh Wilson was entered into evidence at the time of arbitration as Respondent's Exhibit 7, and the witness statement of Gary Fields was entered into evidence at the time of arbitration as Respondent's Exhibit 8. Additionally, the deposition transcript of Josh Wilson was entered into evidence at the time of arbitration as Respondent's Exhibit 9, and the deposition transcript of Gary Fields was entered into evidence at the time of arbitration as Respondent's Exhibit 10.

According to the witness statement prepared by Josh Wilson, on Friday, October 8th, 2010, Petitioner was filling Anhydrous Ammonia tanks with himself and Gary Fields until Gary had to leave. (RX 7). The witness statement indicated that the two men continued to fill tanks with no problems and no questions from Petitioner. (RX 7). The witness statement indicated that Petitioner had on all safety equipment as required. The witness statement also indicated that the two men moved tanks to and from the riser until lunch and at lunch they talked and Petitioner was fine with what he was doing. (RX 7). The witness statement also indicated that after filling twelve tanks everything was locked up, both men walked to the shop and Petitioner said he thought the day went well and had no worries. (RX 7).

According to the witness statement prepared by Gary Fields, Petitioner began learning the process of filling of Anhydrous Ammonia tanks on Friday, October 8, 2010. (RX 8). The witness statement indicated that Mr. Fields personally showed Petitioner the filling process, and that he explained to Petitioner that he was to wear his goggles and gloves at all times while on the riser. (RX 8). The witness statement indicated that four tanks were hooked up and the men began pumping ammonia. (RX 8). The witness statement indicated that Mr. Fields left the plant and returned at approximately 3:00 p.m. (RX 8). The witness statement also indicated that the men finished filling the tanks and that Petitioner went into the office to get his work ticket, at which time Mr. Fields asked Petitioner how it (*i.e.*, filling anhydrous tanks) went. (RX 8). The witness statement indicated that Petitioner said everything went fine and asked if they were working on Saturday, to which Mr. Fields responded they were not but they might have to the following week. (RX 8).

The deposition of Josh Wilson was entered into evidence at the time of arbitration as Respondent's Exhibit 9. Mr. Wilson testified that he was an applicator and warehouse man for Ag-Land FS, Hartsburg for approximately three years. (RX 9, p. 4). Mr. Wilson testified that he was familiar with Petitioner as a part-time worker with Labor Ready who worked for a couple of days in October 2010. (RX 9, p. 5). Mr. Wilson testified that he prepared a written statement regarding his observations and knowledge of Petitioner's activities at Ag-Land on October 8, 2010. (RX 9, pp. 5-6). Mr. Wilson testified that Petitioner was brought in just to fill anhydrous tanks in order for the tanks to be using in farming. (RX 9, p. 6). Mr. Wilson also testified that

Petitioner was also expected to perform various tasks in the shop to keep the shop neat and organized. (RX 9, p. 7).

Mr. Wilson testified that Gary Fields was involved in the training process, and that Petitioner would have completed a written test at Labor Ready prior to his arrival at the work site. (RX 9, pp. 7-8). Mr. Wilson testified that he was also available during the course of the day so as to assist Petitioner in the filling of the anhydrous ammonia tanks. (RX 9, p. 8). Mr. Wilson testified that the process of filling the tanks included getting the hose and connector from the riser, connecting it to the tank, and then turning on the pump which put the anhydrous through the hoses into the tanks. (RX 9, p. 8). Mr. Wilson testified that he observed Petitioner wearing goggles at all times, and that he also observed Petitioner wearing gloves on the day of the alleged accident as well. (RX 9, pp. 9-10). Mr. Wilson testified that Petitioner filled a total of 24 tanks during the course of the day on October 8, 2010. (RX 9, p. 10). Mr. Wilson testified that he observed Gary Fields interact with Petitioner on the date of the alleged accident, including having observed Mr. Fields train Petitioner, showing him how to put the connectors onto the tanks, and walking him through the various steps of the process. (RX 9, p. 10). Mr. Wilson testified that Mr. Fields left the Ag-Land facility for approximately two to three hours on the date of the alleged accident, which left him working alone with Petitioner during that time. (RX 9, p. 11). Mr. Wilson testified that at no point during the day of October 8, 2010 was he out of the line of vision of Petitioner as he worked on the anhydrous ammonia tanks. (RX 9, p. 11).

Mr. Wilson testified that during the lunch break on October 8th, he talked to Petitioner so as to make sure that he was comfortable with what he was doing, and Petitioner seemed to be fine. (RX 9, p. 12). Mr. Wilson testified that at no point during the course of the day on October 8, 2010 did Petitioner indicate to him that he inhaled any of the anhydrous ammonia, nor did Petitioner ever indicate to him that he had come into direct physical contact with any of the anhydrous ammonia that day. (RX 9, pp. 12-13). Mr. Wilson testified that Petitioner did not appear to be in any distress when he spoke to him at any point during the day on October 8, 2010, nor did he observe Petitioner coughing or showing any signs of having any kind of respiratory issues at any point during the day on October 8th. (RX 9, p. 13). Mr. Wilson further testified that Petitioner never reported to him that there was a spill that splashed up onto his face that day, nor did Petitioner report to him that ammonia had spilled down onto his shirt and pants on October 8th. (RX 9, p. 13). Mr. Wilson also testified that Petitioner never reported to him that ammonia had gone down the gloves he had on nor did Petitioner report that he had any direct contact with the ammonia on October 8th. (RX 9, p. 13). Mr. Wilson testified that Petitioner never reported to him that anything had occurred at the plant that day involving anhydrous ammonia. (RX 9, p. 14).

Mr. Wilson testified that he was working in close physical proximity to Petitioner when filling the tanks on October 8th, and he did not observe at any point during the day any ammonia splash onto Petitioner. (RX 9, p. 14). Mr. Wilson testified that he had witnessed an individual that inhaled anyhydrous ammonia, and he indicated that he observed the applicator take approximately 20 steps before collapsing into the field with significant breathing problems. (RX 9, p. 14). Mr. Wilson testified that he has not witnessed an individual who had anhydrous ammonia splash onto their skin or clothing. (RX 9, p. 14). Mr. Wilson testified, however, that a tub of water was available on the riser because in case an individual gets liquid ammonia on themselves, the affected body parts or whole body needs to be placed in the water to fix the freeze burn. (RX 9, p. 15). Mr. Wilson testified that Petitioner did not show any signs of having inhaled anhydrous ammonia on October 8th, nor did Petitioner show any signs of having any direct physical contact with anhydrous ammonia on that day. (RX 9, pp. 15-16). Mr. Wilson further testified that Petitioner's clothing did not show any signs of having any direct physical contact with anhydrous ammonia on October 8th. (RX 9, p. 16).

On cross-examination, Petitioner's counsel inquired whether the ammonia turned from a liquid to a vapor upon contact with clothing, to which Mr. Wilson responded affirmatively. (RX 9, p. 18). On further questioning, Mr.

Wilson testified that the clothing would immediately freeze to the skin. (RX 9, p. 18). Mr. Wilson was unable to answer what would happen after the ammonia froze to the clothing. (RX 9, p. 18).

The deposition of Gary Fields was entered into evidence at the time of arbitration as Respondent's Exhibit 10. Mr. Fields testified that he is the plant manager and administrative assistant at Ag-Land FS in both Hartsburg and New Holland, and that he has been a plant manager for 33 years. (RX 10, pp. 4-5) Mr. Fields testified that he knew of Petitioner as an individual sent from Labor Ready to help in a temporary situation. (RX 10, p. 5). Mr. Fields testified that he prepared a written statement regarding his observations and knowledge of Petitioner's activities at Ag-Land on October 8, 2010. (RX 10, pp. 5-6).

Mr. Fields testified that he was impressed with Petitioner, as Petitioner seemed like he really wanted to work and seemed to like the job. (RX 10, p. 7). Mr. Fields testified that Petitioner went out to the riser with Josh who showed Petitioner what to do, and he also testified that he also went through things with Petitioner as well. (RX 10, p. 7). Mr. Fields testified that he had to leave in order to go to another plant, and when he came back everything seemed to be fine. (RX 10, pp. 7-8). Mr. Fields testified that Petitioner said that everything was fine. (RX 10, p. 8). Mr. Fields testified that Petitioner's job duties on the date of the alleged accident included that of filling anhydrous ammonia tanks as well as some other duties as assigned. (RX 10, p. 8). Mr. Fields testified that Petitioner arrived at the Ag-Land facility on the morning of the alleged date of accident at approximately 8:30 a.m. (RX 10, p. 8).

Mr. Fields testified that Josh stayed on the riser with Petitioner at all times, and that he personally went out on the riser at the beginning of the day with Josh in order to demonstrate for Petitioner what needed to be done. (RX 10, pp. 9-10). Mr. Fields testified that he told Petitioner that at all times when he was on the riser he needed to wear gloves and goggles, even if not filling the tanks. (RX 10, p. 10). Mr. Fields testified that when he left the facility for a period of time for approximately 2.5 hours in order to do paperwork, Petitioner would have been with Josh Wilson in his absence. (RX 10, p. 12).

Mr. Fields testified that he returned to the facility at approximately 3:00-3:30 p.m., at which time he observed Petitioner and Mr. Wilson finishing up filling the last tanks for the day. (RX 10, pp. 12-13). Mr. Fields testified that he asked Petitioner how everything was going and if he liked doing it, and Petitioner responded affirmatively and that he would like to get on full time. (RX 10, p. 13). Mr. Fields testified that at no point during the course of his conversation with Petitioner at the end of the day on October 8, 2010 did Petitioner indicate that he had inhaled any anhydrous ammonia, nor did Petitioner ever indicate to him that he had come into direct physical contact with any of the anhydrous ammonia at any point during that day. (RX 10, pp. 13-14). When asked if Petitioner appeared to be in any kind of distress when he talked to him at the end of the day on October 8th, Mr. Fields testified that Petitioner was smoking a cigarette and Petitioner said he would like to get on full time. (RX 10, p. 14). Mr. Fields testified that it was necessary that Petitioner work a couple of seasons before that would even be discussed, and that he was of the understanding that Petitioner was not allowed to seek employment without the permission of Labor Ready. (RX 10, p. 14).

Mr. Fields testified that at no point during the day of October 8, 2010 did he observe Petitioner coughing or showing any signs of having had any kind of respiratory issues that day, and he further testified that he stood outside with Petitioner at the end of the day and smoked a cigarette with him. (RX 10, p. 14). Mr. Fields further testified that Petitioner did not report to him that there was a spill that splashed up onto his face on October 8th, nor did Petitioner ever report to him that ammonia had spilled down onto his shirt and pants on that date either. (RX 10, pp. 14-15). In fact, Mr. Fields testified that had any ammonia splashed onto Petitioner he would have noticed a burn and that it was a type of burn that would cause much distress because water needed

to be placed on it immediately as it was caustic and would eat skin. (RX 10, p. 15). Mr. Fields further testified that Petitioner did not report to him that ammonia had gone down the gloves he was wearing nor that he had any direct contact with the ammonia on that date, and he further testified that he stressed to his workers the need to use a cuff in order that the ammonia is not able to run down the gloves. (RX 10, p. 15).

Mr. Fields testified that Petitioner never reported to him that anything had occurred at the plant involving anhydrous ammonia on October 8th, and that he has personally witnessed an individual inhale anhydrous ammonia. (RX 10, pp. 15-16). According to Mr. Fields, immediately upon inhalation the individual's lungs want to shut down so getting out of the area immediately is necessary as it is hard to catch your breath until you are out of the vapor. (RX 10, p. 16). Mr. Fields also testified that based on his training and experience in the agricultural field, what typically happens when an individual comes into direct contact with anhydrous ammonia on the skin or clothing is that it immediately starts to burn so it is necessary to put water on the person immediately. (RX 10, p. 16). Mr. Fields testified that based on his observations and contact with Petitioner on October 8th, Petitioner did not show any signs of having inhaled anhydrous ammonia on that date, nor did Petitioner show any signs of having any direct physical contact with anhydrous ammonia on that date. (RX 10, pp. 16-17). Furthermore, Mr. Fields testified that Petitioner's clothing did not show any signs of having any direct physical contact with anhydrous ammonia on October 8th either. (RX 10, p. 17).

On cross-examination, Mr. Fields testified that employees wear respirators at work when there is an emergency and a large amount is released into the air as when a valve cracks or when a transport is unloading. (RX 10, p. 19). Mr. Fields further testified on cross-examination that he had been contacted by Labor Ready the next morning after Petitioner's alleged accident when he did not come to work, and that is the point at which he first became aware of any alleged accident involving Petitioner. (RX 10, p. 20). Mr. Fields further testified on cross-examination that he expected that individuals would have pretty much the same experience when exposed to anhydrous ammonia. (RX 10, p. 20).

Agnes Wood testified at the time of arbitration on behalf of Respondent. Ms. Wood testified that she is currently employed as the assistant branch manager for Respondent in Springfield and has worked for Respondent for approximately eleven years. Ms. Wood confirmed that she held the position of assistant branch manager at the time of Petitioner's alleged accident on October 8, 2010. Ms. Wood testified that she received a call on the Saturday after Petitioner's alleged accident from his fiancé, who stated that Petitioner was in the ER after the alleged anhydrous ammonia exposure.

Ms. Wood testified that she is involved in the extension of light duty job offers to individuals who have allegedly been hurt on the job while working through Labor Ready. Ms. Wood testified that Respondent's Exhibit 2 was a copy of the written job offer with a proposed start date of January 24, 2011 that had been extended to Petitioner. Ms. Wood testified that Petitioner did not return to work at any time back in January 2011, and that Petitioner stated that he was not going to sign anything without speaking to his attorney. Ms. Wood testified that Respondent's Exhibit 3 was a copy of the written job offer with a proposed start date of September 1, 2011 that had also been extended to Petitioner. Ms. Wood testified that Petitioner did not return to work at any time back in September of 2011 either, and that Petitioner has not returned to work at all for Labor Ready at any point since his alleged accident on October 8, 2010. Ms. Wood testified that it was her understanding that both job offers extended positions that were within the restrictions suggested by the IME physician, Dr. Paul. Ms. Wood further testified that Petitioner had indicated to her that he was a heavy smoker and had issues with asthma and pneumonia prior to the alleged accident, which is contrary to Petitioner's testimony that he had no issues with breathing prior to the accident at issue.

Medical Records

Petitioner placed a phone call to Springfield Clinic on October 8, 2010, at 9:05 p.m. The presenting problem was identified as "Anhydrous exposure" and the call was taken as an emergency. According to the condensed telephone report (PX 16) Petitioner was filling anhydrous ammonia tanks earlier that day when there was a spill that splashed up onto his faced and spilled down onto his shirt and pants. Some of the ammonia reportedly went into Petitioner's gloves. Petitioner was wearing goggles. The incident reportedly occurred at 10:30 a.m. and Petitioner continued to work the remainder of the day. Thereafter, Petitioner went home, went out to dinner with his fiancé, and then Petitioner ran an "errand" for his fiancé which required him to be in his car for twenty minutes. Petitioner was wearing his work clothes the entire time. While returning home from the "errand," Petitioner reported his started feeling really ill. At the time of the call Petitioner was diaphoretic, pale, nauseous, dizzy and light headed. His voice was described as "hoarse." While the conversation ensued, a 911 call was placed. Petitioner asked that the telephonic nurse explain to his fiancé why a 911 call had to be placed for an anhydrous exposure. While Petitioner's fiancé was on the phone with the telephonic nurse, Petitioner began vomiting. The report also states that Petitioner's fiancé complained of nausea and diaphoresis while on the phone. The telephonic nurse stayed on the phone with Petitioner's fiancé until EMS arrived. The telephonic nurse also notified the emergency department at Memorial Medical Center "of the exposure." (PX 16)

Petitioner was taken by ambulance on October 8, 2011, from his home to Memorial Medical Center in Springfield. There is no EMT/ambulance report in evidence.

Petitioner arrived at Memorial Medical Center at 9:43 p.m. The emergency room triage notes indicate Petitioner was complaining of shortness of breath. Coughing and wheezing was noted. His skin was cool, pale, and diaphoretic. Psychologically, he was noted to be calm, appropriate, cooperative, and in no acute distress.

Petitioner was initially seen by two residents, Dr. David Timme and Dr. Sandra Ettema. The doctors' dictated history states Petitioner was at his first day of work with noxious chemicals and inhaled anhydrous ammonia from "8 in this morning until 3 in the afternoon. He reports that he was not wearing a mask during this time." After work, Petitioner reportedly had some shortness of breath but declined going to the emergency room. Later in the evening, his respiratory distress did progress, and he did "elect" to be brought in to Memorial's emergency room. Evaluation there showed difficulty breathing and it was felt he needed a secure airway. Petitioner was noted to be able to speak at that time, but his voice was notably hoarse. Petitioner was in increasing distress and further hoarseness was noted in his voice. He was taken to the operating room for intubation. (PX 17)

Dr. Scott Boston prepared a six page emergency room final report. In it he reported a history of Petitioner having spent all day filling anhydrous ammonia tanks and being exposed several times to the gas. Petitioner's symptoms were dyspnea, shortness of breath, coughing, and a headache. In general, Petitioner appeared to be in "severe distress." His throat showed severe erythema. He had diminished breathing and wheezing. Petitioner was to be admitted to the Intensive Care Unit. (PX 17)

While in the hospital Petitioner was under the primary care of Dr. Sreedhar. Dr. Streedhar testified that he did not actually speak with Petitioner when he initially began treating Petitioner because Petitioner had been intubated. Petitioner underwent a fiberoptic intubation and laryngoscopy while hospitalized. (PX 17)

Dr. Dabbs, a resident, prepared a History & Physical. She noted a history consistent with that of Dr. Streedhar's history but Petitioner specifically denied nausea, vomiting, or headache. Petitioner's past medical history

included asthma and bronchitis. Petitioner was noted to be a 16 cigarettes/day smoker for the last twenty years. Petitioner was noted to be in respiratory distress. He was given DuoNebs and racemic epinephrine with no improvement and it was decided to proceed with intubation to protect Petitioner's airway. It was noted that Petitioner was not taking any medication for his asthma. (PX 17)

Petitioner was discharged on October 13, 2010. According to the Discharge Summary, Petitioner's admitting diagnoses were inhalation injury and respiratory failures. The discharge diagnoses added ammonia anhydrous inhalation injury. According to the history, Petitioner "[a]pparently, suffered from ammonia inhalation injury, became in respiratory distress, shortness of breath, came to the ER." Petitioner was discharged with no medications. He was told to follow up with his primary care physician in a week and not return to work for a week until he was seen by his primary care physician. Petitioner reported that he had not been seen by his primary care physician "for a long time" but he could see Dr. Gauen. All information was going to be faxed to Dr. Gauen. Petitioner was told to engage in activities as tolerated. Petitioner's condition was stable at the time of discharge. (PX 17)

Petitioner returned to Memorial Medical Center's emergency department on October 13, 2010. Petitioner reported having a burning feeling in his throat, feeling hot and then cold, and having a cough. He believed he had been exposed to anhydrous ammonia again while in his home. Petitioner was assessed with respiratory alkalosis, most consistent with hyperventilation and anxiety. Petitioner was instructed to follow up for the anxiety and COPD. (PX 17)

Petitioner again returned to the emergency department at Memorial Medical Center on October 17, 2010, with complaints of coughing, wheezing, and shortness of breath. Petitioner was diagnosed with acute bronchitis, anxiety, and a history of a recent anhydrous ammonia exposure. (PX 17)

Petitioner again returned to the Memorial Medical Center emergency room on January 5, 2011, at which time Petitioner reported that he woke up with shortness of breath. (PX 17). Petitioner's diagnosis at the time of discharge was hyperventilation, anxiety and a history of anhydrous ammonia exposure. (PX 17).

Petitioner underwent left heart pressure and selective coronary angio for an indication of chest pain and abnormal SPECT on May 9, 2011 at Memorial Medical Center. Per the Physician Cardiovascular Laboratory Report, the procedure conclusion was that of normal coronary arteries and LV angio was not performed. (PX 17).

Petitioner was seen on multiple dates by Dr. Sreedhar, Dr. Tabassum, and Dr. Ettema. (PX 18). Of note, the November 23, 2010 note for Petitioner's office visit with Dr. Ettema, an ENT physician, reflects that Petitioner stated very openly that his doctor was filing for disability and stated that he would never be able to work again. (PX 18). According to the Phone Note for contact with Dr. Sreedhar's office dated February 9, 2011, Petitioner stated that he needed a letter dictated for his lawyer to state that he needed to be off work from the time he saw Dr. Sreedhar until he saw him again in three months, and that the letter was to be faxed to Petitioner's attorney, Randy Wolter, per the patient's request. (PX 18). The records from SIU Healthcare further reflect that Petitioner called again on February 11, 2011, stating that an off work note from the doctor was supposed to have been faxed to his lawyer dated from last week in January until April and it was not received. (PX 18). The records from SIU Healthcare further reflect that Petitioner called again on February 18, 2011, stating that he needed a letter for his attorney to get workman's comp. (PX 18).

Petitioner was seen at SIU Family Practice Center on October 15, 2010, at which time he was seen for anhydrous exposure. (PX 18A). The records reflect that Petitioner reported that he was very sensitive to all fumes and odors. (PX 18A). The records reflect that Petitioner had not been to the doctor for six years, but he had been taking Prevacid PRN for acid reflux. (PX 18A).

Petitioner underwent a Speech-Language Pathology Evaluation at St. John's Hospital on December 3, 2010. (PX 19). The records reflect that Petitioner presented with characteristics consistent with muscle tension dysphonia, and that Petitioner's voice was severely dysphonic and characterized by a rough and strained vocal quality. (PX 19). The records reflect that it was recommended that Petitioner undergo speech therapy to reduce musculoskeletal tension in the head and neck and train in appropriate patterns of voice production. (PX 19).
Petitioner was seen at St. Francis Hospital on December 8, 2010 for shortness of breath that began at approximately 7:15 p.m. (PX 20). The records reflect that Petitioner was anxious and breathing rapidly, and that he had a CPAP in place. (PX 20). The records reflect that it was noted several times that Petitioner appeared to be anxious. (PX 20).

Petitioner was again seen at St. Francis Hospital on December 21, 2010 at which time Petitioner presented complaining of passing a large amount of bright red blood with a bowel movement approximately 30 minutes prior, and that he had right mid to lower quadrant pain. (PX 20). Petitioner stated that he had no immune system due to having been exposed to anhydrous ammonia in October. (PX 20).

Petitioner returned to St. Francis Hospital on December 26, 2010, at which time Petitioner stated he was having much difficulty moving air and he had been placed on his CPAP by EMS. (PX 20). The records reflect that Petitioner's behavior was anxious. (PX 20).

Petitioner was again seen at St. Francis Hospital on March 27, 2011, at which time Petitioner arrived by ambulance after reporting chest pain. (PX 20). The records reflect that Petitioner was assessed with atypical chest pain and hyperventilation/anxiety. (PX 20).

Petitioner was also seen at St. Francis Hospital on July 20, 2011, at which time Petitioner complained of shortness of breath for one hour. (PX 20). The records reflect that upon arrival Petitioner was alert and oriented, but he was hyperventilating and complaining that his hands were feeling numb. (PX 20). The records further reflect that Petitioner was encouraged to slow his breathing down. (PX 20).

The medical records from Litchfield Family Dentistry entered into evidence at the time of arbitration as Petitioner's Exhibit 21 reflect that Petitioner was seen on December 16, 2010. (PX 21). The records reflect that Dr. Lindsay (who is unrelated to the Arbitrator) was not agreeing that Petitioner's needed treatment as in conjunction with the anhydrous inhalation. (PX 21).

Petitioner was seen at Prairie Cardiovascular Consultants on April 20, 2011 by Dr. Nallamothu for a diagnosis of chest pain and shortness of breath. (PX 22). The records reflect that Petitioner continued to have significant dyspnea on minimal exertion, but he was also now experiencing episodes of chest pains. (PX 22). The records reflect that Petitioner had heartburn prior to his lung injury, and he had taken Prilosec in the past. (PX 22). The records reflect that it was further noted that Petitioner had been on Zantac for the last several months. (PX 22). The records reflect that Petitioner was scheduled for an echocardiographic study, and that Petitioner may need to go for a stress perfusion scan to assess for myocardial ischemia. (PX 22). The records further reflect that Petitioner was assessed with hypertension with tachycardia. (PX 22).

Petitioner was admitted to Touchette Regional Hospital for seizure disorder on August 31, 2011. (PX 24). The records reflect that Petitioner had a known history of seizure disorder and COPD, that he was out of his seizure medication and had not taken it for the past six months, and that he had passed out and was brought to the emergency department by EMS. (PX 24). The records reflect that Petitioner stated that he had seizure disorder in childhood and had grown out of it, but a few years prior when he had head trauma the seizures had returned. (PX 24).

Petitioner was seen at Memorial Hospital in Belleville, Illinois, on October 20, 2011, at which time Petitioner complained of shortness of breath and a sore right arm. It was noted that he was accompanied by a friend who was also experiencing shortness of breath. An emergency department note dated October 21, 2011, states Petitioner had seen his allergist that day at noon and had been given multiple injections of various injections in both arms. (PX 25). Petitioner was again seen there on October 22, 2011, at which time is right arm was swollen and red after receiving allergy shots. The clinical impression was an allergic reaction or cellulitis. (PX 25).

Expert Medical Testimony

Petitioner's treating physician, Dr. Rajagopal Sreedhar, testified by deposition.

Dr. Sreedhar began treating Petitioner after he had been admitted to Memorial Medical Center. The history he had been provided with was from an "outside hospital" and indicated Petitioner had inhaled some anhydrous ammonia which had caused significant shortness of breath and problems speaking. Dr. Sreedhar testified that the report of the doctor was that Petitioner had inhaled some anhydrous ammonia while at work, and that this had caused significant shortness of breath and problems speaking. (PX 23, p. 8). Dr. Sreedhar testified that he had to put Petitioner in a deep sedation and place a breathing tube in order to help him breathe, and that Petitioner was on a ventilator support as well. (PX 23, p. 9). Dr. Sreedhar testified that he has continued to see Petitioner in follow-up after his discharge from the ICU. (PX 23, p. 9). Dr. Sreedhar testified that based on his examination of Petitioner in the hospital and in light of the history that he was given, his working diagnosis was that of acute respiratory failure secondary to inhalational ammonia exposure. (PX 23, p. 10). Dr. Sreedhar further testified that his diagnosis has not changed throughout the period of his care rendered to Petitioner. (PX 23, p. 10).

Dr. Sreedhar testified that Petitioner has had a lot of problems after he was discharged home, and that he has had multiple visits to the emergency room and his clinic. (PX 23, p. 11). Dr. Sreedhar testified that it was his opinion that Petitioner's breathing issues, Reactive Airways Dysfunction Syndrome (*i.e.*, RADS) and changes in voice and hoarseness were all conditions that were secondary to Petitioner's exposure to ammonia, but he was not sure whether Petitioner's sleep apnea was caused by exposure to ammonia. (PX 23, pp. 11-12). Dr. Sreedhar testified that he referred Petitioner to cardiology for testing regarding heart function due to Petitioner's persistent shortness of breath which was unexplained, as well as Petitioner's chest tightness. (PX 23, p. 12). Dr. Sreedhar testified that Petitioner's cardiac workup was negative and did not show any blockages in his heart. (PX 23, p. 13).

Dr. Sreedhar testified that Petitioner's history of smoking and having asthma would not make him more susceptible to injury caused by the anhydrous ammonia. (PX 23, p. 14). Dr. Sreedhar also testified that Petitioner had some changes for asthma in his x-rays and mild COPD, but that should not impair his recovery after exposure to ammonia. (PX 23, p. 14). Dr. Sreedhar testified that Petitioner is on multiple medications to treat his Reactive Airways Dysfunction Syndrome, that Petitioner was placed on multiple inhalers for his nose, and anti-allergy medications because some people have a tendency to acquire new allergies. (PX 23, pp. 14-

15). Dr. Sreedhar testified that various medications were prescribed to alleviate some of the bronchospasm and the symptoms of shortness of breath, wheezing and coughing. (PX 23, p. 15). Dr. Sreedhar further testified that Petitioner has had some ups and downs with his response to treatment, and that this was common with inhalation lung injury. (PX 23, p. 16). Dr. Sreedhar further testified that Petitioner has had multiple episodes of exacerbation of his condition which required medications, and that Petitioner had been waxing and waning for the past few months. (PX 23, p. 16).

Dr. Sreedhar testified at the time of his deposition on August 18, 2011 that he last saw Petitioner on June 14, 2011, and that his concern was that Petitioner would have the waxing and waning condition probably for many years given the nature of the exposure and the way he had reacted since October of 2010. (PX 23, p. 17). Dr. Sreedhar testified that Petitioner's description of symptoms and complaints have been consistent with his diagnosis throughout, and that his re-examinations have also been consistent with the original diagnosis. (PX 23, pp. 17-18).

On cross-examination, Dr. Sreedhar testified that he was not able to speak with Petitioner at the time of the initial consult as to the alleged anhydrous ammonia exposure due to Petitioner's intubation status. (PX 23, p. 23). When asked about witness testimony that Petitioner never said he inhaled any ammonia, that Petitioner never said that he came into physical contact with any ammonia, that Petitioner did not appear to be in any distress, that Petitioner did not cough or show any signs of respiratory issues nor did Petitioner report that anything had occurred at the plant that day involving anhydrous ammonia, Dr. Sreedhar testified that such testimony would not have any affect on his opinions regarding causation because he saw the signs and symptoms that indicated exposure to a chemical substance causing significant injury to the throat and acute respiratory distress. (PX 23, pp. 24-25). Dr. Sreedhar testified that it was possible that Petitioner was exposed to some substance other than anhydrous ammonia on the date of the alleged accident, but he noted that Petitioner had a lot of swelling and edema after the tube was taken out and some changes on x-ray that were suggestive of possible exposure to ammonia. (PX 23, p. 25).

Dr. Sreedhar conceded on cross-examination that he would expect a person suffering from an anhydrous ammonia inhalation injury to start having respiratory issues shortly after breathing it in. (PX 23, p. 25). Dr. Sreedhar further testified, however, that the majority of his patients ignore it until they are acutely ill. (PX 23, p. 26). Dr. Sreedhar testified on cross-examination that if anhydrous ammonia came into direct contact with the skin, he would expect to see burns. (PX 23, pp. 26-27). Dr. Sreedhar testified on cross-examination that no burns were noted on Petitioner's skin or body during his examination during the course of the hospitalization, but the lack of burns suggested to him that there may not have been physical contact. (PX 23, p. 27).

Dr. Sreedhar testified on cross-examination that the apical pulmonary emphysema noted on the CT of the chest performed on October 27, 2010 was not caused by any alleged anhydrous ammonia exposure, but was rather due to a chronic process such as tobacco smoke. (PX 23, p. 28). Dr. Sreedhar testified that the Reactive Airway Dysfunction Syndrome could be caused by a number of things other than any kind of inhalation injury secondary to exposure to a chemical, including postviral cases or exposure to other chemicals, such as bleach or any caustic substance which is inhaled. (PX 23, p. 32).

Dr. Sreedhar further testified on cross-examination that it was per Petitioner's request that he authored the off work letter dated February 16, 2011, and that he also at Petitioner's request authored the note on June 14, 2011 taking Petitioner off work for an additional three months. (PX 23, pp. 33-34). Dr. Sreedhar testified that Petitioner did not mention to him that light-duty work was available with Respondent. (PX 23, p. 34). Dr.

Sreedhar testified that a light duty position that was in a clean, sterile environment away from chemicals or dust could be considered. (PX 23, pp. 34-35).

The Section 12 Independent Medical Examination Report of Dr. Glennon Paul dated January 13, 2011 was entered into evidence at the time of arbitration as Respondent's Exhibit 11, and the Records Review Report of Dr. Paul dated October 11, 2011 was entered into evidence at the time of arbitration as Respondent's Exhibit 12. Additionally, the Section 12 examination report of Dr. Paul dated October 20, 2011, was entered into evidence at the time of arbitration as Respondent's Exhibit 13, and the deposition transcript of Dr. Glennon Paul was entered into evidence at the time of arbitration as Respondent's Exhibit 14.

According to Dr. Paul's testimony at the time of his deposition, he performed the first Section 12 examination on January 13, 2011, a records review on or about October 11, 2011, and a second Section 12 examination on October 20, 2011. (RX 14, p. 5). Dr. Paul testified that his specialty in the practice of medicine is that of internal medicine, critical medicine, and allergy and immunology. (RX 14, p. 5). Dr. Paul testified that he is licensed to practice medicine in both Illinois and Missouri. (RX 14, p. 5). Dr. Paul further testified that less than one percent of his medical practice consists of the performance of either independent medical examinations or records reviews. (RX 14, pp. 7-8).

With respect to the initial Section 12 examination performed on January 13, 2011 (which was entered into evidence at the time of arbitration as Respondent's Exhibit 11), Dr. Paul testified that he reviewed the x-ray interpretive reports for the various chest x-rays performed at Memorial Medical Center. (RX 14, p. 11). Dr. Paul testified that his review of the x-ray reports revealed that Petitioner did not have RADS (*i.e.*, Reactive Airway Disease Syndrome), as there were no infiltrates of the lungs at all. (RX 14, p. 12). Dr. Paul explained that when there is a severe external injury such as that received from chlorine, anhydrous ammonia or some other irritating chemical, there is typically severe inflammation of the lungs. (RX 14, p. 12). Dr. Paul further explained that edema results from the alveoli, and the reaction is so severe that the airways become asthmatic for years afterwards. (RX 14, p. 12).

With respect to the initial Section 12 examination performed on January 13, 2011, Dr. Paul testified that Petitioner reported to him and he also gleaned from the medical records that Petitioner apparently took at least one breath of anhydrous ammonia, which Petitioner called a "heavy exposure." (RX 14, p. 13). Petitioner reported that it did not cause him problems except some difficulty with wheezing, coughing and shortness of breath that night, at which time he went to the emergency room at Memorial Medical Center where he was intubated. (RX 14, p. 13). Dr. Paul testified that the indications for intubation were not clear. (RX 14, p. 13). Dr. Paul testified that Petitioner was in some severe respiratory distress, but he did not know whether Petitioner had abnormal blood gases that would have made intubation necessary but nevertheless Petitioner was intubated. (RX 14, p. 13). Dr. Paul noted that Petitioner was kept on a respirator for approximately three to four days, after which he was discharged on no medication. (RX 14, p. 14). Dr. Paul noted that in the hospital Petitioner had no evidence of any type of pneumonitis or any other lung injury. (RX 14, p. 14).

Dr. Paul testified that it was his understanding that Petitioner was then placed on various medications for symptoms of wheezing, coughing, and shortness of breath, as well as having been given a sleeping aid, an anti-inflammatory and multiple medications for anxiety. (RX 14, p. 14). Dr. Paul further testified that Petitioner was also given various medications for gastroesophageal reflux as well. (RX 14, p. 14). Dr. Paul testified that the Spiriva, Symbicort and Singulair were medications typically used for asthma, but Petitioner had no evidence of asthma. (RX 14, p. 14).

Dr. Paul testified that at the time of the initial Section 12 examination in January 2011, Petitioner discussed his past medical history, which included having had asthma as a child, particularly in the summer months when he was exposed to pollen. (RX 14, p. 15). Petitioner told Dr. Paul that his asthma was much worse now than that he had previously experienced when exposed to pollen. (RX 14, p. 15). Dr. Paul testified that the physical examination performed on January 13, 2011 revealed Petitioner to be morbidly obese, but no other abnormalities were found on physical exam of his chest. (RX 14, pp. 15-16). Dr. Paul testified that the pulmonary function study was normal, and that Petitioner's Methacholine Stimulation Test revealed findings compatible with bronchitis secondary to cigarette smoking. (RX 14, pp. 16-17). Dr. Paul testified that the Methacholine Stimulation Test was negative for the presence of asthma. (RX 14, pp. 17-18).

Dr. Paul testified that upon completion of his review of the medical records, having taken a history from Petitioner and having performed the physical examination on January 13, 2011, the only diagnosis that he rendered was that of dyspnea or shortness of breath. (RX 14, p. 18). Dr. Paul testified that there were several reasons for Petitioner's dyspnea, which included his obesity and possible irritation of bronchitis secondary to exposure to his environment at work. (RX 14, pp. 18-19). Dr. Paul further testified that he had no chance to review the laryngoscopies performed by both of the ENT physicians at the time of the original IME, and that in retrospect there was a good chance that much of Petitioner's dyspnea was due to hyperventilation syndrome. (RX 14, p. 19). Dr. Paul that he dyspnea was not due to any Reactive Airway Disease or asthma. (RX 14, p. 19).

Dr. Paul testified that at the time of the first Section 12 examination, he was not sure if Petitioner's condition of ill-being was causally related to the alleged anhydrous ammonia exposure because he was not aware of the laryngoscopy and he thought at that time that his opinion on whether Petitioner could be returned in any capacity was that he thought Petitioner could go back to light duty, but he thought the biggest limitation was the fact that Petitioner was deconditioned and had gained a lot of weight. (RX 14, p. 21).

With respect to the records review report dated October 11, 2011 (which was entered into evidence at the time of arbitration as Respondent's Exhibit 12), Dr. Paul testified that his report referenced the additional medical records reviewed in addition to those previously referenced in the first IME report. (RX 14, p. 23). Dr. Paul testified that upon his review of the extensive additional medical records back in October 2011, his assessment of Petitioner's condition included that of anhydrous ammonia exposure with laryngitis with a period of intubation at Memorial Medical Center, with the laryngitis resolved as of January 2011. (RX 14, pp. 24-25). Dr. Paul further testified that he also rendered a diagnosis by way of history of muscle tension dysphonia which was associated with anxiety, and that Petitioner had hyperventilation syndrome which was associated with anxiety. Dr. Paul further testified that Petitioner had sleep apnea, gastroesophageal reflux disease and a history of childhood asthma. (RX 14, p. 25). Dr. Paul testified that he was of the opinion that the intubation and treatment in the hospital was related to the alleged anhydrous ammonia exposure, but the muscle tension dysphonia, hyperventilation syndrome, sleep apnea, gastroesophageal reflux disease and history of childhood asthma were not related to the alleged anhydrous ammonia exposure. (RX 14, pp. 26-27).

Dr. Paul testified that the laryngoscopy performed in January 2011 was significant to him in that there was nothing but little granulomas which could have been due to the intubation but could also have been related to his chronic reflux esophagitis. (RX 14, p. 27). In summary, Dr. Paul testified that he was of the position that any treatment rendered for Petitioner's laryngitis could have been related to the alleged anhydrous ammonia exposure, but any other treatment was not related in light of Petitioner's other medical conditions. (RX 14, pp. 27-28). Dr. Paul further clarified that the fact that Petitioner's laryngoscopy was normal as of January led him to believe that any symptoms Petitioner experienced after that time was not related to his alleged accident. (RX

14, pp. 28-29). Dr. Paul further testified that he believed that Petitioner had reached maximum medical improvement as of January 2011, and that he believed that Petitioner could work on a modified basis in that he suggested that Petitioner avoid irritating gases because it would bother him psychologically. (RX 14, p. 30).
With respect to the second Section 12 examination performed on October 20, 2011 (the report for which was entered into evidence at the time of arbitration as Respondent's Exhibit 13), Dr. Paul testified that Petitioner was being followed by Dr. Sreedhar, Dr. Tabassum, Dr. Ettema and a speech therapist at St. John's. (RX 14, p. 34). Dr. Paul noted that it was his understanding that Dr. Sreedhar thought Petitioner had asthma and stated that Petitioner had a positive Methacholine Stimulation Test. (RX 14, p. 34). Dr. Paul testified, however, that when he looked at the Methacholine Test, it was not positive and that effort was quite low. (RX 14, p. 34).
With respect to the physical examination performed at the time of the second Section 12 examination, Dr. Paul testified that the findings were all completely normal, including the evaluation of the chest which revealed no asthmatic findings at all. (RX 14, p. 35). Dr. Paul testified that based upon his review of the various medical records, having taken a history from Petitioner and having performed the second physical examination, his diagnosis of Petitioner's condition was that of anhydrous ammonia with laryngitis lasting approximately three months and having been completely resolved by January 2011 on repeat laryngoscopy; hyperventilation syndrome secondary to anxiety; sleep apnea under treatment at home with CPAP; gastroesophageal reflux disease; and a history of childhood asthma. (RX 14, p. 36).

Dr. Paul testified at the time of his deposition that he had an exchange with Petitioner at the time of the second Section 12 examination. Specifically, Dr. Paul testified that he told Petitioner that he did not have asthma and that the medicines were not going to do him any good, that his shortness of breath was due to his anxiety and obesity, and that he had no damage resulting in asthma that kept him from going back to work. (RX 14, p. 37). Dr. Paul testified that he suggested to Petitioner that he did not need an asthma doctor but rather he needed an ENT to reevaluate his common problem of muscle tension dysphonia which was not related to his exposure; that he continue with the exercises that the speech therapist gave him; and that he see a psychologist to help teach him to do relaxation so he did not hyperventilate. (RX 14, p. 37). Dr. Paul testified that Petitioner did not like these suggestions at all, and that he was going to make "them" pay for any damages that they caused him. Dr. Paul testified that he told Petitioner there was no damage, and Petitioner did not like the idea of returning to work rather than sitting at home. (RX 14, pp. 37-38). Dr. Paul further testified that he thought that returning Petitioner to work may help him, rather than sitting at home with his mother. (RX 14, pp. 38-39).
On cross-examination, Dr. Paul testified that his review of the medical records suggested that he did not know if Petitioner was intubated because of clinical or physiological reasons. (RX 14, p. 42). Dr. Paul testified that the records suggested that Petitioner was short of breath and hyperventilating, and sometimes in that situation you intubate so as to get control of the airways. (RX 14, p. 42). Dr. Paul testified on cross-examination that Petitioner had several clinical symptoms, but Petitioner never had any blood gas findings compatible with requiring intubation. (RX 14, p. 42). Dr. Paul further testified that his suspicion was that Petitioner was exhibiting hyperventilation anxiety at that time. (RX 14, pp. 42-43). Dr. Paul further testified that it was reasonable to expect that patients having issues with shortness of breath would be anxious about their condition. (RX 14, p. 43).

On further cross-examination, Dr. Paul testified that he agreed that Dr. Sreedhar had diagnosed Petitioner as having Reactive Airways Dysfunction Syndrome, but he clarified that RADS would show up on an x-ray of the chest. (RX 14, pp. 48-49). Dr. Paul testified that there were studies that showed that people who have clear lungs do not have Reactive Airway Syndrome coming on after their inhalation of chemicals. (RX 14, p. 49). Dr. Paul further testified that the fact that Petitioner had a negative Methacholine Stimulation Test was further supportive of his opinion that Petitioner did not have RADS. (RX 14, p. 50). Dr. Paul further testified on cross-

examination that an individual suffering from RADS is not more susceptible to developing allergies. (RX 14, p. 52).

Petitioner was given deep sedation and endotracheal intubation. Petitioner had significant swelling and edema in his vocal cords and his upper airways. Petitioner also underwent a laryngoscopy which confirmed the edema. Petitioner was diagnosed with acute respiratory failure secondary to inhalational ammonia exposure. Dr. Streedhar opined that Petitioner's problems speaking, breathing, and reactive airway syndrome were all the result of his inhalation of anhydrous ammonia. On cross-examination, Dr. Streedhar testified that Petitioner was already intubated when he first examined him and was unable to speak. The history he obtained was taken from the medical records or conversations with other physicians. The only history he had was that Petitioner had been exposed to ammonia. (PX 23, p. 29).

The Arbitrator concludes:

Petitioner failed to prove he sustained an accident on October 8, 2010, that arose out of and in the course of his employment with Respondent. Petitioner's testimony at arbitration was not credible. It was not corroborated by, or consistent with, the medical records. Dr. Streedhar's diagnoses are based upon a history that Petitioner inhaled anhydrous ammonia. That history was garnered from the medical records and/or other physicians who had treated or seen Petitioner prior to his intubation. The Arbitrator is not convinced that Petitioner inhaled anhydrous ammonia on October 8, 2010. That conclusion is based upon the credible testimony of witnesses Fields and Wilson as well as a careful review of the earliest medical records of October 8, 2010. Petitioner's testimony as to what happened at work is contrary to the histories contained in the medical records or the testimony of witnesses Fields and Wilson. Petitioner did not have any physical contact with anhydrous ammonia. Furthermore, the credible evidence does not indicate he was inhaling and breathing anhydrous ammonia for nine hours that day or less. In addition, Petitioner's conduct and behavior that day was inconsistent with what one would expect if there had been an inhalation/exposure. Petitioner continued to work, finished his workday, smoked a cigarette, and drove home. At no time did he exhibit any signs of inhalation. If Petitioner was working with Wilson on October 8, 2010, and inhaling fumes, why didn't Wilson feel ill also?

It is not only Petitioner's account of what happened at work that is suspicious, so is his testimony as to what happened thereafter. Petitioner's testimony about experiencing chills while driving back to Springfield is questionable. He mentioned it to no one when he turned in his time card. It was never included in the history to the telephonic triage nurse at Springfield Clinic. Petitioner indicated to the Springfield Clinic telephonic nurse that his problems began while driving home after having had dinner with his fiancé and running an "errand." Petitioner also testified he called 911 regarding his symptoms. The latter is incorrect. The former, for reasons set forth further herein, raises additional questions. According to the Springfield Clinic Condensed Report of October 8, 2010, Petitioner called the Clinic, not 911. According to the same report, it was the telephonic triage nurse who actually called 911 while speaking with Petitioner. Again, the history Petitioner provided to the triage telephonic nurse was different than that which was ultimately relied upon at Memorial Medical Center, Dr. Streedhar, or Dr. Paul. Based upon the history Petitioner provided to the telephonic triage nurse, one could reasonably infer she believed Petitioner had suffered an anhydrous ammonia exposure as Petitioner had described a physical contact. The triage nurse also noted she went ahead and called the emergency room at Memorial – one could reasonably infer that under these emergency circumstances she relayed a history/problem of an anhydrous exposure and no other details. The telephonic nurse documents that Petitioner was feeling nauseous when he called and then began violently vomiting. In the subsequent medical records, Petitioner denied any history of vomiting and nausea. It is also interesting that the telephonic nurse reported Petitioner's fiancé complaining of similar symptoms to her during the phone call. Why was she experiencing similar

symptoms? In sum, everyone has assumed an exposure to anhydrous ammonia occurred. The Arbitrator is not convinced.

The Arbitrator also notes that while Petitioner introduced the ambulance bill into evidence, there are no ambulance records or EMT records in evidence. Petitioner testified emergency personnel showed up, had him undress, and transported him to the hospital emergency room. These records could have corroborated his testimony and history. Their absence suggests they may not have been favorable to Petitioner.

On the issue of causation, the Arbitrator further finds Petitioner failed to prove that his current condition of ill-being is causally connected to his alleged accident. The Arbitrator is not persuaded by the opinions of either Dr. Paul or Dr. Sreedhar as both rendered opinions based upon incorrect information or assumptions. Additionally, Petitioner has continued to treat with numerous physicians and hospitals for various conditions but failed to provide credible opinions showing such treatment was reasonable, necessary, or causally related to the alleged accident.

Based upon the foregoing, the Arbitrator finds that Petitioner ***did not*** sustain an accident that arose out of and in the course of his employment with Respondent, and that Petitioner's condition of ill-being ***is not*** causally related to the accident. Petitioner's claim for compensation is denied.

Respondent asserted entitlement to several credits at the time of arbitration. Respondent is entitled to a credit for all medical bills paid as reflected on Respondent's Exhibit 5, to a credit for all benefits paid out on this claim in the form of TTD benefits as reflected on Respondent's Exhibit 4, and to a credit for permanency advancements as reflected on Respondent's Exhibit 6.

****

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

Rick Brown,

Petitioner,

vs.

NO. 10WC43632

Morgan County Sheriff's Department,

14IWCC0554

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 27, 2013 is hereby affirmed and adopted.

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: JUL 10 2014
SJM/sj
o-6/5/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BROWN, RICK
Employee/Petitioner

Case# **10WC043632**

MORGAN COUNTY SHERIFF'S DEPT
Employer/Respondent

14IWCC0554

On 8/27/2013, 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:

2333 WOODRUFF JOHNSON & PALERMO
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

2337 INMAN & FITZGIBBONS
LAUREN WANINSKI
33 N DEARBORN SUITE 1825
CHICAGO, IL 60602

14IWCC0554

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

RICK BROWN
Employee/Petitioner

v.

MORGAN COUNTY SHERIFF'S DEPARTMENT
Employer/Respondent

Case # **10** WC **43632**

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 **McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **August 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 _____

14IWCC0554

FINDINGS

On **September 27, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident 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 $**34,921.36**; the average weekly wage was $**671.56**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**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 Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment on September 27, 2010, and the claim 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.

D. Ryan McCauley
Signature of Arbitrator

August 21, 2013
Date

AUG 27 2013

14IWCC0554

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICK BROWN,	)	
	)	
Petitioner,	)	
	)	No. 10 WC 43632
v.	)	
	)	Arbitrator McCarthy
MORGAN COUNTY SHERIFF'S DEPT.	)	
	)	
Respondent.	)	

DECISION OF ARBITRATOR

STATEMENT OF FACTS

A. TESTIMONY OF PETITIONER

Petitioner was employed as a correctional officer for the Morgan County Sheriff's Department; his responsibilities included taking care of inmates, booking, feeding, maintenance, and discipline. Petitioner also testified that he has physical confrontations with the inmates on a weekly basis. (Tx. 9-10).

Petitioner first complained of right arm pain on September 2, 2010 at which time he presented to his family physician, Dr. David Coultas. He presented to Dr. Coultas with complaints of right arm pain from the shoulder down to the elbow with shooting pain down to the wrist, which was present for three weeks. Dr. Coultas' diagnosis was right shoulder pain/impingement syndrome. Dr. Coultas' treatment plan included Ibuprofen and Prednisone for the shooting pains, but not to be taken together unless absolutely needed. (Tx. 23-24); RX 3).

On September 9, 2010, Petitioner called Dr. Coultas' office and advised his right shoulder pain was not improving. As a result, an MRI of the right shoulder was ordered by Dr. Coultas. (RX 3).

On September 20, 2010, an MRI of the right upper extremity was performed; the history on the MRI report noted shoulder pain. The reading radiologist's MRI impression indicated a tiny non retracted incomplete full thickness tear of the anterior fibers of the supraspinatus at its insertion in the humeral head; additional tiny bursal surface tear involving the mid fibers of the supraspinatus tendon slightly proximal to its insertion in the humeral head; moderate osteoarthritis of the right acromioclavicular joint. (RX 3).

As a result of the MRI impression, Dr. Coultas provided a referral to an orthopedist, Dr. Albracht, on September 22, 2010. (RX 3).

On September 27, 2010, Petitioner stated he was working for the sheriff's department when inmates broke into a fight. The officers were ordering the inmates to lockdown, but one inmate refused to be put in his cell. Petitioner stated this inmate was over six foot and 200 something pounds. Petitioner and another correctional officer attempted to put the inmate in his cell which resulted in a physical struggle. Petitioner testified he was on the inmate's right side when he was thrown into a wall. He claimed he wrestled with the inmate and jumped on him, ending up on the floor. Petitioner stated they were able to force the inmate back into his cell with the help of the Jacksonville Police Department. (Tx. 12-14).

Following the altercation, Petitioner claimed his right arm became painful with pain shooting down the arm with pain and numbness in his middle fingers. He claimed these were new symptoms. (Tx. 14-15).

On September 29, 2010, Petitioner presented to Dr. Douglas Albracht upon referral from Dr. Coultas. On that date, Petitioner completed a Patient History report. Petitioner reviewed and testified that he completed this report on September 30, 2010. Petitioner read into evidence his answer to the following questions:

What is the main reason you came to the office today? "Pain right rotator cup"
When do your symptoms occur? "In last 3 months w/ progression"
How long have you had these symptoms? "3 months"
Did you have an injury? "No"

Petitioner testified that he marked the box for 'work-related.' He stated he could not explain this discrepancy. (Tx. 16).

Petitioner listed Ibuprofen x 6 200mg on the Patient History form under 'All Current Medications.' (RX 2).

Dr. Albracht's September 30, 2010 report notes no mention of a work injury. Dr. Albracht noted Petitioner presented for right shoulder pain which had been present for the past three months. He reported that he had been taking Ibuprofen but it made him sick. After reviewing the September 20, 2010 MRI report and performing a physical examination, Dr. Albracht provided a diagnosis of a complete tear of the right rotator cuff tendon. As a result, he recommended an open decompressive acromioplasty with distal clavicle resection and rotator cuff repair. No further diagnostic studies were performed. (RX 2) This procedure was recommended by Dr. Albracht without knowledge of the alleged September 28, 2010 work incident. Dr. Albracht noted Petitioner should remain out of work for at least 3 months secondary to the nature of his job. Petitioner reported he did not think there was a light duty available in his job position.

Petitioner underwent a decompressive acromioplasty, distal clavicle resection and repair of rotator cuff tendon in the right shoulder by Dr. Albracht on October 6, 2010. In the section of the operative report titled, 'History and Indications,' Dr. Albracht noted Petitioner's three month history of right shoulder pain. He noted Petitioner denied any specific trauma or injury. No diagnostic studies were performed between the September 20, 2010 MRI and the October 6,

2010 surgery. The pre- and post-operative diagnosis was impingement syndrome with AC arthrosis right shoulder; rotator cuff tear right shoulder. (RX 2).

Petitioner testified that he told Sheriff Randy Duvendack he had been injured and was having surgery. He requested light duty until October 6, 2010, the date of his surgery. According to Petitioner, the sheriff stated he did not have light duty available and Petitioner was removed from work. Petitioner testified he "explained to him about the incident in the block and the pain...and had to go see (his) family doctor and this was the end result." (Tx. 17).

Petitioner stated he underwent the surgery (on October 6, 2010) and was removed from work by his doctor. He did not follow up with his family doctor, Dr. Coultas, but did follow up with Dr. Albracht. (Tx. 18).

Petitioner followed up with Dr. Albracht two days status post-surgery on October 8, 2010. The doctor noted the petitioner was to be seen in the physical therapy department. There was no mention of a work incident or work injury noted in the October 8, 2010 medical report. (RX 2).

On October 15, 2010, Petitioner returned to Dr. Albracht for post-surgical examination. A rash had developed under the right armpit and down the inside of his forearm. Petitioner put cream on the rash which he had at home. The doctor believed the rash was likely secondary to the shoulder immobilizer. He was to continue with cortisone cream, discontinue the shoulder immobilizer. He was to continue his pendulum exercises and return in one week for staple removal. There was no mention of a work incident or work injury noted in the October 15, 2010 medical report. (RX 2).

Petitioner returned on October 22, 2010 to Dr. Albracht for postsurgical examination. It was noted he had continued progress with the pendulum exercises; the rash had almost resolved. He had been attending physical therapy. The impression was status post repair of right rotator cuff tendon. Dr. Albracht noted he was doing very well. He was to continue physical therapy. Petitioner wanted to get back to work in the next four weeks. He was to follow up in four weeks. There was no mention of a work incident or work injury noted in the October 22, 2010 medical report. (RX 2).

On November 19, 2010, Petitioner advised Dr. Albracht he was 98% better. He noted his primary care physician diagnosed his rash as a yeast infection and prescribed powder. Dr. Albracht noted he was doing tremendously well and that Petitioner was quite pleased with the result. He reported no shoulder pain and no numbness or tingling down the arm. He was finished with physical therapy and stated he was ready to return to work on Monday. Dr. Albracht noted Petitioner was able to return to his regular duties without restrictions and return to work on Monday. He was to return to the office as needed. There was no mention of a work incident or work injury noted in the November 19, 2010 medical report. (RX 2).

On February 7, 2011, Petitioner's attorney, Jay Johnson, authored a letter to Dr. Albracht advising of the pending workers' compensation claim and requesting a causation opinion. Mr. Johnson summarized Petitioner's accident and his symptoms. A copy of Mr. Johnson's letter is

contained in Dr. Albracht's subpoenaed records; the letter was not included in Petitioner's trial exhibits. (RX 2).

In response to Mr. Johnson's letter, Dr. Albracht authored a letter to Mr. Johnson dated June 13, 2011. In his letter, Dr. Albracht noted that according to Mr. Johnson's letter, Petitioner had an incident on September 27, 2010 involving an inmate. He opined that the incident with the inmate could have aggravated or accelerated his condition to the right shoulder. (RX 2).

Petitioner returned to Dr. Albracht on July 21, 2011. Dr. Albracht's report notes Petitioner is a work comp follow up. This is the first mention of any work related involvement in Dr. Albracht's medical reports. Petitioner reported pain more in the triceps muscle and a knot in the cervical trapezial area. He reported spasms in the right triceps for approximately three months; he denied any trauma or previous problems. Petitioner reported doing his regular job without difficulty and tries to use the left arm more than the right. Dr. Albracht's impression was distal triceps spasm, intermittent most likely due to nerve irritation proximally in the cervical spinal area; cervical trapezial spasm, right shoulder, intermittent possibly due to same etiology; status post right rotator cuff repair, doing well. Dr. Albracht noted no problem with the rotator cuff repair. He noted the intermittent spams may be caused from neurologic impingement. Petitioner had no numbness or tingling down the arm. Dr. Albracht noted Petitioner had been able to return back to his regular duties without restrictions. He was to be seen on an as-needed basis. (RX 2).

Petitioner stated that he was released from care and returned to full duty work as of November 22, 2010. Petitioner testified he had been working full duty since that time. He underwent a follow up visit in July 2011 and had not presented for medical treatment since that time. (Tx. 18-20).

Petitioner testified he presently experienced some weakness when lifting objects at work such as rolled up mattresses on shelving above his head. He stated he takes Ibuprofen for his pain. Despite this testimony, Petitioner admitted he has worked in a full duty capacity as a Correctional Officer since his return to work in November 2010. He testified that he performs the same job duties that he performed before the alleged accident date including physical altercations with inmates.

B. TESTIMONY OF DOUGLAS ALBRACHT, D.O.

Dr. Douglas Albracht, general orthopedist, testified via evidence deposition on March 27, 2013. (PX 1). Dr. Albracht testified that he first saw the petitioner on September 30, 2010 upon referral from Dr. Coultas. Dr. Albracht stated that it is his regular practice to obtain a full and complete history from a patient prior to rendering treatment. He stated that it is important to obtain as much information as possible in order to provide appropriate medical treatment. At the time of the petitioner's first visit, he completed a Patient History Report. Dr. Albracht reviewed the Patient History Report. He testified that the petitioner provided a history of pain in the right rotator cup with symptoms occurring in the last three months with progression. He noted that he wrote 'repetitious' next to the petitioner's handwritten history. Dr. Albracht testified he was not provided with a history of a workplace accident at that time involving an incident with an

inmate; he testified the only indication of the petitioner's work was noted in a question that asked if it was a work-related problem to which the petitioner responded 'yes.' (PX 1).

Dr. Albracht also testified that it was his regular practice to and important to obtain a complete medical and surgical history prior to rendering treatment to a patient. He stated that he did not know if he reviewed Dr. Coultas' medical records prior to providing medical treatment to the petitioner. (PX 1).

Dr. Albracht stated he reviewed the September 20, 2010 MRI report and film. He testified that the radiologist interpretation was a tiny incomplete tear. Dr. Albracht testified that after physical examination, his impression was that the petitioner had impingement with rotator cuff tendonitis. After review of the MRI scan, Dr. Albracht's impression was a small full-thickness rotator cuff tear. As a result of same, he recommended surgery of the right shoulder. (PX 1).

On October 6, 2010, Dr. Albracht performed surgery on the right shoulder. He testified the petitioner had a full thickness rotator cuff tear. Dr. Albracht reviewed the operative report which he dictated. He read the History and Indications section noting that the petitioner denied any specific trauma or injury. He noted that there was no mention of a work-related incident noted on the operative report. He testified it is his normal practice to remove post-surgical patients from work. (PX 1).

Dr. Albracht testified that Petitioner continued to treat with him for post-surgical follow up visits on October 8, 15, 22, and November 19, 2010. He noted there was no mention of a work-related incident in any of those reports. He was prescribed physical therapy. Petitioner was provided with a shoulder immobilizer for a short period of time. (PX 1).

On November 22, 2010, Petitioner was released from care and returned to work full duty. Dr. Albracht admitted there was no mention of a work-related incident in this report. (PX 1).

Dr. Albracht testified that he received a letter from Mr. Jay Johnson dated February 7, 2011 requesting an opinion concerning medical causation for the petitioner's workers' compensation claim. He admitted that this was the first time he was made aware of a pending workers' compensation claim. He stated that he authored a letter on June 13, 2011 in response to Mr. Johnson's request. He testified that the opinions contained in the letter still stand. He admitted that it is not his normal practice to provide opinion letters unless they are requested. (PX 1).

The next time Dr. Albracht saw the petitioner was on July 21, 2011 for follow up of the rotator cuff tear. The medical report noted a work comp follow-up on the right shoulder. Dr. Albracht admitted this was the first time he noted the petitioner was a work comp patient. He further noted that there was no mention of a work accident occurring on September 27, 2010. The shoulder was doing well at that time. Petitioner had complaints of spasms in the triceps muscle for three months which Dr. Albracht noted was not related to the rotator cuff tear. Petitioner's full duty work status was continued. (PX 1).

Dr. Albracht reviewed the Jail Incident Report. He testified that the report described a struggle, but did not describe the exact positions of the petitioner. He opined that a struggle with an individual described in the report could worsen a shoulder problem and create a tear. (PX 1).

Dr. Albracht testified that the petitioner's rotator cuff tear was a normal looking tear for an acute type tear. He claimed that an acute type tear may not be very painful depending on the person. He admitted that it was possible for someone to have an acute type rotator cuff tear for three months before getting it treated. He testified that the basis of his recommendation for the right shoulder surgical intervention was based on his physical examination of the petitioner and the diagnostic findings found on the MRI report and film. (PX 1).

C. TESTIMONY OF STEPHEN F. WEISS, M.D.

Dr. Stephen F. Weiss, orthopedic and arthroscopic surgeon, testified via evidence deposition on May 29, 2013. (RX 1). Dr. Weiss testified that he performed an independent medical examination of the petitioner on December 14, 2011 and contemporaneously created a report. The report is dated December 21, 2011. Dr. Weiss authored a supplemental report dated March 20, 2013.

Dr. Weiss testified that he stopped treating patients after turning 65. He was 69 years old at the time of the evidence deposition. He testified that he is the medical director of PMRI, Peck Medical Resources, Incorporated. PMRI is a company that facilitates independent medical evaluations in Wisconsin, Illinois, Arizona and Utah. (RX 1).

Dr. Weiss stated he provided a synopsis from his own summary. Prior to obtaining a history from the petitioner, he addressed the inconsistencies regarding whether or not a traumatic injury had occurred as well as the documented history of right rotator cuff pain existing for several months prior to the alleged accident date. The petitioner provided history of an incident occurring on September 27, 2010. Dr. Weiss testified that he reviewed medical records from Dr. Albracht/Springfield Clinic, the Employer's First Report of Injury, Mr. Johnson's February 7, 2011 letter, and the September 20, 2010 MRI report. Dr. Weiss noted that the petitioner had diabetes, which is a comorbidity for rotator cuff tears. (RX 1).

Dr. Weiss testified that after obtaining a history from the petitioner and reviewing the medical records, he performed a physical examination. After doing so, he provided a diagnosis of status post rotator cuff repair and Neer/Mumford procedure. He opined that the petitioner's right shoulder diagnosis was not related to the petitioner's employment as a corrections officer with Morgan County. This opinion was based on the fact that the petitioner had right shoulder problems going on for three months, his age and comorbidity of diabetes to make an idiopathic rotator cuff tear common, as well as his denial of a specific traumatic injury in the contemporaneous medical records and dated shoulder pain three months prior to the alleged accident date. (RX 1).

He noted that the MRI of the right shoulder was performed before the alleged injury and was the basis for the need to perform surgery. He testified that there was really nothing found at surgery which was different from the MRI report with the only difference was the term tiny

noted in the report. He explained that the tear must have been a full thickness tear as Dr. Albracht believed it was sufficient to perform surgery on. He noted that if the petitioner had sustained an injury in the September 27, 2010 jail incident which was sufficient to produce a tear of the rotator cuff, the petitioner should have remembered when providing a history to the doctor days later. (RX 1).

Dr. Weiss opined that the petitioner was not in need of any further medical treatment and could return to work full duty. He thought the petitioner had a mild permanent disability regardless of the issue of causation. (RX 1).

Dr. Weiss testified that it was his opinion that the petitioner would have been in need of the October 6, 2010 right shoulder surgery based on the MRI report and the petitioner's three month history of shoulder pain, regardless of the September 27, 2010 incident. He noted that based on his review of Dr. Albracht's medical records, this was Dr. Albracht's belief as well. (RX 1).

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material fact in support of the following conclusions of law:

C. In support of the Arbitrator's Decision as to whether Petitioner sustained an accident which arose out of and in the course of his employment with Respondent, the Arbitrator makes the following findings:

The Arbitrator, after careful consideration of the evidence, finds as a matter of material fact and as a matter of law Petitioner did not sustain an accident within the meaning of the Illinois Workers' Compensation Act.

To obtain benefits under the Act, a claimant must prove by a preponderance of the evidence that she was injured in an accident which arose out of and in the course of her employment. Stapleton v. Industrial Comm'n., 282 Ill.App.3d 12, 668 N.E.2d 15 (5th Dist. 1996).

Petitioner failed to prove his burden that an accident arose out of and in the course of his employment with Respondent with respect to his alleged right shoulder injury. Petitioner testified that he was involved in a physical altercation with an inmate on September 27, 2010. Petitioner submitted a Jail Incident Report showing evidence of an altercation involving Petitioner, his co-worker and an inmate. (PX 3) Petitioner testified he did not author said incident report. (Tx. 28).

According to the incident report, Petitioner was on the right side of the inmate. Petitioner testified that he was thrown up against the wall and wrestled with the inmate. After reviewing same, the Arbitrator notes that while there is evidence of an altercation involving Petitioner on September 27, 2013; there was no mention of an injury to Petitioner's right shoulder mentioned in said report.

The Arbitrator further notes that despite Petitioner's testimony that he sustained injuries to his right shoulder which resulted in new symptoms, the medical records document evidence to the contrary. Petitioner testified that after the incident, he had shooting pain down the arm with numbness and pain in the middle finger and hand. (Tx. 14). On September 2, 2010, approximately three weeks prior to the alleged September 27, 2010 date of injury, Petitioner presented to his family physician, Dr. Coultas, with complaints of right arm pain from the shoulder down to the elbow with shooting pain down to the wrist, which was present for three weeks. (RX 2). The Arbitrator notes that Petitioner's pain complaints and symptoms on September 2, 2010 and September 27, 2010 were exceptionally similar despite Petitioner's claim that they were new symptoms.

Petitioner testified he did not seek immediate medical treatment following the September 27, 2010 incident. He did not present to the emergency room and completed work that day. (Tx. 28).

When Petitioner presented to Dr. Albracht on September 30, 2010, it was from a September 22, 2010 referral from Dr. Coultas. At the time of his presentation, Petitioner denied any trauma or injury and noted pain in his right rotator cuff which was present for three months with progression. Dr. Albracht testified that he wrote "repetitious" next to the petitioner's onset of symptoms note on the report. While Petitioner marked 'yes' to the question 'Is this a work related problem/injury,' he failed to make any report of September 27, 2010 incident. It is clear from the medical records that Petitioner did not present to Dr. Albracht as a result of the September 27, 2010 incident at the jail, but because he had prior problems involving his right shoulder which were noted on the September 20, 2010 MRI report showing a full thickness tear of the right rotator cuff.

Therefore, the Arbitrator finds that Petitioner did not establish that he sustained a compensable accident on September 27, 2010 which arose out of and in the course of his employment with Respondent under a specific injury theory. Petitioner's medical records show evidence of prior rotator cuff tear which was present and identified via MRI prior to the alleged September 27, 2010 date of accident. The incident report, completed by Officer Gregory, shows only that the petitioner was involved in an altercation on said date. It does not corroborate the petitioner's claim that he injured his shoulder in that altercation. Certainly, the absence of any history to Dr. Albracht also means that his testimony and reports provide no corroboration. While the Arbitrator notes that an incident did occur at work on September 27, 2010, the Arbitrator finds that Petitioner did not sustain an accident within the meaning of the Illinois Workers' Compensation Act.

In light of the above conclusion that no accident was proven, the remaining issues become moot. The claim is denied.

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

COLLEEN HOLBROOK,

Petitioner,

vs.

NO: 05 WC 50349

OFFICE TEAMS,

14IWCC0555

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission adopts the findings of fact and conclusions of law contained in the Decision of the Arbitrator filed on September 11, 2013. The Commission, however, modifies the award of attorney's fees pursuant to Section 16 of the Act. The evidence demonstrates that there remain outstanding medical expenses totaling $116,089.56 and outstanding TTD benefits totaling $22,480.62. The Respondent is entitled to a credit of $11,947.20 for TTD paid. The Commission elects to award attorney's fees pursuant to Section 16 of the Act on the outstanding medical expenses and TTD, which total $126,622.98. Therefore, the Commission finds that Petitioner is entitled to attorney's fees pursuant to Section 16 of the Act in the amount of $25,324.60, representing twenty percent of the outstanding medical and TTD. The Commission affirms and adopts all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $319.20 per week for a period of 70-3/7 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 $116,089.56 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and provide for prospective medical care as prescribed by Dr. Timothy Lubenow.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay attorney's fees of $25,324.60, as provided in Section 16 of the Act; $63,311.58, as provided in Section 19(k) of the Act; and, $10,000.00, as provided in Section 19(l) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: JUL 10 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
052
O: 6/24/14

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

HOLBROOK, COLLEEN
Employee/Petitioner

Case# **05WC050349**

OFFICE TEAMS
Employer/Respondent

14IWCC0555

On 9/11/2013, 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:

0140 CORTI ALEKSY & CASTANEDA PC
RICHARD E ALEKSY
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

0208 GALLIANNI DOELL & COZZI LTD
THOMAS J DOELL
20 N CLARK ST SUITE 825
CHICAGO, IL 60602

14IWCC0555

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)

COLLEEN HOLBROOK
Employee/Petitioner

v.

OFFICE TEAM
Employer/Respondent

Case # **05** WC **50349**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **8/20/2013**. 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 **Prospective Medical**

FINDINGS

On the date of accident, **4/21/2003**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$24,897.60**; the average weekly wage was **$478.80**.

On the date of accident, Petitioner was **38** 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 **$11,947.20** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,947.20**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$319.20**/week for **70 3/7** weeks, commencing **1/24/11 through 1/28/11, 10/3/11 through 10/8/11** and **4/26/12 through 8/20/12.** as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of **$116,089.56**, as provided in Section 8(a) of the Act.

Respondent shall pay to Petitioner attorney fees of **$14662.32**, as provided in Section 16 of the Act; **$63,311.58**, as provided in Section 19(k) of the Act; and **$10,000.00**, as provided in Section 19(l) of the Act.

Respondent shall authorize and provide for prospective medical care as prescribed by his treating physician, Dr. Timothy Lubenow.

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

9-3-13
Date

ICArbDec19(b)

SEP 11 2013

STATEMENT OF FACTS

Colleen Holbrook previously testified before this Arbitrator on June 21, 2010. Ms. Holbrook had been diagnosed with CRPS, Chronic Regional Pain Syndrome, and was under the care of Dr. Timothy Lubenow; the disputed issues at that hearing were accident, causal connection, medical services and prospective medical care. An award was entered in favor of Petitioner and affirmed by the Commission.

In the current Request for Hearing, Petitioner alleged that there was lost time from January 24, 2011 through January 28, 2011 and then again from October 3, 2011 through October 8, 2011 and thereafter from April 26, 2012 through the date of the hearing, August 20, 2013. The issue in dispute once again raised by Respondent was causal connection.

Ms. Holbrook testified that subsequent to the hearing on June 21, 2010 she remained under the care of Dr. Lubenow, who provided various modalities of treatment. Her first post-arbitration visit was on July 7, 2010, with Petitioner reporting persistent sciatic pain. The doctor performed an epidural steroid injection and ordered an MRI.

Routine follow-up visits continued over the next months. At the January 19, 2011 appointment, Dr. Lubenow determined that Ms. Holbrook's CRPS symptoms persisted, with pain levels remaining at five out of ten as well as decreased motion and use of her upper extremities. Because of the progressive nature of Claimant's disease and her desire to be more active, the doctor concluded it was important to take an aggressive approach in her medication regimen. Therefore, he recommended she be admitted for a five-day epidural infusion, which took place between January 24, 2011 and January 28, 2011 at Rush University Medical Center.

Following that inpatient intervention, Ms. Holbrook followed up with Dr. Lubenow on March 10, 2011. The doctor noted that Petitioner's pain relief was not as drastic as with past

infusions, her pain being four out of ten, burning in nature in her bilateral upper extremities; he further noted that her boss had cut her workweek to three days per week. Dr. Lubenow placed her on Savella and recommended she return in approximately eight weeks.

Claimant didn't return to see the doctor until the 31st of August. Dr. Lubenow noted that Ms. Holbrook still suffered from burning pain due to her condition, with her pain at a five out of ten level. Exam revealed some weakness in hand grasp bilaterally with tenderness in the forearms to the lower portion of the upper arm above the elbow, and a positive Tinel's over the right carpal tunnel. The diagnosis on that date was chronic neuropathic pain secondary to chronic median neuropathy of the upper extremities bilaterally. Dr. Lubenow increased her Savella dosage and recommended another five-day continuous epidural infusion; if this was not successful, he would consider a spinal column stimulator. The doctor ordered that she avoid repetitive motion of the upper extremities and imposed a 15-pound lifting restriction; she was also directed to wear a splint for symptomatic pain relief and an edema glove for the right upper extremity. Given the fact that Petitioner's job entailed predominantly typing, Dr. Lubenow recommended vocational training to proceed in a different job, which might avoid a trial of spinal cord stimulation as a long-term treatment and might allow her to decrease the reliance on narcotic medications.

Ms. Holbrook was admitted to Rush University Medical Center on October 3rd and stayed until October 8, 2011 for a five-day cervical epidural infusion. Thereafter she was directed to attend physical therapy at the Midwest Hand Care, which commenced on October 24, 2011 and continued through December 14, 2011. She followed up with Dr. Lubenow approximately three months later, on March 14, 2012, where the doctor noted that she continued to have pain as well as decreased motion of her upper extremities. She continued to take

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medication, including Norco, Zanaflex, Welbutrin, Keppra and Buspar, which did allow her to continue to work despite having pain. The doctor's recommendation was to exchange Norco for Percocet but otherwise continue with her medication regimen.

On April 11, 2012, she saw Dr. Lubenow and advised that she would need a referral to Dr. Alvi, her primary care physician, for the Percocet renewal, as required by federal law. On the 26th of April, she saw Dr. Lubenow again. The doctor documented that the last five-day epidural infusion had been "really helpful" and her baseline pain was down to three out of ten; also, the Percocet helped but she was still having pain in the bilateral upper extremities that radiated into the right shoulder and arm. Dr. Lubenow authored a letter to Dr. Alvi referring Claimant to that physician for refills of Percocet and imposed restrictions of avoid repetitive motion, 15-pound maximum weight lifting, sedentary activity and no typing. Respondent was not able to accommodate those restrictions so Ms. Holbrook was required to stop working.

Petitioner saw Dr. Alvi on May 16, 2012 and he wrote a prescription for Percocet. She continued to follow with Dr. Lubenow, seeing him on the 5th of September, again on the 31st of October, and twice in December at the Rush Pain Center. Claimant underwent another five-day epidural infusion from January 21, 2013 through January 27, 2013 at Rush University Medical Center. In follow up thereafter Dr. Lubenow recommended another course of physical therapy; in the meantime she could only tolerate lifting of two pounds. Ms. Holbrook attended two therapy sessions then saw the doctor again on February 14, 2013 where she complained of increased pain in her left lower extremity. The doctor prescribed an EMG to rule out tibial neuropathy and discussed a spinal column stimulator trial.

On March 13, 2013, Petitioner underwent a compulsory medical examination with Dr. Howard Konowitz. Dr. Konowitz, in his deposition and testimony, concluded that Ms. Holbrook

14IWCC0555

did not have CRPS; the Arbitrator notes, however, that this diagnosis was established by the prior final Commission decision in this matter. Dr. Konowitz also alluded to the fact that he felt Dr. Lubenow was not following the Budapest protocol. On cross-examination, though, the doctor was shown a study which established that Dr. Lubenow was, in fact, one of the participants in the Budapest study which developed this protocol. Dr. Konowitz nonetheless concluded that Claimant could work light to medium duty and was at MMI, but she required medical management post MMI.

Petitioner continued to treat with Dr. Lubenow and ultimately underwent the spinal column stimulator trial on May 20, 2013. She followed up with the doctor three days later, at the midway point of the trial, and the doctor noted she had occasional increased pain with positional changes, but there had been a resolution of the burning sensation in the bilateral hands. On the 29th of May, Dr. Lubenow documented that there was near complete resolution of her painful symptoms; she had been able to wean down her narcotic meds and was able to increase her activities of daily living. The doctor's conclusion was that the positive results of the trial demonstrated that Ms. Holbrook was a good candidate for a spinal column stimulator. The Arbitrator notes that Dr. Konowitz had, in his exam, opined she was not a candidate.

On July 18, 2013, Petitioner returned to see Dr. Lubenow. The doctor noted that since the electrodes had been removed from the trial, Petitioner's pain had returned to baseline and she was back on her pre-stimulator medication regimen. Dr. Lubenow reiterated that Ms. Holbrook was a candidate for permanent placement of the spinal column stimulator due to the positive trial results and she should continue with the permanent restrictions as previously imposed.

14IWCC0555

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WITH REGARD TO THE ISSUE OF CAUSAL CONNECTION, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator notes that he previously found Petitioner to be a credible witness. After once more observing her mannerisms and demeanor, the Arbitrator again finds Ms. Holbrook to be a very credible and forthright witness. She testified that subsequent to the initial hearing in this matter she continued to treat with Dr. Lubenow, continued to suffer from the effects of CRPS, and endured multiple modalities of treatment, including three inpatient epidural infusion therapies. She further testified that there had been no change in her condition nor any intervening accident that would disrupt the causal connection finding previously made.

The Arbitrator gives little weight to Dr. Konowitz's opinion that Ms. Holbrook does not suffer from CRPS. The Arbitrator further highlights the incongruity of Dr. Konowitz's assessment that Dr. Lubenow was incorrect because he had not followed the Budapest protocol; in light of the fact that Dr. Lubenow was a member of that group which determined a diagnostic approach to this insidious condition and helped develop the protocols, the Arbitrator finds Dr. Konowitz's statements regarding Dr. Lubenow's treatment to be unconvincing.

Based on the record as a whole, the Arbitrator finds that the testimony and evidence clearly demonstrate that there continues to be a causal connection between the ongoing symptoms and the work injury proven at the initial hearing.

WITH REGARD TO TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner testified that subsequent to the prior hearing she had continued to work in a restricted fashion and did not lose any time from work other than for the inpatient infusions, the

initial one which occurred January 24, 2011 through January 28, 2011, the second being from October 3, 2011 through October 8, 2011. She continued to work until Dr. Lubenow imposed a significant increase in her restrictions on April 26, 2012; at that point, Respondent was unable to provide an accommodate position and Ms. Holbrook began missing time from work.

Therefore, the Arbitrator finds that Petitioner is entitled to compensation for 70 $^{3}/_{7}$ weeks for the periods of January 24, 2011 through January 28, 2011; October 3, 2011 through October 8, 2011; and April 26, 2012 through August 20, 2013, the date of the hearing herein.

WITH REGARD TO THE ISSUE OF PROSPECTIVE MEDICAL, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Based upon the medical reports and records of Dr. Lubenow and the success demonstrated objectively by the implementation on a trial basis of the spinal column stimulator, the Arbitrator finds the doctor's recommendation for permanent placement of a spinal cord stimulator to be reasonable and necessary under §8(a). The Arbitrator orders Respondent to pay for the treatment as directed by Dr. Lubenow, including the placement of the spinal column stimulator and any follow up treatment attendant thereto.

WITH REGARD TO THE ISSUE OF MEDICAL EXPENSES, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner offered into evidence medical expenses totaling $116,089.56. A significant portion of these bills was paid by Claimant and the balance was paid by her self-paid health care plan. The Arbitrator finds that these bills were reasonable and necessary as defined under Section 8(a) and awards Petitioner the sum of $116,089.56 as and for medical expenses. These bills are not subject to the fee schedule pursuant to the case of Tower Automotive v. Illinois Workers' Compensation Commission, 407 Ill.App.3d 427 (1st Dist. 2011).

WITH REGARD TO THE ISSUE OF PENALTIES, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

He who delays payment of workers' compensation benefits bears the burden of excusing the delay when a penalty for unreasonable and vexatious delay in payment is sought. City of Chicago v. Industrial Commission, 63 Ill.2d 99 (1976). Here, Respondent unilaterally terminated Claimant's benefits in August, 2012; the basis for this was Petitioner's refusal to complete the questionnaires provided by the §12 examiner. A pretrial conference was held in February of 2013 and when presented with the appropriate case law, the Arbitrator determined that Section 12 does not require a petitioner to complete such questionnaires. Nonetheless, Respondent refused to pay compensation when appropriate. Moreover, even though there had been a previous hearing and final Commission determination adopting Dr. Lubenow's conclusion that Ms. Holbrook suffered from CRPS, and despite the fact that it had absolutely no evidence to suggest Claimant had suffered an intervening accident, Respondent nevertheless relied on Dr. Konowitz's opinion that there was no CRPS. Dr. Konowitz's credibility is further eroded by his attempts to disparage Dr. Lubenow's knowledge of the Budapest protocol. Furthermore, the medical expenses certainly should have been addressed and were in keeping with that as outlined in the earlier hearing and the medical evidence presented therein.

Respondent failed to present any evidence to justify its reliance on Dr. Konowitz in terminating Claimant's benefits. The Arbitrator finds Respondent failed to prove by a preponderance of the evidence that its conduct was reasonable. See, Continental Distributing Co. v. Industrial Commission, 98 Ill.2d 407, 415 (1983) ("The test is not whether there is some conflict in medical opinion. Rather, it is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented.") Therefore, the Arbitrator finds that Petitioner is entitled to $10,000 in additional compensation pursuant to Section 19(l) for Respondent's vexatious and frivolous denial of the payment of

benefits. Further, Petitioner is entitled to penalties under Section 19(k) in the amount of 50% of the unpaid Temporary Total Disability benefits and the unpaid medical expenses for a total of $63,311.58. In addition thereto, Petitioner is entitled to attorney's fees pursuant to Section 16 of $14,662.32, equal to 20% of the penalties imposed herein.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BYRON EDWARDS,

Petitioner,

vs.

NO: 04 WC 8660
05 WC 49109

14IWCC0556

INTERLAKE,

Respondent,

DECISION AND OPINION ON §19(h) AND §8(a) PETITIONS

This case comes before the Commission on Petitioner's §19(h) and §8(a) Petitions. Petitioner's two cases were heard before Arbitrator Falcioni on October 17, 2006, and a decision was issued on November 8, 2006. The Arbitrator found that Petitioner sustained accidental injuries on February 6, 2004, and was entitled to three weeks of temporary total disability, $48,921.50 in medical expenses, and 30% person-as-a-whole partial disability under §8(d)2. The Commission affirmed and adopted the Arbitrator's decisions on October 29, 2007. On August 18, 2010, Petitioner filed a §8(a) Petition. On August 26, 2013, Petitioner filed a §19(h) Petition. A hearing was held on Petitioner's petitions on November 19, 2013, before Commissioner Ruth White in Peoria, Illinois.

The Commission, having considered the entire record, finds that Petitioner's §19(h) Petition is barred by the 30-month time limit but that he is entitled to additional medical expenses under §8(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) Petitioner, appearing *pro se*, testified that, since his first hearing on October 17, 2006, his lower back "is still messed up" and has been getting worse as time goes on. Petitioner

testified that he hasn't been able to work because of it and he can't get the treatment that he needs.

2) Petitioner testified that he is asking for payment of the bills contained in his exhibits.
3) Petitioner testified that he has seen Dr. Julian Lin, a neurosurgeon, Dr. Kube, and Dr. Ross. Petitioner testified that he last saw Dr. Ross in July 2013, with complaints of low back pain and stinging, burning, and numbness down the back of his thigh.
4) Petitioner testified that, currently, he feels terrible and has difficulty sitting in one position for a long period. He is more focused on the pain than anything.
5) Petitioner testified that Dr. Russo, who performed his work evaluation, said he would never be able to go back to doing what he did previously and that he would get worse as time goes on.
6) Petitioner testified that he is currently taking Methadone and Oxycodone and Fluoxetine (for depression), which are prescribed by Dr. Camacho. Petitioner testified that he is currently seeing interns but everything is approved by Dr. Camacho who is starting to cut down on the Methadone because of concerns over the long-term effects on Petitioner.
7) Petitioner submitted various medical records and bills into evidence. Some of these pre-dated the original arbitration hearing. Petitioner also submitted several "off work" notes from various physicians due to his chronic back problems.
8) Petitioner was admitted to St. Francis Hospital on January 23, 2007, after complaining of weakness and facial numbness and tingling after receiving an MRI with gadolinium for chronic back pain.
9) On April 3, 2008, Petitioner saw Dr. Ravi with complaints of 5 to 6 out-of-ten low back pain and intermittent sciatica. Dr. Ravi noted that Petitioner had chronic low back pain and a history of laminectomy in 2004 and he has been on methadone, which is not helping.
10) Petitioner submitted several physical therapy records from April through July 2008, which reflect his continued low back complaints.
11) Petitioner saw Dr. Yamoah on December 5, 2008, with 7/10 pain. Dr. Yamoah noted that Petitioner is on scheduled methadone and Oxy IR for breakthrough pain. Petitioner reported that he had not been going to the emergency room when he has severe pain because he did not want his medical bills to accumulate.
12) On March 9, 2009, Dr. Yamoah noted that Petitioner had been having frequent episodes of breakthrough pain when he moves or turns in certain positions. Petitioner requested a disability letter for his condition but needed a formal comprehensive evaluation, which he stated that he could not afford.
13) Respondent's Dr. VanFleet examined Petitioner and reviewed his records. He opined, on August 17, 2012, that Petitioner's "need for current treatment is completely unrelated to his work injuries in 2004, but more likely are a manifestation of the progression of his underlying disc condition that has progressed over the last eight years. He has axial back pain, which is likely related to his degenerative disc disease." (Rx1).

The Commission finds that Petitioner filed his §19(h) petition on August 26, 2013, which is well outside the 30-month limit since the Commission decision was issued on October 29, 2007. His §19(h) petition for additional partial permanency benefits is denied.

Regarding Petitioner's §8(a) petition, we find that that Petitioner's records and bills do support a finding that Petitioner's treatment for his low back complaints remains causally related to his work injury. The Commission finds that the opinion of Dr. VanFleet is not credible. Dr. VanFleet himself diagnosed Petitioner with "multilevel lumbar degenerative disc disease with failed lam syndrome." Since Petitioner's current diagnosis includes "failed lam[inectomy] syndrome," it cannot be reasonably argued that Petitioner's continued back pain and treatment after the original hearing is not causally related. Petitioner had no prior back problems and he underwent surgery. He was awarded 30% loss of use of the person as a whole with Dr. Russo opining that it was doubtful if Petitioner would be able to return to his previous work levels. The Arbitrator also noted that Petitioner was required to take methadone for pain, which was being prescribed at that time through Heartland Clinic. Petitioner's medical records, since the previous hearing, indicate that he is still being prescribed pain medication for his low back condition. There is also no evidence that Petitioner sustained a new injury, which would break the chain of causation, subsequent to the original hearing.

Therefore, we find that Petitioner is entitled to continuing medical treatment for his low back including the following medical expenses, pursuant to the fee schedule in §8.2 of the Act:

Midwest Orthopaedic Center (Office visit, x-rays and MRI on 1/16/07 and 1/23/07)		$3,842.00
Doc's Drugs of El Paso (Prescriptions for Hydrocodone, Oxycodone, Methadone, and Lidoderm patch)		766.11
6/7/08 through 8/20/10	$664.70	
9/09/10 and 9/16/10	$45.98	
12/3/11	$20.83	
12/7/11	$34.60	
Roanoke Pharmacy (Prescriptions for Hydrocodone, Oxycodone, and Methadone 1/10/07 – 11/7/11)		741.26
Total:		$5,349.37

The Commission denies the charges for Clindamycin, Diazepam, Prednisone, Fluexetine, Penicillin, and Amoxicillin as Petitioner has failed to prove that these prescriptions are causally related to his work injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition under §8(a) is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $5,349.37 for medical expenses under §8(a) of the Act pursuant to the medical fee schedule in §8.2 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,400.00. 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: JUL 1 1 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 5/28/14
49

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

STEVE MOORE,

Petitioner,

14IWCC0557

vs.

NO: 12 WC 06190

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

With respect to the issue of nature and extent of Petitioner's injuries, and pursuant to Section 8.1b of the Act, the Commission modifies the award for permanent partial disability benefits from 2% loss of use of the man-as-a-whole to 1% loss of use of the-man-as-a whole under Section 8(d)2 of the Act. The Commission agrees with the Arbitrator's analysis of four of the five factors under Section 8.1b of the Act, factors (i) through (iv). However, with regard to factor (v), "evidence of disability corroborated by the treating medical records," the Commission finds there is minor evidence of same. Following Petitioner's January 3, 2012 twisting low back injury while standing on a ladder, he sought medical care on two occasions, January 4, 2012 and January 10, 2012. At the time of Petitioner's January 4, 2012 office visit, he was diagnosed with a lumbosacral strain, and conservative medical care was prescribed - prescriptions for an anti-inflammatory, a muscle relaxer, moist heat, biofreeze, and light duty. Petitioner was seen in follow up on January 10, 2012, at which time he reported improvement, with pain complaints of one on a scale of one to ten. His physical examination was significant for full range of motion of the lumbar spine, and a normal gait. Petitioner was released to return to work full duty to his

regular duties as a highway maintainer at that time, and advised to follow up as needed. Petitioner testified on direct examination that he had to return to work at that time and sought no further treatment, as Respondent would not pay for any further treatment and he was not receiving any lost time benefits. (T25). Although Petitioner testified he could not afford to be off work without pay, and that he stopped seeking medical care because he could not afford to pay his own medical bills, his treating medical records indicate his release to return to work and his release from medical care were based upon his January 10, 2012 examination findings, and own report of improvement in his medical condition. The Commission also notes that as of January 10, 2012, Petitioner had been off work seven days, from January 4, 2012 through January 10, 2012, and under Section 8(b) he was not entitled to an award of TTD for the first three days of this period of lost time, from January 4, 2010 through January 6, 2010, but was entitled to an award for the period of January 7, 2012 thru January 12, 2012, or a period of four days. Furthermore, Petitioner admitted on cross examination that his receipt of continuing care after January 10, 2012 was not an issue, as he could have submitted any medical bills to his own group health insurance carrier. (T33-34). Although Petitioner testified he has continuing low back pain complaints on an occasional basis, and continuing disability, his medical records fail to corroborate his testimony.

Accordingly, the Commission modifies the award for permanent partial disability benefits from 2% loss of use of the man-as-a-whole to 1% loss of use of the-man-as-a whole under Section 8(d)2 of the Act for the reasons stated herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 31, 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 $ 884.08 per week for a period of 4/7 weeks, for the period of January 7, 2012 through January 10, 2012, 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 $ 712.55 per week for a period of 5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the Petitioner 1% loss of use of the man-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $399.30, pursuant to the medical fee schedule, for medical expenses under §8(a) and §8.2 of the Act.

14IWCC0557

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: JUL 14 2014
KWL/kmt
O-06/24/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0557

MOORE, STEVE
Employee/Petitioner

Case# **12WC006190**

IL DEPT OF TRANSPORTATION
Employer/Respondent

On 12/31/2013, 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:

1097 SCHWEICKERT & GANASSIN LLP
SCOTT GANASSIN
2101 MARQUETT RD
PERU, IL 61354

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
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

DEC 31 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

Steven Moore,
Employee/Petitioner

v.

Illinois Department of Transportation,
Employer/Respondent

Case # **12** WC **6190**

Consolidated cases: **n/a**

14IWCC0557

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 **October 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 _____

FINDINGS

On **January 3, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$68,958.00**; the average weekly wage was **$1,326.12**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** dependent children.

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

Respondent ***has 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 $884.08/week for 4/7 weeks, commencing January 4, 2012 through January 10, 2012, the first three of Petitioner's seven days off in this instance not being compensable, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $399.30 to OSF St. James Occupational Health, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $712.55 (maximum rate)/week for 10 weeks, because the injuries sustained caused the 2% 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

12/26/13
Date

DEC 31 2013

FINDINGS OF FACT

By January 3, 2012, Petitioner, Steven Moore, had been an employee of the Illinois Department of Transportation for 12 years. During the last 6 years, his position was that of a highway maintainer at the Respondent's Pontiac, Illinois transportation facility. As a highway maintainer, among other things, he was required to install and maintain highway signage. These signs vary in size and could include 1 foot high no parking signs to large highway green boards measuring 15 x 20 feet.

On January 3, 2012, Petitioner was assigned a temporary employee to assist him in the placement of signs along Illinois Route 18 near Streator, Illinois. Petitioner testified it was both a cold and windy day. While at this location, Steven Moore was required to take down a damaged black and yellow sign containing a double arrow that was placed at the end of a "T" intersection. The sign was approximately 24 by 48 inches.

Petitioner testified that to perform this task, he placed a 6 foot step ladder next to the sign and climbed up the same. He intended to take the sign off the post and replace it with a new one. After using an impact wrench to loosen and remove the bolts which held the sign to two poles, he handed it to his coworker. This coworker then handed Mr. Moore a new sign that was replaced the old. Petitioner stated he brought this sign to a height just above his shoulders with one hand while holding the impact wrench with the other to start a bolt that would attach the sign to the vertical poles. Petitioner testified that while attempting to perform this task, wind forced the sign to twist. In response, Petitioner attempted to forcibly hold the sign in place. Petitioner stated that while doing so, he twisted his back and felt pain in his low back at approximately his belt level. Petitioner testified that his scheduled hours on January 3, 2012 were 7am to 3:30pm. It was between 10:30am and 11am when the incident allegedly occurred.

Petitioner testified that he and his coworker were able to complete the placement of the sign. Petitioner stated that afterward, he and his coworker discussed that he felt back pain. He was not quite sure what the injury consisted of but knew it caused him back pain.

Petitioner testified that he next spoke to Mike Lauritsen, his supervisor, and reported that he did something to his back. Petitioner stated that he "couldn't say exactly what happened, when [I] went up the ladder [I] was fine, after sign [my] back hurt." Petitioner testified Mr. Lauritsen indicated he needed to go to the Occupational Health facility at St. James Hospital in Pontiac, Illinois. Petitioner testified that on the evening of January 3rd, his back got tighter and more painful.

Petitioner reported to Occupational Health on January 4, 2012. Records of this visit indicate Petitioner was on a ladder when he experienced pain after twisting and lifting. Mr. Moore was examined. He was thought to have a lumbosacral sprain/spasm injury. He was prescribed Naprosyn and Norflex and provided work restrictions of no pushing, pulling, gripping, twisting and lifting above 20 pounds along with no repetitive bending, kneeling, swatting or climbing of ladders.

Petitioner testified that following his visit to Occupational Health, he presented his restrictions to Respondent. He was not provided with light duty work. Petitioner stated that he also spoke to Kayla Crowther about his injury. Ms. Crowther is a worker's compensation coordinator and property damage specialist for Respondent. During the telephone conversation with her, Petitioner indicated he reported that he did something to his back at work on January 3, 2012.

Petitioner testified he remained off work and continued to experience pain and discomfort. His next doctor visit with the St. James Occupational Health Department occurred on January 10, 2012. At this visit, Petitioner reported that he was better, but he continued with low back tightness. (PX 2) Petitioner testified his pain improved but still persisted. Petitioner testified that he understood from Respondent's worker's compensation coordinator, Kayla Crowther, he was not going to be paid while off work. As such, due to financial concerns, he determined he had to return to work. He reports requesting a release for a return to full duty work which was provided. The bills incurred with Occupational Health totaled $399.30. (PX 1)

Petitioner testified he returned to work on January 11, 2012 and continued to experience pain and discomfort. Petitioner explained that he did the best he could noticing the pain and discomfort which radiated into his legs. Petitioner testified that his pain and discomfort eventually improved after 3 to 4 months.

Petitioner testified that on occasions, the pain returns in the same area of the back. He noted however, same was not as severe. To deal with these episodes of pain, he uses a topical cream and the placement of a heating pad on his low back.

During his testimony, Petitioner also discussed his activities outside of the work place prior to his injury. These included work as a volunteer firefighter and licensed emergency medical technician ("EMT"). At the time of and for several years prior to his work injury, Petitioner volunteered his services to the Chatsworth Fire Department. In this role, he received occasional calls for assistance. He did not respond to calls for assistance during his regular work hours.

Petitioner testified that during the night prior to his work injury, he was called to a home of a local resident who needed assistance. He, along with a number of other individuals, helped a large man who had trouble getting up into a standing position. This was done through the use of a gait belt. Petitioner provided that the call lasted no more than 20 minutes and caused no physical distress or injury. Petitioner also testified he was aware that if he had suffered an injury as a volunteer firefighter/EMT, he could have brought a worker's compensation claim there. Petitioner indicated he was no longer a volunteer for the fire department but remains a licensed EMT.

Thomas Schaefer testified on behalf of Respondent in this matter. Mr. Schaefer stated he is a traffic engineer for IDOT and his job includes overseeing of signage and road striping. He is familiar with Petitioner and was aware Petitioner made a complaint about his pain and discomfort. He stated Petitioner called him about his inability to come into work on January 4, 2012. Mr. Schaefer provided Petitioner's foreman also contacted him about Petitioner being unable to return to his employment. Mr. Schaefer explained Petitioner complained of back pain and told this witness he was at work on January 3, 2012 when he experienced this pain but was not certain as to what he did. Mr. Schaefer could not clarify whether the statement "not sure what he did" referred to the type of injury or the activity which caused it.

Mr. Schaefer testified that although he received a call about Petitioner's injury on January 4, 2012, he did not complete an injury report until the following day. In the form entitled "Supervisor's Report of Injury or Illness", Mr. Schaefer responded to the question "was said activity within the course and scope of employment or assigned duties" he marked the box for "yes". In the portion, "activity at time of accident/incident," he wrote "sign installation and replacement when the pain was felt." Also indicated was "Employee stated to me that he was unsure of the activity that caused the pain to occur." (RX 1)

Michael Lauritsen also testified in this matter and indicated he is a lead worker for IDOT. In this position, he assigns duties, supervises activities of those installing signs and the striping of roadways. On January 3, 2012, Petitioner was one of the individuals working under him at the Pontiac facility.

On January 3, 2012 at 12:18 pm, according to the log on his cell phone time, Mr. Lauritsen received a phone call from Petitioner. He testified that during this call, Petitioner reported his injury. Mr. Lauritsen indicated Steven Moore reported his back was hurting and he was going to go home and rest. Three days later, on January 6, 2012, this witness completed Respondent's Exhibit No. 2, a worker's compensation witness report. His report reads in part as follows:

> "On Tuesday January 3rd while making work plans for the day I heard Steve Moore talking about his weekend activities which involved working as a volunteer firefighter on a house fire which lasted for several hours and also talking about him assisting at medical aide which he had to lift someone which he said weighed approximately 500 pounds. Steven didn't complain about his back during this conversation. At approximately 1218 hours on the same day I received a phone call from Steven saying he was going home at 1230 hours because his back was a little sore but he wasn't sure if it had happened at work, he said he really didn't know what had happened that made his back start hurting. I talked to Steven again on January 5th about him taking another day off for his back pain. Steven asked me what he should do as far as work goes. I told him that if he thinks it happened at work then he needed to fill out the paper work for a work comp claim. Steven again told me he wasn't sure if it happened at work. I told him it was better to fill out the paper work and file just in case. He came in later that day and completed the paper work." (RX 2)

Respondent's final witness was Kayla Crowther, the Workers' Compensation Coordinator for IDOT, District 3. She testified that Petitioner called her the day following his alleged work accident and stated that he did something to his lower back at work the day before. Ms. Crowther prepared a report memorializing the telephone conversation on the same day. The January 4, 2012 report provides the following:

> "On January 4, 2012 at 8:24am I received a phone call from Steve Moore. He stated he did something to his lower back at work yesterday…He told me that around 10:00am to 11:00am is when he noticed his back hurting and that he thought he pulled a muscle or had a pinched nerve but he was not sure what he did…I went in and spoke to my manager regarding the injury. She advised that I inform Mr. Moore that in order to file a work compensation claim he had to know what caused his lower back pain. He acknowledged. I then stated, "Steve, in order to file a workers' comp claim there has to be an injury at work." He then told me again that he wasn't sure what he did but he knew he was fine at the beginning of the day and he must have done it putting up signs...He then explained to me he was on IL 18 and 13th North Road in Streator at 10:00am on January 3rd, 2012 when he stretched too much while putting up a sign and injured his low back…" (RX 3)

With respect to (C.) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent; and (F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

There is no dispute that about 7:00 am on the morning of January 3, 2012, while handing out work assignments, Petitioner's IDOT supervisor, Michael Lauritsen, met with Mr. Moore. He noted Petitioner appeared to be fine and complained of no injuries that occurred outside of work or while volunteering as a EMT

or firefighter. No complaints of pain or discomfort were made by Mr. Moore during this cordial conversation. None of Respondent's witnesses, Michael Lauritsen, Kayla Crowther, or Thomas Schaefer, testified Petitioner was injured outside of work. Each inferred this might have been the case due to his volunteer activities as a firefighter and EMT. However, at least two of three Respondent witnesses provided Steven Moore said it was after his installation of a highway sign that he began to experience pain.

The initial medical records of January 4, 2012, the day following the occurrence, provide Petitioner was injured while placing a road sign. Mr. Moore testified the pain he experienced on January 3, 2012 following his injury had increased overnight. He explained this to Respondent and was then directed to the St. James Occupational Health Center. He sought medical assistance on January 4, 2012. Their records indicate Petitioner was placing signage when he experienced pain. He was diagnosed with a lumbar sprain and prescribed medications.

Petitioner reports that over the days that followed, his condition improved somewhat. By the time he returned to Occupational Health on January 10, 2012, because of his concern he was not earning income, although still experiencing continuing pain and discomfort, he requested that Occupational Health return him to work. He was allowed to return to work and has not been to the doctor since. Mr. Moore testified the reason for his request to return to work and his failure to return for a follow up appointment was Respondent's indication they were not going to pay for his care or TTD. Petitioner explained that although he has group insurance and could have used it, there is a deductible associated with use of the insurance that he could not afford.

Following consideration of Petitioner's credible testimony and evidence presented, it is the finding of the Arbitrator that Petitioner was injured on January 3, 2012 and this injury arose out of and in the course Petitioner's employment by Respondent. Further, it is found that Petitioner's current condition of ill-being is causally related to that injury, a lumbosacral sprain/strain injury as reported by St. James Occupational Health Department.

With respect to (J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services; and (K.) What temporary benefits are in dispute, TTD, the Arbitrator finds as follows:

Within a day of the Petitioner's work injury, he was directed to the St. James Occupational Health Department by Respondent. The initial notes of the Occupational Health Department indicate Mr. Moore was on a ladder and twisting at the same time when he experienced low back pain. It was noted at the visit that this back pain increases with twisting and turning. It is sharp and radiates down through his hips. Mr. Moore explained this pain ran from his low back and into his legs.

Following an examination, the Petitioner was provided with work restrictions that included no lifting of more than 20 pounds, no pushing, pulling, gripping, twisting, climbing or ladder use along with no repetitive bending or stooping. After receipt of these restrictions, Respondent did not provide light duty work.

On January 10, 2012, Mr. Moore returned to the Occupational Health Department. At that time, he was not being paid TTD and was concerned about income. He explained he was told that Respondent was disputing his work injury and, therefore, felt he needed to return to work even though he was experiencing continuing pain. He states he then requested Occupational Health to provide him with a full duty release for work.

As a result of Petitioner's work injury, he was placed on a light duty status by Respondent's Occupational Health physician. He remained off work for 7 days. Pursuant to the Worker's Compensation Act, the first 3 days he was off work are not compensable. However, the remaining 4 days of the 7 are compensable.

Following consideration of the testimony and evidence presented, the Arbitrator finds the medical services provided to the Petitioner to be both reasonable and necessary. The Respondent shall pay the charges for those reasonable and necessary medical services that were incurred at the OSF St. James Occupational Health Center in the amount of $399.30. Further, Respondent shall pay Petitioner 4 days of TTD benefits.

With respect to (L.) What is the nature and extend of the injury, the Arbitrator finds as follows:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:
- (i) The reported level of impairment;
- (ii) The occupation of the injured employee;
- (iii) The age of the employee at the time of injury;
- (iv) The employee's future earning capacity; and
- (v) Evidence of disability corroborated by medical records.

With regards to paragraph (i) of Section 8.1(b) of the Act:

i. Neither party submitted an impairment rating.

With regards to paragraph (ii) of Section 8.1(b) of the Act:

ii. Petitioner continues to be employed in his pre-injury employment as a Highway Maintainer. The Arbitrator takes judicial notice that this position is heavy work and any permanent partial disability ("PPD") awarded would be larger than an individual who performs lighter work.

With regards to paragraph (iii) of Section 8.1(b) of the Act:

iii. Petitioner was 43-years old at the time of injury. The Arbitrator considers Petitioner to be a younger individual and concludes that Petitioner will likely have to live and work for a longer period of time than an older individual with the same injuries.

With regards to paragraph (iv) of Section 8.1(b) of the Act:

iv. At the present time, there is no evidence that Petitioner's future earning capacity has diminished as a result of this injury. Petitioner continues to work in a full duty capacity with Respondent.

With regards to paragraph (v) of Section 8.1(b) of the Act:

v. Evidence of disability in Petitioner's treating medical records finds that within a day of Petitioner's work injury, he was directed to the St. James Occupational Health Department by Respondent. The initial notes indicate Mr. Moore was on a ladder and twisting at the same time when he experienced low back pain. Following an examination, Petitioner was provided Naprosyn and Norflex. He was also recommended to use moist heat, biofreeze and restrict his work activities. On January 10, 2012, Mr. Moore returned to the Occupational Health Department. At that time, he was not being paid TTD and was concerned about income. As a result he requested and received a full duty release for work. Petitioner returned to work albeit with pain in his low back that continued into the top of both legs. His discomfort of low back and leg pain continued over the next 3 to 4 months. Currently, he occasionally experiences lower back pain in the same area injured on January 3, 2012. He explained that when this reoccurs, he uses topical cream and heat to relieve the discomfort.

As noted above, Pursuant to Section 8.1b of the Act, all five factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011. Consideration is not given to any single enumerated factor as the sole determinant. Therefore, after applying Section 8.1b of the Act, 820 ILCS 305/8.1b and considering the relevance and weight of all these factors, the Arbitrator concludes that Petitioner sustained 2% permanent partial disability under Section 8(d)2 of the Act.

With respect to issue (M.) Should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

A legitimate dispute existed in this matter. As such, fees and penalties are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES GRECO,
Petitioner,
vs.

14IWCC0558

NO: 12 WC 14915

Tenant Project 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 accident, medical expenses, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,700.00. 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: JUL 14 2014
KWL/vf
O-7/8/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0558

GRECO, JAMES
Employee/Petitioner

Case# **12WC014915**

TENANT PROJECT SERVICES
Employer/Respondent

On 11/18/2013, 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:

0544 LOSS & PAVONE PC
JOSEPH J LOSS
1920 S HIGHLAND AVE SUITE 203
LOMBARD, IL 60148

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
JOHN CAMPBELL
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0558

James Greco,
Employee/Petitioner

v.

Tenant Project Services,
Employer/Respondent

Case # **12** WC **14915**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Wheaton**, on **8/13/13**. 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. ☒ 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 **4/4/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$93,600.00**; the average weekly wage was **$1,800.00**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$0.00** 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 $1,200.00 per week for 12-2/7 weeks, commencing 4/4/12 through 6/28/12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 4/5/12 through 8/13/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $27,037.42, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 15.05 weeks, because the injuries sustained caused the 35% loss of the right index finger, as provided in §8(e)2 of the Act.

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

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

Signature of Arbitrator

10/30/13
Date

NOV 18 2013

STATEMENT OF FACTS:

Petitioner, a 52 year old projects manager, testified that he had worked for Respondent for approximately 10 months prior to the date of the accident and that his job entailed overseeing build outs for new tenants in office buildings. He noted that at times he would work on multiple projects at different locations, and that at other times he worked on only one project at a time. He indicated that Respondent paid for his gasoline and travel expenses and reimbursed him for mileage to and from the job site.

Petitioner testified that on April 4, 2012 he left for work a little before 6:00 a.m. and that his normal start time was 7:00 a.m. He noted that the time he left home depended upon where he was assigned to work. On the morning in question he stopped at a service station to inflate the tire on a two wheeled dolly. He indicated this was his own two wheeled dolly that he was transporting from his home to the job site. The two wheeled dolly was low on air and he stopped to put air in one tire. He testified that he needed to use the dolly to transport bankers' boxes full of contractual documents down two (2) flights of stairs to the basement of the bank building he was working in. He noted that the bankers' boxes were full of documents that were sensitive contractual documents that.

Petitioner testified that he was informed that because the job was finishing up he was going to be laid off. He testified that the reason for removing these bankers' boxes was the fact that the job had been completed and tenant was now occupying that space. He had been given the opportunity to put those bankers' boxes in temporary spare maintenance space in the building; however, multiple individuals had keys to the door of that maintenance room and he felt it was in his employer's best interest not to leave those documents in an area that was easily accessible to others.

Petitioner testified that since he was in charge of the project and that it had come to an end, he felt it necessary to safeguard the sensitive material. Petitioner testified that he believed that not securing the boxes of sensitive material would harm his employer if this material got into the wrong hands. He also believed it could be embarrassing to his employer if these documents were open to review and that is was his decision to move the boxes. Petitioner testified that as project manager, this was within his authority. Petitioner testified that he had requested laborers to move the boxes, but was advised they were unavailable. Petitioner testified that he was bringing his own personal two-wheeled dolly which stands about 4 to 5 feet high in order to move the bankers' boxes.

Petitioner testified that there was no dolly on the job site that he could have used and that if there were, it would have been much easier for him to use that hand dolly to move the boxes rather than to bring one from home. Petitioner testified that the only type of equipment available on that job site was a furniture dolly which is a flat platform with four casters on it and stands about six inches off the ground. He testified that he could not use the furniture dolly to move the boxes because he had to transport the boxes vertically down stairs and over cobblestone sidewalks.

Petitioner testified that his back had been injured previously unrelated to his employment. He has a sciatic nerve problem and did not want to further aggravate that problem by lifting boxes onto a furniture dolly and transporting them down the stairs by hand. Petitioner further testified the only reason he brought the hand dolly from home and was putting air in its tires was that he knew that particular piece of equipment could move the bankers' boxes to his employer's principle office. He testified he had no other reason to bring a hand truck from home nor did he intend to do any work with it other than move the bankers' boxes. He testified that if a laborer had been available, he would have had the laborer move the boxes.

Petitioner testified that while filling the tire of the dolly with air the tire exploded and severed his right index finger almost completely. The finger was dangling and being held on by the skin. It broke the bone and severed the tendon in his right index finger. Petitioner testified that he is right-handed. He noted that following the event he was in shock and experienced a severe loss of blood. Fortunately, the filling station was across the street from Edward Hospital Emergency Room. He drove himself to the hospital, where his wound was stabilized and cleansed. He had x-rays and the wound was disinfected. Arrangements were immediately made for him to see a hand surgeon. The emergency room doctor temporarily reconnected the finger. He testified that he went immediately from Edward Hospital to the hand surgeon to whom he had been referred.

He was seen by Dr. Richard Thomas at OAD Orthopaedics in North Naperville. (PX2). Surgery was performed the same day as the accident. Petitioner testified that Dr. Thomas cleaned the wound, inserted a stud to reconstruct the tendon, and screwed the broken bones together. A pin was inserted to stabilize his finger and he was sutured up. He testified that it was very painful at that time and he was dispensed pain medication. Petitioner was unable to return to work and two days after the accident and was treated only by the ER physician and the surgeon, Dr. Thomas. He did not see any other doctors for treatment of his injury. He testified he was off work from the day of the accident, April 4, 2012 until released to return to work by Dr. Thomas on June 28, 2012.

Petitioner testified that he has permanent hardware in his right index finger. There is a surgical screw implanted as well as a rod with a hook, also permanently implanted. The Arbitrator observed Petitioner's injured digit and noticed a slight flexion and extension deformity right index finger.

Petitioner testified that he is currently working as a project manager and has to use the computer quite often as well as manually writing reports and documents. He testified that he lost dexterity in his finger, approximately 30%. He testified there was numbness and it is painful after a full day's work. He is not able to do the type of things he was able to do before the injury since he has difficulty grasping things completely with his right hand. He stated he constantly drops things.

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

The question here is ultimately one of credibility.

Petitioner testified that on April 4, 2012 he left his home shortly after 6:00 a.m. and that he stopped at a gas station on the way to work to inflate the tire on a two-wheel dolly when the tire exploded and severed his right index finger.

He stated that the day before he had received a call from the owner indicating that the job was finishing up and that he was being laid off. Petitioner testified that he had been moved out of his office previously when the tenant moved in and that he had been given some "rough office space" that could have been entered by anyone. As a result, he indicated that he felt the need to move certain boxes of documents -- which contained sensitive information such as cost estimates – to another area of the building that had key access in order to safeguard them. Petitioner testified that the day before the incident he had asked two laborers at the site, Robbie and Matt Mrofcza, to move the boxes but that they were unavailable. He indicated that the standard operating procedure was to schedule work in advance, and that even though he was project manger his orders could be and oftentimes had been preempted by either Thomas Prezen, the owner and president of Respondent, or his brother, John Prezen, who Petitioner described as someone who "felt he could do anything."

Petitioner testified that the only piece of equipment at the job site that he could have used to move the boxes was a furniture mover with flat casters. He stated that such a device was not appropriate for moving boxes down stairs and that he did not want to have to lift the boxes onto the furniture cart given problems he had had with his back. He indicted that he would have had no other reason to bring in his own dolly. He agreed that no one specifically asked him to bring the dolly from home. However, Petitioner noted that in general laborers brought in their own tools, and that he himself had brought in a skill saw, socket wrenches and other hand tools on his own.

Petitioner testified that he was reimbursed for his expenses and paid mileage to and from the job site. When asked whether the job site was the only job site he would go to, Petitioner noted that he had also been to one in St. Charles and another one by River Road, as well as one across the street from where he had his office.

The owner and president of the company, Thomas Prezen, conceded that while Petitioner was the boss on the job site in question, and had authority to direct the laborers, it could have happened that his brother John would override Petitioner. Mr. Prezen also agreed that if sensitive documents containing quotes and whatnot were on the job site that it would be a good idea to move and secure them. However, Mr. Prezen testified that he did not ask Petitioner to do physical labor on the job and that laborers were available to move boxes, although he could not say whether Rob or Matt Mrofcza, the laborers in question, were on that job. Furthermore, Mr. Prezen noted that he typically does not ask workers to bring in tools, other than hand tools, and that he did not ask Petitioner to bring in a dolly on the morning he was injured. Mr Prezen also believed that a hand dolly was available on the job site. Finally, Mr. Prezen noted that he felt Petitioner was a good man, someone who was honest and trustworthy and knows his business. He indicated that Petitioner was let go simply because they ran out of work.

Robert Mrofcza testified at the request of Respondent. Robert Mrofcza stated that he had worked for Respondent for eight (8) years as a laborer, and that he had been promoted to superintendent within the past year. Robert Mrofcza indicated that Petitioner was his boss on the project in question and that he worked under Mr. Greco's control on the day of the incident. Robert Mrofcza noted that the laborers would move material and that he did not see Petitioner do perform physical activities other than hook up water lines. Robert Mrofcza also could not recall Petitioner ever asking him a day or so before the incident to move documents, although he conceded that there was a time when they may have been doing a task and he could not do what Petitioner had asked. Finally, Robert Mrofcza testified that a hand cart was available in the van and that if asked by Petitioner he would have gotten it for him.

Matthew Mrofcza also testified at the request of Respondent. Matthew Mrofcza stated that he had worked for Respondent for three (3) years as a laborer and that he was working in that capacity and under Petitioner in 2012. Matthew Mrofcza noted that Petitioner was the project manager and that if asked by Mr. Greco to move items he would comply. When asked directly, Matthew Mrofcza testified that Petitioner did not ask him if a two-wheel dolly was available the day before the incident. In fact, Matthew Mrofcza indicated that both a hand dolly and a furniture mover were in his van. More to the point, Matthew Mrofcza did not recall Petitioner asking him for a dolly or to move documents, and that if Mr. Greco had asked him to move it he would have done so.

Both of the Mrofcza brothers testified that they discussed their testimony with Respondent attorney before the hearing with the owner of the company present. Both men are currently still employed by Respondent.

With respect to the above, the Arbitrator finds Petitioner's account to be reasonable under the circumstances and thus credible. Even the owner/president, Mr. Prezen, agreed that if the boxes contained sensitive information

they should be secured, and that his brother often overrode Petitioner's authority on such matters as the allocation of laborers. And while both Mrofcza brothers claimed a dolly was available, albeit in their van, there is no indication that Petitioner was aware of the location of such a dolly. Furthermore, even if Petitioner did not specifically ask the laborers for assistance, it would not be outside the scope of his responsibilities as project manager to see to it that documents he viewed as sensitive were properly secured. Whether or not Petitioner had other employees under his control who could have moved the boxes is beside the point. Instead, what is important is that Petitioner took it upon himself to perform this function and he was preparing to do just that at the time of the accident.

Respondent next raises the issue of an inconsistent history. Along these lines, it would be best to set forth the histories themselves.

Edward Hospital Emergency Department records on the date of the incident, April 4, 2012, contain the following two (2) histories:

"Pt. to Rm. B1 from triage. ***States filling tire which exploded*** – laceration to tip of R[ight] index finger – open fracture distal tip – some numbness to tip of finger – some bleeding." (Emphasis added) (PX1).

"51-year-old male presents to emergency department states he ***was changing a tire and the tire came down on his finger***. Patient suffered a fracture or laceration of the distal tip of the right index finger…" (Emphasis added) (PX1).

On the same date, April 4, 2012, orthopedic surgeon Dr. Richard Thomas recorded the following history: "Mr. Greco is a 51 [year old] right-hand dominant engineer who ***was airing a tire on a dolly that he was going to use at work when the tire exploded*** …" (Emphasis added) (PX2).

The operative report by Dr. Thomas, also dated April 4, 2012, recorded that Petitioner was "… a pleasant gentleman who earlier today had a tire explode. He was ***airing up tires to small dolly to use at work when it exploded*** and he suffered a significant injury to his digest." (Emphasis added) (PX3).

The Arbitrator also notes that Dr. Thomas' records contain a "Workman's Compensation Authorization Form" confirming an "appointment" with Dr. Thomas for evaluation and treatment on April 4, 2012. (PX3). Thus, it would appear that as early as the date of the incident this matter was being processed by Dr. Thomas' office as a work related injury.

Out of the above four (4) histories, it would appear that only one (1) differs from Petitioner's version of events. Putting aside the fact that Petitioner denied giving the aberrant history in question, it would be hard to imagine someone practically blowing their finger off while simply changing a tire, either car or otherwise. Also, one has to consider such a history in the context in which it was given – namely, as someone who had just experienced a serious injury and who was in dire need of emergent medical care. That being the case, documenting the precise details of the event may not have been the overriding concern of either Mr. Greco or the emergency room's intake person at the time it was recorded. Plus, this is not a situation where the history references an incident that is completely divergent from the claimed mode of injury – such as a mishap involving a saw, for example. Instead, all four (4) histories reference an incident involving a tire with only one of those histories differing on the particulars. In any event, to rely on this slightly different version of events to the exclusion of the remaining three (3) consistent histories would be wholly unfair and disingenuous, to say the least, particularly in light of the fact that the requisite standard of proof under the Act is by "a preponderance of the evidence" and not "beyond a reasonable doubt."

Respondent also attempts to show that Petitioner's failure to present some type of proof of damage to the tire, such as a repair bill, is somehow evidence of the fact that the incident did not occur in the manner claimed. The Arbitrator does not agree, noting that such an argument assumes that one would even bother to attempt to repair such an easily replaceable piece of equipment in the first place, let alone return to the scene to retrieve such an item after such a horrific incident.

Accordingly, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner proved by the preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on April 4, 2012.

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

The Arbitrator finds that Petitioner established a causal connection between his work accident of April 4, 2012 and his current right index finger condition of ill being. In so finding, the Arbitrator notes that nothing in the record indicates Petitioner had ever had a problem with the right index finger prior to the date of accident, April 4, 2012. Neither Petitioner's Exhibit No. 1, the Emergency Room record of Edward Hospital, nor Petitioner's Exhibits Nos. 2 and 3, the treating records of OAD Orthopedics and hand surgeon, Dr. Richard Thomas, describe any pre-accident injuries or problems with the right index finger.

The Arbitrator also notes that the accident of April 4, 2012 resulted in an abrupt change in the Petitioner's right index finger condition. Petitioner testified that his right index finger was almost completely amputated as a result of a tire, which he was filling with air, exploding. Petitioner testified feeling sharp pain in his right index finger and he immediately proceeded to Edward Hospital Emergency Room, which was across the street from the filling station from where he was injured. He was directed from the Emergency Room to OAD Orthopedics and Dr. Richard Thomas, who performed surgery that very afternoon of April 4, 2012. All of the medical records submitted into evidence confirm an injury consistent with trauma from the tire explosion.

Therefore, based upon the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident (issue "C", supra), the Arbitrator finds that Petitioner's current condition with respect to his right index finger is causally related to the accident on April 4, 2012.

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

The parties submitted into evidence an agreed stipulation as to the amount of medical expenses that would be due and owing in the event this matter was found to be compensable, with Respondent maintaining any objection as to liability. (Arb.Ex.#2). This stipulation shows that Petitioner would be entitled to the following medical expenses pursuant to the fee schedule:

	Provider	DOS	Amt. Charged	Fee Schedule Amt
1)	OAD Orthopaedics	4/4/12 – 5/16/12	$14,200.00	$7,446.58
2)	DuPage Ortho Surgery Ctr.	4/4/12	$32,502.00	$16,707.33
3)	Edward Hospital ER	4/4/12	$4,435.25	$2,883.51
		Total:	$51,137.25	$27,037.42

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses totaling $27,037.42 pursuant to §8(a) and the fee schedule provisions of §8.2 of Act.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner is entitled to TTD benefits for the period extending from April 4, 2012 through June 28, 2012, representing 12-2/7 weeks.

The record shows that on the date of the accident Petitioner suffered an open fracture with complete dislocation of the distal interphanlangeal joint, right index finger with extensor tendon laceration and ulnar collateral ligament laceration. Post operatively, Petitioner was advised to employ elevation for the following 24 to 48 hours with the hand being held at a level higher than the heart. He returned for follow up care with Dr. Thomas, who prescribed physical therapy and limited use of the hand. (PX2, PX3). His apparent last visit with Dr. Thomas was on June 28, 2012 indicating return to work with full use of both hands on June 29, 2012. (RX3).

Both Petitioner and the owner/president of Respondent, Thomas Prezen, testified that Petitioner's job was terminated two days after the accident. The Arbitrator concludes there was no light duty available with the Respondent thereafter.

Petitioner testified that he uses both hands in his employment as a project manager. He is required to use a computer for extended periods of time during the day as well as writing out reports manually. Petitioner is right handed, and could not use his right hand to perform his duties.

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from April 4, 2012 through June 28, 2012, for a period of 12-2/7 weeks.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and

(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a construction project manager at the time of the accident and that he was able to return to work in his prior capacity, albeit for a different employer, following his release to return to full duty work on June 28, 2012.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 52 years old at the time of the accident.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there would appear to be no significant impact, from a physical standpoint, on his ability to earn a living in his chosen occupation as a construction project manager. The record shows that Petitioner is currently employed by LeCore Construction and there is no indication that he is earning any less than what he was earning at the time of the accident.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Edward Hospital Emergency Room records reveal that Petitioner presented with an amputation involving the right index finger at the middle phalanx with displacement of the fingertip. Treatment consisted of realignment of the bones and soft tissues of the distal index finger with the remainder of the finger near anatomic alignment. The fracture fragment was noted on the distal aspect of the middle phalanx laterally.

Petitioner was directed immediately to OAD Orthopaedics for surgery. He was seen by Dr. Richard Thomas, a hand surgeon. Pre-operative diagnosis was open fracture, complete dislocation, distal interphalangeal joint of the right index finger with extensor tendon laceration. Prior to surgery, in his initial progress note dated April 4, 2012 Dr. Thomas had noted that he had reviewed x-rays of the right index finger from the Edward Hospital ER and that "[t]here does not appear to be bony injury to the distal phalanx itself." (PX2). Thus, there does not appear to have been any bone loss associated with the traumatic injury itself. Post operative diagnosis included open fracture, dislocation of distal interphalangeal joint, right index finger with extensor tendon laceration and an ulnar collateral ligament laceration. Open reduction with internal fixation of the intra articular fracture of the middle phalangeal head/DIP joint of the right index finger with repair of the extensor terminal tendon on the right index finger was performed. In addition, a repair of the 100% transection ulnar collateral ligament laceration of the right index finger along with debridement of the skin and subcutaneous tissue and bone was performed. Petitioner was released with instructions to keep his hand above heart level for the next 48 hours and restricted to one handed work.

Petitioner then was directed to follow up with Dr. Thomas and shortly thereafter, he followed a self-directed home physical therapy program to regain flexion in the finger. (PX2, PX3).

Petitioner testified that there is a surgical screw and what he termed a "stud" which is permanently implanted in the index finger. The K wire was removed sometime after surgery. The injury is to the right index finger and the Petitioner testified he is right handed.

Petitioner testified that in his job duties as a project manager he is on the computer quite often during the day. In addition, he is required to use his hand to manually write out various reports and documents. Petitioner testified he also previously participated in hobbies such as woodworking and fishing. He testified that he has numbness at times and that his finger is painful after a full day's work. He is not able to do the type of things he was able to do prior to the injury and has difficulty grasping things completely. He testified that the finger is painful with changes of weather.

The Arbitrator observed Petitioner with a slight flexion deformity of the distal tip of the right index finger as well as a longitudinal scar down the volar aspect of the index finger approximately 2 inches long.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of right index finger pursuant to §8(e)2 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

Deborah Sillman,
Petitioner,
vs.

14IWCC0559

NO: 10WC 18749

City of Chicago,
Respondent.

DECISION AND OPINION ON REVIEW

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

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 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: JUL 14 2014
KWL/vf
O-7/8/14
14

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0559

SILLMAN, DEBORAH
Employee/Petitioner

Case# **10WC018749**

CITY OF CHICAGO
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:

2053 LAW OFFICES OF GEORGE L TAMVAKIS
ELIZABETH BOWER KENT
53 W JACKSON BLVD SUITE 1401
CHICAGO, IL 60604

0766 HENNESSY & ROACH PC
SUSAN E WALSH
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0559

Case # 10 WC 18749

Consolidated cases: _____

Deborah Sillman
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **August 30, 2012 and May 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 **Is Petitioner entitled to Vocational Rehabilitation?**

14IWCC0559

FINDINGS

On the date of accident, **October 15, 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 **$76,602.50**; the average weekly wage was **$1473.12**.

On the date of accident, Petitioner was **45** 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 **$24,885.84** for TTD, **$0** for TPD, **$0** for maintenance, and **$85,186.86** for other benefits, for a total credit of **$110,072.70**.

Respondent is entitled to a credit of all related medical bills under its group carrier under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner is not entitled to any TTD or maintenance benefits because she failed to prove that she sustained an accidental injury on October 15, 2009. Therefore, all remaining issues are moot.

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

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

David A. Kane
Signature of Arbitrator

June 18, 2013
Date

ICArbDec19(b)

JUN 18 2013

STATE OF ILLINIOS)
)
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Deborah Sillman,	)	14IWCC0559
Petitioner,	)	
v.	)	Case No. 10 WC 18749
City of Chicago,	)	
Respondent.	)	

DECISION OF ARBITRATOR

Regarding the disputed threshold issues of accident, causal connection, temporary total disability ("TTD") benefits, maintenance benefits and Petitioner's entitlement to vocational rehabilitation, after observing the witness and reviewing the evidence, the Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury on October 15, 2009. Therefore, all remaining issues are moot. The Arbitrator's decision is based upon the following evidence adduced at trial:

Accident:

Petitioner, a forty-five (45) year old bricklayer for the City of Chicago, is alleging that she injured her lower back on October 15, 2009 while lifting a bag of mortar.

Medical History:

In a report dated October 19, 2009, Dr. Joseph indicated that Petitioner had severe worsening of her neck and upper back pain *since her work-related injury on November 4, 2002.* (*emphasis added*). The doctor noted that Petitioner's pain was increasingly disabling and more severe even with less strenuous tasks. There was no mention of any other work-related accident. (Pet. Ex. 7)

On August 9, 2010, Petitioner was evaluated by Dr. Wehner at the Respondent's request. Petitioner reported that following a work incident on October 15, 2009, she went to see Kevin Regan, a chiropractor, because she had been treating with him for seven (7) years. She also sought treatment with Dr. Joseph because she treated with her in the past. In fact, Petitioner was evaluated by Dr. Joseph on September 5, 2009, approximately one and ½ months prior to the alleged work accident, at which time she complained of chronic worsening of her neck, upper back and shoulder pain which radiated to the back of her head and caused migraines. During this office visit, Petitioner advised Dr. Joseph that she was seeing a chiropractor three (3) times per week. Dr. Joseph recommended an interdisciplinary pain program. Petitioner was also evaluated by Dr. Joseph on June 12, 2009 due to her complaints of 10/10 pain in the

back, neck, shoulder and hip. On May 3, 2009, Petitioner presented to Dr. Joseph and reported that her pain flared "severely" over the past three to four (3-4) weeks with radiating headaches up the neck, occasional severe migraines with nausea, blurred vision and whole body weakness.

Petitioner provided Dr. Wehner with an "elaborate" pain drawing which depicted pain on the top and both sides of her head and at the base of her neck. She reported going to the emergency room four to five (4 to 5) times over the past several years due to "severe pain complaints." Dr. Wehner's diagnosis was chronic pain syndrome involving the cervical, thoracic and lumbar spine. The doctor opined that this was a pre-existing condition which was well-documented in the medical records by Chiropractor Regan and Dr. Joseph prior to the alleged accident of October 15, 2009; Petitioner's episode of back pain on October 15, 2009 was a manifestation of her pre-existing illness; there was no causal connection between Petitioner's condition of ill-being and the alleged work accident; work did not cause her chronic pain syndrome; and the alleged incident did not cause any change in Petitioner's condition. Dr. Wehner opined that Petitioner had achieved maximum medical improvement and released her to return to full-duty work. The doctor concluded that Petitioner's totality of pain complaints, with a paucity of any type of radiologic or clinical findings, suggested some degree of symptom magnification. Specifically, Petitioner's reported pain symptoms were fairly high despite a normal neurological examination. Also, her

subjective complaints did not follow a specific pattern and were not supported by any clinical or radiographic findings. (Resp. Ex.1)

On February 3, 2011, Dr. Joseph made a diagnosis of severe chronic myofascial pain of the thoracic spine, neck, scapulae, low back and left hip girdle. She recommended a one month interdisciplinary pain management program. Dr. Joseph recommended this same pain program as early as November 2002. (Pet. Ex. 11)

A MRI of the lumbar spine performed on August 11, 2010 revealed mild multilevel degenerative changes. (Pet. Ex. 12)

On December 8, 2010, Petitioner underwent a MRI of the cervical spine which revealed mild multilevel degenerative changes. There was no evidence of significant spinal canal or neuroforaminal stenosis. (Pet. Ex. 14)

In a letter dated November 21, 2010 from Dr. Joseph to Petitioner's attorney, Dr. Joseph agreed with Dr. Wehner's diagnosis of multiple sites of myofascial pain. However, she did not agree with Dr. Wehner's overall assessment and recommendations. Dr. Joseph noted that that she had been treating Petitioner since November 4, 2002 at which time she recommended an interdisciplinary pain management program for shoulder girdle, cervical and mid-thoracic pain. Although Petitioner was able to return to work following her November 2002 accident, Dr. Joseph noted that Petitioner required intermittent attention for her pain problems including a left trochanter

bursa injection and prolonged frequent treatments with Chiropractor Regan. (Pet. Ex. 16)

On January 21, 2011, Dr. Rozenthal's office contacted Petitioner to advise her that the doctor reviewed her cervical MRI and Doppler study results and both were within normal limits. (Pet. Ex. 14)

Petitioner was evaluated by Dr. Ghanayem, at the Respondent's request, on March 5, 2012. Dr. Ghanayem reviewed Petitioner's prior medical records and opined that she had significant and severe neck pain dating back to at least May of 2008. Likewise, she treated for cervical and thoracic back pain in May of 2009. Dr. Ghanayem's impression was subjective complaints of back pain which appeared to be soft tissue in nature. The doctor opined that this was a longstanding problem which pre-dated the alleged work injury of October 15, 2009. Although the doctor agreed that she had manifestations of her problems at work, he did not see any evidence of an injury. Therefore, he found "no evidence of a distinct work injury causing structural changes to the integrity of her spine." Dr. Ghanayem opined that the issue of maximum medical improvement was moot because Petitioner did not sustain a work-related accident. She was released to full-duty work. (Resp. Ex. 2)

On March 15, 2012, Petitioner was evaluated by Dr. Noren at the Respondent's request. Petitioner completed a pain diagram which depicted pain in her lower back, left lateral thigh, buttock region, a small area in the mid- thoracic region, neck and both hands. She admitted to a previous neck injury in 2002. Treatment to date

consisted of chiropractic care including acupuncture and electrical stimulation. She had not undergone any physical therapy. She reported that she had not taken any pain medications since 2009.

According to Dr. Noren's review of Petitioner's medical records, she treated with Chiropractor Regan at least sixty-four (64) times from September 21, 2009 through January 6, 2011. At times, she sought chiropractic treatment for six (6) consecutive days. She had been treating with Dr. Joseph since November of 2003. Dr. Noren found it significant that during her office visit with Dr. Joseph on June 12, 2009, Petitioner complained of 10/10 pain in her back, neck, shoulders and hip. She was taking Tramadol and Xanax. Dr. Joseph gave her a greater trochanter injection at the June 12, 2009 office visit.

Dr. Noren opined that Petitioner had subjective historical complaints of myofascial type pain, left bursitis hip pain for which she had received injections prior to the reported injury and decreased sensory and motor findings which were not present in any of Dr. Joseph's records. Petitioner also reported a degree of disability which Dr. Noren opined was not consistent with her physical examination. Specifically, she had no findings to confirm a diagnosis of fibromyalgia. She was taking Xanax which she admitted taking prior to the reported injury. She reported ongoing chiropractic care which was a continuation of the treatment she received prior to the alleged accident of October 15, 2009.

Dr. Noren reported that Petitioner had a recorded history of anxiety and chronic pain which he opined was a longstanding syndrome and not related to her reported work accident. She had no

objective physical findings to explain her pain symptomatology. The doctor concluded that she had achieved maximum medical improvement and she had no physical disability which would prevent her from returning to work. (Resp. Ex. 3)

In a letter dated April 30, 2012 from Chiropractor Regan ("Regan") directed to Petitioner's attorney, Regan indicated that he reviewed Dr. Ghanayem's and Dr. Noren's IME reports. Regan disagreed with Dr. Ghanayem's and Dr. Noren's opinions that Petitioner did not sustain a work accident in October of 2009. (Pet. Ex. 17)

In a letter from Dr. Joseph to Petitioner's attorney dated May 25, 2012, Dr. Joseph indicated that she reviewed Dr. Ghanayem's and Dr. Noren's IME reports. She agreed with Dr. Ghanayem's physical examination findings and conclusion regarding his diagnosis of myofascial mid/low back and left buttock pain. However, she disagreed with Dr. Ghanayem's opinion that Petitioner did not suffer a work-related accident on October 15, 2009. Dr. Joseph further stated that Dr. Noren "is very accurate in his (sic) description of Ms. Sillman's current pain problems. Ms. Sillman has continued to complain of significant pain and disability, which we often see in our Chronic Pain Program at the Rehabilitation Institute of Chicago. She had not learned to manage her pain independently and has relied on passive chiropractic care of her current provider. Therefore, I have asked her not to continue to consult me on a regular basis as I do not think she can get better from simply this most passive approach." Dr. Joseph continued to recommend the same pain program she had prior to the alleged work accident of October 15, 2009. (Pet. Ex. 18)

Accident:

The Arbitrator finds that Petitioner failed to prove that she sustained a compensable accident and/or aggravation of her pre-existing condition on October 15, 2009.

The following is the basis of the Arbitrator's opinion: 1) Petitioner has been treating for the same pain complaints since 2002; 2) there are no objective findings to support an accident or aggravation on October 15, 2009; and 3) the opinions of Dr. Wehner, Dr. Ghanayem and Dr. Noren are more credible than the those of Chiropractor Regan and Dr. Joseph.

Petitioner admitted to treating with Chiropractor Regan and Dr. Joseph since at least 2002.

Dr. Joseph first evaluated Petitioner on November 4, 2002. At that time, the doctor recommended an interdisciplinary pain management program for shoulder girdle, cervical and mid-thoracic pain. Since her initial evaluation, Petitioner required intermittent attention for her pain problems including a left trochanter bursa injection and prolonged frequent treatments with Chiropractor Regan.

On May 3, 2009, Petitioner presented to Dr. Joseph and reported that her pain flared "severely" over the past three to four (3-4) weeks with radiating headaches up the neck, occasional severe migraines with nausea, blurred vision and whole body weakness. Once again, Dr. Joseph recommended an interdisciplinary pain program. Petitioner was also evaluated by Dr. Joseph on June 12, 2009 due to her complaint of 10/10 pain in her back, neck, shoulder and hip. Petitioner was re-evaluated by Dr. Joseph on September 5, 2009 at which time she complained of chronic worsening of her neck,

upper back and shoulder pain which radiated to the back of her head and caused migraines. Petitioner advised Dr. Joseph that she was seeing a chiropractor three (3) times per week.

Dr. Ghanayem reviewed Petitioner's prior medical records and opined that she had significant and severe neck pain dating back to at least May of 2008. Likewise, she treated for cervical and thoracic back pain in May of 2009.

Petitioner reported ongoing chiropractic care which was a continuation of the treatment she received prior to the alleged accident of October 15, 2009.

The Arbitrator finds that there are no objective findings to support an accident and/or aggravation of Petitioner's pre-existing condition on October 15, 2009.

In conjunction with her examination of August 9, 2010, Dr. Wehner reported that Petitioner's reported pain complaints were fairly high despite a normal neurological examination. Also, her subjective complaints did not follow any specific pattern and were not supported by any clinical or radiographic findings.

A MRI of the lumbar spine performed on August 11, 2010 revealed mild multilevel degenerative changes. A MRI of the cervical spine performed on December 8, 2010 also revealed mild multilevel degenerative changes. There was no evidence of significant spinal canal or neuroforaminal stenosis. On January 21, 2011, Dr. Rozenthal's office contacted Petitioner to advise her that the doctor

reviewed her cervical MRI and Doppler study results and both were within normal limits.

According to Dr. Noren, Petitioner reported a degree of disability which was not consistent with her physical examination. Specifically, she had no findings to confirm a diagnosis of fibromyalgia. Also, she had no objective physical findings to explain her pain symptomatology.

Following his evaluation, Dr. Ghanayem opined that there was "no evidence of a distinct work injury causing structural changes to the integrity of her spine."

In a report dated October 19, 2009, Dr. Joseph indicated that Petitioner had severe worsening of her neck and upper back pain *since her work-related injury on November 4, 2002.* (*emphasis added*). The doctor noted that Petitioner's pain was increasingly disabling and more severe even with less strenuous tasks. There was no mention of any other work-related accident. (Pet. Ex. 7)

The Arbitrator finds Dr. Ghanayem's opinion credible that Petitioner's subjective complaints of back pain were subjective, longstanding and pre-dated the alleged work injury of October 15, 2009. Although the doctor agreed that Petitioner had manifestations of her pain symptoms at work, he did not see any evidence of an injury. Therefore, he concluded that there was "no evidence of a distinct work injury causing structural changes to the integrity of her spine."

Dr. Wehner's diagnosis was chronic pain syndrome involving the cervical, thoracic and lumbar spine. The doctor opined that this was a pre-existing condition which was well-documented in the medical records by Chiropractor Regan and Dr. Joseph prior to the alleged accident of October 15, 2009; Petitioner's episode of back pain on October 15, 2009 was a manifestation of her pre-existing illness; there was no causal connection between Petitioner's condition of ill-being and the alleged work accident; work did not cause her chronic pain syndrome; and the alleged incident did not cause any change in Petitioner's condition.

As further evidence that Petitioner did not sustain a work accident, Dr. Noren reported that Petitioner had a recorded history of anxiety and chronic pain which the doctor opined was a longstanding syndrome and not related to her reported work accident.

Having found that the Petitioner failed to prove that she sustained a compensable accident on October 15, 2009, the Arbitrator finds that that there is no causal relationship between Petitioner's present condition of ill-being and the alleged accident and that All other issues are therefore rendered moot.

Therefore, compensation is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN WOODS,

Petitioner,

14IWCC0560

vs.

NO: 12 WC 07868

MENARD CORRECTIONAL CENTER/
STATE OF ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the September 11, 2013, 19(b) Decision of Arbitrator Gallagher finding that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on February 21, 2012, that Petitioner's current condition of ill-being is causally related to his accidental injuries, that Respondent shall pay the reasonable and necessary medical expenses identified in Petitioner's Exhibit 1 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule, and ordering Respondent to authorize and pay for prospective medical treatment as recommended by Dr. Mirly, including, but not limited to, additional conservative care and/or surgery for bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. The issues presented on review are accident, notice, causal connection, medical expenses, and prospective medical. The Commission, after considering the entire record, reverses the Decision of the Arbitrator to find that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent, failed to prove timely notice, and failed to prove a causal relationship between his current condition of ill-being and the accident in question. As a result the Commission's findings herein, the Arbitrator's awards of medical expenses and prospective medical are hereby vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) Petitioner testified he began working for Respondent as a Correctional Officer on October 6, 1980. Petitioner testified he initially worked at Respondent's psychiatric facility, and opened and closed cell doors with Folger Adam keys five to six hours a day, operated chuckholes, rapped bars, cuffed and uncuffed inmates. Petitioner testified he spent approximately 90% of his time in the gallery, and 10% in the tower during that time period. Petitioner testified he was promoted to sergeant in 1987, and from that date until 1997 he performed same duties as a correctional officer. Petitioner testified he agreed with the job description, job posting, job site analysis, and demands of the job contained in PX8. (T13-18).

2) Petitioner testified from 1980 to 1997 he was also assigned to the tactical unit, responsible for cell extractions, major disturbances, practice for same, and that his job duties also included working as a firearms instructor. Petitioner testified that during those 17 years, at the end of his work shifts, he noticed numbness and tingling in his hands. (T22-23).

3) Petitioner testified that in 1997 he was promoted to Laundry Manager I, and that he did that job for seven years, until 2004. Petitioner testified his job duties as laundry manager I were supervising inmates after 8:00 a.m., starting the laundry himself at 7:00am. Petitioner testified that laundry was brought to his department in carts, with 50 to 80 pound canvas bags containing 15 to 20 mesh laundry bags. The mesh laundry bags had to be loaded by hand into washing machines, then transferred by hand and loaded into dryers, and then loaded back into canvas bags and placed in carts. Petitioner testified that he supervised and assisted the inmates four hours, and that he himself performed these duties approximately four hours a day as the inmates left at 1:00 p.m., and he had to finish anything leftover. Petitioner testified that when he performed those job duties as a laundry manager, grabbing and pulling wet laundry, he noticed his hands were numb and fell asleep. (T23-29).

4) Petitioner testified that in 2004 he began working as a Supply Supervisor I and was promoted to Supply Supervisor II in 2005. Petitioner testified he spent the majority of his time as a Supply Supervisor in the cold storage area where he was required to load 50 to 100 pounds of product on skids and drag product on pallets with a pallet jack, with weights sometimes exceeding 2000 pounds. Petitioner testified he worked alongside the inmates, and that on lockdown he did the work of six inmates by himself. Petitioner testified that as a Supply Supervisor he spent less than 5% of his time in the commissary, and 95% of his time in cold storage. Petitioner testified he was also responsible for manual bookwork and data entry, and that while performing his job duties in cold storage he noticed his hands falling asleep on him. (T29-37).

5) Petitioner testified he retired from his employment with Respondent on January 31, 2012, and subsequently sought treatment with his personal physician, Dr. Platt, at Chester Clinic. (T37). Petitioner was seen by Dr. Platt on February 13, 2012 for follow-up on his hypertension, as well as a complaint of carpal tunnel symptomatology, at which time Petitioner requested a referral for nerve studies and an orthopedic consultation. Dr. Platt's assessment was hypertension, not well controlled, and complaints of nocturnal carpal tunnel symptomatology. He recommended NCV/EMG studies. Dr. Platt's February 13, 2013 office notes contain no mention of any work-related complaints. (PX3).

6) On February 21, 2012, Petitioner underwent NCV studies with Dr. Goldring, which indicated bilateral carpal tunnel syndrome, borderline on the left side, and evidence of ulnar neuropathies in both elbows. Dr. Goldring recorded a history of numbness and tingling in the fingers of both hands at night. Petitioner denied any hand weakness, dropping of things, or any daytime symptoms. Dr. Goldring opined Petitioner's testing was compatible with bilateral carpal tunnel syndrome, borderline on the left side, and bilateral mild ulnar neuropathy. Dr. Goldring's February 21, 2012 initial evaluation report contains no mention of any work-related complaints. (PX4).

7) The March 1, 2012 Employee Notice of Injury form signed by Petitioner reflects that he alleged a date of injury February 21, 2012, that the injury occurred while loading and unloading trucks, as well as moving pallets and product, and that the injury occurred while he was working in cold storage, the general store, the warehouse, and the commissary. The March 1, 2012 Form 45 further reflects Petitioner provided a history of bilateral carpal tunnel and bilateral cubital tunnel as a result of repetitive motion from lifting food sacks and meat products, pushing and pulling jacks, and loading and unloading semi-trucks. (PX6).

8) Petitioner testified that on March 1, 2012 he filled out an Employee Notice of Injury report at work (PX6), listing his date of injury as February 21, 2012, based upon the date he was given his diagnosis by Dr. Goldring. Petitioner testified that prior to the date of his NCV testing he had no diagnosis, testing, or treatment for his pain and symptoms in his arms and hands. Petitioner testified that he did not mention his job duties as a Laundry Manager on the accident report, but instead listed that his injuries were due to his job duties as a Supply Supervisor because that was the job he was performing at the time of his injury. (T37-39). Petitioner also testified that he did not know what was causing his symptoms, and that was the reason he mentioned his job duties as a supply supervisor instead of his prior work as a laundry manager. (T72-74).

9) The March 2, 2012 office phone note from Dr. Platt's office indicates Petitioner's request for a referral to a Dr. Young at Southern Illinois Orthopedics was granted, and

that Petitioner's diagnosis was bilateral carpal tunnel and bilateral ulnar neuropathy. (PX3).

10) Petitioner admitted that throughout the course of his employment with Respondent he was seen by his personal physician for yearly or semi-annual checkups, that he was frequently seen for monitoring of his hypertension, and that at no time during the course of that treatment did he advise his personal physician about any carpal tunnel or cubital tunnel symptoms. (T47-49). The treating records from Petitioner's personal physician at Chester Clinic document routine office visits for general health care issues from February 6, 1988 through Petitioner's date of retirement fail to document any history of hand or arm numbness, tingling or pain complaints. (RX2).

11) Petitioner also admitted that since November of 1987 he worked as a part-time police officer for the City of Chester, working one to two shifts a week. Petitioner also admitted that since his January 2013 retirement from Respondent he had increased his work as a police officer, working two to three shifts. Petitioner admitted his job duties as a police officer involved general patrol work, and that he sometimes noticed numbness or tingling in his hands when driving 60 to 100 miles per shift, or when shooting his weapons while qualifying, while working for the City of Chester. (T49-57).

12) Petitioner admitted he always had numbness in his hands, and that his symptoms significantly increased when he started working in the laundry department, with his hand falling asleep. Petitioner admitted he worked in the laundry department from 1997 to 2004, typically the 7:00 a.m. to 3:00 p.m. shift, with inmates present 7:30 a.m. to 1:00 p.m. Petitioner testified that once the inmates reported for work in that department, he would assist them with their job duties, but that when the inmates were not there he and the other employees performed the work duties. Petitioner admitted the inmates did a higher percentage of the physical labor than the employees performed. (T59-63).

13) Petitioner admitted he never discussed his symptoms or his condition with any other employees while he was working for Respondent, and admitted that around four or five years prior to hearing he did hear talk about carpal tunnel syndrome at work for Respondent. (T65-66). Petitioner admitted that he sought treatment with Dr. Mirly on his own, that he may have provided Dr. Mirly with a history of having symptoms for ten years, and that he also provided a history of very little symptoms during the day. Petitioner admitted he still has very little symptoms during the day and has not been dropping things as a result of his symptoms. Petitioner admitted his symptoms remained the after he retired from Respondent. (T67-68).

14) Petitioner admitted he did not inform any of his treating doctors of his job duties with Respondent with regard to his bilateral hand and arm complaints. Petitioner admitted

he may have filed his Workers Compensation Claim prior to receiving the results of his nerve studies and prior to him filing his incident report with Respondent. (T71-75).

15) After Petitioner's nerve studies were conducted, he sought treatment with Dr. Mirly, a hand surgeon. The May 18, 2012 patient health history form signed by Petitioner reflects a history of numbness and tingling in the fingers of both hand and soreness in both elbows, with a date of onset of February 21, 2012. The patient form further reflects that his condition is work related, but a denied claim. On May 18, 2012 Dr. Mirly recorded a history of numbness and tingling in the fingers of both hands and soreness in both elbows. Dr. Mirly's office note further reflects that Petitioner reported February 21, 2012 was the date of onset, the date he reported this condition, but that he had symptoms for 10 years. Dr. Mirly opined the nerve studies showed delayed motor and sensory latency on the right side and delayed sensory latency on the left side, as well as a little slowing of the motor conduction velocity across the elbow. Dr. Mirly diagnosed carpal tunnel syndrome and cubital tunnel syndrome, and recommended splinting, and possible injections and surgical releases if his symptoms increased. The patient form and the February 21, 2012 office noted fail to reflect any history of any specific work duties that contributed to or caused Petitioner's bilateral hand and arm complaints. Dr. Mirly's office notes contain no opinion on the issue of causal connection. (PX5).

16) Petitioner was seen in follow up by Dr. Mirly on August 24, 2012, at which time Petitioner reported improvement in his symptoms with night splinting, and only occasional non-severe symptoms. Dr. Mirly noted Petitioner was not in a hurry to proceed with surgery and that observation was appropriate as of that date. Petitioner was released from care and advised to follow up if his condition worsened. (PX5).

17) Dr. Mirly testified he did not obtain detailed work information from Petitioner during the course of his treatment of him, and that he did not recall Petitioner providing him with information on exactly what he did in the jobs he held as a guard, laundry manger and supply supervisor. Dr. Mirly also testified he did not personally observe the laundry manager job or see a video of same, but that he did review Petitioner's written job description for that position. Dr. Mirly opined that Petitioner's earlier work duties as a correctional officer could have been a minor contributory cause for his current condition of ill-being, but that he was of the opinion Petitioner's condition was more likely related to his work in the laundry department, as those were, based upon Petitioner's history, the duties he performed when he was most symptomatic. Dr. Mirly testified that based upon Petitioner's report of symptoms starting 10 years prior to seeing him, the onset of his symptoms would have been in 2002, while he was working as a laundry manager. Dr. Mirly opined Petitioner's earlier work duties in the laundry department were a contributing but not the sole primary cause or only cause of his carpal tunnel and cubital tunnel syndromes. He also admitted that while

he was advised of the job titles Petitioner held, he had no information as to what his exact job duties were at the time Petitioner was evaluated by him. (PX9, T42-45). Dr. Mirly testified that "the strongest association between the causation of a duty being responsible for the cause is that you would expect the symptoms to arise while you're doing the job, certainly not before and it it's delayed after, I said the relationship is much weaker." (PX9, T53).

18) Petitioner underwent a Section 12 examination with Dr. Sudekum on September 6, 2012. Dr. Sudekum testified that he reviewed treating records, diagnosis testing, numerous job analyses, and the workers' compensation initial report of injury, and conducted an EMG study. Petitioner provided a history of occasional periods of numbness and tingling at night. Petitioner's physical examination indicated a positive left wrist Tinel's and Phalen's, an equivocal Tinel's on the right wrist, a positive Phalen's on the right wrist, a negative Tinel's on both elbows, and an equivocal Phalen's on both elbows. Petitioner's subjective sensation was noted to be normal, and his bilateral upper extremity studies performed that day showed no evidence of median or ulnar neuropathy on either side, no evidence of carpal or cubital tunnel syndrome electrodiagnostically. Dr. Sudekum opined that the nerve testing was consistent with the other tests he conducted, that Petitioner had very benign findings with respect to his symptoms and normal nerve studies on September 6, 2012. Dr. Sudekum testified Petitioner reported a history of working as a supply supervisor from 2005 through 2010, and that this was the most strenuous job he held, but admitted that from 2010 through 2012 he worked as a supervisor in the commissary and did very little manual activity. (RX5, T4-28)

19) Dr. Sudekum testified that he diagnosed mild, relatively subjective complaints and symptoms of the upper extremities, including nocturnal paresthesias. Dr. Sudekum testified Petitioner had no significant neuropathic symptomatology during the daytime, no weakness, shooting pain, dysesthesias or other neuropathic pathology. He opined Petitioner was not suffering from carpal tunnel syndrome or cubital tunnel syndrome, based upon his review of treating records, testing, and physical examination. Dr. Sudekum testified that as of the date of his examination of Petitioner he did not have a pathological condition or a condition that required any medical treatment. (RX5, T31-42). He was of the opinion that Petitioner's comorbid factors for carpal tunnel syndrome symptoms were age, hypertension, and water retention, and that fluid retention was more likely the cause of Petitioner's nocturnal symptoms. (RX5, T28, T51-58).

The Commission finds Petitioner failed to prove he sustained accidental repetitive trauma injuries arising out of and in the course of his employment with Respondent, or that his current condition of ill-being is causally connected to same. Petitioner was employed by Respondent as a Correctional Officer from 1980 to 1987, as a Correctional Sergeant from 1987 until 1997, as a

Laundry Manager from 1997 until 2004, then as a supply supervisor from 2004 until 2008, and then as a Commissary Manager from 2008 until his January 31, 2012 retirement. During the entire time period from 1980 until January 31, 2012. Petitioner failed to complain to any medical provider or seek treatment for any of his alleged complaints. Petitioner sought no medical treatment until February 13, 2012, and even at that time he failed to relate any of his symptoms to his work duties, either as a cause or as an aggravating factor. Although Petitioner testified his symptoms manifested while working in the laundry department as a laundry manager from 1997 until 2004, the medical records and the accident reports fail to corroborate his testimony. The employee report of injury completed on March 1, 2012 and the Form 45 both indicate his injury arose while working in cold storage, the general store, the warehouse, and the commissary, when he was required to load and unload trucks, move pallets and product. The Commission notes the office notes of Drs. Platt, Goldring, and Mirly fail to reflect that the onset of his symptoms was related to any specific repetitive work duties, and also fail to contain any opinion on the issue of causal connection. Furthermore, the only favorable causal connection opinion rendered was from Dr. Mirly at the time of his deposition, and his opinion on casual connection was offered with regard to Petitioner's laundry manager duties, and not based upon Petitioner's other work duties for Respondent as a supply manager.

A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. See, e.g., Orsini v. Industrial Commission, 117 Ill.2d 38, 44-45 (1987), Parro v. Industrial Commission, 260 Ill.App.3d 551, 553 (1993). The Commission finds that Petitioner failed to do so. The Petitioner has not credibly shown a manifestation date of repetitive trauma injuries of February 21, 2012. The patient questionnaire and the office notes from Dr. Mirly indicate that his symptoms were long standing and that Petitioner asserted a ten year history of numbness and tingling in his hands and soreness in his elbows. The claimant testified at trial he did not know this was related to work, though he testified the symptoms were provoked by work activities. Dr. Mirly's causal connection opinion statement is not based upon a detailed job description, but upon Petitioner's own report of an onset 10 years prior and employment records indicating he worked as a Laundry Manager at that time. From 1997 until 2004, Petitioner worked as a Laundry Manager, and then as a Supply Manager from 2004 until he retired from his employment in January 2012. In cases relying on the repetitive trauma concept, the Petitioner must show the injury arose out of and in the course of his employment and was not the result of a normal degenerative aging process. See, e.g., Peoria County Bellwood, 115 Ill.2d 524 (1987); Quaker Oats Co. v. Industrial Commission, 414 Ill. 326 (1953). Simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased risk to the Petitioner. *Id.* The Commission also notes a claimant fails to prove a causal relationship through repetitive trauma where the medical opinion upon which they have relied is based upon incorrect or incomplete information about the claimant's job duties. See, e.g., Lon Dale Beasley v. Decatur Public School # 61, 03 IIC 301. The Commission has determined a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the Petitioner engaged in and the frequency of the motions. Gambrel v. Mulay Plastics, 97 IIC 238.

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). In this case, Dr. Mirly's testimony is less persuasive than Respondent's medical witness testimony as Dr. Mirly failed to describe with any specificity the force and repetition which Petitioner was required to use as a laundry manager which caused his carpal tunnel and cubital tunnel conditions, and furthermore had no history within his own office notes to reflect that Petitioner's symptoms were caused or aggravated by his work duties. In contrast to Dr. Mirly's vague understanding of Petitioner's duties, Dr. Sudekum obtained a detailed history from Petitioner of his numerous job duties for Respondent, reviewed numerous job descriptions as well as DVDs of a supply supervisor and commissary supervisor, and previously viewed toured Respondent's facility. Dr. Sudekum reported with a reasonable degree of medical certainty that Petitioner was not suffering from carpal tunnel or cubital tunnel syndrome, and that Petitioner's diagnosis was mild and relatively subjective complaints and symptoms affecting both upper extremities which included nocturnal paresthesias. Dr. Sudekum further opined that Petitioner's current condition of ill-being was most likely related to his personal predisposing risk factor for nocturnal paresthesias, water retention, and that it was not caused by any of his work duties for Respondent.

Based on the evidence contained in the record, the Commission finds that the Petitioner failed to establish that his alleged bilateral carpal tunnel syndrome and cubital tunnel syndrome arose out of and in the course of his employment. Given the Commission's findings above, relative to accident and causal relationship, the Arbitrator's award of medical expenses identified in Petitioner's Exhibit 1, and the award of prospective medical are herby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses identified in Petitioner's Exhibit 1 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical care is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that since the Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on February 21, 2012, his claim for compensation is hereby denied.

DATED: JUL 14 2014
KWL/kmt
03/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Phil Carello
Petitioner,

vs.

NO: 05WC 27417
14IWCC 0561

Northfield Township High School District, #225
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 July 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 July 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: SEP - 4 2014
MJB/bm
052

Michael J. Brennan

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

Phil Carello,

Petitioner,

vs.

NO: 05 WC 27417
14 IWCC 0561

Northfield Township High School District, #225,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of permanent disability under Section 8(d)1 and/or Section 8(d)2, 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.

On August 20, 2014, Respondent filed a Motion to Amend the Record. On August 21, 2014, Petitioner filed a Response to Respondent's Motion to Amend the Record. Hearing on the motion was held before Commissioner Michael Brennan on August 27, 2014.

At hearing, Respondent's counsel made an oral motion to amend Respondent's Motion to Amend the Record to Motion to Correct Clerical Error under 19(f). Petitioner's counsel then made an oral motion to amend his response to Respondent's motion to Petitioner's Response to Respondent's Motion to Correct Clerical Error under 19(f). There being no objections to the requested amendments, Commissioner Brennan granted the motions to amend Respondent's motion and Petitioner's response.

At the hearing, the parties agreed to the following:

- Petitioner was temporarily partially disabled from May 25, 2005 through January 31, 2007, and was off work at intermittent periods during his treatment.
- Respondent paid Petitioner $17,014.05 in temporary partial disability benefits and for the intermittent periods of lost time.
- The amount paid in temporary partial disability benefits and lost time satisfied the Petitioner's periods of lost time and temporary partial disability.
- That the $17,014.05 paid by Respondent to Petitioner should have been noted at the arbitration hearing and included as part of the Arbitrator's Decision as a credit for Respondent for benefits paid.

Based on the above, the Commission finds that the $17,014.05 was for Petitioner's periods of temporary partial disability and lost time and cannot be used as a credit against the permanent partial disability award. The Decision of the Arbitrator is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 4, 2013, is hereby clarified as stated above, and otherwise affirmed and adopted.

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

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

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

DATED: SEP - 4 2014
O-07/08/14
MJB/ell
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0561

PHIL, CARELLO
Employee/Petitioner

Case# 05WC027417

NORTHFIELD TOWNSHIP DISTRICT #225
Employer/Respondent

On 9/4/2013, 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:

0878 COLLISON & O'CONNOR LTD
E K COLLISON II
19 S LASALLE ST SUITE 1400
CHICAGO, IL 60603

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW P SHERIFF ESQ
ONE N LASALLE 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
NATURE AND EXTENT ONLY

14IWCC0561

PHIL CARELLO
Employee/Petitioner

v.

NORTHFIELD TOWNSHIP DISTRICT #225
Employer/Respondent

Case # 05 WC 27417

Consolidated cases: None

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 **Dave Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **August 1, 2013, and August 28, 2013**. By stipulation, the parties agree:

On the date of accident, **March 10, 2005**, 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 $**39,848.24**, and the average weekly wage was $**766.31**.

At the time of injury, Petitioner was **53** years of age, ***single*** with **zero** 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**.

14IWCC0561

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 $459.79/week for a period of 200 weeks as provided in Section 8(d)2 of the Act because the injuries sustained caused **the partial disability of said Petitioner to the extent of 40% thereof.**

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

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

David A. Kane
Signature of Arbitrator

September 4, 2013
Date

SEP 4 - 2013

14IWCC0561

ILLINOIS WORKERS' COMPENSATION COMMISSION

Phil Carello
Employee/Petitioner

Case # 05 WC 27417

v.

Consolidated cases: None

Northfield Township District 225
Employer/Respondent

RIDER

I. Statement of Facts

On March 10, 2005 the petitioner, 53 years of age at the time, was working for the respondent as the assistant boy's gymnastics coach and the assistant girl's gymnastics coach. Petitioner testified that he had a significant past history in gymnastics, including high school, as well as junior college and at the NCAA level. Petitioner also testified that he had attended numerous clinics and workshops regarding gymnastics. The petitioner testified that practices would occur usually 5-6 days per week in season, and that the students would be engaged in 2-3 separate events per day which would include teaching and spotting which the petitioner testified is a very "hands on" activity.

The petitioner testified that on the date of loss, he was spotting a gymnast on the floor exercise when the student performed two back flips and on the second back flip he had not rotation which required the petitioner to reach in with his left arm to attempt to support the student which resulted in his upper left arm being kicked by the heel of the student. The petitioner testified that he is right hand dominant and usually writes

with his right hand. The petitioner testified that immediately upon the incident he felt great pain in the biceps region of his left arm, and noticed that his biceps had appeared to him to have "rolled up" near his shoulder.

In the initial Emergency Room visit, the petitioner presented to Dr. FitzSimons at Illinois Bone & Joint complaining of pain in the left arm and giving a history as noted above. It was the doctor's impression that he believed the petitioner had suffered a rupture of the biceps tendon, though he requested an MRI to confirm this diagnosis.

On March 16, 2005 the petitioner presented to Highland Park Hospital for an MRI of the left arm which confirmed a complete tear of the distal biceps tendon. (P.X. 1).

On March 24, 2005, the petitioner was seen by Dr. Craig Phillips at Illinois Bone & Joint, upon referral from Dr. FitzSimons. The doctor reviewed the MRI and also examined the petitioner and recommended surgical repair. (P.X. 2).

On March 30, 2005 the petitioner presented to Evanston Northwestern Hospital for surgery under the direction of Dr. Phillips. The pre and post-operative diagnosis was left biceps tendon tear, and the procedure performed was a tendon tenotomy, tendon repair using bone tunnel technique. (P.X. 2).

The petitioner returned to Dr. Phillips for follow-up following the surgery, and on April 19, 2005 the petitioner noted that he had been "doing very well" and had begun once a week therapy. On examination, the petitioner had complete flexion of the elbow and lacked only about 15° of extension. (P.X. 2).

The petitioner continued with the therapy and returned to Dr. Phillips on May 12, 2005 indicating he was doing well, and relatively pain free,

though was having some problem with supination. Because of this complaint, the doctor requested an x-ray which showed significant heterotopic ossification. Petitioner was advised to continue therapy and advised that he would likely need excision of that bone growth in the future. (P.X. 2).

The petitioner completed his therapy and returned to Dr. Phillips on June 23, 2005 exhibiting full flexion and extension as well as full strength in the elbow, though the forearm supination was still limited. X-rays taken on that date continued to show the excess bone formation and the petitioner was advised to return in 2 months for a repeat x-ray to decide whether surgery would be appropriate. (P.X. 2).

The petitioner returned to Dr. Phillips on August 23, 2005 now 4½ months post biceps tendon repair, indicating full range of motion other than the slight limitation of the forearm supination. The x-rays taken on that date noted a small decrease in the bone formation and Dr. Phillips recommended petitioner continue taking Indocin to see if the bone formation could be reduced without surgery. (P.X. 2).

The petitioner returned to Dr. Phillips on October 25, 2005 now 7 months post surgery continuing to complain of supination problems. The doctor again recommended medication to attempt to deal with this, and the petitioner agreed. (P.X. 2).

The petitioner returned to Dr. Phillips on December 15, 2005 continuing to complain of the limited supination of the forearm, and both the petitioner and physician decided to undergo surgical removal of the bone formation. (P.X. 2).

On January 13, 2006 the petitioner presented to Evanston Northwestern Hospital for the surgical procedure under the direction of Dr.

Phillips. The pre and post-operative diagnosis was heterotopic ossification with rotation contracture of the left elbow, and the procedure performed on that date was radial nerve neurolysis, radical excision of the heterotopic bone and capsule at the left elbow joint. (P.X. 2).

The petitioner returned to Dr. Phillips on several occasions in early and spring of 2006 at which time the petitioner felt he was experiencing "significant improvement", and on examination the petitioner had full elbow flexion and extension and forearm rotation was significantly improved.

On October 31, 2006 the petitioner presented to Dr. Paul Papierski for an independent medical examination at the request of the respondent. Following a review of the medical treatment records and examination of the petitioner, Dr. Papierski was of the opinion that the petitioner's treatment had come to an end by that point, and that due to the fact that the range of motion of the left elbow was markedly improved from a pre-operative state and that the strength testing was generally normal on examination, that the petitioner should not have any restriction at that time. The doctor also felt that maximum medical improvement would likely not be until January of 2007, as usually it takes approximately 1 year post the surgery which was performed in January of 2006. (R.X. 1).

On February 1, 2007 the petitioner returned to Dr. Phillips for examination now approximately one year post surgery, and it showed full flexion and extension as well as full pronation and 85° of supination with no pain. Strength also was 5/5. (P.X. 2).

On August 27, 2007 the petitioner underwent a functional capacity evaluation which indicated some minor inconsistencies, though the ultimate recommendation was for the petitioner to be allowed to return to coaching

gymnastics except for those activities involved with spotting, essentially breaking the fall, lifting or carrying of athletes. (P.X. 4).

On July 2, 2008 a report was authored by Dr. Papierski after he had the opportunity to review the medical records from his previous IME to that date, and he indicated that he did not feel there was any need for any additional treatment of the petitioner's left arm/elbow. Dr. Papierski understood what the FCE said, though indicated that it would be reasonable for the petitioner to attempt to return to any type of coaching activity, as noted the petitioner was comfortable in performing spotting and coaching activities and it would reasonable to possibly return with more experienced athletes or with some sort of assistance. (R.X. 1).

The petitioner also underwent an independent medical examination with Dr. Vender at the request of the petitioner's attorney, and it was Dr. Vender's opinion that due to the fact that he had some limitation in his left forearm supination, as well as the restrictions of the FCE, that the petitioner could not return to coach gymnastics if spotting was involved as part of the job description. (R. X. 1).

The petitioner called an additional witness in this case, Mr. Stephen Gale, who also works as a gymnastics coach, and has been involved in gymnastics since 1963. It was Mr. Gale's opinion that you could not be a coach in gymnastics if you were not able to spot the athletes, as spotting is "critical" to performance of those duties.

The petitioner testified that on May 25, 2005, approximately 2 months following the incident, he presented a resignation letter to Mr. Stephen Rockrohr, the Athletic Director with District 225. This letter advised that petitioner was resigning as girl's gymnastics coach and as assistant boy's

gymnastics coach due to the injuries sustained during that year's gymnastics season.

Mr. Rockrohr testified via deposition that from the date of the incident to the present date, the petitioner has never given him anything in writing regarding his medical restrictions and requested accommodation regarding any sort of head or assistant coaching position. (R.X. 2). Mr. Rockrohr also testified to how the coaching positions are filled, namely they are listed on the website, and he receives applicants. At that time he interviews the applicants and hires the appropriate individual. Mr. Rockrohr testified that at no time from the date of accident to the present date has the petitioner applied for any coaching positions, either assistant or head, in any sport. (R.X. 2).

The petitioner testified that he has also been a teacher with the respondent for the past 14 years in special education, a position which he still holds today. In addition to a teaching job, the petitioner testified that he also works as a gymnastics official for meets, and has been certified in that capacity for the past 18 years.

II. Conclusions of Law

With respect to the issue of the nature and extent of Petitioner's permanent disability, the Arbitrator notes that Petitioner has sought an award of a wage differential under section 8(d-1) of the Act. Petitioner claims that he is unable to return to gymnastics coaching, a loss of income of approximately $15,000.00 per year. However, the facts demonstrate that Petitioner did not make any effort to replace this lost income with any other activity, either coaching another sport or applying to perform some other additional teaching activity, such as driver's education. Accordingly,

the Arbitrator finds that Petitioner failed to prove he is entitled to a wage differential under section 8(d-1) of the Act.

However, the Arbitrator does note that the significant impairment of Petitioner certainly effects him more than a loss of use of the arm. Therefore, after considering the entire record, the Arbitrator finds that Petitioner is permanently disabled to the extent of 40% under section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Diaz,

Petitioner,

14IWCC0562

vs.

NO: 11 WC 25967

GCA Services Inc,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 27, 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 $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: JUL 14 2014
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MJB/bm
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

14IWCC0562

DIAZ, MARIA
Employee/Petitioner

Case# **11WC025967**

GCA SERVICES INC
Employer/Respondent

On 11/27/2013, 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:

2932 KUGIA & FORTE PC
MARTIN KUGIA
711 W MAIN ST
WEST DUNDEE, IL 60118

3227 HOLECEK & ASSOCIATES
JAMES M EBERLIN
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

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

14IWCC0562

Case # 11 WC 25967

Consolidated cases: none

Maria Diaz,
Employee/Petitioner

v.

GCA Services, 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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Wheaton**, on **8/16/13**. 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. ☒ 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 _____

14IWCC0562

FINDINGS

On the date of accident, **4/20/11**, 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 condition of ill-being relative to her lower back ***is*** causally related to the accident up through 9/28/11, but her current condition of ill-being relative to her right knee ***is not*** causally related to the accident .

In the year preceding the injury, Petitioner earned **$20,428.26**; the average weekly wage was **$392.85**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **no** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services. The parties agreed to defer the issue of medical expenses to a later date. (See Arb.Ex.#1).

Respondent shall be given a credit of **$6,013.26** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$6,013.26**.

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 $261.90 per week for 20-6/7 weeks, commencing 5/6/11 through 9/28/11, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 4/21/11 through 8/16/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $6,013.26 for temporary total disability benefits that have been paid.

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

11/22/13
Date

ICArbDec19(b)

NOV 27 2013

STATEMENT OF FACTS:

Petitioner, a 53 year old cleaner, testified that she had worked for Respondent since 2001. She speaks Spanish and testified through an interpreter. Petitioner testified that on April 20, 2011 she was pushing a rack of chairs up a ramp with a co-worker when the co-worker let go of the rack and the weight of the chairs came toward her. She indicated that as she tried to hold on to the rack her right leg and waist were twisted. She estimated that the rack held 70-80 chairs. She noted that she yelled for help as she held onto the rack until another co-worker came and helped push the rack to the breakfast room. She testified that after the incident she felt very strong pain in her back that ran down to the bottom and front of her right leg. She also indicated that the pain was worse in her back and in her knee. She finished her shift that day.

The following day Petitioner visited the company clinic, Concentra. She noted that at that time she was experiencing a strong pain from her hip to her butt and down the front of her leg. The record from Concentra dated April 20, 2011 states: "she was pushing a rack of chairs that was very heavy and felt pain to her lower back." She was diagnosed with a lumbar strain. She continued treating at Concentra where she underwent physical therapy. (PX1). Petitioner also continued to work following the accident, albeit in a light duty capacity consisting of sit down office work, until she was taken off work completely on May 6, 2011. Petitioner testified that she has not worked or looked for work since that date.

Petitioner underwent a lumbar MRI on May 17, 2011 which was interpreted as revealing spondylosis and disc bulging L3-4, L4-5, L5-S1 with a tiny herniation at L5. Concentra doctors subsequently referred Petitioner to Dr. Mercier, an orthopedic surgeon, whom she saw on June 1, 2011. Dr. Mercier's records indicate that Petitioner complained of right radicular low back pain with right foot numbness. Dr. Mercier also noted a positive straight leg raise on the right as well as a small herniated disc at L5-S1 on MRI. Dr. Mercier suggested epidural injections and imposed restrictions, but noted that she avoid surgery. (PX4).

Petitioner was seen by Dr. McNally at Suburban Orthopedics for her ongoing back pain on June 28, 2011. The records from Dr. McNally indicate that she complained of back and right leg pain from pushing a rack of chairs. (PX2). Petitioner reported that following the accident she had low back pain and then right leg pain an hour later. She complained of ongoing low back pain going down her right leg and numbness from her right knee down to her ankle. She also related that she had pain in both her right leg and back but that her back was her primary concern. Dr. McNally reviewed the MRI and interpreted the results as evidencing a disc protrusion at L5-S1 consistent with Petitioner's complaints. He ordered an EMG and kept Petitioner off work at that time.

Petitioner followed up with Dr. McNally on July 6, 2011. His records indicate that Petitioner could not stand her right knee pain and that she was having trouble walking and bending with her right knee. Petitioner reported to Dr. McNally that her right knee pain began on the date of injury but that the workers' compensation doctor told her the knee pain was from her back injury. Dr. McNally referred Petitioner to Dr. Freedberg to evaluate her knee and referred her to Dr. Rathi for pain management for her back pain. Dr. McNally also kept her off work at that time.

Petitioner was seen by orthopedic surgeon Dr. Freedberg on July 19, 2011. Dr. Freedberg's records reflect a history of right knee pain from an injury on April 20, 2011 that occurred while she was pushing a rack of chairs. Dr. Freedberg diagnosed a possible meniscal tear, ordered an MRI of the right knee and kept Petitioner off work.

An MRI of the right knee performed on November 12, 2011 revealed degenerative changes and a meniscal tear.

On November 15, 2011 Dr. Freedberg recommended right knee surgery, instructed her to remain off work and instructed her to follow up 2 weeks after surgery.

With respect to her back, Petitioner was seen by Dr. Rathi for pain management on July 26, 2011. (PX3). The records from Dr. Rathi document her complaints of back pain radiating into her right leg with numbness and tingling in her right leg. His exam revealed decreased range of motion of the right knee. Dr. Rathi administered bilateral sciatic nerve blocks and lumbar point injections and fascia injections for her back pain. Petitioner subsequently followed up with Dr. Rathi and received the same injections three more times in August and September 2011. On September 28, 2011 Dr. Rathi recommended continued treatment at his clinic. Petitioner testified that the injections did provide short term relief and that she would like to receive additional pain management treatment. However, she noted that Respondent will not authorize same.

Dr. Rathi's records indicate that on October 24, 2011 Petitioner did not show up for her appointment due to "insurance problems." Petitioner was seen by Dr. McNally on March 20, 2012. At that time Dr. McNally recorded that workers' compensation was "denying everything" and he reiterated his recommendation for additional pain management and for knee surgery per Dr. Freedberg.

At the request of the Respondent, Petitioner visited Dr. Carl Graf on September 26, 2011 for purposes of a §12 examination. Following his examination and review of the records, Dr. Graf indicated that Petitioner's lumbar MRI was normal and that he was unable to substantiate the etiology of Ms. Diaz's subjective complaints of pain. As a result, Dr. Graf concluded that Petitioner did not need any further treatment and that she could return to unrestricted work. (RX5).

At the request of her attorney, Petitioner visited Dr. Aaron Bare on May 7, 2012 for purposes of a §12 examination. Dr. Bare examined Petitioner's right knee and reviewed medical records, including the MRI of the right knee. Dr, Bare noted that although the MRI suggested meniscal tears, her primary source of pain was the osteoarthritis. Dr. Bare's diagnoses were right knee degenerative joint disease, osteoarthritis, lateral compartment. Dr. Bare opined that, provided there were no prior issues with the right knee, Petitioner's complaints relative to same were related to her work injury. He also believed that if she did have a pre-existing condition in her right knee then her condition could be been exacerbated by the incident. Dr. Bare recommended a cortisone injection to the knee, physical therapy and possibly hyaluronic acid injections. In addition, Dr. Bare noted that surgical arthroscopy should be utilized as a last resort. Finally, Dr. Bare suggested that a lateral compartmental off-loader knee brace was an option to consider. (PX5).

At the request of the Respondent, Petitioner visited Dr. Pietro Tonino on June 4, 2012 for purposes of a §12 examination. Following his examination and review of the medical records, Dr. Tonino concluded that Petitioner had degenerative arthritis of the right knee and that she was a candidate for right knee arthroscopy. Dr. Tonino also recommended restrictions of no squatting, twisting, climbing or lifting more than 20 pounds. Finally, Dr. Tonino opined that within a reasonable degree of medical and surgical certainty her right knee condition was not related to any injuries that occurred at work on April 20, 2011. (RX4).

In a letter dated June 29, 2013, Dr. Freedberg noted that he was of the opinion that there was a positive causal connection between the accident of April 20, 2011 and Petitioner's right knee injury and need for surgery. (PX6).

Petitioner testified that she would like to proceed with the right knee surgery as recommended by Dr. Freedberg and that she would also like to proceed with the additional pain management for her back as recommended by Dr. Rathi and Dr. McNally.

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

Concentra Medical Center records dated April 21, 2011 reflect a history of pushing a rack of chairs and injuring her lower back on April 20, 2011. (PX1). These notes also indicate that Petitioner reported she "was bent over pushing a stack of chairs in a bent over position yesterday and hurt her back." (PX1). Petitioner's chief complaint was noted to be bilateral lower back pain, right greater than left, as well as bilateral buttock pain into upper hamstrings. (PX1). No mention of any right knee pain is noted. (PX1). Petitioner was diagnosed with a lumbar strain and referred to therapy. (PX1). She was released with light duty restrictions of no lifting over 15 pounds. (PX1).

Petitioner returned to Concentra on April 25, 2011 at which time therapy records reflect that since Ms. Diaz "… went back to work [performing her regular duties] her pain has spread up her entire back to her neck and into both her elbows." (PX1). Once again, no mention of any right knee pain was noted. (PX1). A separate "Progress Note" on that date show that Petitioner's symptoms were worsening and that "[s]he complains of pain to her lower back, back of both thighs, mid and upper back, neck, and arms to elbows… The patient denies bilateral lower extremity numbness, tingling or weakness…" (PX1). The assessment at that time was lumbar strain and back pain. (PX1). Petitioner was prescribed medication, instructed to continue with therapy and was given the following restrictions -- no repetitive lifting more than 10 pounds, limited bending and no mopping/sweeping. (PX1).

Petitioner returned to Concentra on April 29, 2011 at which time therapy records reflect that she was "working modified activity with acceptable tolerance" and that she presented with complaints of back pain and pain going down her right thigh. (PX1). It was also noted that "[s]he works in a cold room and she feels tension & the cold room make her hurt more. The patient[']s condition continues to be aggravated by standing or sitting for a long time." (PX1). Once again, it does not appear that any specific complaints were made relative to the right knee at that time. (PX1).

Petitioner returned to Concentra on May 2, 2011 at which time therapy records reflect complaints of right hamstring pain and right lower back pain as well as complaints of pain "… of her entire back up to her shoulders/arms. She reports her upper/middle back pain is better." (PX1). This therapy note goes on to indicate that "[t]he patient[']s condition continues to be aggravated by going up stairs, sitting, walking – she was unable to take a walk with her family, reaching [overhead] hurts with exercise, and putting weight on her R[ight] [lower extremity] hurts." (PX1). Once again, there are no specific references to pain complaints or treatment relative to the right knee at that time. (PX1). A separate "Progress Note" on that date refers to Petitioner's current complains of "… pain to the right upper back to upper arm and lower back. The patient has no new complaints… The patient denies bilateral lower extremity numbness, tingling or weakness…" (PX1). The assessment at that time was lumbar strain and back pain. (PX1).

Petitioner returned to Concentra on May 6, 2011 at which time therapy records reflect Petitioner "… reported that she had on a pair of jeans today that were not very tight but she couldn[']t stand to wear them while driving here, and she had to go home & take them off. It was causing her back pain." (PX1). These therapy records also note that Petitioner "… reported R[ight [lower extremity] numbness today after piriformis stretching …" and that "[p]rolonged sitting and walking causes her R[ight] leg to go numb." (PX1). A separate "Progress Note" on that date indicates Petitioner felt her pattern of symptoms was worsening and that in addition to her lower back pain she "… now complains of some pain to the right upper back but her main concern is the lower back. She states that she is currently in a log of pain and could not finish her shift due to the pain. She believes that some stretches she did in therapy earlier

today significantly aggravated her pain and caused her to have radiating symptoms to her leg. Per therapy patient was doing psoas stretches which may have contributed to increased pain." (PX1). The assessment was lumbar radiculopathy, lumbar strain, back pain. (PX1). Petitioner was prescribed Vicodin and a Medrol dose pak and instructed to continue with the previous therapy schedule, including a home exercise program. (PX1). Petitioner was also given the following restrictions at that time: "Off work rest of shift. No repetitive lifting more than 10 pounds. No prolonged standing/walking more than tolerated. No bending more than 0 times an hour. No mopping or sweeping." (PX1).

Petitioner returned to Concentra on May 10, 2011 at which time therapy records reflect complaints of "… constant pain to the right lower back and pain radiating to right leg. She also states her toes are numb. She states that she is still in a lot of pain. She states that her supervisor took her off work since her last visit. The patient has no new complaints…" (PX1). An MRI of the lumber spine was ordered and Petitioner was started on ibuprofen instead of the Vicodin, which was making her dizzy. (PX1). Petitioner was also instructed to hold therapy and not to engage in activity pending authorization, scheduling and the results of the MRI. (PX1).

Petitioner returned to Concentra on May 13, 2011 at which time therapy records reflect that Petitioner was "… feeling better with her new medication … She [complaints of] R[ight] buttock and R[ight] [lower extremity] pain. The patient[']s condition continues to be aggravated by lying prone. She also reports that 15 minutes after doing her gently quad stretch in PT today her R[ight] quad hurts pretty badly." (PX1). A separate "Progress Note" on that date indicate that Petitioner felt "… the pattern of symptoms is not better. The patient currently complains of persistent pain to her lower back. The patient has no new complaints. She states se stopped using the ibuprofen because it made her feel depressed. She is here to discuss her MRI results. She is not working." (PX1). It was noted that the MRI was interpreted as evidencing disc bulging at multiple levels. (PX1). The assessment at that time was lumbar radiculopathy and lumbar strain. (PX1). Petitioner was instructed to discontinue her pain medication, prescribed Tylenol 500mg and referred to an orthopedic specialist. (PX1).

On June 1, 2011 Petitioner visited orthopedic surgeon Dr. Charles Mercier. (PX1). Dr. Mercier noted Petitioner's complaints of right radicular low back pain associated with right foot numbness with the patient noted was "no better from the beginning." (PX1). Dr. Mercier reviewed the MRI and noted a "… small herniated disk at L5-S1 with a bulging disk at L4-5 associated with other degenerative changes" and no significant neural impingement noted. (PX1). Dr. Mercier noted that he told Petitioner that "… she does not seem to need surgery" and recommended epidurals, which Ms. Diaz agreed to undergo, after obtaining permission from the insurance company. (PX1). In the meantime, Petitioner was to continue with her modified duties and return in three weeks. (PX1).

Petitioner subsequently visited Dr. Thomas McNally on June 28, 2011. (PX2). On that date Dr. McNally recorded a history of moving a stack of chairs up a ramp into a gym when "… the other helper let go of the other side and [Petitioner] had to hold the whole rack by herself and push it so that it would not land on her. She had immediate low back pain, with right leg pain starting about an hour later… The patient states that her pain begins from lower back radiating into her right leg, worst in the back. She states that the pain goes into her right foot and toes. She states that she does have numbness from her right knee down to her ankle. The patient also notices that her right side of groin area is swollen. She states that her left lower back side has started to hurt now as well." (PX2). Dr. McNally also recorded complaints of pain in the right shoulder and lower shoulder blade area, noting that Petitioner denied numbness or tingling in the left side or arm or tingling of her hands or fingers. (PX2). In addition, Dr. McNally noted that the [right shoulder] pain has been there since the injury, but her back is her primary concern." (PX2).

Dr. McNally reviewed the lumbar spine MRI and noted that his "independent reading differs somewhat from the official report" in that he felt "[t]here is foraminal narrowing and [a] small disc protrusion on the right at L5-S1 that is consistent with the patient's complaints." (PX2). Dr. McNally's diagnosis was lumbar disc displacement. (PX2). Finally, Dr. McNally noted that "[i]n order to better evaluate the source of her right leg pain and paresthesias, we will obtain an EMG of bilateral lower extremities." (PX2).

Petitioner returned to Dr. McNally on July 6, 2011 at which time it was noted that Petitioner presented with low back and right knee pain. (PX2). Dr. McNally noted that Petitioner stated that "... she has constant right knee pain that makes it difficult to put weight on it" and that "[s]he states that it started on the day of her work related injury on 4/20/2011. She states that the work comp doctor told her that her right knee pain was do [sic] to he back injury." (PX2). Dr. McNally noted that the EMG was still pending, and referred Petitioner to Dr. Freedberg for the right knee pain and Dr. Rathi for pain management. (PX2).

On July 11, 2011, Petitioner underwent an EMG which was interpreted as evidencing 1) acute moderately severe degree predominantly L5 lumbosacral radiculopathy, more prominent on the right side, and 2) no evidence of generalized polyneuropathy or entrapment moneneuropahty during examination. (PX2).

Petitioner had previously treated with Dr. Freedberg and underwent left knee arthroscopy, partial lateral meniscectomny and chondroplasty of the patella on July 16, 2007. (PX2). Petitioner was released from Dr. Freedberg's care at maximum medical improvement following that procedure on December 20, 2007. (PX2).

Petitioner visited Dr. Freedberg for the first time following the present accident on July 19, 2011. (PX2). At that time, Dr. Freedberg recorded complaints of right knee pain following an injury on April 20, 2011. (PX2). Dr. Freedberg noted that at the time Petitioner was pushing a rack of chairs up a ramp when the person who was helping her let go and the rack rolled back. (PX2). Dr. Freedberg indicated that when this happened she "... tried to hold it with her arms and her knee. States she has not had any previous treatment for the right knee." (PX2). Dr. Freedberg noted current complaints of pain on the whole kneecap which travels up the thigh as well as some pain from her low back that radiates down the back of her leg to her calf. (PX2). Dr. Freedberg also recorded that "[s]he hears a popping noise and loses strength in her leg. States she has had episodes of the knee giving out on her. She is also having numbness in her toes." (PX2). Following his examination, and review of x-rays, Dr. Freedberg diagnosed a right knee sprain with possible meniscal tear. (PX2). Dr. Freedberg recommended an MRI of the right knee and that Petitioner remain off duty until follow up. (PX2).

Petitioner returned to Dr. McNally on July 28, 2011 with continued complaints of low back and right leg pain. (PX2). Dr. McNally noted that the MRI recommended by Dr. Freedberg had not been approved yet, but that Petitioner had seen Dr. Rathi who had prescribed Naprosyn and performed a trigger point injection. (PX2). Dr. McNally also indicated that he had reviewed the EMG results and that "[h]er symptoms and objective EMG testing are consistent with my interpretation of her poor resolution OPEN mri ..." (PX2). Dr. McNally's diagnosis was lumbar disc displacement ad joint pain leg/knee. (PX2). Dr. McNally went on to note that "[d]ue to the patient's continuing back and right lower extremity radicular pain, we discussed the option of referral to interventional pain management for evaluation and treatment. We discussed that the patient can continue medication management with Dr. Rathi as well. Regarding her knee pain, we agree with Dr. Freedberg's recommendation of an MRI, in order to obtain additional diagnostic information." (PX2).

Petitioner visited Dr. Sapna Rathi on July 26, 2011 for "eval of low back pain with sciatica down the right lower ext[remity]. She was injured at work on 4/20/11. She and a coworker were moving a cart of chairs. Her coworker was pulling the cart up the ramp, and the pt was pushing it up. However, the coworker let go, and the pt pushed the cart away, which injured her back." (PX3).

On August 9, 2011 Dr. Rathi administered nerve blocks and lumbosacral muscle point and fascia injections at that time, with claimed improvement of symptoms. (PX3). Petitioner returned to Dr. Rathi on August 15, 2011, August 31, 2011, September 15, 2011 and September 28, 2011 and received additional injections.

Petitioner visited Dr. Carl N. Graf at the request of the Respondent on September 26, 2011 for purposes of a §12 examination. (RX5). Following his examination and review of the records, Dr. Graf noted that he was "unable to substantiate the etiology of Ms. Diaz's subjective complaints of pain" and that it was his opinion that "her pain is not spine related given her examination and normal MRI." (RX5). Earlier, Dr. Graf had noted that Petitioner demonstrated multiple nonorganic pain signs with pain improvement with distraction and that the MRI revealed no evidence of disk herniation or otherwise. (RX5). Furthermore, Dr. Graf opined that further pain management injections were neither reasonable nor medical necessary and that with respect to the lumbar spine Petitioner was at maximal medical improvement. (RX5). Along these lines, Dr. Graf felt there was no objective reason why Petitioner could not return to full, unrestricted duty with regard to her spine, although he did recommend a referral to an orthopedic lower extremity specialist. (RX5).

Petitioner subsequently underwent an MRI of the right knee on November 12, 2011. In a note dated November 15, 2011, Dr. Freedberg noted that the MRI revealed extensive abnormality of the posterior horn of the lateral meniscus with extensive degeneration and evidence of meniscal tear. (PX2). Dr. Freedberg noted that he discussed surgery with Petitioner as a current option, and that Ms. Diaz wished to proceed with same. (PX2). In a "Work Duty Status" report dated November 15, 2011 it was noted that Petitioner was medically unable to work and was to return to the clinic post op. (PX2).

At the request of her attorney, Petitioner visited Dr. Aaron A. Bare on May 7, 2012 for purposes of a §12 examination. (PX5). Dr. Bare recorded a history of injury on April 20, 2011 while pushing a pile of chairs up a ramp. (PX5). Dr. Bare noted that Petitioner reported that "… the person helping her out let go of the load of chairs and the weight of the load caused her to step backwards and that the load of chairs knocked into her and this lead to her pivoting, especially with the right leg backward. She backed up into and pivoted into a wall. The weight of the chairs led her to pivot against the wall and this raised the load. The other person was able to help lift the load of chairs off of her by pulling on the top of the ramp. After the injury, she noticed pain in her back as well as the knee. She reports that the pain in her back after the injury was worse than the knee." (PX5). Following his examination and review of the records, Dr. Bare opined that "[t]here was a very reasonable chance that this current condition [with respect to the right leg] is stemming from her work injury. If indeed she has no previous problems, treatments, or injuries requiring medical care for her knee, I believe with a high degree of medical certainty that her complaints today are related to her work injury." (PX5). Dr. Bare went on to state that "[a]lthough the MRI report suggests meniscal tears, her primary source of pain is osteoarthritis", and that treatment for the knee should be based on presence of pre-existing osteoarthritis. The condition should be considered an exacerbation of her pre-existing condition." (PX5). As a result, Dr. Bare recommended intraarticular cortisone injection, over-the-counter or prescription strength anti-flammatories and a brief course of physical therapy. (PX5). Failing that, Dr. Bare felt Petitioner might be a candidate for a series of hyaluronic acid injections, and as a last resort, surgical arthroscopy. (PX5). In addition, Dr. Bare noted

that "[b]ased upon her complaints today, it is also apparent that some of her pain in the leg is most likely not derived all from the knee but rather from a radicular source." (PX5). Dr. Bare also recommended that Petitioner consider the use of an off-loader knee brace. (PX5).

Petitioner visited Dr. Pietro Tonino at the request of the Respondent on June 4, 2012 for purposes of a §12 examination. (RX4). Following his examination and review of the records, Dr. Tonino opined that the patient was a candidate for right knee arthroscopy but that her prognosis with surgery was "fair because of degenerative changes of her right knee, and it is likely not all of her symptoms will be relieved by the arthroscopic procedure, although presumably her mechanical complaints should improve with meniscectomy." (RX4). Dr. Tonino went on to opine that "her right knee condition is not related to any injuries that occurred at work on April 20, 2011" given that "[t]here were no knee complaints made until July 19, 2011" despite having been "seen on multiple occasions from April 20, 2011, including April 21st, April 25th, May 2nd, May 10th, and June 1st, without complaints of any knee condition. Based on her degenerative changes noted on her x-ray, it is likely that she has a longstanding condition of her right knee." (RX4).

In a letter addressed to Petitioner's counsel dated June 29, 2013, Dr. Freedberg noted that "[i]t is my opinion based off of the review of my chart and the records provided to me that she did at the time of the 4/20/11 accident sustained a right lateral meniscal tear. According to her mechanism of injury, it is consistent with the production of a meniscal tear. The patient did have pain down the right leg, and to that end, there could be a masking phenomenon where she just felt that this knee pain was emanating from the spinal area. It was not until an expert doctor of Dr. McNally noted that he felt she had a knee problem additional to the spine issue itself and then referred her for my medical attention. For that reason, it is my opinion that there is a positive causal connection of ill being caused by the accident of April 2011." (PX6). Earlier in his letter, Dr. Freedberg had noted that "[t]he hypothetical from the attorney is that as she tried to hold up the chairs, she also twisted her right knee. She denied any problems prior for the right knee." (PX6).

Petitioner, for her part, claimed that she informed medical personnel at Concentra about her right knee pain on April 21, 25, and 29, 2011 and on May 2, 6, 11 and 13, 2011. Likewise, she claims she told Dr. about her right knee pain Mercier on June 1, 2011. As previously noted, other than an occasional reference to numbness down the leg, which one would normally associate with radicular symptoms relating to her low back condition, there are no specific references to right leg pain, let alone any treatment or diagnosis relative to same, in any of these histories. In fact, it was not until Dr. McNally's note on June 28, 2011, or more than two (2) months after the accident, that there is a specific reference to complaints relative to the right knee, and it was not until Dr. Freedberg's office note on July 19, 2011, or almost three (3) months following the accident, where there is any reference to the incident involving the rack of chairs as being the precipitating cause of both the low back and right knee complaints. (PX2). Even so, Dr. Freedberg's history as to the mechanism of injury differs slightly from Petitioner's version at trial in that he recorded the injury happened when Petitioner "... tried to hold [the rack of chairs] with her arms and her knee" (PX2) whereas Petitioner testified that her right leg and her waist got twisted as she tried to hold onto the chairs.

In any event, the Arbitrator finds the absence of any recorded complaints specifically relating to the right knee in any of the initial histories to be significant and highly probative. In his letter, authored at the request of Petitioner's attorney, Dr. Freedberg attempts to explain away the absence of right knee complaints in the initial histories as being the consequence of a possible "masking phenomenon where she just felt that this knee pain was emanating from the spinal area." (PX6). The Arbitrator is not

convinced that this was actually the case, much less that it provides an adequate basis for a finding of causation under the circumstances, particularly in light of the fact that such an explanation would seem to go more to the question of how a diagnostician might have overlooked a particular diagnosis, and not necessarily why a layperson such as Petitioner would have chosen not to mention such an important bit of information in the first place. As a result, the Arbitrator is not inclined to find that Petitioner's current condition of ill-being with respect to her right knee condition is causally related to the accident in question.

As far as the lumbar spine is concerned, it would appear that since she last saw Dr. McNally on July 28, 2011 and pain management specialist Dr. Rathi on September 28, 2011 Petitioner's treatment has focused almost exclusively on her right knee. Along these lines, even Petitioner's §12 examining physician, Dr. Bare, made a point of noting, in his report dated May 7, 2012, that Petitioner had related that her back pain had gotten better but that her knee condition continues to bother her. (PX5). Furthermore, in his report dated September 26, 2011, Respondent's §12 examining physician, Dr. Graf, noted that he was "unable to substantiate the etiology of Ms. Diaz's subjective complaints of pain" and that it was his opinion that "her pain is not spine related given her examination and normal MRI." (RX5). Furthermore, Dr. Graf opined that further pain management injections were neither reasonable nor medicall necessary and that with respect to the lumbar spine Petitioner was at maximal medical improvement. (RX5). Based on this evidence, the Arbitrator finds that Petitioner's condition of ill-being relative to her lumbar spine condition had reached maximum medical improvement as of the date of Dr. Rathi's final set of injections on September 28, 2011.

Accordingly, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's condition of ill-being relative to her low back was causally related to the undisputed accident at work on April 20, 2011 up through the date of her last visit with Dr. Rathi on September 28, 2011. Furthermore, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that her current condition of ill-being relative to her right knee is causally related to said accident. Therefore, Petitioner's claim for compensation relative to her low back after September 28, 2011 and claim for compensation relative to her right knee is hereby denied.

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

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner failed to prove her entitlement to prospective medical treatment in the form of ongoing pain management services for her lower back as well as surgery relative to the right knee. Accordingly, Petitioner's claim for same is hereby denied.

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

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from May 6, 2011 through September 28, 2011, or the date of her last visit to Dr. Rathi, for a period of 20-6/7 weeks.

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

JACK HUPPERT,

Petitioner,

vs.

NO: 10 WC 31417
11 WC 39534

14IWCC0563

STATE OF ILLINOIS /
MENARD CORRECTIONAL CENTER,

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, temporary total disability, medical expenses, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 the Arbitrator's decision but finds that Petitioner's benefits after November 3, 2011, should be classified as maintenance pending vocational rehabilitation instead of temporary total disability. On November 3, 2011, Dr. Gross returned Petitioner to work with restrictions of no prolonged squatting, kneeling, walking or standing. We find that Petitioner had reached maximum medical improvement as of that date, which ends his entitlement to temporary total disability benefits. However, we agree with the Arbitrator that Petitioner is entitled to vocational rehabilitation services. As such, we find that Petitioner is entitled to maintenance benefits under Section 8(a) of the Act from November 4, 2011 through the date of the hearing on

January 10, 2013. We therefore modify the award to reflect that Petitioner is entitled to 65-2/7 weeks of temporary total disability (8/4/10 – 11/3/11) and 62 weeks of maintenance benefits (11/4/11 – 1/10/13).

The Commission also notes that Respondent listed "nature and extent" as an issue on its Petition for Review. However, this case was tried under Section 19(b) and permanency was not an issue at that time.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,018.83 per week for a period of 65-2/7 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 THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,018.83 per week for a period of 62 weeks, that being the period of maintenance benefits under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses for the hernia, the neck, and the right knee under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide vocational assistance, rehabilitation, and retraining pursuant to §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.

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: JUL 14 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 6/19/14
49

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

HUPPERT, JACK
Employee/Petitioner

Case# **10WC031417**

11WC039534

SOI/MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0563

On 5/29/2013, 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 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

MAY 29 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0563

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- [ ] 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)

Jack Huppert
Employee/Petitioner

v.

State of Illinois / Menard Correctional Center
Employer/Respondent

Case # **10** WC **31417**

Consolidated cases: **11 WC 39534**

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 Simpson**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **1/10/13**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent only as to D/A 9/14/11?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent, only as to D/A 9/14/11?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the dates of accident, **8/3/10 & 9/14/11**, 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 Aug. 3, 2010, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

On Sept. 14, 2011, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$79,469.80**; the average weekly wage was **$1,528.25**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$67,827.89** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$67,827.89**.

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 **$1,018.83**/week for **127 2/7** weeks, commencing **8/3/10** through **present**, as provided in Section 8(b) of the Act. Respondent shall receive credit for any and all amounts previously paid.

Respondent is ordered to provide vocational assistant, rehabilitation, and retraining pursuant to Section 8 so that Petitioner can engage in an ongoing good faith job search.

Respondent shall pay reasonable and necessary medical services for the hernia, the neck and the right knee only as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

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

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

Deborah L. Simpson
Signature of Arbitrator

May 29, 2013
Date

ICArbDec19(b)

MAY 29 2013

14IWCC0563

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jack Huppert,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 10 WC 31478**
	)	**consolidated with 11 WC 39534**
State of Illinois, Menards Correctional Center,	)	
	)	
Respondent.	)	
	)	

HEARING PURSUANT TO SECTION 19 b
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

With respect to 10 WC 31417, the parties agree that on August 3, 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. That on that date the Petitioner's earnings for the year preceding the injury were $79,469.00 and his average weekly wage was $1,582.25.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (2) Is the Respondent liable for any unpaid medical bills which are listed in Petitioner's Exhibit #1; (3) Is the Petitioner entitled to TTD from August 3, 2010 to the present; and (4) Is the Respondent entitled to any credit pursuant to Section 8(j) of the Act, for any money that has been paid for TTD prior to the hearing.

With respect to 11 WC 39534, the parties agree that on September 14, 2011, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree further that during the year preceding the injury the Petitioner's earnings were $79,469.00 and his average weekly wage was $1,528.25.

At issue in this hearing is as follows: (1) Did the Petitioner sustain accidental injuries or was he last exposed to an occupational disease that arose out of and in the course of employment; (2) Did the Petitioner give notice of the accident within the time limits stated in

the Act; (3) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (4) Is the Respondent liable for the unpaid medical bills reported in Petitioner's Exhibit #1; (5) Is the Petitioner entitled to TTD from 8/3/10 to the present; (6) Did the Respondent pay $67,827.89 in TTD; and (7) Is the Respondent entitled to any credit under Section 8(j) of the Act.

STATEMENT OF FACTS

Before testimony was presented, the parties stipulated that the Petitioner had been paid TTD by the Respondent from August 7, 2010 through November 1, 2011.

The Petitioner is a 52 year old male, employed by the Respondent at the Menard Correctional Center as a plumber. He testified that he is a high school graduate, worked for five years as an apprentice plumber, then he became a union plumber. He has worked as a plumber his entire life. He stated that all he has ever done is plumbing; he has no other skills or side jobs. He began working as a plumber at Menard on October 21, 1991.

As a plumber the Petitioner is required to lift, stoop, kneel and crawl, and squat. He also climbs in and out of holes and up and down ladders and stairs. The Petitioner was working for the Respondent on August 3, 2010, in his capacity as a plumber. On that day a valve broke in a tunnel and he was assigned to fix the problem. He unlocked the metal sheet of steel that closes off the tunnel and stepped in the hole. There is a ladder leaning against the wall that you need to climb down to access the tunnel. When he stepped through the hole onto the ladder it slipped out from under him and he fell to the ground. That is all he remembers because he lost consciousness. He testified that he felt pain in his head, suffered a concussion, and had pain in his right leg, low back, and neck. Records from the emergency personnel that responded to the emergency call from the Respondent indicate that "the Patient denies any neck or back pain, rates pain at 8 on pain scale; Patient states that he fell approximately 6 feet off of a ladder getting his right knee caught around a pipe. . . . Patient says he does not know if he hit his head but it is sore . . . patient also complaining of numbness and tingling in both arms and hand." (P. Ex. 3, pre-hospital care report summary)

The Petitioner was transported to Memorial Hospital in Chester where he remained overnight. The final progress note (8/4/10) from the hospital indicates: "Extremities show some swelling over the medial compartment of the right knee with tenderness. He lacks full flexion of about 20 to 30 degrees due to swelling. . . . He did wear a knee immobilizer last night on the knee because of the discomfort." His discharge diagnosis indicated that he had a concussion with loss of consciousness secondary to head trauma; right knee sprain; cervical neck sprain; and lumbosacral back strain. (P. Ex. 3) A note from August 3, 2210 at 22:30 indicates "Clarification of orders followed by a hand written notation "may leave knee immobilizer off while in bed replace when ambulating." (P. Ex. 3) He was directed to follow-up with his doctor by Friday August 6, 2010. He was taken off of work and instructed not to drive until he was cleared by his doctor. (P. Ex. 3)

On August 9, 2010, the Petitioner began treating with Dr. George Paletta. On cross examination the Petitioner first testified that a friend recommended Dr. Paletta, then he changed

it to his doctor recommended Dr. Paletta and then he admitted that his attorney recommended Dr. Paletta. On August 9, 2010, Dr. Paletta took the history of the injury and noted complaints of right knee pain. He saw that Petitioner had been placed in a knee immobilizer at the hospital. His exam showed an obvious right-sided limp, mild swelling with pain, and tenderness along the medial aspect of the knee. X-rays showed degenerative changes with medial compartment narrowing. Dr. Paletta's impression was probable medial collateral ligament sprain, acute exacerbation of underlying medial compartment degenerative joint disease, and possible medial meniscus tear. Dr. Paletta stated in his initial note that based on the mechanism of the injury, the current exam warranted an MRI and that his current right knee complaints were causally related to the work incident which occurred on August 3, 2010. (P. Ex. 6, 8-9-10 report)

The MRI was done on August 11, 2010. According to Dr. Paletta the MRI demonstrated multiple abnormalities. It showed what appeared to be a complex tear of the posterior horn and mid body of the medial meniscus, a small ganglion cyst associated with the ACL which was intact and early degenerative joint disease. Dr. Paletta recommended surgery for the tear of the medial meniscus. (P. Ex. 6, 8-17-10 report) While he believed that the meniscal tear could be repaired, it was also his opinion that surgery would not fully relieve the Petitioner's symptoms related to the aggravation of the underlying medial compartment DJD and the tibial plateau overload. (P. Ex. 6, 8-17-10 report) It was also the opinion of Dr. Paletta that his medial collateral ligament injury should heal spontaneously and did not require treatment. (P. Ex. 6, 8-17-10 report)

The Petitioner underwent surgery on October 5 2010, in the form of a partial medial meniscectomy for the large complex tear of the posterior horn in mid body. Post-surgery, Dr. Paletta recommended physical therapy and a custom unloader brace. (P. Ex. 6) During surgery Dr. Paletta found "significant medial compartment DJD" (degenerative joint disease). (P. Ex. 6, 12/1/10) Dr. Paletta referred the Petitioner to his partner, Dr. Matthew Gornet, for the neck pain that the Petitioner was complaining of and the Petitioner saw Dr. Gornet November 15, 2010.

When the Petitioner saw Dr. Gornet on November 15, 2010, he took a history of the injury from the Petitioner and noted that the Petitioner's neck pain was ongoing. He recommended an MRI, which showed disc pathology at C4-5 and C6-7 with some foraminal stenosis on the right at both levels. (P. Ex. 11) Dr. Gornet recommended injections to those levels, and referred the Petitioner to Dr. Steven Granberg for the injections. The Petitioner had injections on February 4, 2011 and again on February 25, 2011. (P. Ex. 12) The Petitioner returned to Dr. Gornet on March 17, 2011, and reported only transient improvement from the injections. Dr. Gornet then recommended surgery. (P. Ex. 11) This was done on May 3, 2011, in the form of a two level disc replacement at C4-5 and C6-7.

Intraoperative findings showed an almost complete collapse of the disc spaces at both levels. Following the surgery the Petitioner continued to treat with Dr. Gornet. On August 11, 2011, Dr. Gornet noted that Petitioner was doing great and that he was having minimal or no problems with regard to his neck. (P. Ex. 11) Dr. Gornet released the Petitioner to work full duty with respect to his neck on August 11, 2011. (P. Ex. 11)

Between the MRI of the knee and the knee surgery the Petitioner had also seen his family physician, Dr. Dale Blaise, complaining of swelling in his abdomen following the accident. Dr.

Blaise diagnosed a hernia and referred him to Dr. Judson Brewer for surgical repair. On September 1, 2010, the Petitioner had surgery to repair the hernia with mesh. (P. Ex. 5) Dr. Brewer monitored the Petitioner's care with respect to the hernia. The Petitioner was released on September 28, 2010 to return to work full duty with respect to the hernia, by Dr. Brewer, and told to follow up as needed. (P. Ex. 5) The Petitioner did not voice any complaints regarding the surgery or any residual problems with the hernia or its repair during his testimony at the hearing.

During his November 15, 2010 visit with Dr. Paletta, Petitioner mentioned having left knee pain in addition to his right knee and his neck. (P. Ex. 5) Imaging studies were obtained of the left knee. The x-rays revealed some degenerative changes in Petitioner's left knee. (P. Ex. 5) Dr. Paletta recommended surgery and on January 13, 2011, Dr. Paletta performed arthroscopic surgery on Petitioner's left knee. (P. Ex. 5) During surgery, Dr. Paletta found degenerative joint disease in the left knee. (P. Ex. 5) On February 23, 2011 it was noted that Petitioner was doing extremely well with regards to the left knee and had no complaints. (P. Ex. 5)

The Petitioner continued to treat for the pain in his right knee which he maintained had not been eliminated by the surgery that Dr. Paletta had performed in October of 2010. Dr. Paletta referred the Petitioner to another partner, Dr. Bayes for a Synvisc injection. The injection did not relieve the pain so Dr. Bayes referred the Petitioner to Dr. Lyndon Gross to be evaluated for a knee replacement.

The Petitioner saw Dr. Gross on April 28, 2011. At that time Dr. Gross reviewed the Petitioner's prior history of the injury and the treatment, noted that the prior surgery, unloader brace and Synvisc injection had failed to provide relief to the Petitioner. He recommended surgery in the form of a total knee replacement. He also recommended that the Petitioner proceed with his neck surgery and rehabilitate his neck before the recommended knee surgery. (P. Ex. 15)

Dr. Gross performed a right knee arthroplasty on July 25, 2011. (P. Ex. 15) Dr. Gross stated that as a result of the 8/3/10 fall Petitioner had a MCL strain in his right knee, a right knee medial meniscus tear and the degeneration in the right knee was preexisting. (P. Ex. 15) Dr. Gross continued to follow Petitioner's care following surgery. On August 11, 2011 Dr. Gross released Petitioner to return to work without prolonged standing, squatting or kneeling. (P. Ex. 15).

The Petitioner testified that on September 14, 2011, while he was at home walking down the stairs, his knee gave way causing him to fall injuring his back. He testified that this was the day after he had seen Dr. Gross for a procedure with his right knee. He filed an Application for Adjustment of claim for an injury occurring on September 14, 2011 alleging that his knee gave out due to a prior work related injury. This is case 11 WC 39534. The only physician that the Petitioner reported this injury to was Dr. Gornet on October 6, 2011, the same date that the Petitioner signed his application for adjustment of claim. At that time he told Dr. Gornet that his right knee gave out causing him to fall and injure his back. (P. Ex. 11)

On the same date that Petitioner reported the fall to Dr. Gornet, October 6, 2011, the Petitioner had an appointment with Dr. Gross, the doctor treating his right knee and the doctor he had been treated by the day before he allegedly fell. The Petitioner **never** reported to Dr. Gross that he had any problem with his right knee giving out causing him to fall or to injure his back. Additionally, the Respondent had the Petitioner examined by two doctors with regards to the Petitioner's neck and knee injuries after the alleged fall and he **did not** report the fall to either of them. (R. Ex. 1, 2)

On October 13, 2011, the Respondent had the Petitioner examined by Dr. David Robson with respect to his neck and low back injuries. The Petitioner provided a description of how he was injured and was examined by Dr. Robson. The Petitioner did not disclose any information about a fall down the stairs that occurred on September 14, 2011, or that he had injured his back on that date. Dr. Robson reviewed the Petitioner's records and tests. After his examination and record review Dr. Robson formed the opinion that the injury that the Petitioner sustained on August 3, 2010 was an aggravating factor in the development of the herniated discs at C4-5 and C6-7. It is his opinion that both the non-operative treatment and the operative treatments were medically necessary to address the spine pathology. At that time he felt that the Petitioner had reached MMI with respect to his neck but he was not sure what restrictions, if any, would need to be in place due to the Petitioner's knee symptoms. (R. Ex. 2)

On October 18, 2011, the Respondent had the Petitioner examined by Dr. Richard Lehman with respect to the injury to his right knee. The Petitioner provided a history of the injuries and was examined by Dr. Lehman, who also reviewed the medical records, treatment history and test results. At the time of the examination the Petitioner did not advise Dr. Lehman of the fall he purportedly took on September 14, 2011, as a result of his right knee giving out and the subsequent alleged injury to his back, leg and knee. (R. Ex. 1 & 5) Based upon a review of the records and diagnostic studies Dr. Lehman concluded that the Petitioner had a diagnosis of "bilateral degenerative joint disease in his right and left knee." It was the opinion of Dr. Lehman that even though the Petitioner had never missed any time from work as a plumber up until the accident that the condition of the Petitioner's knees, including the meniscal tears to the right knee were pre-existing and not related to the Petitioner's accident but were degenerative in nature. (R. Ex. 1 & 5) Dr. Lehman did agree that the Petitioner, in his current condition could not work for extended periods on his knees or squatting, nor can he climb ladders. (R. Ex. 5, p. 28, 29)

Dr. Gross has placed restrictions on Petitioner of no prolonged squatting or kneeling. Both Dr. Gross and Dr. Lehmann believe that Petitioner has restrictions which prevent him from working as a plumber for Respondent.

Petitioner testified at Arbitration that, prior to the injury, he was working full duty with no restriction. He testified to no prior treatment concerning either of his knees, and there is nothing in the record indicating that he had prior issues or treatment for his right knee. Petitioner was paid temporary total disability benefits until November 16, 2011, when these benefits were stopped.

Petitioner's testified that as of today, his right knee remains constantly swollen and he has permanent loss of range of motion. When he is on his feet, the swelling gets worse, and he acknowledged that he could not crawl. Stooping, kneeling, and climbing ladders were questionable activities for him at this time. He testified that all those duties would be required on a daily basis at Respondent's Menard facility.

Petitioner testified that he had been a plumber since 1977. Since he was released by his doctor to return to work with restrictions he has asked his union to attempt to place him with his restrictions; however, nobody has offered him work as a union plumber. If same was offered, he would go to work. He has testified that he has received no vocational assistance from the State of Illinois. Petitioner is ready, willing, and able to look for work within his restrictions, however, has done nothing but plumbing work since he graduated from high school.

CONCLUSIONS OF LAW

An employee will not be denied benefits just because of a preexisting condition. Recovery will be allowed if it can be shown that the condition was aggravated or accelerated by the employment. The employer takes the employee as he or she is and the compensation law is for the old and the young, the diseased and the healthy. If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 65, 67-68 (1967); *see also Illinois Valley Irrigation, Inc. v. Industrial Commission*, 362 N.E.2d 339 (1977).

Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (2003).

As to 10 WC 31478 the Arbitrator finds as follows:

Is the Petitioner's current condition of ill-being causally connected to this injury or exposure?

The Respondent stipulated to Petitioner's accident of August 3, 2010, and to the causal connection with respect to the injury to Petitioner's neck and to the hernia. From the beginning the Petitioner complained of pain to right leg, head, back and neck. These statements are supported by the reports of the medical personnel involved. Dr. Gross, who performed the right knee arthroplasty on July 25, 2011, stated that as a result of the fall on August 3, 2010, the Petitioner strained his right knee and had a medial meniscus tear; the degeneration in the right knee was preexisting. Prior to the fall on August 3, 2010, the record is unrebutted that the Petitioner was able to perform his job, climbing, squatting, crawling and kneeling without any problems.

The Petitioner has proven by a preponderance of the evidence that the injury to his right knee is causally connected to the injuries sustained from his accident on August 3, 2010.

With respect to his low back, the Petitioner initially indicated that he injured his low back during the fall, however he has not had significant treatment for any injury he may have suffered to his low back as result of the fall. Additionally, Petitioner did not voice any complaints about low back pain to the medical personnel when he was being treated. Petitioner has not described any continuing pain or limitations as result of any injury to his back. Petitioner has not proven by a preponderance of the evidence that there is a causal connection between the condition of his back and the injuries sustained on August 3, 2010.

Is the Respondent liable for any unpaid medical bills which are listed in Petitioner's Exhibit #1?

The Petitioner has proven a causal connection between the current condition of Petitioner's right knee and the injuries sustained on August 3, 2010. It would appear that on the question of reasonableness and necessity of the treatment with respect to the right knee, Dr. Lehmann, Respondent's Section 12 examiner would have immediately gone for surgery to replace the knee rather than attempt the conservative approach of attempting to repair the damage with less drastic measures first. The Arbitrator finds that the more conservative approach of attempting to repair the tears, trying Synvisc injection and the use of a brace were reasonable.

In addition to the treatment for the hernia and the neck, which the Respondent has admitted liability for, Respondent shall pay the medical bills for treatment to the Petitioner's right knee contained in Petitioner's group exhibit 1 pursuant to the fee schedule in Section 8.2 of the Act. Respondent shall receive credit for any and all amounts previously paid pursuant to the Act. The Respondent is responsible for bills for medical treatment as it relates to the hernia, the neck and the right knee only; any bills for treatment for the left knee are not the responsibility of the Respondent. The left knee was not included in either Application for Adjustment of a Claim.

Is the Petitioner entitled to TTD from August 3, 2010 to the present? Is the Respondent entitled to any credit pursuant to Section 8(j) of the Act, for any money that has been paid for TTD prior to the hearing?

The parties stipulated that Petitioner was paid temporary total disability benefits to 11/16/11. Since that time, Petitioner has used his benefit time and received no TTD.

Both Dr. Gross and Dr. Lehmann believe that the Petitioner has restrictions, due to his current medical condition, with respect to his right knee, which prevent him from working as a plumber for the Respondent. No evidence has been produced that indicates that the Petitioner has offered to accommodate the restrictions that have been placed on the Petitioner at this time.

Petitioner testified that he had been a card carrying union member since graduating from high school and has been a plumber for over 35 years. He has no transferable skills. He has asked

his union to put him back to work within his restrictions, but they have not. Respondent has not offered any vocational assistance, and Petitioner testified that he was ready, willing, and able to both look for work and accept work within his restrictions if offered.

Petitioner is entitled to have and receive from Respondent temporary total disability benefits of $1,018.83/week for 127 2/7 weeks, commencing 8/3/10 through present, as provided in Section 8(b) of the Act. Respondent shall receive credit for any and all amounts previously paid.

Respondent is ordered to provide vocational assistant, rehabilitation, and retraining pursuant to Section 8 so that Petitioner can engage in an ongoing good faith job search.

With respect to 11 WC 39534, the Arbitrator finds as follows:

Did the Petitioner sustain accidental injuries or was he last exposed to an occupational disease that arose out of and in the course of employment?

The burden is on the party seeking the award to prove by a preponderance of credible evidence the elements of the claim . . . *Hannibal, Inc. v. Industrial Commission*, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967)

Petitioner filed an Application for Adjustment of claim for an injury occurring on September 14, 2011 alleging that his knee gave out due to prior work related injury, which is the subject of case 11 WC 39534. Petitioner never filled out any paperwork from his employer reporting this accident. At trial, Petitioner testified that he was at home walking on stairs when his knee gave way causing him to fall down 3 stairs injuring his right knee. On October 6, 2011, the Petitioner signed this application for adjustment of a claim regarding this purported fall, indicating that he injured his right knee/leg, back and body as a whole.

Also on October 6, 2011 the Petitioner saw two doctors, Dr. Gornet, who treated his neck, and Dr. Gross, who treated his right knee and was the doctor he saw for an injection in his right knee the day before he purportedly fell down the three stairs. The only physician that Petitioner reported this injury to was Dr. Gornet. At that time he told Dr. Gornet that his right knee gave out causing him to fall and injury his back. (P. Ex. 11)

On the same date, October 6, 2011, that Petitioner signed the Application and saw Dr. Gornet regarding his neck, he had an appointment with Dr. Gross, who was treating Petitioner for his right knee. Petitioner never reported to Dr. Gross having any problem with his right knee giving out causing him to fall.

Additionally, Respondent had Petitioner examined by two doctors with regards to Petitioner's neck and knee injuries. (R. Ex. 1, 2) Dr. Lehman examined Petitioner on October 18, 2011. Petitioner did not mention to Dr. Lehman any fall that was caused by Petitioner's right knee giving out while on stairs. (R. Ex. 1, 5) On October 13, 2011, Petitioner was examined by Dr. Robson with regards to Petitioner's spine. (R. Ex. 2) No mention was made to Dr. Robson with regards to a fall injuring Petitioner's low back as a result of Petitioner's knee giving way.

Petitioner's testimony regarding a fall on September 14, 2011, was not credible. Petitioner has failed to prove by a preponderance of the evidence that he sustained accidental injuries or was last exposed to an occupational disease that arose out of and in the course of employment.

Did the Petitioner give notice of the accident within the time limits stated in the Act?
Is the Petitioner's current condition of ill-being causally connected to this injury or Exposure?
Is the Respondent liable for the unpaid medical bills reported in Petitioner's Exhibit #1?
Is the Petitioner entitled to TTD from 8/3/10 to the present?
Did the Respondent pay $67,827.89 in TTD?
Is the Respondent entitled to any credit under Section 8(j) of the Act?

These issues are all moot based upon the Arbitrator's findings that the Petitioner failed to prove an accident on September 14, 2011.

ORDER OF THE ARBITRATOR

Respondent shall pay Petitioner temporary total disability benefits of **$1,018.83**/week for **127 2/7** weeks, commencing **8/3/10** through **present**, as provided in Section 8(b) of the Act. Respondent shall receive credit for any and all amounts previously paid.

Respondent is ordered to provide vocational assistant, rehabilitation, and retraining pursuant to Section 8 so that Petitioner can engage in an ongoing good faith job search.

Respondent shall pay reasonable and necessary medical services for the hernia, the neck and the **right knee only**, as provided in Sections 8(a) and 8.2 of the Act.

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

Deborah L. Simpson
Signature of Arbitrator

May 29, 2013
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 Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KAZIMIERZ NAREL,

Petitioner,

vs.

NO: 11 WC 14298

BADGER MURPHY FOOD SERVICE,

14IWCC0564

Respondent,

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County. Judge Sherlock's January 13, 2014 order "reverses and remands this matter back to the Commission with instructions to address the credibility issues highlighted by the Arbitrator and Commissioner White and explain its reasoning supporting its credibility determination." (Circuit order at 11).

Procedural History

In her August 22, 2012 decision, Arbitrator Kelmanson found that "Petitioner failed to prove the mechanism of injury on March 22, 2011, was such as to cause a permanent worsening of his symptoms, prompting him to consider surgery." (Arb. Dec. at 6). The Commission, on April 22, 2013, reversed the Arbitrator's decision and found that "Petitioner's work injury caused an aggravation of his condition that hastened the need for additional surgery." (Comm. Dec. at 2). Commissioner Donohoo signed a Special Concurring Opinion (Ziegler) because he was not on the panel at the time that Commissioners Dauphin and DeVriendt reached the majority decision. Commissioner White issued a dissenting opinion.

Circuit Court Order

The circuit court found that the Commission did not adequately explain its credibility determinations and chain-of-events analysis and that this "constructively shields the

Commission's Decision for review." (Circuit order at 11). The Commission notes that, although the circuit court used the term "reverses and remands," the instructions to the Commission are to "address the credibility issues." As such, we find that the circuit court did not actually reverse the Commission's decision such that the Arbitrator's decision would be reinstated. Rather, the Commission finds that the circuit court merely vacated the Commission's previous decision and has ordered the Commission to more fully explain its reasoning.

In order to "address the credibility issues highlighted by the Arbitrator and Commission White and explain its reasoning supporting its credibility determination," the Commission finds that its original decision, which is attached hereto and made a part hereof, should be reissued as part of this current decision. Following are various passages from the Arbitrator's decision and Commissioner White's dissent interspersed with the Commission's analysis of each issue.

From Arbitrator's Decision:

"The Arbitrator has reason to question Petitioner's credibility. Petitioner testified in an evasive and inconsistent manner. Of particular concern is Petitioner's testimony that he fell four feet. The Arbitrator notes that Mr. Zekrzewski testified he [did] not see Petitioner fall, although he was working only five to ten feet away. Mr. Zakrzewski testified that he realized something was wrong when he saw Petitioner standing next to the electric jack, holding his leg. Mr. Zakrzewski further testified that an electric jack would elevate a person no higher than two and a half feet. The Arbitrator further notes that Petitioner testified he continued to work after reporting the accident, and worked for eight hours the following day." (Arb. Dec. at 6).

Commission Analysis:

The Commission disagrees with the Arbitrator's depiction of Petitioner's testimony. We note that Petitioner testified via an interpreter, which could be responsible for some of the Arbitrator's perceptions in this case. As ordered by the circuit court, we address the Arbitrator's specific instances of Petitioner's lack of credibility below.

The Arbitrator was "particularly" concerned with Petitioner's testimony that he fell four feet but that Mr. Zakrzewski "testified that he did not see Petitioner fall even though he was working only five to ten feet away." (Arb. at 6). The Commission first notes that the issue of accident is not disputed in this case. Respondent admitted that Petitioner sustained accidental injuries on March 22, 2011. Petitioner was sent to Concentra by Respondent on March 23rd where he was assessed with an acute right ankle and foot sprain which was complicated by a prior fusion with severe degenerative joint disease and he was taken off work.

Second, the Arbitrator was incorrect regarding Mr. Zakrzewski's testimony about how far he was from Petitioner in the freezer. The Arbitrator wrote that he was "working only five to ten feet away." However, Mr. Zakrzewski actually testified that he was "maybe ten meters apart." (T.55). The Commission takes judicial notice that ten meters would be closer to 30 feet away than the 5 to 10 feet that the Arbitrator found. As such, we do not consider the fact that Mr. Zakrzewski did not actually see Petitioner fall to reflect negatively on Petitioner's credibility. Mr. Zakrzewski did testify that he saw Petitioner standing right next to the jack, holding his leg, and trying to move. This is consistent with Petitioner's testimony that he had incredible pain and was holding his leg when his co-worker saw him.

Third, Petitioner initially testified that he fell "maybe about four feet." Mr. Zakrzewski testified that the electric pallet jacks lifted "maybe 20 centimeters, no more." However, he also indicated the height of the jack on his body, at which point the Arbitrator stated that it was about the height of a desk, and the parties agreed that Mr. Zakrzewski was indicating a height of approximately two-and-a-half feet from the ground. (T.57-8). Kevin Joyce, Respondent's V.P. of Operations, did not testify regarding how high the jack is from the ground. The Commission does not find that the difference between four feet and 2 ½ feet to be significant enough to call Petitioner's credibility into question on this issue.

Regarding the fact that Petitioner continued to work after the accident and worked eight hours the following day, we find that Petitioner credibly explained this during his testimony. Petitioner testified that he tried to continue to work after the accident but he sat for a while and did lighter work on the bottom shelf while his co-worker did the heavier work. Petitioner testified that his foot "really hurt a lot" but he thought it would pass so he came to work the next day. He was supposed to work thirteen hours that day but was only able to work for eight hours. During those eight hours, Petitioner testified that he couldn't do it even though he was taking medication and was walking minimally. His co-worker was helping him. (T.22-3). The Commission finds that this testimony is credible and is consistent with someone who was attempting to work through pain in spite of his injury.

From Arbitrator's Decision:

"The Arbitrator is also not persuaded by Petitioner's testimony that at the time he settled his 1995 claim for $141,000.00, he felt well and thought he could work normally, and that his symptoms prior to March 22, 2011, were fairly minor, compared to his current symptoms. The Arbitrator notes the severity of Petitioner's original injuries and Dr. Metrick's 1998 report, stating that Petitioner might need fusion surgery in the future and imposing permanent restrictions." (Arb. Dec. at 6).

Commission Analysis:

Petitioner testified that beginning in 1999, he had worked at a plastics company and a metal factory where he spent 90% of the day on his feet. (T.14-15). Petitioner's testimony is uncontradicted that he did not see any doctors for his right foot until he saw Dr. Dzwinyk on October 30, 2010. (T.16). Petitioner also testified about the circumstances surrounding his previous settlement. He testified that he treated with Dr. Metrick until approximately August 1998 and answered the following questions on cross-examination:

Q: At that time do you recall Dr. Metrick stating that he believed you would need another fusion in the future?
A: It was already fused.
Q: If Dr. Metrick's records indicate that on at least 4 different occasions after your last surgery he told you that he believed you would need a fusion in the future, would that be correct or incorrect to your knowledge?
A: He said that this is the end of the treatment, that he can do nothing more.
Q: He gave you permanent work restrictions, didn't he?

A: I don't know. I mean I wasn't working at the factory then. I didn't need anything.
Q: Sir, did Dr. Metrick ever tell you that you had permanent work restrictions after your first work injury?
A: I don't recall. You know, I was always there with a translator, you know, maybe a translator that wasn't exact.
Q: If Dr. Metrick's records indicate that in August of 1998 he authored permanent work restrictions, including not to stand for a prolonged period of time, no heavy lifting, no stress to the ankle, and light-duty work as tolerated, would those be correct or incorrect to your recollection?
A: Maybe nobody translated it to me because maybe I would have looked for different kind of work, lighter.

(T.37-38).

To fully understand this issue, we focus on the following records from Dr. Metrick in 1998 (Rx1) with certain portions italicized for emphasis:

- February 3, 1998: Third and final surgery to Petitioner's right ankle;

- February 9, 1998 visit:

"The *rehab person* stated that she thought the appointment was scheduled for today. However, the pt. came in on Thursday, today being Monday. At any rate, we discussed the surgery and reviewed the Polaroids. She *mentioned vocational training but she stated that she thought the company is just going to settle with the patient since he is hard to place vocationally, language, etc.* She is aware of the fact that the pt. did have changes within the joint that *probably will necessitate future surgery*, such as a fusion. *Presently, if the patient does well and maintains his motion, I obviously will not recommend surgery. However, there is the possibility that later on he will require surgery.*"

- February 19, 1998 visit:

"The patient is okay, he is here with his girlfriend who acts as an interpreter. [Exam findings] … Treatment: Basically the same, non-weightbearing until Tuesday, five days from now, then he can start partial weightbearing, increasing gradually as tolerated. He will return in three weeks. They are also advised that approx. six weeks after that we will consider an x-ray. *The rehab person, Sandra J. Yusczak from Corvel Corp.*, came into the room and observed all of the above. She wanted to know approx. when his maximum improvement would be. We discussed this and it will probably be somewhere between four and six months. She *is aware of the fact that the patient still could very well be a candidate for fusion.*"

- March 16, 1998 visit:

"The patient has stiffness and discomfort when he wakes up in the morning, but during the day he is okay. When he walks without shoes he does get increased discomfort, he is more comfortable in shoes. [Exam findings]; ... X-ray taken today is noted and is reviewed with patient, his interpreter and Sandra J. Yusczak from CorVel Corp., his rehab nurse. Weightbearing surfaces appear to be satisfactory. He does have small residual calcification at the tip of the medial malleolus, but apparently this is not causing any problems.
Treatment: Basically the same, continue to use a cane, avoid undue stress/strain. *Sandra she is recommending sedentary-type of work. Apparently they are not going to put him through a vocation training program.* He will return in three months w/x-ray. Sandra asked if I still feel it will be a year before he reaches maximum medical improvement and I told her that would be approximately correct. *They are also made aware of the fact that the patient may still very well require a fusion. She said they will leave the medical open for the patient.*"

- August 27, 1998 "To Whom It May Concern" letter:

"Mr. Narel has reached maximum medical improvement. He *may* need a fusion in the future. His work restrictions are as follows: not to stand for a prolonged period of time, no heavy lifting, no stress to the ankle, and light duty *as tolerated.*"

The Commission notes that Petitioner's case was settled so there is no prior testimony by him to indicate that he knew that these restrictions were permanent. Petitioner admitted at the current hearing that he had job restrictions when he was treating with Dr. Metrick:

Q: If records indicate that you underwent an initial vocational rehabilitation evaluation in February 1997 because you were at sedentary job restrictions with CorVel, would that be correct or incorrect to your recollection?
A: I had restrictions until '98, '97 until '98 until the case was closed.

(T.39).

The Commission notes that this vocational rehabilitation evaluation referred to by Respondent's attorney occurred prior to Petitioner's third surgery on February 3, 1998, so it is not relevant to what Petitioner's understanding of his restrictions were after he settled his claim. We further note that the records of Dr. Metrick indicate that the rehabilitation nurse, Sandra Yusczak, told Dr. Metrick that "the company is just going to settle with the patient since he is hard to place vocationally, language, etc."

Although Dr. Metrick told Ms. Yusczak that Petitioner might need a fusion in the future and Ms. Yusczak told Dr. Metrick that "they will leave the medical open for the patient," Petitioner's ultimate settlement contract did not preserve his medical rights. Petitioner testified that he was aware of this but clarified:

Q: And you agreed to settle that case even though your treating doctor noted it was likely you would need a fusion of your ankle in the future, is that correct?
A: I wouldn't have agreed. I mean they treated me, and it was ended.

Q: You settled your workers' compensation case for $141,000 dollars on October 21st, 1998; is that correct?
A: Yes.
Q: And do you know what the basis for that amount of money was?
A: I don't understand.
Q: Did you receive that amount of money because you could not go back to your prior job?
A: No, I was feeling good, and I thought that I could normally work.

(T.40-41).

Q: Okay. So isn't it true that your doctor told you in 1998 before you settled your prior case that you would need a fusion and that you told Dr. Dzwinyk in 2010 that you had a 5-year history of increasing pain and stiffness in your ankle?
A: That what?
Q: Is that true?
A: Well, I mean if I had known that there's supposed to be another surgery, I would have continued with the treatment.
Q: Isn't it true that you've been in pain for your right ankle since your first work accident?
A: Well, I mean I don't have that kind of pain. I mean…I wouldn't be working 13 hours a day if I had that kind of pain.

(T.47-48).

The Commission finds Petitioner's testimony credible that he would not have agreed to settle his claim and terminate his medical rights if he believed that he needed a fusion at that time or shortly thereafter. We also note that there is no evidence that Petitioner ever saw Dr. Metrick's August 27, 1998 letter regarding his restrictions at that time. We find Petitioner's testimony credible that he didn't know if he was given permanent restrictions because he wasn't working at the time so he didn't need any and that, if he had known, he would have looked for lighter work. Regardless, Dr. Metrick's final letter does indicate "light duty *as tolerated*." Dr. Metrick also wrote, on February 9, 1998, that "Presently, if the patient does well and maintains his motion, I obviously will not recommend surgery." Apparently Petitioner was doing well enough that he was able to tolerate returning to work sometime in 1999 and continued working for over a decade before he saw Dr. Dzwinyk on October 30, 2010. This is consistent with his testimony that he was feeling good at the time he settled his claim and that he thought that he could work normally.

The Commission finds that, contrary to the Arbitrator's finding on this issue, the fact remains that Petitioner did work for Respondent for four years full-duty prior to his accident on March 22, 2011. This is consistent with Petitioner's testimony that he had no difficulty doing his job prior to the accident. (T.12). Petitioner's co-worker, Mr. Zakrzewski testified that he was aware that Petitioner had a prior foot injury in the 1990s but that he worked with Petitioner for almost four years at Respondent on the same shift and never noticed any problems with him performing his job and Petitioner never complained about his foot prior to March 22, 2011. (T.53-54). Respondent's V.P. of Operations, Kevin Joyce, testified that Petitioner's job involved

heavy lifting and standing for a prolonged period of time (T.62) and that he didn't observe anything in Petitioner's personnel file to indicate that Petitioner was unable to do his job prior to the date of accident. (T.67). The Commission finds that all of these factors support a finding that Petitioner's testimony was credible that his symptoms prior to March 22, 2011 were fairly minor compared to his current symptoms.

From Dissent:

"On February 9, 1998 Dr. Metrick noted that Petitioner would likely need a fusion in the future due to chronic changes in the right ankle joint but that Petitioner was planning to proceed with settling his workers' compensation case."

Commission Analysis:

The Commission finds that this February 9, 1998 note was actually a record of a conversation that Dr. Metrick had with Sandra Yusczak, the rehabilitation nurse for CorVel, while Petitioner was not even present. This record states that it was Ms. Yuszack who "thought the company is just going to settle with the patient since he is hard to place vocationally, language, etc." There is no indication that Petitioner was pushing for the settlement. Dr. Metrick also wrote, "Presently, if the patient does well and maintains his motion, I obviously will not recommend surgery. However, there is the possibility that later on he will require surgery." The Commission finds that, at that time, Dr. Metrick's records indicate that Petitioner was doing well and maintaining his motion so surgery was not recommended.

From Dissent:

"On August 27, 1998 Dr. Metrick issued a report stating that Petitioner was at maximum medical improvement but may need a fusion in the future and he restricted Petitioner from prolonged standing, heavy lifting or 'stress to the ankle.' … Petitioner did not tell Respondent about his permanent restrictions from Dr. Metrick at the time he was hired by Respondent. At hearing, Petitioner denied that he was even aware that he was under any permanent restrictions. (T.41). Petitioner's testimony is not believable where it is directly contradicted by Dr. Metrick's records."

Commission Analysis:

Kevin Joyce testified that he was not working for Respondent at the time that Petitioner was hired in 2007 but there is nothing in his personnel file about Petitioner having previous work restrictions. (T.60-63). This is consistent with Petitioner's testimony:

Q: When you were hired by Badger Murphy, did you tell them that Dr. Metrick had issued permanent work restrictions?
A: How could I explain that if I myself didn't know?

Commissioner White found that Petitioner's testimony is not believable because it is directly contradicted by Dr. Metrick's records. However, as discussed above, there is no

evidence that Petitioner ever saw Dr. Metrick's "To Whom It May Concern" letter and, furthermore, there is no medical record or other evidence to prove that Petitioner was ever directly told by anyone that he had permanent restrictions. There is no prior testimony by Petitioner on this issue, such that he might be impeached, because the previous claim was settled without a hearing. Just because something is contained in Dr. Metrick's records does not mean that Petitioner was aware of it. The Commission finds that Petitioner's testimony regarding being unaware that Dr. Metrick's restrictions were permanent should not be deemed "not believable" in this case.

From Dissent:

"On direct examination, Petitioner testified that his right ankle felt good prior to the accident and he had no complaints. On cross-examination, however, Petitioner admitted that he had discomfort in his right foot for approximately three years prior to the accident and received one injection by Dr. Dzwinyk on October 30, 2010." (Comm. Dec. at 5).

Commission Analysis:

The Commission notes that, contrary to the implication that Petitioner was not truthful on direct examination, Petitioner actually volunteered during his direct examination that he had received this treatment by Dr. Dzwinyk. (T.16). Petitioner testified on direct examination that for "like maybe three years," he would have a little bit of pain or discomfort after working long hours in the cooler or freezer and that it would feel "strange or odd" in the morning when he got up but it never interfered with his ability to do his job and he never had any difficulty bearing weight on it before he saw Dr. Dzwinyk. (T.17-18). The Commission finds that Petitioner was not being evasive regarding his pre-injury condition or his previous treatment with Dr. Dzwinyk. The Commission also finds that Petitioner's one visit and injection with Dr. Dzwinyk is insufficient to impugn Petitioner's credibility that his right foot felt "good, like every day" immediately prior to the accident. He had continued working full duty for the next four and a half months after visiting Dr. Dzwinyk, Petitioner never complained to his co-worker about his right foot, and Respondent did not present any evidence that Petitioner's right ankle interfered with his ability to work prior to March 22, 2011.

From Dissent:

"However, the sole basis for Dr. Kaz's causal connection opinion is Petitioner's history of no pain prior to the accident and severe ongoing pain following the accident. With respect to Petitioner's objective condition, Dr. Kaz, when confronted with Dr. Dzwinyk's records, testified that there appeared to be no significant differences between Petitioner's condition after the March 22, 2011 accident and Petitioner's condition as reflected in Dr. Dzwinyk's report of October 30, 2010. [Citation omitted]. Prior to his deposition, Dr. Kaz was unaware that Petitioner treated with Dr. Dzwinyk only months prior to the accident. It is clear that Dr. Kaz's causal connection opinion was based on incomplete and inaccurate evidence." (Comm. Dec. Dissent at 5).

Commission Analysis:

The Commission acknowledges that Dr. Kaz testified that he was not previously aware of the previous treatment with Dr. Dzwinyk on October 30, 2010, but he also testified that this fact did not change his opinion about causal connection. (Px3 at 20). Dr. Kaz agreed that Dr. Dzwinyk's impression on October 30, 2010 was "osteoarthritis of the right ankle, status post subtalar fusion, cavovarus foot" and his own impression on June 23, 2011 was "right posttraumatic ankle arthritis status post right subtalar fusion." He acknowledged that there was no significant difference between those *impressions*. The Commission notes that, although the *impressions* or diagnoses were not significantly different, that does not mean that Petitioner's condition of ill-being was identical at both times. When Petitioner saw Dr. Dzwinyk, he had complaints of increasing pain and stiffness in the right ankle, which were worse in the morning and after prolonged weightbearing. Petitioner had a mildly antalgic gait, mild cavus and varus deformity, and his ankle motion was limited to -5 to 30 degrees. Dr. Dzwinyk performed a cortisone injection and prescribed Arthrotec and told Petitioner to follow up in four weeks. (Px3-DepRx1). There was no mention of needing an additional surgery at that time nor was Petitioner prescribed a brace, physical therapy, or light duty. Notably, Petitioner continued to work full duty after this visit, which is consistent with Petitioner's testimony that he never returned to Dr. Dzwinyk for any follow up visits because it didn't bother him at work and he didn't see the need to return. (T.18). Prior to March 22, 2011, Petitioner never complained to his co-worker about his right foot and Respondent did not present any evidence that Petitioner's right ankle condition affected his ability to work in any way.

However, after his undisputed work injury on March 22, 2011, Petitioner testified that he had incredible pain which was not comparable to what he felt prior to the injury. (T.21). Respondent sent him to Concentra on March 23rd, which began an uninterrupted course of treatment for his right foot. Dr. Bridgeforth diagnosed him with an acute right ankle and foot sprain complicated by a prior fusion with severe degenerative joint disease. He was treated conservatively with Ibuprofen, physical therapy, a straight cane, stirrup brace, and was kept off work. On April 15, 2011, Dr. Bridgeforth felt that Petitioner was plateauing with conservative measures but still had persistent ankle pain with weight bearing and limited range of motion. He noted that Petitioner's treatment course was complicated by his history of preexisting degenerative joint disease and referred Petitioner to an orthopedic physician, Dr. Westin. On April 19, 2011, Petitioner saw Dr. Westin who noted that prior to his fall, Petitioner was able to walk without significant limitation and was able to work 12-hour days with only minor intermittent problems. Dr. Westin performed an injection, recommended therapy, and noted that Petitioner's pain was from "impact to previously arthritic joint with added stress of fused subtalar joint." On May 10, 2011, Dr. Westin reported that the injection helped for a couple of weeks but Petitioner was "still convinced that his foot is more crooked since his injury." Dr. Westin performed another injection, recommended continued therapy, and gave Petitioner restrictions of 20-pounds lifting and "sitting half the time." After a repeat injection, Petitioner returned on May 31, 2011 to Dr. Westin who noted that the cortisone had worn off and that Petitioner "is not capable of working because he cannot walk except for very short distances without pain." He referred Petitioner to Dr. Kaz, a foot specialist, who believed that an ankle fusion was the only option but he also prescribed an Arizona brace, which only diminished Petitioner's pain approximately 50%. On July 28, 2011, Dr. Kaz noted that Petitioner still had trouble with significant pain and deformity as well as disability due to his right ankle. He noted that the July 7th CT scan showed significant arthritic changes throughout the tibtalar joint but

there also appeared to be some collapse of the talus more so anteriorly. The Commission notes that there is no pre-injury CT scan available to make an interval comparison but this does not preclude a finding that Petitioner's condition of ill-being was permanently aggravated such that it hastened the need for surgery. Since the accident, no doctor has released Petitioner to full duty. Petitioner testified that his condition has gotten "rather worse" since Dr. Kaz prescribed surgery even though he continues to wear the brace that Dr. Kaz prescribed. (T.31).

Based on the above, the Commission finds that Dr. Kaz's causal connection opinion is credible and was not based on incomplete and inaccurate evidence.

Dr. Kelikian's opinion

Regarding Dr. Kelikian's opinion, we initially note that the focus of his testimony was that the incident on March 22, 2011, did not *cause* Petitioner's right ankle arthritis. Dr. Kelikian stated that "a two-and-a-half feet ankle sprain doesn't cause you arthritis…"; "[t]he ankle sprain isn't the cause of his arthritis or symptomatology"; (Rx4 at 32); "[a]n ankle sprain doesn't cause his arthritis. It's not the cause of his disability. It has nothing to do with it." (Id. at 34). However, Dr. Kelikian also admitted that the number one criteria for prescribing a fusion is pain (Id. at 30) and that, absent pain, he is not going to advise his patient to have surgery. (Id. at 31). The Commission notes that it is undisputed that Petitioner had pre-existing arthritis. The question is whether the work injury aggravated the condition and, particularly, whether it accelerated his need for treatment. Dr. Kelikian opined that that Petitioner's injury was a temporary aggravation of his pre-existing condition but not an exacerbation. Dr. Kelikian's opinion presumes that Petitioner had a certain level of pain when he saw Dr. Dzwinyk in October 2010, and that, although the pain was temporarily aggravated by the work accident on March 22, 2011, that the pain then returned to its pre-accident level or baseline. However, the evidence shows that Petitioner's pain was not interfering with his work prior to the accident. After the undisputed work accident, Petitioner was prescribed an Arizona brace, which he continues to wear. Dr. Kaz noted on July 28, 2011, that Petitioner had 50% diminishment in his pain with the brace but continued to have significant difficulty weight bearing. Petitioner was never released to full duty work by any of the treating physicians. Petitioner testified that the pain he experienced prior to March 22, 2011, was completely different than what he experienced afterwards and that it has continued to worsen since he was prescribed surgery by Dr. Kaz. (T.43, 49). After the accident, Petitioner received an actual recommendation for surgery as opposed to the previously speculative opinion by Dr. Metrick that he might need one in the future. Based on the above, the Commission finds that there is no evidence that Petitioner's aggravation was "temporary" or returned to its pre-accident baseline. Dr. Kelikian used his own bad knees as an example:

Q: Isn't it true that patients with severe arthritic changes and severe arthritic processes in a lower extremity can live their life without need for medical care, and not all will require a fusion?

A: People can suffer and they can get along with things. I have got bad knees, theoretically speaking. Actually, it's a fact, to give you an example. It bothers me. It bothers me all the time. If I fall at work and sprain my knee here today when I'm walking out of this room, it's due to the pre-existing problem I have. It's not due to me falling at work. It's due to what I have.

So yeah, people can have it – I work, and I don't complain about it, and I live with it, and I function, and I am fine. That doesn't mean I need an artificial need, but I am going to have one.

Q: So, for example, if you fall you may need an artificial knee because of what you bring to the table, where – as opposed to me, who, as far as I know, don't have any problems with my knees, if I fall, there's less of a chance that I would have the impact that you would.

A: The pre-existing problem I have is the cause of it; nothing else. It's not from falling at work. That's a bunch of garbage. It's ridiculous. It's what's wrong with the system and this country. It's ridiculous.

This guy has preexisting arthritis. It's documented left and right, all over the place. It's there when I saw him. It's there three weeks after the "injury," quote, unquote. It's not from the ankle sprain. I don't buy it. Anybody in their right mind – any orthopaedic surgeon that knows anything and is being honest with you is going to tell you that.

(Rx4 at 28-30). It isn't clear what "percentage of causation" Dr. Kelikian would require before he would concede that a traumatic incident could hasten the need for surgery in a case involving the aggravation of a pre-existing condition. However, it is clear to the Commission that Dr. Kelikian's opinion is not in line with the current state of the law as outlined by the Supreme Court in Sisbro, Inc. v. Indus. Comm'n (Rodriguez), 207 Ill. 2d 193, 205 (Ill. 2003). ("Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being.").

Dr. Kelikian believed that "most" of Petitioner's current incapacities would be related to the original accident in the 1990's. (Rx4 at 13). However, the Commission finds that this implies that some of Petitioner's incapacities could be related to the most recent injury. Dr. Kelikian testified that he agreed with Dr. Metrick's 1998 opinion that there was a "high chance" that Petitioner would need a fusion in the future. (Id. at 17). However, the Commission again notes that Petitioner was never actually prescribed surgery prior to March 22, 2011 and even though there may have been a "high chance" had Petitioner never sustained the injury at work, this is still speculative not only as to if Petitioner would need surgery but, more importantly, when.

Dr. Kelikian believed that Petitioner was untruthful when he claimed that his right ankle didn't hurt prior to the work accident and didn't put any significance on the fact that Petitioner was able to continue to work full duty prior to the accident. However, despite the one visit with Dr. Dzwinyk in October 2010, the Commission finds that Petitioner's testimony that his ankle felt "good" prior to his work injury is credible considering the fact that he was actually able to continue to work full duty until the accident.

On cross-examination, Dr. Kelikian felt that 99% out of 100 that the arthritic changes were from the original accident. (Id. at 28). However, the Commission finds that this is not inconsistent with Dr. Kaz's opinion that Petitioner's work injury was still *a* contributing factor. Even Dr. Kaz believed that Petitioner's arthritis was pre-existing but opined that the work accident still contributed to his need for surgery.

For all of these reasons, the Commission finds Dr. Kelikian's opinion to be less credible than that of Dr. Kaz regarding causal connection.

Chain-of-Events Analysis

The chain-of-events analysis is that Petitioner was capable of performing full-duty in a job that required heavy lifting for four years at Respondent. He did have pre-existing arthritis in his right ankle and saw Dr. Dzwinyk one time on October 30, 2010 with complaints of increasing pain and ankle stiffness for which he received a cortisone injection and was told to return in four weeks. Petitioner credibly testified that he did not return to Dr. Dzwinyk because his right foot felt the same as it did before and it wasn't bothering him at work so he didn't see the need to return. Despite this one visit with Dr. Dzwinyk, Petitioner was able to continue working full duty up to 13 hours a day. Petitioner never complained to his co-worker about his right foot and Respondent did not present any evidence that Petitioner was unable to work prior to March 22, 2011. Petitioner then sustained an undisputed work injury on March 22, 2011, for which Respondent sent him to Concentra on March 23, 2011. This began a continual and uninterrupted course of treatment with multiple doctors, which included being taken off work, being prescribed injections, physical therapy, a straight cane, stirrup brace, and ultimately an Arizona brace which only reduced Petitioner's pain by 50%. He has received an actual and definitive recommendation for right ankle fusion surgery as opposed to having only a speculative previous opinion that he might need one at some undetermined point in the future. No doctor has released Petitioner to return to full duty work.

The Commission finds that Petitioner's injury was not merely a "temporary aggravation." There is no evidence that Petitioner's pain level ever returned to its pre-accident "baseline." There is no evidence that Petitioner was exaggerating his post-accident complaints.

Based on all of the above, the Commission finds that Petitioner's testimony was not inconsistent or evasive. Rather, we find that he credibly testified that his right foot pain significantly increased after his work injury, which led to continuous medical treatment, an actual (as opposed to speculative) recommendation for surgery, and continued inability to return to his pre-injury employment. We find that the undisputed work accident on March 22, 2011 caused a permanent aggravation of his pre-existing arthritic right ankle condition, which hastened the need for the prescribed surgery by Dr. Kaz.

Conclusion

Pursuant to the circuit court order, the Commission finds that the above analysis of the chain-of-events and the credibility of the various witnesses supports our original finding that Petitioner's pre-existing arthritic right ankle condition was permanently aggravated by the undisputed work accident on March 22, 2011, which hastened the need for the prescribed surgery by Dr. Kaz.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $401.99 per week for a period of 68-2/7 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 Respondent shall authorize and pay for the prospective right ankle fusion surgery as recommended by Dr. Kaz under §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: JUL 15 2014

Charles J. DeVriendt

Daniel R. Donohoo

SE/
O: 5/21/14
49

DISSENT

The following Dissent which was issued with the April 22, 2013, Decision of the Commission remains my opinion.

The Decision of the Arbitrator should be affirmed. The evidence shows that Petitioner sustained a temporary aggravation of his pre-existing right ankle condition on March 22, 2011 and returned to his baseline within six weeks of the accident. There is no evidence that Petitioner's condition was permanently altered, and there were no physical findings after the accident that did not exist prior to the accident. The right ankle fusion recommended by Dr. Kaz is not related to the March 22, 2011 accident and prospective medical treatment should not be awarded.

Petitioner sustained a serious right ankle injury while working for a prior employer in 1995. Petitioner was installing siding when he fell off of the scaffolding and down two floors.

The injury resulted in threes surgeries to his right ankle, three and a half years off of work, and the inability to return to his prior employment. On February 9, 1998 Dr. Metrick noted that Petitioner would likely need a fusion in the future due to chronic changes in the right ankle joint but that Petitioner was planning to proceed with settling his workers' compensation case. On August 27, 1998 Dr. Metrick issued a report stating that Petitioner was at maximum medical improvement but may need a fusion in the future and he restricted Petitioner from prolonged standing, heavy lifting or "stress to the ankle." (RX 1) Petitioner settled his case against his prior employer for $141,000.00 but subsequently did return to the workforce in full-duty manual labor jobs. (T. 40) After working as a packer at a plastics company and as a machine operator at a metal factory, Petitioner was hired by Respondent in April of 2007 in shipping and receiving. (T. 14-15) Petitioner testified that his job required him to stand for prolonged periods of time and occasionally perform heavy lifting. Petitioner did not tell Respondent about his permanent restrictions from Dr. Metrick at the time he was hired by Respondent. At hearing, Petitioner denied that he was even aware that he was under any permanent restrictions. (T. 41) Petitioner's testimony is not believable where it is directly contradicted by Dr. Metrick's records.

Petitioner testified that on March 22, 2011 he slipped off a jack and fell no more than four feet, landing on a pallet. (T. 20-21) The parties later agreed that the jack could go no higher than approximately two and a half feet. (T. 58-59) Petitioner's coworker, Mr. Zakrzewski, testified that he was standing approximately ten meters from Petitioner but did not see him fall. (T. 55) He saw Petitioner standing on the floor next to the jack and holding his leg. (T. 56) Petitioner continued working for the remainder of his shift and for eight hours the following day before seeking medical treatment at Concentra. (T. 22-23) Respondent's Section 12 examiner, Dr. Kelikian, testified that the Petitioner sustained no more than a strain and that the mechanism of injury is not consistent with Petitioner's current condition of ill-being in his right ankle. (RX 4, p. 31-32)

The Arbitrator correctly agreed with the opinion of Dr. Kelikian that Petitioner's injury on March 22, 2011 was temporary and that he returned to baseline of arthritis-related pain and discomfort within six weeks. On direct examination, Petitioner testified that his right ankle felt good prior to the accident and he had no complaints. On cross-examination, however, Petitioner admitted that he had discomfort in his right foot for approximately three years prior to the accident and received one injection by Dr. Dzwinyk on October 30, 2010. (T. 17-18) Dr. Dzwinyk's evaluation records actually note that Petitioner gave a history of five years of increasing pain and stiffness. (T. 42) Petitioner's orthopedic surgeon, Dr. Kaz, opined that the need for right ankle fusion is causally related to the March 22, 2011 accident. However, the sole basis for Dr. Kaz's causal connection opinion is Petitioner's history of no pain prior to the accident and severe ongoing pain following the accident. With respect to Petitioner's objective condition, Dr. Kaz, when confronted with Dr. Dzwinyk's records, testified that there appeared to be no significant differences between Petitioner's condition after the March 22, 2011 accident and Petitioner's condition as reflected in Dr. Dzwinyk's report of October 30, 2010. (PX 3, p. 20) Prior to his deposition, Dr. Kaz was unaware that Petitioner treated with Dr. Dzwinyk only months prior to the accident. It is clear that Dr. Kaz's causal connection opinion was based on incomplete and inaccurate evidence.

The Arbitrator considered Petitioner's lack of credibility as well as the medical records

and expert opinions, and correctly found that Petitioner failed to prove the accident caused a permanent aggravation resulting in the need for surgery and entitlement to temporary total disability benefits. I would affirm the Decision of the Arbitrator.

Respectfully, I dissent from the majority opinion.

Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Munoz,

Petitioner,

14IWCC0565

vs.

NO: 11 WC 16820

McDonalds,

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, the reversal of the September 30, 2013 Order granting Respondent's Motion to Strike Petitioner's Petition to Reinstate, and being advised of the facts and law, affirms and adopts the Order of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Order of the Arbitrator dated September 30, 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.

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: JUL 15 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/10/14
45

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Glen Owens,

Petitioner,

14IWCC0566

vs.

NO: 12 WC 38283

City of Elmhurst,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of the 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 October 30, 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.

14IWCC0566

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: JUL 15 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/10/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OWENS, GLEN
Employee/Petitioner

Case# **12WC038283**

14IWCC0566

CITY OF ELMHURST
Employer/Respondent

On 10/30/2013, 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 0.08% 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:

4036 MILLON & PESKIN LTD
MITCHELL PESKIN
2100 MANCHESTER RD SUITE 1060
WHEATON, IL 60187

0445 RODDY LEAHY GUILL & ZIMA LTD
RRICHARD ZENZ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0566

GLEN OWENS
Employee/Petitioner

v.

CITY OF ELMHURST
Employer/Respondent

Case # 12 WC 38283

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 4, 2013**. By stipulation, the parties agree:

On the date of accident, **July 18, 2012**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$70,131.36**, and the average weekly wage was **$1,348.68**.

At the time of injury, Petitioner was **58** years of age, ***married*** with **0** dependent children.

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

Respondent shall pay the Petitioner temporary total disability benefits of **$957.67/week for 12** weeks form **October 29, 2012** through **January 20, 2013**. As stipulated on ARB EX 1.

Respondent shall be given a credit of **$11,688.56** for TTD already paid for the stipulated period of 10/29/12 through 1/20/13. As stipulated on ARB EX 1.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$712.55**/week for a further period of 37.5 weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused 7.5% loss of use of a person as a whole pursuant to Section 8(d)(2) of the Act

Respondent shall pay Petitioner compensation that has accrued from **July 18, 2012** through **October 4, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Carolyn DeMuth
Signature of Arbitrator

10/22/13
Date

OCT 30 2013

FINDINGS OF FACT

The sole issue presented for trial was the nature and extent of Petitioner's injury. ARB EX 1. Petitioner, a 58 year old utility worker for Respondent, testified that on 7/18/12, he was employed in Respondent's water department as a valve turner. Petitioner began working for Respondent in that capacity in 1981. His job duties required Petitioner to turn between 30 and 50 valves per day in order to shut off water connections. Petitioner testified that he used a valve key that weighed 20 to 30 pounds. The key is made of welded pipe in a "T" shape and is thus called a T handle. Petitioner testified that in order to turn a valve he lowered the T handle down and placed it on the valve. Petitioner would then turn the T handle until the water was off. Petitioner testified that he would turn the T handle 40 to 50 times while applying 100 pounds of pressure to the turn process. Petitioner worked 5 days per week.

On 7/18/12, Petitioner was working to shut down a water valve for a contractor. Petitioner testified that as he was applying pressure to turn the valve clock wise, the valve snapped and he was thrown to the ground. Petitioner testified that landed on his left shoulder falling on grass and dirt. He immediately noticed numbness in his left arm from his shoulder to his hand. Petitioner was taken the same day by his boss to Elmhurst Occupational Health. Petitioner was placed in a sling, given pain medication and returned to restricted duty with no use of the left hand. PX 1. Petitioner testified that he saw his family physician, Dr. Boblick, the next day. Dr Boblick referred Petitioner to an orthopedic, Dr. Bartucci. PX 2.

Petitioner saw Dr. Bartucci on 7/23/12. Petitioner had previously treated with Dr. Bartucci for a right shoulder injury in 2008. On 7/23/12, Dr. Bartucci noted that Petitioner was feeling better but was still having trouble lifting his left arm and reaching across his body. Physical exam showed moderately painful internal rotation with a mild to moderately positive Jobe's test. PX 3. The initial impression was shoulder strain, rotator cuff strain. Petitioner was to continue taking Naproxen and follow up in a few days. PX 3. Petitioner testified that he was off work and paid full salary from 7/19/12 to 7/26/12 and then worked light duty as of 7/26/12. PX 3.

Petitioner received conservative care in the form of injections to his shoulder and physical therapy. PX 3. As of 9/17/12, Dr. Bartucci noted that Petitioner was not improving and seemed to be regressing in that he had increased pain and weakness of the right shoulder. An MRI was performed on 9/26/12, which was interpreted by the radiologist as essentially normal showing only a mild downward sloping acromial process without significant impingement on the supraspinatus muscle. PX 3. Dr. Bartucci interpreted the MRI to show rotator cuff tendinitis and to be "otherwise nondiagnostic." Dr. Bartucci sent Petitioner back to physical therapy and light duty and told Petitioner to return in 2 weeks. PX 3. The light duty restrictions included minimal left shoulder work and no work over the shoulder. PX 3.

On 10/10/12, Dr. Bartucci noted that Petitioner "has rotator cuff impingement syndrome, which traumatically induced from a work injury turning a water valve at work on July 18, 2012." Based on the failure of conservative care, Dr. Bartucci recommended arthroscopic subacromial decompression and distal clavical resection. On 10/29/12, Dr. Bartucci performed arthroscopy of the left shoulder, arthroscopic debridement of the labrum, and arthroscopic subacromial decompression with partial distal clavicle resection. The postoperative diagnosis was left shoulder impingement syndrome and rotator cuff strain. During surgery, the rotator cuff and biceps tendon were found to be intact. PX 3. Petitioner was taken off work while attending physical therapy thereafter at Athletico. PX 3, PX 4.

On 1/16/13, Dr. Bartucci noted that Petitioner was improving but still lacked strength. Dr. Bartucci continued physical therapy for 3 more weeks at which time Petitioner was to return to Dr. Bartucci for "probable discharge." Dr. Bartucci also noted that Petitioner was going to return to light duty work as of 1/21/13 until 2/4/13. The restrictions in place included no over the shoulder work, left shoulder and minimum work using the left arm. PX 3.

On 1/15/13, Petitioner underwent a Section 12 examination by Dr. Pomerance. Dr. Pomerance noted Petitioner's accident history and his treatment and medical records to date. Petitioner reported current left shoulder pain and mild limited range of motion and that overall, his symptoms are significantly improved compared to prior to surgery. RX 1. His exam of the left shoulder was relatively normal with no over signs of impingement. Dr. Pomerance offered a present diagnosis as "suspicious for possible residual abnormalities at the level of the AC joint. However, he wanted to review the intraoperative arthroscopy pictures and post-op x-rays due to concerns of residual abnormalities at the level of the distal clavical. In the interim, Dr. Pomerance determined an unclear prognosis. Finally, he determined that if there were no residual abnormalities at the level of the distal clavicle, then it would be reasonable for him to complete an approximate two-week strengthening program in therapy and then be allowed to return to his former job activities without imposing restrictions. He withheld definitive comment until the requested imaging studies have been received and reviewed. Pending review of the requested information, Dr. Pomerance determined that Petitioner could work "some form of gainful employment" and determined that light duty would be appropriate with a lifting limit of 15 to 20 pounds if necessary.

On 2/14/13, Dr. Pomerance authored a second letter following his review of the arthroscopic photos. He determined that these photos did not provide any further information to assist in determining the source for Petitioner's residual symptoms in the AC joint. Dr. Pomerance determined that Petitioner's work status remained "unchanged." RX 2.

Petitioner's last visit with Dr. Bartucci was on 2/6/13. Dr. Bartucci advised Petitioner to finish his last session of PT and then discharged Petitioner from care. PX 3, PX 4. Petitioner was to return if there was a problem. Petitioner testified that he has not had any treatment for his left shoulder since 2/6/13.

Petitioner testified that he retired from Respondent on 2/1/13. His retirement was voluntary. Petitioner was still on light duty restrictions from Dr. Bartucci as of his 2/1/13 retirement. PX 3. Petitioner testified that he does not plan to return to employment.

At trial, Petitioner testified that he currently experiences stiffness in his left shoulder in the morning. He loosens his arm with exercises. Petitioner experiences pain in his left shoulder when reaching overhead and described feeling a "knot" in his left shoulder. Petitioner testified that he had pain in his shoulder after he went swimming. He takes aspirin or ibuprofen for shoulder pain and stiffness two to three times per week. He does not take prescription medication for his symptoms. Petitioner testified that his pain has improved significantly since his surgery. He is able to perform his normal daily activities at home.

CONCLUSIONS OF LAW

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

In considering permanent disability the Arbitrator shall base the determination on the following factors pursuant to Section 8.1b(b) of the Act: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician are explained below. The Arbitrator initially notes that no reported level of impairment pursuant to Section 8.1b(a) was provided. The remaining enumerated factors were considered as follows and include consideration of the Section 12 physician, Dr. Pomerance.

As a result of the accident on 7/18/12, the 58 year old Petitioner sustained left shoulder impingement syndrome and rotator cuff strain. Petitioner underwent a course of unsuccessful conservative treatment including medication, physical therapy and injection. Thereafter, on 10/29/12, Dr. Bartucci performed arthroscopy of the left shoulder, arthroscopic debridement of the labrum, and arthroscopic subacromial decompression with partial distal clavicle resection. The postoperative diagnosis was left shoulder impingement syndrome and rotator cuff strain. During surgery, the rotator cuff and biceps tendon were found to be intact. After surgery, Petitioner again attended physical therapy through February 2013.

Residual symptoms in Petitioner's left shoulder were noted by both Dr. Bartucci and Dr. Pomerance. As of 2/4/13, Petitioner was still under light duty restrictions of minimal use of the left arm and no overhead work with the left arm. PX 3. Dr. Pomerance, while noting Petitioner's residual complaints in the area of the AC joint, agreed with light duty and with a lifting limit of 15 to 20 pounds, if necessary. No determination was made that Petitioner could return to his full duty regular heavy capacity job at the time of his discharge from treatment by Dr. Bartucci or by Dr. Pomerance.

Petitioner testified that he voluntarily retired from Respondent as of 2/1/13 after returning to light duty work for a short period. Petitioner has no plans to return to any employment. Accordingly, the Arbitrator finds that effects of this injury on Petitioner's future earning capacity are speculative. However, the Arbitrator notes that at the time of his discharge from care, Petitioner was not released to return to his heavy capacity job and was still under light duty restrictions.

Petitioner testified that he currently experiences stiffness in his left shoulder in the morning. He loosens his arm with exercises. Petitioner experiences pain in his left shoulder when reaching overhead and described feeling a "knot" in his left shoulder. Petitioner testified that he had pain in his shoulder after he went swimming. He takes aspirin or ibuprofen for shoulder pain and stiffness two to three times per week. He does not take prescription medication for his symptoms. Petitioner testified that his pain has improved significantly since his surgery. He is able to perform his normal daily activities at home. Petitioner's injury was to his left shoulder on his non-dominant arm.

Based on the foregoing evaluation, the Arbitrator determines that Petitioner sustained 7.5% loss of use of a person as a whole pursuant to Section 8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jonathan MacIntyre,

Petitioner,

14IWCC0567

vs.

NO: 13 WC 05918

Red's Body Shop, Inc., and Secura Insurance,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of wage rate, permanent partial disability, number of dependent children, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

14IWCC0567

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $29,200.00. 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: JUL 15 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/10/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MacINTYRE, JONATHAN
Employee/Petitioner

Case# **13WC005918**

14IWCC0567

RED'S BODY SHOP INC & SECURA INSURANCE
Employer/Respondent

On 9/4/2013, 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:

1876 PAUL W GRAUER & ASSOCIATES
CZAPLA, EDWARD A
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

2912 HANSON & DONAHUE LLC
KURT HANSON
900 WARREN AVE SUITE 3
DOWNERS GROVE, IL 60515

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

14IWCC0567

Jonathan MacIntyre
Employee/Petitioner

Case # 13 WC 05918

v.

Consolidated cases: _____

Red's Body Shop, Inc., and Secura Insurance
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 **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 9, 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 **Number of dependent children**

14IWCC0567

FINDINGS

On **11/30/2012**, 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 $**23,029.76**; the average weekly wage was $**442.88**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **4** dependent children.

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

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

The parties stipulate Petitioner was temporarily totally disabled from **December 1, 2012**, through **January 2, 2013**, and from **February 19, 2013**, through **May 28, 2013**. Petitioner was temporarily partially disabled from **January 3, 2013**, through **February 18, 2013**.

Respondent shall be given a credit of $**5,751.43** for TTD and $**410.12** for TPD benefits, for a total credit of $**6,161.55**.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $**330.00**/week for **63.25** weeks, because the injuries sustained caused the **25%** loss of use of the **left arm**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner further permanent partial disability benefits of $**330.00**/week for **25** weeks, because the injuries sustained caused the **5%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

9/3/2013
Date

SEP 4 - 2013

14IWCC0567

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, who is right hand dominant, testified that on November 30, 2012, he worked as a tow truck driver for Respondent. While walking through the parking lot of an apartment complex, checking for illegally parked vehicles, Petitioner was attacked by three men. Petitioner tried to shield his head with his left forearm. One of the attackers struck his left forearm with a hammer and then the attackers repeatedly struck the back of his head, causing him to lose consciousness. When Petitioner regained consciousness, there was blood all over his head and left arm.

An ambulance transported Petitioner to Lutheran General Hospital (Lutheran General). The medical records from Lutheran General show that the attending physician noted multiple hematomas on the head, the largest in the parietal region, two scalp lacerations, and a hematoma on the left forearm. X-rays showed a fracture through the midshaft of the left ulna. A CT scan of the brain showed no intracranial pathology or bone fractures. A CT scan of the cervical spine was unremarkable. The staff closed the scalp lacerations with staples and applied a splint to the left forearm. Petitioner refused admission for further evaluation of head and maxillofacial injuries, checking out against medical advice. The staff referred Petitioner to Dr. Jimenez, an orthopedic surgeon, and the trauma clinic for follow-up care. On December 7, 2012, Petitioner followed up at Lutheran General's trauma clinic. The staff removed the staples and instructed him to follow up as needed.

On December 19, 2012, Dr. Jimenez performed an open reduction and internal fixation of a displaced, rotated and unstable ulnar fracture. Petitioner's initial postoperative recovery was unremarkable. On February 5, 2013, Dr. Jimenez released Petitioner to return to work on light duty. On February 19, 2013, Petitioner returned to Dr. Jimenez with complaints of significant pain and swelling in the left arm after attempting to work full duty because no light duty work was available. Dr. Jimenez prescribed physical therapy and took Petitioner off work. On March 26, 2013, Petitioner reported some improvement with physical therapy. However, he complained of pain, swelling and stiffness. On physical examination, Dr. Jimenez noted a decreased range of motion of the elbow. Dr. Jimenez instructed Petitioner to continue physical therapy and kept him off work. On April 25, 2013, Petitioner followed up with Dr. Jimenez, complaining of residual pain and swelling. On physical examination, he had an improved range of motion. Dr. Jimenez instructed Petitioner to continue physical therapy and kept him off work.

On May 10, 2013, Dr. Heller, an orthopedic surgeon, examined Petitioner at Respondent's request. Petitioner indicated he had minimal complaints and was ready to return to work. Physical examination was normal, with full range of motion and normal strength. Dr. Heller expected Petitioner to reach maximum medical improvement by June 19, 2013.

On May 28, 2013, Petitioner followed up with Dr. Jimenez, reporting significant improvement and stating he was ready to return to work. Physical examination was normal, with good range of motion. Dr. Jimenez declared Petitioner at maximum medical improvement and released him to return to work full duty.

No impairment rating was introduced into evidence.

Petitioner testified that he did not return to work for Respondent out of fear of being attacked again. At the end of June of 2013, Petitioner began working at Busse Auto Body. His main job duties involve preparing vehicles for painting. Regarding his current condition, Petitioner testified that he has residual pain and weakness in the left arm. He feels the pain when he lifts more than 15 pounds, like when he empties heavy metal garbage cans or pushes cars at work. He also feels the pain when he uses a hand held polishing buffer. Petitioner favors his left arm and tries to use his right arm more for job duties that require lifting or exertion. Petitioner also feels the pain in the left arm while performing activities of daily living, such as carrying laundry baskets or garbage cans, or mowing the lawn. He takes ibuprofen to help alleviate the pain. Regarding the residual effects of his head injuries, Petitioner testified that he suffered from headaches for a month or two after the accident. Petitioner believes the accident caused some memory problems, explaining that he is more forgetful than he was before the accident. At work and at home, he needs to be reminded of the tasks he is supposed to do. Petitioner has not treated for his left arm injury since Dr. Jimenez discharged him from care, and has not treated for his head injury since following up at Lutheran General's trauma clinic on December 7, 2012. Petitioner feels he might need surgery in the future to maintain or remove the hardware in the left arm.

In the request for hearing form, Petitioner claimed four dependent children, asserting *loco parentis*. Petitioner testified that for the past nine years he has lived with his girlfriend, Mida, and four "stepkids:" twins Mario and JJ, age 14; Isabella, age 15; and Yasmine, age 16. The children are Mida's children from a prior marriage. The children's father pays child support of $450.00 a month, but is not involved in the children's daily lives. Petitioner and Mida both work and use their combined incomes to support the household. They deposit their paychecks into a joint bank account, from which they pay household and children's expenses. Petitioner and Mida make the decisions about the children's care jointly, and the children call Petitioner "dad." Petitioner is actively involved in the children's day to day care, such as feeding them, driving them to and from school, and disciplining them. The children receive a weekly allowance from the joint bank account.

**In support of the Arbitrator's decision regarding (F),
is Petitioner's current condition of ill-being causally related to the injury,
the Arbitrator finds as follows:**

The Arbitrator finds that Petitioner's left arm condition and residual memory problems are causally connected to the work accident.

**In support of the Arbitrator's decision regarding (O),
how many dependent children may Petitioner claim,
the Arbitrator finds as follows:**

The parties stipulated that Petitioner's average weekly wage at the time of the accident was $442.88, corresponding to a permanent partial disability rate of $265.73, unless Petitioner had more than one qualifying dependent, in which case the minimum permanent partial disability rate schedule would apply. Sections 8(b)2.1 and 8(b)3 of the Act, fixing the minimum

permanent partial disability rate, provide in pertinent part that the baseline minimum rate shall be increased by 10 percent for each child of the employee under the age of 18, including children "to whom the employee stood in loco parentis," not to exceed the Illinois minimum wage for a 40 hour workweek. 820 ILCS 305/8(b)2.1, 8(b)3 (West 2012).

In Mid-American Lines, Inc. v. Industrial Comm'n, 82 Ill. 2d 47, 52 (1980), the supreme court explained that to establish a loco parentis relationship, there must be a showing that the putative parent (1) intended to assume parental functions and (2) discharged parental duties. The Arbitrator finds that Petitioner proved that at the time of the accident, he stood in *loco parentis* to Mida's four children, which entitles him to compensation at the minimum permanent partial disability rate of $330.00.

In support of the Arbitrator's decision regarding (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator has carefully considered the entire record in light of the factors enumerated in section 8.1b of the Act (820 ILCS 305/8.1b (West 2012)), noting: Petitioner's physically demanding occupation as a tow truck driver at the time of the accident and currently as an automotive paint "prepper;" his age of 38 at the time of the accident, corresponding to a long work life ahead; possible impairment to his future earning capacity as a result of the injuries; and evidence of disability corroborated by the treating medical records. As noted, no impairment rating was introduced into evidence.

The Arbitrator finds credible Petitioner's testimony regarding residual pain and weakness in the left arm, as well as some memory problems. Presently, the residual problems cause some limitations in Petitioner's functioning at work and at home. The Arbitrator further notes that Petitioner did not return to his job as a tow truck driver for Respondent out of fear of being attacked again. Petitioner did not testify how his present average weekly wage compares to his average weekly wage at the time of the accident.

The Arbitrator finds that the injury to the left arm caused loss of use to the extent of 25 percent thereof. The Arbitrator further finds that the head injuries caused permanent disability to the extent of 5 percent of the person as a whole.

The Arbitrator notes that Petitioner also seeks compensation for "20% disfigurement of the left forearm." The Arbitrator awards no disfigurement benefits. Section 8(c) of the Act clearly states: "No compensation is payable [for disfigurement] where compensation is payable under paragraphs (d), (e) or (f) of this Section." 820 ILCS 305/8(c) (West 2012). The Arbitrator finds that Petitioner is not entitled to compensation for disfigurement, as he is awarded compensation for partial loss of use of the left arm pursuant to section 8(e)10 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dwayne Smart,

Petitioner,

vs.

Ford Motor Co.,

Respondent.

14IWCC0568

NO: 11 WC 17327

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, permanent partial disability, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 6, 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.

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: JUL 15 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/10/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMART, DWAYNE
Employee/Petitioner

Case# **11WC017327**

14IWCC0568

FORD MOTOR CO
Employer/Respondent

On 12/6/2013, 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 0.10% 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:

0570 BECKER & SILVERMAN
NORMAN SILVERMAN
250 PARKWAY DR SUITE 150
LINCOLNSHIRE, IL 60069

0075 POWER & CRONIN LTD
BRIAN A RUDD
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0568

Dwayne Smart
Employee/Petitioner
v.
Ford Motor Co.
Employer/Respondent

Case # **11** WC **17327**

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 27, 2013 and September 26, 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 **February 7, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$77,132.12**; the average weekly wage was **$1,481.31**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$35,880.00** for other benefits, for a total credit of **$35,880.00**.

Respondent is entitled to a credit of **$38,943.45** under Section 8(j) of the Act.

ORDER

No benefits are awarded, because Petitioner has not carried his burden of proof that an accident occurred that arose out of and in the course of 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

December 6, 2013
Date

DEC 6 - 2013

FACTS

The Petitioner has been an employee of Respondent since 1989 and was working in the position of End of Line Motor Repair on February 7, 2011. That job required the employee to evaluate vehicles coming off the assembly line and determine if repairs are necessary. If vehicles are unable to be driven off the line, the end of line repairman must use an electric power pusher to move the vehicle off the line while another employee steers

the vehicle from the driver's seat.

Petitioner testified that on February 7, 2011 his shift began at 6:00 p.m. Petitioner testified that at 7:30 p.m. he was using a power pusher to remove a vehicle from the assembly line, that the power pusher jerked, and that he felt a sudden and quick pop in his back through the pusher. Petitioner testified that he immediately went to Respondent's medical department. Petitioner testified that at the medical department either ice or heat, he forgot which, was applied. Petitioner testified that he realized he was getting no results, so he requested authorization to leave the plant in order to obtain his own chosen medical treatment. The plant medical records (PX7) do not include a visit dated February 7, 2011.

Petitioner testified that he had been undergoing spinal treatment, including a prior laminectomy, since approximately 1991. Petitioner testified that on February 7, 2011 he was feeling great and that he was ready to stop his medical visits. Petitioner was under medical treatment by Dr. Marie Tholl, a chiropractic physician at the Center for Integrative Medicine, and he was examined by her on February 7, 2011 before he reported to work. Dr. Tholl's records recite that on February 7, 2011 Petitioner described symptoms radiating down the right leg to the foot and that the symptoms were aggravated by standing, walking, and twisting. That chart note further recites that he was really sore with back and leg pain from walking at the mall two days earlier, that he was not as bad the next day, and that he feels "ok" again today.

Petitioner returned to Dr. Tholl complaining of worsening symptoms on February 8, 2011 and February 9, 2011. Dr. Tholl's medical note of February 8, 2011 recites that Petitioner was at work for about an hour the previous day, felt and heard something "pop" in his low back, was seen by the nurse at work, and was sent home. (PX8). Petitioner testified that he had been previously scheduled for another appointment with Dr. Tholl.

Petitioner testified that he next went to St. James Hospital emergency room complaining of excruciating pain. He was transferred to Rush University Medical Center where he underwent a laminectomy and discectomy. The resident consult note of February 10, 2011 recites that Petitioner had lower back pain with

shooting pain for the last month or so (PX9).

Petitioner has never returned to work and alleges that he is permanently and totally disabled.

Marcus Lowe, a coworker, testified as Petitioner's witness. Mr. Lowe testified that he was working with petitioner on February 7, 2011 and was there at 7:30 p.m. He testified that he observed the petitioner working. He testified that he had taken a car to "roadability", that on his way back he saw Petitioner limping, that he asked Petitioner what was wrong, and that Petitioner stated that when he was pushing a car he thinks he hurt his back. Mr. Lowe testified that Petitioner was not limping prior to that time. Mr. Lowe testified that it was not unusual to experience a jolt in the power pusher and that it happens from time to time.

Steve Ciotti, a supervisor, testified as Respondent's witness. Mr. Ciotti testified that he has never seen a problem or mechanical issue with the power pusher in the six years that he has been at Respondent's facility. Mr. Ciotti testified that on February 7, 2011 at 6:05 p.m. Petitioner told him that Petitioner would ask to seek medical attention due to a pre-existing back injury and that Petitioner wanted to get it checked out. Mr. Ciotti testified that Petitioner did not use a power pusher on February 7, 2011.

Respondent played a short video demonstrating the use of the power pusher (RX6).

Petitioner testified as a rebuttal witness. Petitioner denied the conversation that Mr. Ciotti testified to. Petitioner testified that the incident with the power pusher was at approximately 7:30 p.m.

At the conclusion of the conflicting testimonial evidence, the Arbitrator made a request pursuant to Section 19 for documentation showing when Petitioner was sent to Respondent's plant medical department. At the next hearing, Petitioner submitted a payroll record purporting to show that he was paid for working two hours on February 7, 2011 (PX12). Petitioner also submitted a Respondent medical form dated February 7, 2011 and showing a time of 7:47 p.m. permitting him to leave the plant and see his health care provider because of severe back pain (PX13). Petitioner also submitted a Respondent form dated February 7, 2011 showing that at 8:09 p.m. he signed a document that he was leaving the plant (PX14). Respondent submitted a medical visit log

dated February 7, 2011 showing that Petitioner had signed in at 7:09 p.m. (RX8).

Petitioner was examined at Respondent's request by Dr. Ryon Hennessy, who also reviewed medical records. Dr. Hennessy testified at an evidence deposition. Dr. Hennessy opined that 50% of Petitioner's cauda equina syndrome was due to pre-existing degenerative disease and 50% to the jarring of the Petitioner's back at the end of the assembly line. Thereafter, Dr. Hennessy visited Respondent's plant to assess the use of a power pusher. As a result of that visit, Dr. Hennessy changed his opinion and opined that100% of Petitioner's cauda equina syndrome was due to pre-existing degenerative disease (RX7).

ANALYSIS

Petitioner testified that on February 7, 2011 he was feeling great and that he was ready to stop his medical visits. That testimony is contradicted by Dr. Tholl's records. Those records recite that on February 7, 2011 Petitioner described symptoms radiating down the right leg to the foot and that the symptoms were aggravated by standing, walking, and twisting. That chart note further recites that he was really sore with back and leg pain from walking at the mall two days earlier, that he was not as bad the next day, and that he feels "ok" again today. Dr. Tholl's records do not state that Petitioner was feeling great and that he was ready to stop his medical visits. Significantly, Petitioner testified that he had been previously scheduled for a February 9, 2011 appointment with Dr. Tholl. Dr. Tholl's medical note of February 8, 2011 does recite that Petitioner was seen by the nurse at work after a "pop" in his low back and sent home.

Petitioner's testimony that he was feeling great and that he was ready to stop his medical visits is further contradicted February 10, 2011 Rush University Medical Center records, which recite that Petitioner had lower back pain with shooting pain for the last month or so.

The February 10, 2013 St. James Hospital records, which might be corroborating, are missing.

The most contemporaneous medical records would be of Petitioner "immediate" visit to Respondent's medical department on February 7, 2011, which according to his testimony would have been at approximately 7:30 p.m. and which according to the medical visit log would be at 7:09 p.m. However those medical records,

which might be corroborating, are also missing.

Petitioner's testimony that his injury occurred at about 7:30 p.m. is contradicted by Mr. Ciotti's testimony that at 6:05 p.m. Petitioner said he would ask to seek medical attention due to a pre-existing back injury.

Mr. Lowe testified that at 7:30 p.m. he observed Petitioner working and limping, but he never testified that he observed the actual alleged incident. Mr. Lowe's testimony that he observed Petitioner at 7:30 p.m. is contradicted by respondent's medical log showing a sign in time of 7:09 p.m.

Dr. Ryon Hennessy,s testimony is given no weight as it relates to accident. Dr. Hennessy is a medical expert who was qualified to testify regarding causation. Dr. Hennessy is not an accident reconstruction expert who was qualified to testify regarding the reconstruction of an alleged traumatic occurrence.

In the final analysis, Petitioner bears the burden of proving by a preponderance of the credible evidence that an accident occurred that arose out of and in the course of employment. There are too many unresolved inconsistencies in this case. The Arbitrator finds that Petitioner has not carried his burden of proof. Therefore, no benefits are awarded.

The remaining issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Peggy Cooper,
Petitioner,

vs. NO: 12 WC 24183

14IWCC0569

State of Illinois,
Illinois State Police,
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, the nature and extent of Petitioner's disability, medical expenses, and date 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.

The Commissioner corrects a clerical error, on page 2 of the Arbitrator's Decision and finds that the parties stipulated that Respondent is entitled to a credit of $10,771.26. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013, is hereby affirmed and adopted.

14IWCC0569

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: JUL 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-06/25/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOPER, PEGGY
Employee/Petitioner

Case# **12WC024183**

ILLINOIS STATE POLICE
Employer/Respondent

14IWCC0569

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:

0724 JANSSEN LAW CENTER
BRYAN W HERNANDEZ
333 MAIN ST
PEORIA, IL 61602

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

0988 ASSISTANT ATTORNEY GENERAL
BRETT D KOLDITZ
500 S SECOND ST
SPRINGFIELD, IL 62706

2202 ILLINOIS STATE POLICE
801 S 7TH ST
SPRINGFIELD, IL 62703-2487

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

AUG 29 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

PEGGY COOPER
Employee/Petitioner

v.

ILLINOIS STATE POLICE
Employer/Respondent

Case # 12 WC 24183

Consolidated cases: N/A

14IWCC0569

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 **Peoria**, on **June 26, 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 **December 19, 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 **$66,560.00**; the average weekly wage was $1066.93.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$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 orders the Respondent to pay Petitioner permanent partial disability benefits of $640.15/week for 61.5 weeks, because the injuries sustained caused 15% loss of each hand, 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.

S J Mathis

Signature of Arbitrator

8-22-13

Date

AUG 2 9 2013

PEGGY COOPER)
)
v.) Case No. 12 WC 24183
)
ILLINOIS STATE POLICE) 14IWCC0569

IN SUPPORT OF THE ARBITRATOR'S MEMORANDUM OF DECISION, THE ARBITRATOR MAKES FINDINGS REGARDING THE FOLLOWING ISSUES:

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?

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

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

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

The Petitioner is a 53 year old woman who was employed by the Respondent, the Illinois State Police, for the thirty year (30) period between July 1, 1982 until her retirement on April 30, 2012. Petitioner was hired specifically as a "telecommunicator specialist" in the Respondent's Metamora, Illinois facility. Since the time of her hiring, and for the entire duration of her employment with the Respondent, Petitioner has been employed as a full-time telecommunicator specialist, working approximately seven and one half (7.5) to eight (8) hours per day, five days per week.

Petitioner testified that, since the time of her hiring, and for the entire duration of her employment, her job duties included answering telephone calls, typing and keyboarding, filing, and hand writing documents. Petitioner testified that she would spend approximately five (5) to six (6) hours per day typing. Petitioner testified that this time period also included periods where she would type and talk on a telephone simultaneously, holding the phone with her shoulder. Petitioner testified that she would take approximately 70 calls per day, on average. Petitioner testified that her job duties also included working with a radio, including turning dials and, starting in September of 2001, answering certain emergency calls. As a part of job duties, Petitioner testified that she was required to type in information from numerous tickets issued by police officers employed by the Respondent, the Illinois State Police.

Petitioner testified that her normal work day included a half hour (30 minute) break for lunch. Petitioner testified that, occasionally, she would work through these lunch breaks and continue typing and answering phone calls. Petitioner testified that when she did work through these designated lunch hours, she was paid accordingly for the extra time worked.

Petitioner testified that she first began experiencing numbness, tingling, and weakness in her left hand in approximately 2004 to 2005. Petitioner indicated that these symptoms then appeared in her right hand shortly thereafter. Petitioner first discussed these symptoms with her family doctor, general practitioner Dr. Myers.

Petitioner testified that, after Dr. Myers passed away, she continued to discuss the symptoms in her hands with Dr. Myers replacement, a general practitioner named Dr. Brad Stoeker, M.D.

To treat her symptoms, Dr. Stoeker recommended take the anti-inflammatory Motrin and wear splints on her wrists. Petitioner testified that she wore the recommended splints, but they did not alleviate her symptoms. Petitioner testified that her understanding was that Dr. Stoeker believed that Petitioner likely suffered from carpal tunnel syndrome in her hands and suggested she see an orthopedic specialist. Petitioner testified that Dr. Stoeker asked the Petitioner if there was any orthopedic specialist she would like to go to. Petitioner indicated that an orthopedic specialist by the name of Dr. Gregory J. Adamson, M.D. of Great Plains Orthopaedics had treated her father, and that she wished to see him. Accordingly, Dr. Stoeker referred Petitioner to Dr. Adamson at Great Plains.

Petitioner was first seen by Dr. Adamson on December 18, 2008. At that time, Petitioner reported experiencing bilateral carpal tunnel syndrome symptoms for three (3) to four (4) years. On that date, Dr. Adamson administered an injection of cortisone into the Petitioner's left wrist for treatment of the carpal tunnel syndrome symptoms in that wrist.

Upon returning to work on December 19, 2008, the day after the cortisone injection to her right wrist, Petitioner filled out a Workers' Compensation Employee's Notice of Injury (an incident report). On the incident report, Petitioner indicated that she had "increasing pain over a number of years," and listed Dr. Adamson as her doctor. Petitioner listed "taking radio traffic, phone traffic, repetitive typing, data processing on a continual basis" as the duties she performed when the injury occurred. In describing how the injury occurred, Petitioner listed "repetitive typing, taking radio traffic, handling phone traffic, processing data entry on a continual basis." Petitioner listed Pam McGarr as her supervisor.

Additionally, Dr. Adamson referred the Petitioner to Dr. Russo for a Nerve Conduction Velocity test. This nerve test was performed by Dr. Russo on January 15, 2009.

The Petitioner's Nerve Conduction Velocity test revealed bilateral carpal tunnel syndrome. On January 27, 2009, during a follow-up office visit, Dr. Adamson discussed the findings of the Nerve Conduction Velocity test and confirmed that the petitioner suffered from both right and left carpal tunnel syndrome. Dr. Adamson went on to administer a cortisone injection into the Petitioner's right wrist on that day.

On February 24, 2009, during a follow-up visit, Dr. Adamson recommended that the Petitioner undergo a surgical procedure consisting of a right carpal tunnel release. This procedure was performed on the Petitioner by Dr. Adamson on May 11, 2009. During a post-operative visit on May 26, 2009, Dr. Adamson recommended the same carpal tunnel release procedure for the petitioner's left hand. Petitioner underwent a left carpal tunnel release with Dr. Adamson on July 13, 2009.

Following both procedures, Petitioner underwent rehab and strengthening for both of her wrists at Great Plains until September 22, 2009, when she was released with no restrictions.

Petitioner was unable to work as a result of her injuries from the time of the first carpal tunnel release on May 11, 2009 until September 1, 2009. At that time she returned to work with restrictions. Those restrictions were ultimately lifted on September 22, 2009, and Petitioner returned to work full-duty.

Petitioner testified that she maintained no other employment besides her employment with the Petitioner during the time period of July 1, 1982 and May 2012. Petitioner also testified that she had no hobbies or performed any other activities outside her job duties that were strenuous on her hands or wrists, or were otherwise repetitive in nature. Petitioner further testified that, prior to her employment with the Respondent, she had never experienced any of the same symptoms of pain, numbness, tingling, or weakness, nor had she had any other problems that predated her employment with the Respondent.

Petitioner testified that payment for all medical treatment associated with her left and right carpal tunnel syndrome, including the cortisone injections, the two carpal tunnel releases, and the physical therapy, was provided by the Respondent. Petitioner also testified that she received Temporary Total Disability (TTD) benefits for the time period she spent off of work from May 11, 2009 until she returned to work on September 1, 2009.

Petitioner testified that when she inquired with the Respondent with regards to a permanency award, Respondent requested a letter from her physician discussing causation. Petitioner testified that, since Dr. Adamson had retired, that Dr. Jeffrey R. Garst, M.D., provided the requested causation letter. Dr. Garst's causation letter is dated March 29, 2012. Upon receipt of this letter, Respondent refused to provide a permanency award to the Petitioner.

The Arbitrator finds the testimony of Petitioner Peggy Cooper to be credible, consistent with the medical records presented, as well as the other evidence on file.

THE ARBITRATOR MAKES THE FOLLOWING ADDITIONAL FINDINGS:

Dr. Jeffrey Garst, M.D., is a board certified orthopedic surgeon with a further certificate of added qualification in hand and upper extremity surgery. Dr. Garst estimated in his evidence deposition that he performs approximately one hundred (100) carpal tunnel release procedures per year.

Dr. Garst was a former partner of Dr. Adamson's at Great Plains Orthopaedics in Peoria, Illinois.

Dr. Garst was not one of the Petitioner's treating physicians, but worked with Petitioner's treating physician, Dr. Adamson, at Great Plains Orthopaedic.

Dr. Garst testified that, while he does perform record reviews for patients, he does not do so for income, nor does he contract with any outside entity to perform records reviews.

Dr. Garst testified that he was provided with a job description detailing the Petitioner's job duties. The Arbitrator finds that the job description provided to Dr. Garst is consistent with the testimony of the Petitioner and the evidence on record.

Dr. Garst testified that his opinion, to a reasonable degree of medical certainty, was that the Petitioner's bilateral carpal tunnel syndrome was related to her employment with the Respondent.

The Arbitrator finds the testimony of and the causation opinion rendered by Dr. Garst to be credible.

ARBITRATOR'S FINDINGS REGARDING THE FOLLOWING ISSUES:

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?

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

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

Based on the credible testimony of the Petitioner, the medical records entered into evidence, the incident report of December 19, 2008, as well as the credible testimony and causation opinion rendered by Dr. Garst, the Arbitrator hereby finds by a preponderance of the evidence that the Petitioner's current condition of ill-being as it relates to her bilateral carpal tunnel syndrome to have arose in and out of the course of her employment with the Respondent, first reported via the incident report of December 19, 2008.

The Arbitrator finds that all reasonable and necessary medical treatment for the Petitioner's bilateral carpal tunnel syndrome has been rendered and has been paid for by the Respondent.

The Arbitrator finds that the Respondent has paid to the Petitioner all TTD benefits due.

Based upon the foregoing, as well as the credible evidence, the Arbitrator finds that, as a result of her bilateral carpal tunnel syndrome and the surgical procedures performed for treatment thereof, the Petitioner sustained a 15% loss of use of her right hand and a 15% loss of use of her left hand, pursuant to section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Betty R. Mantels,
Petitioner,

vs.

NO: 06 WC 007701
06 WC 15225
11 WC 41069

Aramark,
Respondent.

14IWCC0570

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 11, 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.

14IWCC0570

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,200.00. 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: JUL 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-06/25/14
drd/wj
68

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

MANTELS, BETTY R
Employee/Petitioner

Case# **06WC007701**

11WC041069
06WC015225

ARAMARK
Employer/Respondent

14IWCC0570

On 9/11/2013, 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:

0393 THOMAS R LICHTEN LTD
53 W JACKSON BLVD
MONADNOCK BLDG SUITE 1634
CHICAGO, IL 60604

2337 INMAN & FITZGIBBONS LTD
COLIN MILLS
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

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)

BETTY R. MANTELS
Employee/Petitioner

v.

ARAMARK
Employer/Respondent

Case # 06 WC 7701

Consolidated cases: 06 WC 15225; 11 WC 41069

14IWCC0570

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 **Urbana**, on **July 19, 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

14IWCC0570

FINDINGS

On the dates of accident, **December 15, 2004, January 12, 2006,** and **October 7, 2011,** Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is in part*** causally related to these accidents. (See Memorandum of Decision of Arbitrator for further discussion).

In the year preceding the injuries, Petitioner earned **$4,740.99, $4,377.57,** and **$5,524.27,** respectively; the respective average weekly wages were **$136.31, $139.92,** and **$158.83.**

On the dates of accident, Petitioner was **48, 49,** and **55** years of age, respectively, and ***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 **$4,140.54** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$4,140.54.**

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

ORDER

Respondent shall pay reasonable and necessary medical services of $165.00, as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act (assuming said bill has not been paid to date; see Arbitrator's Exhibit 1, noting that said bill for $165.00 has been placed in line for payment by Respondent).

Respondent shall authorize and pay for the surgery recommended by Dr. Robert Bane, pursuant to Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability (TTD) benefits of $136.31/week for 2 $^{2}/_{7}$ weeks, commencing January 24, 2006 through February 8, 2006, as provided in Section 8(b) of the Act. Respondent shall further pay Petitioner TTD benefits of $158.83/week for 87 $^{5}/_{7}$ weeks, commencing November 14, 2011 through July 19, 2013, as provided in Section 8(b) of the Act. Respondent shall have a credit for TTD paid in the amount of $4,140.54, as noted above.

Penalties and attorneys' fees are not imposed on Respondent.

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

08/29/2013
Date

ICArbDec19(b)

SEP 11 2013

STATE OF ILLINOIS)
)SS
COUNTY OF CHAMPAIGN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BETTY R. MANTELS
Employee/Petitioner

v.

Case # 06 WC 7701
Consolidated Cases: 06 WC 15225; 11 WC 41069

ARAMARK
Employer/Respondent

14IWCC0570

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Betty A. Mantels, suffered three separate work accidents while employed by Respondent, Aramark, on December 15, 2004, January 12, 2006, and October 7, 2011, respectively. These work accidents are not disputed by Respondent. Petitioner has been employed with Respondent since 1993. Petitioner performed food service duties for Respondent at grade schools, and her job duties also included cleaning and stocking work. Petitioner testified to having no shoulder problems prior to her December 2004 work injury.

On December 15, 2004, Petitioner injured her right shoulder while moving crates of food product while at work. A subsequent MRI revealed no evidence of a rotator cuff tear. Petitioner was diagnosed with post-traumatic rotator cuff tendonitis and adhesive capsulitis of the right shoulder. Petitioner underwent a course of conservative treatment before being scheduled for a shoulder manipulation procedure. (Respondent's Exhibit (RX) 3; RX 5). Petitioner also underwent a course of physical therapy that she testified helped to some degree. (See also PX 6).

Before the scheduled shoulder manipulation occurred, Petitioner suffered a second work accident on January 12, 2006, when she fell at work on tile flooring. She experienced pain in her knees, right shoulder and wrist as a result of the fall. She also experienced rib pain. The initial diagnosis was that of multiple contusions. On January 13, 2006, Petitioner was diagnosed with right shoulder adhesive capsulitis, neck strain, knee strain, and anterior wall chest contusion and strain. (RX 3).

On January 25, 2006, Petitioner underwent right shoulder manipulation under anesthesia for a frozen shoulder. Petitioner was off work due to the manipulation procedure from January 24, 2006 through February 8, 2006. On January 31, 2006, Petitioner was diagnosed with a left rib contusion, right shoulder capsulitis and a neck strain. (RX 5). Petitioner's shoulder symptoms persisted, but she did not desire a second operation at this time. Petitioner was placed at maximum medical improvement (MMI) by Dr. Thomas Sutter in both March and August of 2006. (RX 3). By September 2010, Dr. Robert Bane (Petitioner's treating orthopedic surgeon) reported that Petitioner's adhesive capsulitis symptoms were

waxing and waning, but were "pretty well resolved." An MRI was recommended at this time but did not occur. (PX 1; PX 5; RX 5).

On March 28, 2006, Dr. Sutter (from Carle Clinic's Department of Occupational Medicine) diagnosed Petitioner with a neck strain as a result of her January 2006 fall at work. Dr. Sutter also evaluated Petitioner's knees and ribs, and reported that Petitioner was doing well aside from the neck pain. (RX 3). On May 31, 2006, Petitioner underwent a MRI of the cervical spine at Illini Open MRI. The results were revealed to be mostly normal with the exception of a non-work-related C5-6 posterior annular bulge. (RX 5).

On October 7, 2011, Petitioner was hit by a swinging kitchen door on the right arm (elbow) and shoulder. Petitioner was treated at the emergency room and x-rays were performed that indicated no acute fractures. Petitioner was diagnosed with a contusion to the right arm and shoulder by Dr. William Scott from the Department of Occupational Medicine. (RX 5).

On October 11, 2011, Petitioner was seen by Dr. Philbert Chen of Carle's Department of Occupational Medicine. Petitioner complained of right shoulder, arm and wrist pain. Trauma to the elbow and wrist was noted as a result of the accident. She was diagnosed with a right shoulder injury post-surgical repair, right lateral traumatic epicondylitis, and right wrist pain secondary to trauma. X-rays of the wrist and MRI testing of the shoulder were ordered. (RX 5).

On October 18, 2011, Petitioner underwent MRI testing that indicated minimal fluid in the joint capsule and subacromial bursa, a tiny tear limited to the undersurface of the distal supraspinatus tendon, and otherwise no significant findings. (RX 5).

On October 20, 2011, Petitioner returned to Dr. Chen, who reviewed the MRI of her shoulder. It was noted that she had a very small tear of the undersurface of the distal supraspinatus and a small amount of fluid. Petitioner was diagnosed with a right shoulder strain and a mild supraspinatus tendon tear, right lateral epicondylitis, and right wrist pain. It was noted that Petitioner could be a candidate for an injection, but that Dr. Chen did not think she needed surgery at that point in time. Full range of motion across the neck was also noted. (RX 5).

On November 14, 2011, Petitioner returned to Dr. Chen. Petitioner was diagnosed with right shoulder impingement with a supraspinatus tendon tear and right wrist tendonitis. Dr. Chen took Petitioner off work on that date. (RX 5). Petitioner has not returned to work since that time.

On November 21, 2011, Petitioner was evaluated by Casey Shroyer, PA, at Carle Orthopedics for her right shoulder pain. She was diagnosed with frozen shoulder and a partial thickness rotator cuff tear. It was noted that an injection was recommended but that Petitioner refused. (RX 5).

On August 10, 2012, Petitioner returned to Dr. Chen for a follow-up evaluation. She was diagnosed with a history of shoulder impingement and a small supraspinatus tear, right wrist deQuevain's tenosynovitis, and right wrist flexor tendonitis. (RX 5).

Dr. Bane authored a letter on January 11, 2013, in which he addressed causation and noted a summary of Petitioner's care concerning her right shoulder condition. Dr. Bane interpreted the October 2011 MRI as showing a probable partial tear of the supraspinatus tendon that appeared to be less than 50% thickness. Dr. Bane believed Petitioner was suffering from symptoms of impingement and AC joint arthrosis.

Petitioner did not want injections, and Dr. Bane recommended Petitioner proceed with a diagnostic arthroscopy, subacromial decompression and distal clavicle resection. Dr. Bane opined that Petitioner's condition was a result of the work injuries of December 2004 and October 2011. The doctor reported that he believed Petitioner's ultimate prognosis would be good following the recommended surgery, and that she would be off work for two weeks before being released to light duty, and then within twelve-to-sixteen weeks be able to resume regular work without restriction. Dr. Bane opined that Petitioner would likely be at MMI at six months post-surgery. (PX 1).

Petitioner was evaluated multiple times at Respondent's request by Dr. Lawrence Li, pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). Dr. Li's deposition testimony was taken twice, and Petitioner's counsel objected to the testimony based on grounds set forth in *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 663 N.E.2d 1046 (4th Dist. 1996), and in Section 12 of the Act. Dr. Li agreed that Petitioner's diagnosis following the December 2004 and January 2006 work injuries was adhesive capsulitis. (RX 1, pp. 12-19). Dr. Li also noted that Petitioner's residual symptoms from the January 2006 fall consisted of pain in her neck that radiated into her upper back. (RX 1, p. 18).

On November 17, 2011, Dr. Li evaluated Petitioner and made a diagnosis of right elbow contusion and chronic adhesive capsulitis with an acute contusion. (RX 1, pp. 32, 37). Dr. Li believed Petitioner was exhibiting signs of symptom magnification on this date. (RX 1, pp. 35-36). Dr. Li opined that Petitioner would have reached MMI in six weeks' time from her October 2011 injury, at which point she could have returned to work with no restrictions and would be in need of no further treatment. (RX 1, pp. 39, 42-43). After reviewing Petitioner's MRI films, Dr. Li was of the impression that Petitioner's shoulder condition was a result of AC joint arthrosis, and that the surgery proposed by Dr. Bane would be due to this condition and not the work accidents in question. (RX 1, pp. 43-45). Dr. Li disagreed with the MRI radiologist's interpretation of Petitioner's shoulder condition, as well as disagreed with the interpretation of the films offered by the other physicians noted *supra*, including treating orthopedic surgeon Dr. Bane. (RX 2, pp. 7-9). Dr. Li also opined that the May 2006 cervical MRI demonstrated normal alignment in the cervical column and revealed no evidence of radiculopathy. He also noted that Petitioner had not undergone any follow-up treatment for her neck following the initial course of treatment. (RX 1, p. 24).

Dr. Bane disagreed with Dr. Li that Petitioner did not need any further treatment to her right shoulder. His basis for disagreement with Dr. Li was that Petitioner was still having pain and suffered from what appeared to be a partial tear of the supraspinatus. Dr. Bane further reported regarding the basis for his disagreement, in that Petitioner had been unable to perform her work duties and had pain on an eight on a scale of ten. (PX 1).

The evidence in record indicates that Petitioner suffers from "needle phobia." (See RX 5, noting multiple times that she is "afraid" and "phobic" of needles). Petitioner explained that this phobia was the reason she had declined steroid injections recommended by her treating physicians in the past.

Petitioner testified that all of her medical bills have been paid with the exception of an invoice totaling $165.00 from Carle Clinic. (See also PX 3). Respondent noted that said medical bill has been placed in line for payment. (See Arbitrator's Exhibit (AX) 1, paragraph 7). Petitioner also filed a petition for penalties and attorney's fees pursuant to Sections 19(k), 19(l) and 16 of the Act. (PX 2). Respondent in turn filed a response to said motion. (RX 6).

Petitioner testified that she currently has difficulty lifting with her right arm. She experiences pain in her right shoulder, as well as pain through her arm and in her wrist. She also testified to continued knee and neck pain.

CONCLUSIONS OF LAW

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

As an initial note, the Arbitrator overrules the objections by Petitioner's counsel to the deposition testimony of Dr. Li. *See Fenton v. Gardner Denver, Inc.*, 12 IWCC 1366 (Dec. 10, 2012).[1]

The Arbitrator finds that Petitioner's current condition of ill-being with respect to her right shoulder, elbow and wrist are causally connected to the work accidents in question, particularly the October 2011 accident. The Arbitrator finds that Petitioner's current condition of ill-being with respect to her neck and knees is not causally related to the work injuries.

Concerning Petitioner's right shoulder, the evidence establishes that Petitioner suffered a work accident in December 2004, whereby she was diagnosed with rotator cuff tendonitis and adhesive capsulitis, for which she eventually underwent a shoulder manipulation. MRI studies did not reveal any tearing. She did not have a good recovery, but was released at MMI and returned to work with restrictions following the manipulation procedure. On October 7, 2011, Petitioner re-injured her right shoulder at work. MRI testing revealed minimal fluid in the joint capsule and subacromial bursa, and a small tear in undersurface of the distal supraspinatus tendon. Dr. Bane, Petitioner's treating orthopedic surgeon, believed the films revealed a probable partial tear of the supraspinatus tendon that appeared to be less than 50% thickness. Dr. Bane believed Petitioner was suffering from symptoms of impingement and AC joint arthrosis. Dr. Chen, the occupational medicine doctor, agreed with the MRI radiologist that a small tear of the undersurface of the distal supraspinatus and a small amount of fluid was shown in the films. Physician's Assistant Shroyer at Carle Clinic also noted that the 2011 MRI films indicated a partial thickness rotator cuff tear. Dr. Li, Respondent's examining physician, testified that he disagreed with the foregoing doctors, and in fact did not believe there to be tearing. Dr. Li believed Petitioner suffered from simply AC joint arthrosis.

The Arbitrator places more weight on the opinions of treating orthopedic surgeon Dr. Bane in regard to the diagnosis concerning Petitioner's shoulder, as well as the opinions of occupational medicine doctor, Dr. Chen. The weight of the evidence establishes that Petitioner injured her right shoulder in 2004, underwent a procedure and was subsequently released at MMI and returned to work, and then re-injured her shoulder at work in October 2011. Petitioner's prior MRI from 2005 did not reveal any tearing, yet the MRI following the 2011 accident did, as confirmed by the interpreting radiologist, Dr. Bane, Dr. Chen and PA Shroyer. Petitioner testified to ongoing right shoulder pain, and the records confirm these complaints. Based

[1] In *Fenton*, he Commission noted that *City of Chicago v. Ill. Workers' Comp. Comm'n*, 387 Ill. App. 3d 276, 899 N.E.2d 1247 (1st Dist. 2008) specifically overruled the decision of *Marks v. ACME Industries, Inc.*, which was a Commission decision holding that the start of the hearing as defined in Section 12 of the Act was the first deposition taken. The Commission further noted that Section 12 of the Act states that a copy of the examining physician's report should be furnished to the employee or his representative as soon as practicable, but not later than 48 hours before the time the case is set for hearing. However, the statute does not require any particular timetable for disclosure of reports prior to depositions being taken.

on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being with respect to her right shoulder is causally connected to the injuries in question.

Petitioner also injured her right wrist and elbow as a result of the trauma that occurred during the work accident in October 2011. The occupational medicine records immediately following this accident confirm trauma to these regions. Dr. Li confirmed an elbow diagnosis as a result of the trauma. Petitioner still experiences pain in these areas. It is also noted that Petitioner initially injured her wrist when she fell at work during the January 2006 accident. The evidence establishes that Petitioner's current condition of ill-being with respect to her right elbow and wrist are causally connected to her work injury of October 7, 2011.

As a result of the fall at work in January 2006, Petitioner suffered a neck strain and knee strains. Petitioner underwent a course of treatment for her neck strain with the occupational medicine doctors following this episode. In March 2006, Petitioner was evaluated concerning her knees, ribs and neck. Aside from the neck pain, Petitioner reported doing well. As Dr. Li noted, Petitioner's treatment concerning her neck ceased shortly thereafter. Full range of motion of the neck was reported by Dr. Chen in October 2011. Accordingly, the Arbitrator finds that Petitioner suffered a neck strain as a result of the January 2006 fall at work that in turn resolved, and therefore her current condition of ill-being in this regard is not causally connected to that injury. Furthermore, while Petitioner complained of continued knee pain at trial, treatment concerning the diagnosed knee strains ceased shortly after the accident. Based on the medical evidence in the record, the Arbitrator finds that Petitioner's current condition of ill-being regarding her knees is not causally related to that 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 only outstanding medical invoice at issue is a bill from Carle Physician Group in the amount of $165.00. (PX 3). Respondent noted that said invoice was placed in line for payment. (See AX 1, paragraph 7). Therefore, said medical bill shall be paid by Respondent, subject to the medical fee schedule, Section 8.2 of the Act.

Issue (K): Is Petitioner entitled to prospective medical care?

Given the Arbitrator's findings concerning causation, as discussed above, and noting that the opinions of Dr. Bane are hereby adopted by the Arbitrator concerning prospective medical treatment, the Arbitrator hereby orders Respondent to authorize and pay for the surgery recommended by Dr. Bane (diagnostic arthroscopy, subacromial decompression and distal clavicle resection), subject to the medical fee schedule, Section 8.2 of the Act.

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

Petitioner is claiming to be entitled to temporary total disability (TTD) benefits from January 24, 2006 through February 8, 2006 (the time she was off work due to the shoulder manipulation), and again from November 14, 2011 (when she was taken off work entirely per occupational medicine doctor, Dr. Chen) through the date of trial, July 19, 2013. The parties have stipulated to a credit due Respondent for TTD benefits paid to date, totaling $4,140.54. (See AX 1). Having found causation in favor of Petitioner concerning her right shoulder, the Arbitrator adopts the "off-work" recommendation of occupational medicine doctor, Dr. Chen, and awards Petitioner TTD benefits for the periods claimed.

Issue (M): Should penalties or fees be imposed upon Respondent?

The Arbitrator does not find that Respondent's refusal to authorize medical treatment or pay benefits in this matter is unreasonable or vexatious, and accordingly denies Petitioner's petition for penalties and fees.

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

Patty Holland,
Petitioner,

vs.

NO: 12 WC 39745

14IWCC0571

Gilster-Mary Lee,
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, temporary total disability, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

14IWCC0571

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,600.00. 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: JUL 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-05/27/14
drd/wj
68

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

HOLLAND, PATTY
Employee/Petitioner

Case# **12WC039745**

12WC035454

GILSTER-MARY LEE
Employer/Respondent

14IWCC0571

On 9/4/2013, 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:

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

0693 FEIRICH MAGER GREEN RYAN
BRANDY L JOHNSON
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

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)

Patty Holland
Employee/Petitioner

v.

Gilster-Mary Lee
Employer/Respondent

Case # 12 WC 39745

Consolidated cases: 12 WC 35454

14IWCC0571

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 24, 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 _____

14IWCC0571

FINDINGS

On the date of accident and manifestation, respectively, September 28, 2011, (12 WC 35454) and October 10, 2012 (12 WC 39745), Respondent was operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship did exist between Petitioner and Respondent.

On these date, Petitioner did sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents was given to Respondent.

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

In the year preceding the injuries, Petitioner earned $25,487.70; the average weekly wage was $544.61.

On the dates of accident, Petitioner was 57 years of age, married with 0 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 $6,680.40 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $6,680.40.

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 1, 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. Lander, including, but not limited to, a total knee replacement surgery.

Respondent shall pay Petitioner temporary total disability benefits in the amount of $363.07 per week for 61 weeks commencing October 24, 2011, through March 11, 2012, and October 11, 2012, through July 24, 2013.

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

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

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

August 30, 2013
Date

ICArbDec19(b)

SEP 4 – 2013

Findings of Fact

Petitioner filed three Applications for Adjustment of Claim which alleged that she sustained accidental injuries arising out of and in the course of her employment for Respondent. In both 12 WC 27885 and 12 WC 35454, Petitioner alleged that she sustained a work-related accident on September 28, 2011. Case 12 WC 27885 was filed prior to Petitioner retaining counsel to represent her and, by agreement of the parties, that case was dismissed. The Amended Application filed in 12 WC 35454 alleged that Petitioner injured her left leg/knee when twisting while scrubbing steps. In case 12 WC 39745 the Application alleged a date of accident (manifestation) of October 10, 2012, and that Petitioner sustained an aggravation of a pre-existing condition which resulted in further injuries to the left leg/knee. At trial, the parties agreed to a consolidation of 12 WC 35454 and 12 WC 39745.

These cases were tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent stipulated that Petitioner sustained a compensable accident in regard to 12 WC 35454 and paid both medical and temporary total disability benefits. Respondent disputed liability in regard to 12 WC 39745 on the basis of accident and causal relationship.

Petitioner worked for Respondent as a custodian and, prior to September 28, 2011, Petitioner had some bilateral knee pain; however, most of the prior symptoms were in respect to the right knee. Further, Petitioner did not have any claims for injuries to the left knee any time prior to September 28, 2011. Petitioner testified that on September 28, 2011, she was kneeling on a concrete step while she was in the process of scrubbing the steps with a brush. When Petitioner stood up, she felt pain and a burning sensation in her left knee.

Petitioner initially sought medical treatment from Dr. Lisa Lowry-Rohlfing, her family physician, who saw her on October 24, 2011. At that time, Petitioner informed Dr. Lowry-Rohlfing that she had experienced left knee pain for some time but that it had been getting worse, in particular, when she had to kneel or squat while at work. Dr. Lowry-Rohlfing suspected meniscal pathology and ordered an MRI scan. The MRI was performed on October 26, 2011, and it revealed a torn medial meniscus and a degenerative signal within the lateral meniscus.

At the direction of the Respondent, Petitioner was examined by Dr. Lyndon Gross, an orthopedic surgeon, on November 17, 2011. Dr. Gross reviewed medical reports provided to him by Respondent and examined the Petitioner. Dr. Gross opined that Petitioner had chronic thinning of the cartilage in the patella and subchondral edema that were not significantly aggravated by the injury; however, he also opined that Petitioner had a degenerative tear of the medial meniscus made symptomatic by her work activities. Dr. Gross further opined that most of Petitioner's symptoms were because of the meniscal tear and that arthroscopic surgery consisting of a partial medial meniscectomy and chondroplasty of the patella was appropriate.

Dr. Lowry-Rohlfing referred Petitioner to Dr. Robert Lander, an orthopedic surgeon, who initially saw Petitioner on December 7, 2011. Dr. Lander reviewed the MRI and examined Petitioner and opined that she had sustained a torn medial meniscus and that surgery was indicated. On December 12, 2011, Dr. Lander performed arthroscopic surgery on the left knee

consisting of a partial medial meniscectomy. Petitioner remained under Dr. Lander's care following surgery and received physical therapy.

Dr. Lander released Petitioner to return to work on March 12, 2012, but with restrictions of no ladder climbing and no kneeling. Petitioner did return to work at that time but continued with her home exercises. When Dr. Lander saw Petitioner on April 11, 2012, he continued the restriction in regard to ladder climbing, but stated she could kneel so long she had knee pads. When Dr. Lander saw Petitioner on July 11, 2012, he opined that she was at MMI and that she had permanent restrictions of no ladder climbing or kneeling.

Petitioner testified that when she returned to work, she was still required to climb stairs and that her left knee kept hurting. In spite of the fact that Petitioner had a restriction of no ladder climbing, she still had to climb both stairs and a ladder to clean ceilings. The ladder that Petitioner climbed when performing this task lead to a platform that had a metal railing around it. While Petitioner was cleaning the ceiling, she leaned forward with her knees pressed against the metal railing. Petitioner testified that, over a period of time, this caused increased pain and swelling of her left knee. On October 10, 2012, Petitioner was seen by Dr. Lander and, at that time, she complained of severe left knee pain. Dr. Lander opined that Petitioner had severe degenerative arthritis and that this is what was causing her complaints of pain. He recommended that Petitioner have a total knee replacement and authorized her to be off work.

At the direction of the Respondent, Petitioner was re-examined by Dr. Gross on December 6, 2012. Dr. Gross reviewed additional medical records and again examined Petitioner. Dr. Gross opined that Petitioner's continued left knee symptoms were related to the underlying degeneration in her knee caused by the normal aging process and not by a work injury. Dr. Gross opined that if Petitioner continued to have knee symptoms that further treatment was appropriate, either a unicompartmental or total knee arthroplasty.

At trial Petitioner testified that her left knee hurts, swells and that she experiences tightness in the knee joint. Petitioner has problems walking and is unable to squat. Petitioner testified that she has no stairs in her residence. She does want to proceed with the knee surgery as recommended by both Dr. Lander and Dr. Gross.

Respondent brought Brad Bruns, the safety/sanitation supervisor to the trial but he was called by Petitioner's counsel to testify. Bruns testified that he never directed Petitioner to climb any ladder; however, he did not know if Petitioner was told to clean ceilings or not. He agreed that Petitioner was a good employee and that he had no reason to disbelieve her testimony.

Dr. Lander was deposed on April 11, 2013, and his deposition testimony was received into evidence at trial. Dr. Lander's testimony was consistent with his medical records and he acknowledged that when he saw Petitioner in July, 2012, that she was at MMI and that he released her to return to work with permanent restrictions. Dr. Lander noted that Petitioner had degenerative arthritis at the time of the initial injury and that removal of the meniscus had a 50% chance of making her better. He also opined that Petitioner's degenerative symptoms were aggravated by her work activities. He reaffirmed his opinion that Petitioner should undergo total knee replacement surgery.

Dr. Gross was deposed on June 21, 2013, and his deposition testimony was received into evidence at trial. Dr. Gross' testimony was consistent with his narrative medical reports and he reaffirmed his opinion that Petitioner's current condition was due to the degenerative changes and not related to her work activities. However, Dr. Gross opined that Petitioner's ongoing knee problems were caused by the "work restrictions" imposed by Dr. Lander in regard to climbing and kneeling and that someone with arthritis will have pain if they engaged in those activities. Dr. Gross agreed that subsequent to September 28, 2011, Petitioner's left knee symptoms never resolved and that he had no specific information as to what Petitioner was doing between the time she was released at MMI in July, 2012, and October, 2012, but that he did know that her pain was increasing during that period of time.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury arising out of and in the course of her employment that manifested itself on October 10, 2012.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that when she returned to work with restrictions in March, 2012, that she was still required to climb stairs and that her knee symptoms got progressively worse. Even though Petitioner had a restriction of no ladder climbing, she had to do so to clean ceilings. While performing this task, Petitioner had to lean forward with her knees against a metal railing and, over a period of time, her left knee symptoms increased. On October 10, 2012, Petitioner was seen by Dr. Lander who opined that she had severe degenerative arthritis that was causing her pain.

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 her work-related accident of September 28, 2011, and her work-related repetitive trauma injury of October 10, 2012.

In support of this conclusion the Arbitrator notes the following:

As stated herein, there was no dispute that Petitioner sustained a work-related injury on September 28, 2011, which ultimately required meniscus surgery. Petitioner did experience some relief following the surgery; however, her left knee condition never returned to its pre-injury state. When Petitioner was determined to be at MMI and released to return to work in July, 2012, it was with permanent restrictions.

When Petitioner returned to work the job duties she performed were many times outside her work restrictions, which continued to aggravate her left knee symptoms. This included the task of clean ceilings which required Petitioner to climb a ladder and then lean forward with her knees pressed against a metal railing.

Petitioner's treating physician, Dr. Lander, testified that Petitioner's degenerative symptoms were aggravated by her work activities. Respondent's Section 12 examiner, Dr. Gross, opined that someone with degenerative arthritis will have pain symptoms if they engage in climbing and kneeling.

Petitioner credibly testified that her left knee condition never returned to its pre-accident state and that upon her being found to be at MMI and returning to work in July, 2012, her job duties continued to aggravate her left knee symptoms.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services 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 (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 total knee replacement surgery recommended by Dr. Lander.

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

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 61 weeks commencing October 24, 2011, through March 11, 2012, and October 11, 2012 through July 24, 2013.

In support of this conclusion the Arbitrator notes the following:

There was no dispute as to Petitioner's entitlement to temporary total disability benefits from October 24, 2011, through March 11, 2012. Further, the evidence is clear that Petitioner has been totally disabled from October 11, 2012, through July 24, 2013.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Monica Hedger,
Petitioner,

vs. NO: 99 WC 64700

The Limited Express,
Respondent.

14IWCC0572

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 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.

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

14IWCC0572

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: JUL 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-07/02/14
drd/wj
68

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

HEDGER, MONICA
Employee/Petitioner

Case# 99WC064700

14IWCC0572

THE LIMITED EXPRESS
Employer/Respondent

On 8/6/2013, 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 0.07% 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:

4262 ROMANEK & ROMANEK
DARON ROMANEK
ONE N LASALLE ST SUITE 425
CHICAGO, IL 60602

0208 GALLIANI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST 18TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

Monica Hedger
Employee/Petitioner

v.

The Limited Express
Employer/Respondent

Case # 99 WC 64700

Consolidated cases: N/A

14IWCC0572

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 **December 14 and 19, 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 causal connection, TTD, medical, 19(b) and 8(a)

FINDINGS

On the date of accident, **October 22, 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 only to the extent explained *infra*.

In the year preceding the injury, Petitioner earned[1] **$11,700.00**; the average weekly wage was **$225.00**.

On the date of accident, Petitioner was **20** 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 **$29,833.95** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$29,833.95**.

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

ORDER

Temporary Total Disability & Maintenance Benefits

Respondent shall pay Petitioner temporary total disability benefits of $150.00/week for 122 and 5/7th weeks, commencing November 17, 2004 through August 31, 2006 and commencing again February 13, 2010 through September 3, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from May 24, 2002 through December 14, 2012, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $29,833.95 for temporary total disability benefits that have been paid.

Denial of Other Benefits

Petitioner's claim for additional temporary total disability benefits, maintenance benefits, payment of unpaid medical bills as submitted into evidence, penalties or fees, and any prospective medical care is denied as explained in the Arbitration Decision Addendum.

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.

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[1] The Arbitrator notes that the parties' request for hearing form in this case indicates different earnings and average weekly wage calculation than previously agreed by the parties at trial in 2002. Petitioner's earnings and average weekly wage were not disputed at the time of hearing in 2002. The March 19, 2002 request for hearing form reflects the aforementioned earnings and average weekly wage. The parties are bound by their stipulations made at trial and the Arbitrator is bound by the law of the case already established, which reflects that Petitioner earned $11,700 and had an average weekly wage of $225.

14IWCC0572

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 5, 2013
Date

ICArbDec19(b)

AUG 6 – 2013

14IWCC0572

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Monica Hedger
Employee/Petitioner

v.

The Limited Express
Employer/Respondent

Case # 99 WC 64700

Consolidated cases: N/A

FINDINGS OF FACT

Procedural History & Issues in Dispute

On March 19, 2002 and May 23, 2002, Arbitrator Edward Lee ("Arbitrator Lee") held a hearing pursuant to Petitioner's Section 19(b) petition. Petitioner's Exhibit ("PX") 1. Arbitrator Lee issued a decision on July 2, 2002. PX1. Petitioner filed a review with the Commission and it reversed the arbitration decision. PX2. The Commission issued its decision on July 1, 2003 with a dissent from Commissioner Stevenson. *Id.* Respondent appealed the Commission's decision and the Circuit Court of Cook County affirmed the Commission's decision, for the most part, in a decision dated June 11, 2004. PX3. Specifically, the Court affirmed the Commission's causal connection finding that Petitioner sustained a torn labrum as a result of her injury at work in 1999 and its award of certain medical bills, temporary total disability benefits, and prospective medical care related to the shoulder, but reversed the Commission's award of penalties and fees. *Id.* No further appeals were taken.

Petitioner's case was eventually remanded to arbitration. The parties ultimately appeared for trial on December 14 and 19, 2012 pursuant to Petitioner's most recent Section 19(b) and Section 8(a) motion. The issues in dispute include causal connection, Respondent's liability for certain medical bills, Petitioner's entitlement to 10½ years of temporary total disability benefits commencing on May 24, 2002 through December 14, 2012, Petitioner's entitlement to prospective medical care, and whether penalties should be imposed pursuant to Sections 16, 19(k), and 19(l). Arbitrator's Exhibit ("AX") 1.

Petitioner offered voluminous medical evidence overlapping with the period of medical treatment previously addressed by an Arbitrator, the Commission and then definitively resolved by the Circuit Court in its final June 11, 2004 decision. However, Petitioner now claims that her current condition of ill being is causally related to her injury at work with regard to medical conditions and body parts that were not previously addressed (i.e., neck/cervical spine, thoracic spine, and complex regional pain syndrome) at the first hearing which concluded on May 23, 2002 and that her continued right shoulder after the last trial date on May 24, 2002 remains causally connected to her injury at work. In accordance with the law of the case[2] and the evidence presented at this trial, the Arbitrator makes findings on the disputed issues as stated *infra*.

[2] "The rule of the law of the case is a rule of practice, based upon sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 125 Ill.App.3d 1083, 1086-1087, 91 Ill.Dec. 314 (Ill. App. Ct., 1984). The Appellate Court went on to state that the "trial court order becomes the 'law of the case' only if there is a final and appealable order." *Id.*, (citation omitted). In Petitioner's case, no further appeals were taken after the Circuit Court's June 11, 2004 decision and the Arbitrator is, thus, bound by the Circuit Court's findings and decision.

Background

The medical records reflect that Petitioner saw Dr. Marcotte and sought medical treatment as a teenager from 1989 up to her date of accident for a variety of issues including a sore throat, headaches, left elbow popping, twisted right foot, congestion, bottom lip and right hand numbness, emergency room treatment for "screaming and crying" after tetanus immunization, right hip pain, swivel knee, foot numbness, fatigue, "frequent illnesses," upper respiratory infection, back and lower extremity pain with a "metal plate" in her back, etc. PX4; PX6. There is no medical evidence that Petitioner ever had surgery involving instrumentation implantation in her back.

Petitioner testified that she had not been diagnosed with reflex sympathetic dystrophy ("RSD") or complex regional pain syndrome ("CRPS") before October 22, 1999. Tr. at 49-50. She also testified that she never had problems in her neck or involving the thoracic spine before her injury at work. Tr. at 50.

Petitioner also testified that her primary care physician, Dr. Marcotte, referred her to Dr. Mehl for right shoulder treatment before she began treating with Dr. Silver on September 7, 2001. Tr. at 23, 71; PX10.

Medical Treatment

On November 2, 1999, Petitioner underwent a cervical spine and right shoulder x-ray which showed no fracture or bony abnormality, and normal alignment in the cervical spine. PX4 at 52.

On November 19, 1999, Petitioner underwent an EMG related to shoulder pain and hand numbness complaints. PX4 at 53-55. The results of this EMG were compared with Petitioner's March 5, 1999 EMG results. *Id.* Both examinations were normal. *Id.*

On January 1, 2000, Petitioner underwent a right shoulder MRI which the interpreting radiologist noted was negative and specifically noted that it showed an intact glenoid labrum, no evidence of a full thickness rotator cuff tear, no evidence of tendonitis, and a normal AC joint among other normal findings. PX5 at 54. Petitioner continued to follow up with Dr. Mehl per Dr. Marcotte's referral on January 7, 2000 and thereafter. PX5.

On January 28, 2000, Dr. Mehl noted that Petitioner's right shoulder MRI was "completely negative." PX5 at 57. On February 17, 2000, Petitioner reported feeling a " 'pop/crack' " in the anterior portion of her shoulder while exercising and tightness/soreness/pain ever since. PX5 at 69. On February 22, 2000, Petitioner reported being sore from playing darts. PX5 at 68. On October 30, 2000, Dr. Mehl noted his recommendation that Petitioner have shoulder surgery without arthroscopy "[s]ince there is some debate as to whether or not there is a labral tear...." PX5 at 56. On November 2, 2000, Petitioner underwent an arthrogram and CT arthrogram of the right shoulder, which the interpreting radiologist noted showed a tear of the anterior labrum and no evidence of a rotator cuff tear. PX5 at 53. On November 8, 2000, Dr. Mehl noted his conversation with Petitioner reviewing the arthrogram which documented a labral tear and indicated that she should discuss it with her lawyer and he would schedule surgery thereafter when it was cleared with her attorney. PX5 at 58.

On April 9, 2001, Dr. Mehl noted that Petitioner reported secondary pain into the neck and shoulder and even headaches. PX5 at 55. On examination, he noted that she had tenderness into the trapezius muscle extending up into the sternocleidomastoid area as well. *Id.* He noted that Petitioner had a "known right shoulder labral tear which was the direct result of her work injury." *Id.* He diagnosed her with a right shoulder labral tear and secondary neck/shoulder muscle strain. *Id.*

Petitioner then chose to seek medical treatment with Dr. Silver at her attorney's recommendation. PX5 at 7-16. Petitioner saw Dr. Silver for the first time on September 7, 2001. PX5 at 105-106. She reported lifting a box of metal clips that was heavy and feeling pain and something happened in her right shoulder and she experienced numbness, tingling, and pain while at work in October of 1999. *Id.* She reported difficulty with activities above the shoulder and with activities of daily living. *Id.* On examination, Petitioner had tenderness anteriorly and anterolaterally around the humeral head and rotator cuff region, limited range of motion to 100° of forward flexion, 90° of lateral at adduction, internal rotation to the beltline posteriorly, positive impingement sign, equivocal sulcus sign, negative apprehension signs, and ability to sublux Petitioner's shoulder anteriorly quite easily in the side lying position reminiscent to Petitioner of the clicking and shifting she feels the time of her injury. *Id.* He diagnosed Petitioner with recurrent subluxation with secondary impingement of the right shoulder in conjunction with the torn glenoid labrum. *Id.* Dr. Silver recommended surgery including labrum repair with capsular shift reconstruction. *Id.*

Petitioner continued to see Dr. Silver on January 16, 2002 and July 24, 2002 at which time he continued to recommend surgery. Tr. at 11; PX4; PX5 at 108-109.

Dr. Marcotte's medical records reflect that Petitioner was involved in a motor vehicle accident on July 9, 2003. PX6 at 7-10, 101-104, 147. When she saw Dr. Marcotte on July 12, 2003, she reported that she was the passenger inside of a truck that was hit by a car on the passenger's side. *Id.* Petitioner reported "bad headaches on [right] side of head x [illegible] [with] nausea blurry vision" and pain and swelling under the right eye. *Id.* Petitioner's CT scans of the head, lumbar spine, and abdomen were normal. *Id.*

On August 2 and/or 4, 2003, Petitioner continued to report headaches over the prior three weeks and Dr. Marcotte diagnosed Petitioner with cephalgia on the right after motor vehicle accident. *Id.*

Approximately 14 months later Petitioner returned to Dr. Silver on October 3, 2003 who kept her off work. Tr. at 11-12; PX4 at 164-165. His records reflect that Petitioner reported continued shoulder problems. *Id.* On examination, Petitioner had limited range of motion and a positive impingement sign. *Id.* Petitioner was still waiting for approval of her right shoulder surgery on that date. *Id.*

On January 24, 2004, Petitioner saw Dr. Marcotte reporting that she cut her fingers of the right hand while mowing the lawn and that she "cannot move fingers pain from fingers up through arm." PX6 at 14. On cross examination, Petitioner denied ever complaining to her doctors that she injured her hands during a riding lawnmower accident. Tr. at 73-74.

Ten months after her last visit to Dr. Silver, Petitioner returned on August 4, 2004 and he continued to recommend right shoulder surgery and keep her off work. Tr. at 12; PX4 at 168-169. He noted that Petitioner's physical examination remained unchanged. *Id.* She returned to Dr. Silver on September 3, 2004 and he kept her off work. Tr. at 12; PX4 at 171.

First Section 12 Examination – Dr. Cole

On September 14, 2004, Petitioner underwent a Section 12 examination with Dr. Cole. Tr. at 12; PX5 at 7-16, 157-164, 166. Petitioner reported right shoulder pain and a sense of instability, headaches, numbness going down the arm, back, and chest. *Id.* She reported being unable to use her arm overhead with a sense that the arm comes out of the socket. *Id.* She reported an injury at work in 1999 while lifting a 15 to 20 pound box of metal

clips overhead when she felt pulling in her right shoulder. *Id.* On examination, Dr. Cole noted active elevation to 90° compared to 180° on the left, external rotation to 45°, internal rotation to L1, positive apprehension test, positive relocation test, positive sulcus test, some discomfort with posterior testing, no Frank instability posteriorly, no neurological defects, full range of motion in the cervical spine and a negative Spurling test, slight tenderness anteriorly in the biceps, and some tenderness over the trapezius region dorsally. *Id.*

Dr. Cole noted that based on his objective findings Petitioner's condition was consistent with possible multidirectional right shoulder instability. *Id.* Dr. Cole noted that no medical records were available to him and that if Petitioner's reports to him were correct, he would state that Petitioner's condition might or could be work-related. *Id.* He also noted, however, that it was unlikely to be traumatic anterior/inferior with an anterior/inferior labral tear based upon the reported mechanism of injury. *Id.* He noted that it generally required much more trauma to tear the anterior/inferior labrum, but that he did not have diagnostic studies to review at the time. *Id.*

In any event, Dr. Cole stated that the need for intervention was related to the injury in question and he failed to understand why Petitioner had not worked during the period of time reported by her when she clearly could have been working light duty without any restrictions other than overhead activities. *Id.* Thus, Dr. Cole released Petitioner to light duty work with no use of the right arm and no overhead lifting activities over 10 pounds and he endorsed arthroscopic evaluation of the shoulder. *Id.*

Continued Medical Treatment

On November 17, 2004, Dr. Silver performed Petitioner's first right shoulder surgery. Tr. at 12-13; PX4 at172. Pre- and postoperatively, Dr. Silver diagnosed Petitioner with recurrent subluxation of right shoulder. *Id.* He performed a right anterior-inferior capsular shift reconstruction of the right shoulder, but did not perform any repair of the labrum because, intraoperatively, Dr. Silver noted that "[t]he labrum was intact." *Id.*

Petitioner returned to Dr. Silver postoperatively. PX4. On November 24, 2004, Dr. Silver placed Petitioner in another immobilizer and kept her off work. Tr. at 13; PX4 at 173-174. On December 10, 2004, he discontinued use of the immobilizer, ordered physical therapy, and kept her off work. Tr. at 13-14; PX4 at 175-176.

On January 7, 2005, Dr. Silver ordered continued physical therapy and returned Petitioner to light duty work performing one-handed work only. Tr. at 14; PX4 at 179-180. Petitioner underwent the recommended physical therapy. PX4 at 181-182. Petitioner testified that she underwent 18 sessions of physical therapy between December 16, 2004 and February 2, 2005. Tr. at 14.

On February 2, 2005, a physical therapist noted that Petitioner "...may benefit from a chronic pain assessment." PX4 at 186; PX9 at 183 & PX9 (Dep. Exh. 2).

On February 4, 2005, Dr. Silver noted that Petitioner had regained almost full range of motion although she was severely weak. Tr. at 14-15; PX4 at 183-184. He ordered continued physical therapy and decreased Petitioner's work restrictions to include limited use of the right arm below shoulder level with no lifting. *Id.*

Petitioner underwent physical therapy at Lowell Physical Therapy[3] beginning February 14, 2005. Tr. at 15; PX4 at 186-190. A physical therapist from Lowell Physical Therapy wrote a letter to Dr. Silver dated March 3, 2005 in which she noted that Petitioner reported a subjective setback following her last physical therapy session with pain increasing to 10/10 which subsequently reduced to 5/10. *Id.* The physical therapist noted that Petitioner had reported pain at a level as low as 1/10 prior to March 1, 2005. *Id.* The physical therapist further noted that, objectively, Petitioner demonstrated improved scapular stability, improved postural position, and improved strength and tolerance to shoulder exercises. *Id.*

On March 4, 2005, Petitioner returned to Dr. Silver who ordered continued physical therapy and decreased Petitioner's work restrictions to include limited use of the right arm and no lifting over 5 pounds. Tr. at 15-16; PX4 at 190-192. Petitioner continued to undergo physical therapy. PX4 at 194-198.

On April 1, 2005, Dr. Silver noted that Petitioner had "just some slight discomfort at 180° of forward flexion." PX4 at 199-201. He decreased Petitioner's work restrictions to include limited use of the right arm and no lifting over 10 pounds. *Id.*; Tr. at 16.

The Lowell physical therapist wrote a second letter to Dr. Silver dated April 13, 2005 noting that Petitioner's reported pain level was 9/10 and that she reported no relief after her treatment with pain symptoms beginning approximately 1 1/2 weeks prior on a Sunday afternoon with no identifiable activity that may have aggravated her pain symptoms. PX4 at 202. She further noted that Petitioner did not tolerate progression of exercise were manual therapy and requested Dr. Silver's advice on the appropriateness of further therapy. *Id.* Petitioner returned to Dr. Silver on April 15, 2004 at which time he ordered continued physical therapy and some anti-inflammatory medication. PX4 at 203-204, 211.

On May 6, 2005, Dr. Silver ordered a functional capacity evaluation. Tr. at 16-17; PX4 at 206, 210. He noted that Petitioner had reached a plateau and regained full motion in her shoulder, but with discomfort at extremes of motion due to some degree of spasm in the trapezius on the right. *Id.*

Petitioner continued physical therapy at Lowell beginning April 18, 2005 through the date of her functional capacity evaluation. PX4 at 205, 207-209, 213. At the time of her discharge from physical therapy, the physical therapist noted that Petitioner's subjective "pain levels were reported to have increased to require patient to resume use of muscle relaxers. Patient reported difficulty sleeping. Pain levels fluctuated between 3-4/10 and 7-8/10 on a regular basis. Objectively, despite increases in active, passive range and strength grades, patient reported increased difficulty and pain with motion." PX4 at 213.

Petitioner underwent the functional capacity evaluation on May 17, 2005. Tr. at 16-17; PX4 at 212-257; PX7 at 71-121. In summary, the physical therapist noted that "[o]verall test findings, in combination with clinical observations, suggest moderate inconsistency to the reliability/accuracy of [Petitioner's] subjective reports of pain/limitation. [the physical therapist further noted that, without commenting on Petitioner's intent, Petitioner] can do more at times than she currently states or perceives. While her subjective reports should not be disregarded, they should be considered within the context of such RCR findings." PX4 at 248, 215.

[3] The Lowell physical therapy records reflect that Lowell is also known as Duneland Regional Rehab. PX7. For consistency, the Arbitrator will refer to this provider as Lowell Physical Therapy.

At trial, Petitioner testified that the physical therapy she received between December 16, 2004 and February 2, 2005 and again from February 14, 2005 through May 4, 2005 did not help her right shoulder in terms of strength or pain. Tr. at 16.

Petitioner did not see Dr. Silver after her functional capacity evaluation, but rather his partner, Dr. Jablon, on June 3, 2005. PX4 at 258. Dr. Jablon noted his review of Petitioner's functional capacity evaluation results. PX4 at 258. Dr. Jablon did not address the subjective notations made by the physical therapist. *Id.* He decreased Petitioner's work restrictions and imposed permanent restrictions including no lifting or carrying over 25 pounds and only occasional above right shoulder work lasting no more than 5 to 7 minutes at a time and totaling no more than 30 to 40 minutes per day. *Id.*; Tr. at 17.

Second Section 12 Examination – Dr. Cole

On August 22, 2005, Petitioner returned to Dr. Cole for a second independent medical evaluation at Respondent's request. Tr. at 18; PX5 at 17-18, 25, 153-156, 165. Petitioner reported feeling worse than before her surgery, tiredness, and inability to internally rotate or go up behind her back, and a feeling that her shoulder was not sitting in the correct position, it was sitting somewhat anteriorly. *Id.* He reviewed Petitioner's November 17, 2004 operative report reflecting that she had an open stabilization with no mention of examination under anesthesia or interarticular findings. *Id.* He noted that with such a procedure, it was sometimes difficult to view all potential interarticular pathology and, given Petitioner's age, Dr. Cole believed that it was somewhat imperative to understand what was going on inside her joint in addition to the instability patterns. *Id.*

On examination, Dr. Cole noted forward elevation to 160° with scapulothoracic dyskinesis compared to 180° on the left, external rotation with her arm down her side to 60°, with her arm abducted to 90° at 70° which was symmetrical, severely limited internal rotation at 90° to approximately 30°, and up behind her back to L1 compared to T7 on the left, pain with apprehension testing which was reduced with relocation maneuver, eight non-tendered biceps, functioning subscapularis, and full rotator cuff strength. *Id.* He diagnosed Petitioner with positive capsular tightness and residual shoulder pain. *Id.* Dr. Cole placed Petitioner at maximum medical improvement with no other treatment recommended unless she decided to have further surgical intervention with severe enough symptoms given the potential for marginal improvement. *Id.* He released Petitioner back to work pursuant to the results of a recommended functional capacity evaluation. *Id.*

Continued Medical Treatment

On October 12, 2005, Petitioner returned to Dr. Silver. Tr. at 18; PX4 at 260-261. Petitioner reported pain and Dr. Silver noted that Petitioner's shoulder condition had deteriorated. *Id.* On examination, Petitioner had pain above 110° of forward flexion and lateral at abduction, internal rotation to the back pocket, slightly positive impingement sign, a negative drop arm test, negative sulcus and apprehension signs, and negative load and shift tests. *Id.* Dr. Silver ordered an MRI to rule out any further intra-articular pathology and placed her off work due to her pain. *Id.*

On December 5, 2005, he diagnosed Petitioner with a rotator cuff tear and again ordered an MRI. PX4 at 263. Petitioner underwent the recommended MRI on December 14, 2005. Tr. at 18; PX4 at 264; PX13 at 5. The interpreting radiologist noted the following: (1) mild to moderate degenerative changes of the acromioclavicular joint; (2) mild thinning and attenuation of the lateral portion of the supraspinatus and infraspinitis tendons

proximal to their insertion sites to the greater tuberosity of the humerus; (3) tendonitis or partial tear could not be excluded; and (4) no definitive full thickness tear. *Id.*

On January 4, 2006, Petitioner returned to Dr. Silver who noted inflammation of the rotator cuff that he found to be clinically consistent with impingement. Tr. at 18-19; PX4 at 265-266. He administered a subacromial cortisone injection into the right shoulder and kept Petitioner off work. *Id.*

On January 20, 2006, Petitioner saw Dr. Silver and reported improvement after her injection. Tr. at 19; PX4 at 267-268. Dr. Silver noted 140° of forward flexion and lateral abduction, ordered physical therapy, and kept Petitioner off work. *Id.* Petitioner underwent the recommended physical therapy from May 26, 2006 through August 28, 2006. Tr. at 19-20; PX4 at 274-306.

A physical therapist at Lowell directed a third letter dated June 5, 2006 to Dr. Silver in which she noted that Petitioner continued to report pain at a level of 8-10/10 since her initial evaluation, that she was not tolerating treatment reporting that it made her pain worse, that she informed the therapist that physical therapy was not helping and that "too much time had passed between her injury and her surgery (5 years, per patient reports), and she is sure therapy won't help." PX4 at 278.

On June 16, 2006, Petitioner saw Dr. Silver reporting that her severe pain has returned and, "[a]s a matter of fact, she's finding therapy is making her pain even worse." Tr. at 20; PX4 at 284-286. On examination, Dr. Silver noted approximately 130-140° of forward flexion with pain above 90°, lateral abduction at 90°, internal rotation did not make the back pocket, positive impingement and Hawkins tests, and a negative drop arm test. *Id.* Dr. Silver indicated that Petitioner continued to show signs of rotator cuff impingement and, based on her persistent symptoms and resistance to conservative care, he recommended arthroscopic subacromial decompression surgery. *Id.* He also kept Petitioner off work. *Id.* Petitioner was discharged from physical therapy on June 19, 2006. PX4 at 287-288.

Petitioner underwent the second recommended right shoulder surgery on July 25, 2006. Tr. at 20; PX4 at 289. Pre- and postoperatively, Dr. Silver diagnosed Petitioner with rotator cuff impingement of the right shoulder. *Id.* He performed the following procedures: (1) arthroscopic subacromial decompression-partial anterior acromioplasty, coracoacromial ligament transection subacromial synovectomy; (2) arthroscopic debridement; and (3) arthroscopic distal clavicle resection. *Id.*

Petitioner returned to Dr. Silver postoperatively. PX4. On August 4, 2006, Dr. Silver noted that Petitioner had full active forward flexion and he ordered physical therapy and kept Petitioner off work. Tr. at 20; PX4 at 292-294. Petitioner returned to Lowell for the recommended physical therapy beginning August 7, 2006. PX4 at 295. On August 23, 2006, Petitioner reported pain at a level of "over a 10/10" and that her shoulder seemed to be getting worse and more aggravated; she reported increased pain level following physical therapy. PX4 at 298-299.

Petitioner underwent a physical capacity evaluation related her bilateral hands on August 25, 2006 at the request of Petitioner's nurse case manager and as referred by Dr. Silver. PX4 at 303-306. The physical therapist noted sub-maximal effort by Petitioner noting that "[o]verall test findings suggest the presence of variable levels of physical effort on [Petitioner's] behalf. In describing sub-maximal effort, this evaluating her is by no means implying intent. Rather, it is simply stated that [Petitioner] can do more physically at times than was demonstrated during this testing date. Any final vocational rehabilitation decisions for [Petitioner] should be made with this in mind." *Id.*

On August 28, 2006, a Lowell physical therapist addressed a fourth letter to Dr. Silver noting that Petitioner was not tolerating physical therapy, demonstrated significant rotator cuff and scapular weakness with muscle spasms and she consistently complained of numbness and tingling throughout the entire right upper extremity extending into the neck and cheek as well as "heat and burning" sensations. PX4 at 297.

On August 30, 2006, Petitioner saw Dr. Silver Tr. at 20-21, 51-52; PX4 at 307-309; PX32. He noted that Petitioner had achieved full range of motion although she continued to report severe muscle spasm and pain in the periscapular region on the right. *Id.* He placed Petitioner at maximum medical improvement and imposed permanent work restrictions including no use of the right arm above shoulder level, no lifting over five pounds on the right side, and no repetitive motion activities on the right. *Id.* Petitioner was released from physical therapy on the same date. *Id.*

Petitioner testified that she had burning, numbness, tingling, muscle spasms, and discoloration in her hands since her last visit to Dr. Silver on August 30, 2006 and when Dr. Marcotte placed her off work on April 16, 2007. Tr. at 22. Petitioner then testified that she also had pain in her right shoulder on questioning by her attorney. Tr. at 22-23. The medical records, however, do not reflect any objective or clinical findings of discoloration in the hands by Dr. Silver or Dr. Marcotte.

Petitioner testified that she requested vocational rehabilitation on August 31, 2006. Tr. at 21. She also testified that this was her last visit with Dr. Silver until approximately 2½ years later. Tr. at 22, 52-53.

On December 9, 2006, Petitioner saw her primary care physician, Dr. Marcotte, who prescribed Vicodin for Petitioner's right shoulder symptoms. Tr. at 21-22.

Petitioner testified that Dr. Marcotte placed her off work on April 16, April 23, and May 9, 2007. Tr. at 22. Dr. Marcotte's April 16, 2007 notes reflect that she restricted Petitioner from lifting with the right arm/shoulder and indicated no specific return to work date. PX6 at 21. In another note, however, Dr. Marcotte indicated that Petitioner was unable to return to work. PX6 at 25. Dr. Marcotte also prescribed Vicodin for Petitioner's right shoulder pain. *Id.* Dr. Marcotte also saw Petitioner on April 23, 2007 and May 9, 2007, ordered a right shoulder MRI and continued to prescribe Vicodin and anti-inflammatory medication for use as needed. *Id.* Dr. Marcotte kept Petitioner off work. PX6 at 26-27. Petitioner testified that Dr. Marcotte continued to order Vicodin for her right shoulder pain. Tr. at 23.

On April 30, 2007, Petitioner underwent a right shoulder MRI as ordered by Dr. Marcotte. Tr. at 23; PX5 at 81; PX13 at 7. The interpreting radiologist noted tendinosis of the supraspinatus tendon, no partial or full thickness tear, hypertrophy of the AC joint, and intact glenoid labrum, and intact long head of the biceps tendon, and an overall similar appearance of the shoulder as compared to Petitioner's December 14, 2005 study. *Id.*

Six years after her last visit with him, Petitioner returned to Dr. Mehl on June 6, 2007. Tr. at 23; PX5 at 73; PX6 at 120. Dr. Mehl noted that Petitioner "*finally ended up with a Dr. Silver at Evanston Hospital performed for some reason and open anterior shoulder capsulorrhaphy.* .... He [later] did an arthroscopy the second time and for some type of clean up surgery, but this is again not clear to me." *Id.*, (*emphasis* added). On examination, Dr. Mehl noted severe positive impingement sign, significant restriction of motion to 130° of flexion, 110° of abduction, 80° of external rotation, and 50° internal rotation. *Id.* She had severe pain and weakness to resisted external rotation testing, but no gross instability. *Id.* He diagnosed Petitioner with severe persistent right shoulder impingement/pain and severe shoulder pain/stiffness. *Id.* Dr. Mehl stated that he did

not know if another surgery would be beneficial for Petitioner unless he reviewed Petitioner's prior treating medical records. *Id.*

Petitioner saw Dr. Mehl on September 21, 2007 at which time he recommended shoulder surgery and placed Petitioner off work. Tr. at 23-24.

Third Section 12 Examination – Dr. Cole

On March 10, 2008, Petitioner underwent a third independent medical evaluation with Dr. Cole at Respondent's request. Tr. at 24; PX5 at 23-24, 148-150. Dr. Cole noted:

> I last saw her in August of 2005. Since that time, she has undergone arthroscopy with Dr. Silver on 7/25/06 which included subacromial decompression, distal clavicle excision, and virtually had no improvement. My recommendations in August of 2005 had been proceeding to arthroscopy if her pain remained refractory to benign neglect. The surgery took place subsequently to January 4, 2006 cortisone injection with no improvement, and she has had no injections post- surgery. Her complaints at this point (*having not returned to work since prior to her 10/22/99 injury*) remain pain in the anterolateral right shoulder, numbness and tingling down the right arm into all fingers of the right hand, *neck stiffness, neck pain, headaches*, and pain around her shoulder blade as well. This affects her each and every day, all day.
>
> She notes her pain to be at a level of 7 out of 10 today, with 10 being the worst pain imaginable. *She says she has severe limitations and is unable to work or participate in any sport recreational activities. Id.*, (*emphasis* added).

On examination, Dr. Cole noted tenderness to palpation in a large soft tissue distribution around the right scapula, right trapezius, and paracervical spinal musculature - right sided greater than left, right AC joint and right deltoid. *Id.* He also noted positive Spurling maneuver, decreased range of motion secondary to reported pain upon cervical spine range of motion testing which was reduced but symmetric, positive impingement type pain with forward elevation above 90° reduced with scapulothoracic stabilization test at the inferior pole of the scapula, forward elevation to 165° with pain, external rotation to 60° with pain, and internal rotation to the thoracic level. *Id.*

He diagnosed Petitioner with right shoulder myofascial pain, right sided neck pain. *Id.* Dr. Cole indicated that Petitioner had some level of scapular dyskinesis that could be addressed had she not had physical therapy, but that was not the case; Petitioner had exhausted therapy to the right shoulder and AC joint and had multiple foci of pain. *Id.* He recommended an AC joint injection, noting that the medical records that he reviewed did not indicate such treatment. *Id.* He further recommended a cervical spine MRI and possible EMG study given Petitioner's large amount of distal and proximal complaints to the shoulder that could not be explained by a primary shoulder condition and appeared secondary to her primary ongoing shoulder problem. *Id.* Dr. Cole opined that Petitioner's shoulder condition and ongoing pain seemed to be continually causally related. *Id.* He also noted that maximum medical improvement could not yet be determined. *Id.* Dr. Cole indicated that a cervical spine specialist or a neuro-psychiatrist should address Petitioner's other conditions. *Id.*

Continued Medical Treatment

Three days after independent medical evaluation with Dr. Cole, Petitioner saw Dr. Marcotte on March 13, 2008 who noted "Rt shoulder pain, numbness face area Rt side started this mon 3-10-08 saw Dr. Cole – WC Dr. @ Rush recently." PX6 at 29. Dr. Cole does not note that Petitioner reported any numbness in the face on the right side on March 10, 2008. PX5 at 23-24, 148-150.

Petitioner underwent a cervical MRI on March 14, 2008. Tr. at 24; PX6 at 108. The interpreting radiologist found the MRI to be entirely normal. *Id.*

Petitioner testified that Dr. Marcotte referred her to Dr. McComis, a neurologist, and she saw him on March 20, 2008. Tr. at 24-25; PX11. His medical records reflect that Petitioner reported an injury nine years prior while lifting a box over her head and a pop in her right shoulder. *Id.* Petitioner reported that she could hardly lift her right arm, night pain, terrible pain with burning, numbness, and weakness, and some neck pain with stiffness. *Id.* On examination of the cervical spine, Dr. McComis noted tenderness at the mid-cervical level on the right, good range of motion without limitation, and a negative Spuling's test. *Id.* Petitioner exhibited tenderness throughout the right shoulder, guarding with range of motion, flexion to 80° and extension to 30° to the internal waist, and a positive impingement sign. *Id.* Petitioner had a normal neurological exam. *Id.* Dr. McComis reviewed Petitioner's cervical spine MRI, which was normal. *Id.* He diagnosed Petitioner with chronic shoulder pain without cervical problem, suspect RSD. *Id.* He ordered an EMG/NCV and recommended pain management treatment and placed Petitioner off work until May 1, 2008. *Id.*

Dr. Marcotte continued to prescribe Vicodin for Petitioner's right shoulder pain as of July 19, 2008. Tr. at 25; PX6 at 30-32. At this time, Petitioner reported that the "[right] side of face went numb c/o both arms went numb c/o felt like face was swollen c/o feels like PMS on her right arms." *Id.* Dr. Marcotte diagnosed Petitioner with cephalgia and numbness in the face and arms. *Id.* She ordered a bilateral upper extremity EMG, continued to prescribe Vicodin for pain as needed, and referred Petitioner to Dr. Bhasin for an evaluation. *Id.*

Petitioner testified that Dr. Marcotte placed Petitioner off work on December 10, 2008 and advised her to try to return to work on January 10, 2009. Tr. at 25. Dr. Marcotte's records reflect that she placed Petitioner off work on December 10, 2008 related to her shoulder injury. PX6 at 34.

On January 23, 2009, Petitioner returned to Dr. Silver. Tr. at 26-27; PX4 at 313-314, 318. Petitioner testified that he administered a second injection into her right shoulder and placed her off work. *Id.*

Petitioner underwent the recommended EMG/NCV on February 16, 2009. Tr. at 27; PX4 at 315-317. The interpreting physician noted: (1) an essentially normal EMG exam with no evidence of any mononeuropathies; (2) normal EMG evidence of cervical radiculopathy; and (3) no evidence of brachial plexus involving the upper brachial plexus. *Id.*

On February 20, 2009, Petitioner saw Dr. Silver reporting a few days of pain relief from the injection, but that her symptoms had returned. Tr. at 27; PX4 at 318-319. He ordered a right shoulder MRI and kept Petitioner off work. *Id.*

Petitioner underwent an EMG/NCV on March 5, 2009 pursuant to Dr. Marcotte's orders for complaints of "numbness in her hands and neck pain." PX4 at 71-73. The results were normal. *Id.* Petitioner also underwent thoracic spine and cervical spine x-rays on this date. PX4 at 74-76. With regard to the thoracic spine, the

interpreting radiologist noted minimal anterior wedging of the vertebral bodies at T6, T7, and T8. *Id.* With regard to the cervical spine, the radiologist noted straightening of the cervical spine. *Id.*

Petitioner underwent the recommended right shoulder MRI on April 24, 2009. Tr. at 27; PX4 at 320-323; PX13 at 8-9. The interpreting radiologist noted moderate acromioclavicular osteoarthritis is with hypertrophic changes mildly impressing on the supraspinatus musculotendinous junction which may correlate to a subacromial/external impingement, slight flattening of the undersurface of the acromion on which may be related to a prior acromioplasty, and increased hypertrophic of the acromioclavicular joint likely resulting in worsening symptoms of impingement. *Id.*

Petitioner returned to Dr. Silver on April 29, 2009. Tr. at 27-28; PX4 at 324-325. Dr. Silver noted that Petitioner had a recurrence of pain in the right shoulder clinically demonstrating rotator cuff impingement that had been resistant to a steroid injection, anti-inflammatory medication, and exercise. *Id.* He noted that the MRI confirmed her impingement and he recommended a third right shoulder surgery. *Id.* Petitioner testified that Dr. Silver kept her off work and that she wanted to undergo the surgery. Tr. at 28.

Fourth Section 12 Examination – Dr. Cole

On December 14, 2009, Petitioner underwent a fourth independent medical evaluation with Dr. Cole at Respondent's request. Tr. at 28; PX4 at 326-327; PX5 at 27-28. Dr. Cole confirmed his prior opinion that Petitioner's AC joint should be treated and that she should have a cervical spine evaluation. *Id.* Petitioner reported that Dr. Silver was recommending an arthroscopy to "remove bone spurs" and she underwent a subacromial injection February 2009 with no improvement although her medical records reflect a few days of relief as a result of the injection. *Id.* Dr. Cole again noted that Petitioner was off work and had not worked since her date of injury. *Id.*

On examination, Dr. Cole noted significant tenderness and crepitation of the right AC joint, a stable shoulder and intact rotator cuff on provocative testing, significant pain and tenderness related to the trapezius, rhomboid, and periscapular musculature consistent with myofascial pain. *Id.* She was neurovascularly intact. *Id.*

Dr. Cole diagnosed Petitioner with right shoulder AC joint pain with significant myofascial pain. *Id.* Based on his objective findings that day and the diffuse nature of Petitioner's subjective complaints that were soft tissue in nature, Dr. Cole recommended a very localized AC joint shoulder surgery with AC joint exploration and distal clavicle excision. *Id.* He released Petitioner to sedentary work with regard to her right upper extremity. *Id.*

Continued Medical Treatment

On February 6, 2010, Petitioner saw Dr. Marcotte for preoperative testing. PX6 at 35-40.

On February 13, 2010, Petitioner underwent her third right shoulder surgery with Dr. Silver. Tr. at 28; PX4 at 331-332. Pre-and postoperatively, Dr. Silver diagnosed Petitioner with rotator cuff impingement of the right shoulder. *Id.* He performed the following procedures: (1) arthroscopic subacromial decompression, partial anterior acromioplasty, coracoacromial ligament transection, and subacromial synovectomy; (2) arthroscopic debridement; and (3) arthroscopic distal clavicle resection. *Id.* Intraoperatively, Dr. Silver noted that the articular surface, glenoid labrum, biceps tendon, and articular surface of the rotator cuff were normal. *Id.* He also noted obvious rotator cuff impingement in the subacromial space. *Id.*

On February 24, 2010, Petitioner saw Dr. Silver postoperatively at which time he recommended continued use of her passive motion machine, ordered physical therapy, and kept Petitioner off work. Tr. at 29-30; PX4 at 336-337.

Petitioner underwent the recommended physical therapy at Lowell physical therapy from March 2, 2010 through May 12, 2010. Tr. at 30; PX4 at 338-340, 344-347, 350-353.

Petitioner saw Dr. Marcotte on March 16, 2010. PX6 at 41-44. She noted that "*Pt states P.T. thinks she has RSD* [illegible] nubness [sic], burning, swelling weakness hot and cold flashes dizziness." *Id.*, (*emphasis* added). Dr. Marcotte made a working diagnosis of a prolonged right shoulder injury recovery and "? RSD." *Id.*

Without any documented indication of how he arrived at this diagnosis, notations of Petitioner's reported symptomatology, or physical examination findings, if any, made on March 19, 2010, Dr. Silver diagnosed Petitioner with complex regional pain syndrome - reflex sympathetic dystrophy of her right upper extremity postoperatively. Tr. at 30-31; PX4 at 341-343. He prescribed Vicodin, anti-inflammatory medication, gastrointestinal protection medication, continued physical therapy, referred her to a pain management clinic, and kept Petitioner off work. *Id.* At his deposition, Dr. Silver testified that he diagnosed Petitioner with RSD on this date because she demonstrated color changes in her skin going from red to pasty white and because of temperature changes which he stated were indicative of autonomic nervous dysfunction. PX9 at 31-32. None of these purported physical indications are documented in his records on March 19, 2010.

On April 16, 2010, Dr. Silver reiterated his diagnosis of CRPS/RSD. Tr. at 31, 33; PX4 at 348-349. He noted that he observed color changes occurring going from red to a pasty white and Petitioner's report that her extremity gets cold at the same time accompanied with tingling and burning. *Id.*; PX9 at 33. He also noted that Petitioner had improved with physical therapy and had approximately 150° of active forward flexion. *Id.* He referred Petitioner to a pain management clinic. *Id.*

Petitioner testified that she had the following symptoms in her right arm and right upper extremity as of April 16, 2010: burning, numbness, tingling, muscle spasms, discoloration in her right hand, beginning discoloration in her left shoulder, arm and hand, clammy hands, cold sweats, and random hot sweats. Tr. at 31-32.

On May 14, 2010, Dr. Silver noted that Petitioner regained full forward flexion and lateral abduction, but she was unable to progress with strengthening in physical therapy because of the lack of a pain management program. Tr. at 33-34; PX4 at 354-355. He discontinued physical therapy pending her placement in a pain management program. *Id.*

On June 18, 2010, Dr. Silver continued to recommend a pain management program for Petitioner. Tr. at 34-35; PX4 at 359-360. He noted that Petitioner's motion had regressed to approximately 120-130° of forward flexion and approximately 90° of lateral abduction. *Id.* He continued to prescribe Vicodin, anti-inflammatory medication, gastrointestinal protection medication, reiterated his recommendation that Petitioner be placed in a pain management program, and kept Petitioner off work. *Id.*

On July 16, 2010, Dr. Silver noted that Petitioner's motion had regressed to approximately 100° of forward flexion and he maintained his prior prescriptions and recommendations. PX4 at 362.

Dr. Marcotte's records reflect that Petitioner reported that she fell off her bicycle and fractured her jaw on August 1, 2009. PX6 at 138. On cross examination, Petitioner initially denied any injury to her face and/or

riding a bicycle after her accident, but then testified that she fell off her bike in 2009 and fractured her jaw. Tr. at 59, 64-65. She treated with an oral surgeon for approximately 4 weeks. Tr. at 59-61. On redirect examination, Petitioner testified that she did not injure her right shoulder in the bike accident. Tr. at 76.

Fifth Section 12 Examination & Deposition Testimony – Dr. Konowitz

On August 6, 2010, Petitioner underwent a fifth independent medical evaluation with Dr. Konowitz at Respondent's request. RX1 (Dep. Ex. 2); PX4 at 365-375; *see also* Tr. at 35. Dr. Konowitz also submitted to a deposition on April 6, 2012. RX1. Dr. Konowitz is board-certified physician in internal medicine, anesthesia, and the subspecialty of pain management. RX1.

At the time of the evaluation, Petitioner provided a history including description of her original injury on October 22, 1999 when she lifted a box of metal clips followed by residual pain localized over the arms with bilateral subjective dysesthesias that includes the whole arm. *Id.* Petitioner reported numbness, a pulling and needles sensation in the shoulder occurring after surgery, pain at rest at a level of 4-5/10, pain with activity at a level of 9-10/10, constant symptoms, and the quality of her pain described as burning, stabbing, dull, throbbing, cramping, tingling, numb, aching, or shooting. *Id.* Petitioner also reported swelling occurring three or four times per month in the bilateral hands, right elbow, or mainly over the shoulder at the scar, sensitivity over the right shoulder scar, weakness over the right arm and shoulder, and the ineffectiveness of medications such as Vicodin, massage, heat and cold pack usage, and physical therapy. *Id.* Petitioner further reported increased pain with sitting, standing, heat, cold, walking, movement, position, mild exercise, hot baths, sleep, massage, distractions, liquor, weather change, smoking, loud noise, pressure, tension, and use of a TENS unit. *Id.* She reported decreased pain with medications and brace support. *Id.* Petitioner also complained of associated symptoms due to pain including nausea, drowsiness, depression, headaches, irritability, dizziness, sweating, sleep problems, and anxiety. *Id.* Petitioner reported taking Vicodin twice monthly. *Id.*

Dr. Konowitz testified that he performed a head-to-toe examination of Petitioner, which is documented in his report. *Id.* On examination of the right shoulder, Dr. Konowitz noted range of motion in the right shoulder and elbow to 60° on active flexion, 45° on active extension, 60° on passive flexion, 45° on passive extension, abduction of the right shoulder limited to 90°, and no identifiable spasm or pain along the scar anteriorly of the right shoulder. *Id.* Dr. Konowitz also noted that Petitioner had motor strength sufficient to swing or lift herself onto the examining table twice lifting her whole body with her shoulders and moving backwards demonstrating excellent stability and limitations-limited pain. *Id.* The remainder of Petitioner's physical examination was normal. *Id.*

Dr. Konowitz diagnosed Petitioner with subjective myofascial pain complaints and subjective dysesthesias (i.e., complaints of numbness and tingling) of the arm with no objective findings of significant disability. *Id.* He testified that Petitioner has residual shoulder pain, but she does not have CRPS. *Id.* He also opined that Petitioner did not meet the Budapest criteria of CRPS which requires:

(1) Continuing pain, which is disproportionate to any inciting event.
(2) Must report one symptom in three of the following categories; sensory, reports of hyperesthesia and allodynia, vasomotor, reports of temperature asymmetry and/or color changes, pseudomotor or sweating changes, trophic changes, weakness, tremor or dystonia.
(3) Must display at least one sign in two or more of the following categories; sensory, evidence of hyperalgesia to pinprick or allodynia to light touch, vasomotor, evidence of temperature asymmetry or skin color changes, pseudomotor edema or evidence of edema and sweating, motor evidence including

loss of range of motion or motor dysfunction, or there is no other diagnosis that better explains the signs and symptoms. *Id.*

At his deposition, Dr. Konowitz testified that complex regional pain syndrome ("CRPS") is also referred to in literature as causalgia and reflex sympathetic dystrophy. *Id.* He explained that the Budapest criteria were developed to better diagnose CRPS in conjunction with diagnostic testing and clinical correlation from a qualified physician. *Id.* Dr. Konowitz testified that he did not find any hair changes, temperature changes in the extremities, nail changes, changes in skin quality/color/turgor, swelling in the right shoulder or right upper extremity, change in sweat patterns, observable sweating at the time of the examination, atrophy of the right upper extremity compared to the left, or evidence of allodynia. *Id.* On cross examination, Dr. Konowitz acknowledged that Petitioner subjectively reported changes in her nail beds and skin color, and decreased sensation to pinprick in the right upper extremity, however, he maintained that a CRPS diagnosis was only appropriate where the subjective criteria reported by the patient's clinical examination. *Id.*

Dr. Konowitz opined that Petitioner had reached maximum medical improvement with regard to pain management and that no further surgical intervention was warranted with regard to Petitioner's shoulder abduction limitations. *Id.* He also opined that at the time of his examination, he found no evidence of a cervical plexus injury, brachial plexus injury, or thoracic outlet syndrome. *Id.* On cross examination, Dr. Konowitz testified that Petitioner did not have cervical issues at the time of his examination of her and, thus, he declined to opine whether any claimed cervical issues were causally related to Petitioner's injury at work in 1999. *Id.* Dr. Konowitz further disagreed with the differential diagnoses made by Dr. Piska in October of 2010 (i.e., that Petitioner had pain in the thoracic spine, myalgia, myositis, pain in the joint shoulder region, adhesive capsulitis of the shoulder, other affections of the shoulder region not elsewhere classified, thoracic outlet syndrome and brachial plexus lesions). *Id.* He opined that Petitioner only had myofascial pain. *Id.* Dr. Konowitz also opined that no further treatment was needed and he released Petitioner to full duty work. *Id.*

Continued Medical Treatment

On August 13, 2010, Petitioner returned to Dr. Silver at which time he noted that Petitioner had 90° of forward flexion and 85° of lateral abduction. PX4 at 363-364. He maintained his prior prescriptions and recommendations. *Id.*

On September 21, 2010, Dr. Marcotte referred Petitioner to a pain management doctor at Advanced Pain Specialists, Dr. Piska. Tr. at 35-36; PX6 at 121-125.

On September 27, 2010, Petitioner completed a preliminary information form for Dr. Piska. PX6 at 134-137; PX12 at 16-19. Regarding her injury at work, she reported that she was "[l]ifting a box of metal clips above shoulder level and felt a pull." *Id.* She also reported that her pain started "[s]ince date of injury & has got worse [sic] over the yea[rs.]" *Id.*

Petitioner saw Dr. Piska for the first time on October 1, 2010. PX6 at 121-125; PX12 at 3-7. Petitioner provided a history of first noticing pain when she was bending and lifting heavy items. *Id.* She reported neck pain with radiation down to her upper extremities causing difficulty in daily activities and sleeping. *Id.* She also reported taking Vicodin for her pain which did not improve her pain, and which she reported was gradually getting worse. *Id.* "[*Petitioner*] *indicates that these symptoms are related to a work related injury.*" *Id.*, (*emphasis* added). Regarding her symptoms on the date of examination, Petitioner reported pain in the thoracic spine, a new constant problem in the neck of moderately severe pain which she described to include moderately

severe stiffness, restricted movement, pins and needles sensations, achiness, burning and stabbing pain radiating to the right deltoid area, right arm, right forearm, right hand, posterior right upper shoulder, right lateral upper thoracic region, right medial upper thoracic region, and right elbow. *Id.* Petitioner further reported that her pain worsened with repetitious movements, stress, and lifting. *Id.* She estimated her neck pain level 8/10, indicated that it was associated with tingling, numbness, and weakness in the right arm, and that nothing made her more comfortable. *Id.*

Dr. Piska noted that Petitioner's past medical history was significant for "Chronic Dry Skin and RSD (Reflex Sympathetic Dystrophy)." *Id.* Petitioner's treating medical records prior to this date are devoid of complaints of dry skin or objective clinical notations of dry skin. On examination, Dr. Piska noted that Petitioner's neck was normal. *Id.* Petitioner had no tenderness on the midline demonstrated at spinous processes, moderate tenderness on the bilateral found at the suboccipital with headache, paraspinals, teres major and minor muscles, and upper trapezius. *Id.* Dr. Piska noted reduced cervical flexion and extension with moderate pain, normal left lateral cervical rotation with no pain, and reduced right lateral cervical rotation with moderate pain. *Id.* Petitioner had full muscle strength in her left extremity, muscle strength at 4/5 in her right extremity, and normal grip strength bilaterally. *Id.* On examination of the thoracic spine, Dr. Piska noted that his inspection was normal, Petitioner's right shoulder blade was higher than left, and she had no tenderness on the midline in the spinal area with no tenderness on the bilateral in paraspinal muscles. *Id.*

Dr. Piska diagnosed Petitioner with the following: (1) pain in the thoracic spine; (2) myalgia and myositis unspecified; (3) pain in joint involving shoulder region; (4) adhesive capsulitis of the shoulder; (5) other affections of the shoulder region not elsewhere classified; (6) thoracic outlet syndrome; and (7) brachial plexus lesions. *Id.* Dr. Piska prescribed muscle relaxants, pain medication, ordered a chest x-ray "which is going to show the differences in her scapula position," and noted that "**[b]ecause of tight neck and shoulder muscles her right scapula is higher than the left side causing lots of muscle spasms and limitations in her right shoulder movement. Because of this she has lots of limitations in her neck mobility and pain.**" *Id.*, (**emphasis** in original).

On October 8, 2010, Petitioner saw Dr. Piska for the second and last time. PX6 at 125-128; PX12 at 7-10. She reported continued pain in her neck, right shoulder, and upper extremity, difficulty with activities of daily living and sleeping, and a stabbing pain. *Id.* Petitioner estimated her neck pain to be at a level of 10/10 on this date. *Id.* After a physical examination with almost identical findings made in comparison to her last visit to Dr. Piska, he maintained his diagnoses and recommended an MRI "**since she has a moderate to severe hypo function of her thoracic nerves. X-Ray of the chest did not show much difference in the shoulder blades.**" *Id.*, (**emphasis** in original).

Petitioner testified that she followed up with Dr. Piska after October 8, 2010, but did not return to him thereafter because he would no longer treat her for a reason unknown to her. Tr. at 36. On cross-examination, Petitioner testified that Dr. Piska did not provide a reason why he discontinued her treatment. Tr. at 54-55. Dr. Marcotte's medical records reflect a note with a copy of Dr. Piska's October 8, 2010 diagnostic test scripts stating "*Pt wanted x-ray of shoulder also said Dr. Piska wanted it.*" *Id.*, (*emphasis* added).

On October 4 and 11, 2010, Petitioner underwent chest, right shoulder, and thoracic spine x-rays for reported bilateral scapular pain, right shoulder pain, and back pain. PX6 at 110-112. The right shoulder, clavicle, chest, and bilateral scapulae were normal. *Id.* The thoracic spine x-ray showed minimal multilevel degenerative changes with no evidence of acute fracture or subluxation. *Id.*

On November 9, 2010, Petitioner testified that she went to the emergency room at Provena St. Mary's Hospital because she was in severe, paralyzing pain in the upper half of her body was numb. Tr. at 36-37. The medical records reflect that Petitioner reported numbness and tingling in both arms, pressure in her head/neck, pain to the shoulder/jaw, and intermittent symptoms over the past 10 years from an old shoulder injury. PX13 at 12-24. Emergency room staff noted that Petitioner's past medical history was positive for neck bone spurs in the past, for thoracic problems, and "NECK BONE SPURS SX IN FEB 2010, THORACIC PROBLEMS[.]" *Id.* At the time of her discharge, staff noted that Petitioner's pain was slightly improved but that she was "still crying" and that she was supposed to have an MRI last month, but she was awaiting insurance approval. *Id.* On cross examination, Petitioner denied telling anyone at the hospital that she had neck surgery in February of 2010 and she further testified that she has not undergone neck surgery. Tr. at 37.

On November 18, 2010, Petitioner underwent a thoracic spine MRI ordered by Dr. Piska. Tr. at 37-38; PX6 at 109, 129; PX13 at 10. The interpreting radiologist noted a clinical indicator of "chronic back pain from the neck to the tailbone. Numbness between the scapula's and tingling to both arms." *Id.* The interpreting radiologist noted multiple disc bulges most significant at T7-T8 where there is possible superimposed central and right paracentral disc protrusion causing spinal canal stenosis and mild flattening of the cord. *Id.*

On January 3, 2011, Petitioner saw Dr. Marcotte reporting continued pain in the back around the chest and occasional feeling of numbness in the body. PX6 at 50-51. She diagnosed Petitioner with low back pain (primary), and thoracic area, cervical, and lumbar. *Id.*

On March 7, 2011, Petitioner returned to Dr. Marcotte reporting a painful bulge on her neck that was still painful after she pushed it in with no reported recent injury, very bad neck pain, a bulging not on the back of the neck where she pushed it in and felt bone rubbing, chest pains on the right side under her arm into her chest, pain which Petitioner reported was due to her shoulder placement, pain behind both ears, and a tingling pulsing pain over her incision. PX6 at 52-56. Petitioner reported going to the gym and doing an hour of cardio exercises with pain while working out but that she pushes through it and using an elliptical and arc trainer machine with her legs going back and forth and then she is done for the day. *Id.* On examination of the neck, Dr. Marcotte noted no obvious mass. *Id.* Dr. Marcotte did not note any thoracic spine examination or clinical findings related to the thoracic spine. *Id.* Nonetheless, she reviewed Petitioner's latest MRI and referred Petitioner for an evaluation "by ortho or neurosurgeon for further tx" and diagnosed Petitioner with pain in the thoracic spine. *Id.*

On March 22, 2011, Dr. Marcotte noted her diagnosis referencing Petitioner's thoracic spine MRI showing disc bulges at T7-8 and a possible superimposed central and right paracentral disc protrusion causing spinal canal stenosis and she reiterated her referral of Petitioner to an orthopedic surgeon and she referred Petitioner to a pain specialist. Tr. at 38; PX6 at 59.

On June 18, 2011, Petitioner saw Dr. Marcotte with no complaints. PX6 at 60-61. Nonetheless, and without any physical examination findings of abnormalities, she diagnosed Petitioner with chronic pain syndrome and continued to prescribe Vicodin for Petitioner's right shoulder pain. *Id.*; Tr. at 38.

Deposition Testimony – Dr. Silver

Dr. Silver submitted to a deposition on December 5, 2011. PX9. Dr. Silver is board-certified orthopedic surgeon. *Id.*; PX11. Dr. Silver testified that he disagreed with Dr. Cole's opinions, in part because he was unsure how he could render opinions when he did not treat Petitioner. PX9. Dr. Silver maintained that

Petitioner should be kept completely off work as reflected in his medical records and as of the date of his deposition lacking any placement in an appropriate pain management program. *Id.* He opined that Petitioner's cervical conditions were causally related to her injury at work in 1999 because "[i]f indeed she had some cervical issues that had been part of this pain picture of hers and that's where they come from, she had no other injury to cause it." PX9 at 48-49. He further opined, without explanation, that his diagnosis of Petitioner's RSD was causally related to Petitioner's injury at work in 1999. PX9 at 49-50.

Dr. Silver "generally" agreed with Dr. Piska's June 26, 2011 diagnoses, but offered no explanation regarding the reason for his agreement. PX9 at 51-52. He opined that Dr. Piska's diagnoses were causally related to Petitioner's injury at work in 1999. *Id.* On questioning about whether Petitioner's thoracic spine MRI findings on November 18, 2010 were causally related to Petitioner's injury at work he requested to go "[o]ff the record[,]" and then testified that he did not "remember them[,]" but that they could have been caused or aggravated by Petitioner's injury at work. PX9 at 52.

Dr. Silver also opined, without explanation, that all of the medical treatment rendered by him, Dr. Mehl, Dr. McComis, Dr. Bhasin, Dr. Piska, and in the emergency room was reasonable and necessary, that all of the time that he kept Petitioner off work was causally related to her injury at work, and that all of his medical bills were charges for reasonable and necessary medical treatment. PX9 at 50-51, 53-55.

On cross examination regarding Petitioner's first shoulder surgery, Dr. Silver testified that sometimes one finds a torn labrum with recurrent subluxation and sometimes not. PX9 at 56-58. Dr. Silver disagreed with the functional capacity evaluation physical therapist's notes on validity testing and her opinion that Petitioner could do more than she exhibited at the time of the evaluation because he knew Petitioner's "pain and what I had seen in her shoulder...." PX9 at 60-61.

Dr. Silver acknowledged that he did not diagnose Petitioner with any problem in the AC joint until 5-6 years thereafter and testified that Petitioner's right shoulder problem then became impingement related to the acromion, not the AC joint, and that occurred in Petitioner as it sometimes does after a shoulder reconstruction. PX6 at 61-62. He denied diagnosing Petitioner with rotator cuff tendonitis and testified that sometimes impingement can occur when there is inflammation of the rotator cuff and that Petitioner's rotator cuff impingement occurred in conjunction with inflammation. PX9 at 62-63. He later added that Petitioner had recurrent impingement and, essentially, there was something rubbing on the rotator cuff that was the source of Petitioner's problem. PX9 at 70.

With regard to Petitioner's cervical spine, Dr. Silver acknowledged that Petitioner's February 16, 2009 EMG ruled out all cervical radiculopathy and neural impingement; it was completely negative. PX9 at 68-69. He refused to opine whether Petitioner had any pathology in her cervical spine, but he testified that he did not note any such pathology. PX9 at 70.

With regard to his March 19, 2010 diagnosis of RSD, Dr. Silver acknowledged that he did not "elucidate" any findings in that report that were consistent with RSD. PX9 at 71-73. He testified that he believed that Petitioner had RSD because her pain was "so severe it was so out of - - it's out of the normal context of pain after a surgery of this sort [and...] she had temperature changes that we saw in her arm. She had coloration changes that we saw in her arm. She had sensations of burning, tingling, lack of feeling in her arm. All these are the appropriate criteria for complex regional pain syndrome. Even that Budapest criteria that the other

doctor[4] refers to are, those are included in there. But again that's what we viewed over time. The other doctor, I guess, didn't view her[5], or I'm not sure what happened, but that's what we viewed and that's how we made the diagnosis." PX9 at 72.

He acknowledged, however, that he did not note any changes in Petitioner's hair or nail growth, or see any such changes referenced by other physicians. PX9 at 77-79. While his notes do not specifically reflect notation of "shininess" he indicated that he did note this. PX9 at 79; *but see* PX4 at 348-349. Incredibly, Dr. Silver testified that on cross examination that while he "absolutely" has an independent recollection of Petitioner's treatment over the many years that he treated her and of his findings of objective indicia of RSD on multiple occasions, he only noted them once on April 16, 2010 because to do otherwise would be "redundant." PX9 at 80-81. He testified that he sees approximately 100 patients per week. *Id.*

On further cross examination questioning, Dr. Silver stated that it was "absolutely incorrect" that he made no findings supporting his RSD diagnosis on March 19, 2010, but that he simply did not "elucidate them in my note at the time." PX9 at 73. He added that it was important to those in the legal profession to write such findings down, but "we know what we are treating, and per my medical notes, no, not at all." *Id.* Dr. Silver acknowledged that he does not treat RSD and on questioning about whether he refers suspected RSD patients out to pain management specialists because of their expertise he responded "I would say that's a leading question, but having said that, no." PX9 at 73-74. He then added that he was "joking." *Id.* He again made a legal objection that the question was "asked and answered." *Id.*

Dr. Silver eventually agreed that Dr. Konowitz was a pain management specialist qualified to diagnose RSD, but only after being presented with his own notation that "[b]oth Dr. Konowitz and myself would be qualified to diagnose RSD syndrome." PX9 81-83. He acknowledged that on the date that Dr. Konowitz saw Petitioner he did not note many of the objective physical indicia of RSD as reflected in Dr. Konowitz's report. PX9 at 83. He also acknowledged that along with Dr. Konowitz, Dr. Piska did not indicate that Petitioner had RSD, but that Dr. Konowitz had been "requested by the workers' comp carrier" and further testified "[l]isten, I'm the one who saw this patient multiple times. I had the advantage over these doctors." PX9 at 83-84, 86.

The Arbitrator notes that while Dr. Silver was asked to opine, and willingly opined, on the propriety and validity of Dr. Cole's opinions and about treatment rendered by Petitioner's other treating physicians on questioning by Petitioner's counsel, he was unwilling to offer such opinions on cross examination because he indicated that such questions involved medical treatment that he did not render himself. PX9. In fact, Dr. Silver took exception to Dr. Cole's ability to opine on Petitioner's conditions at all when "he never saw[6] [Petitioner]" and he wholly disagreed with every opinion rendered by Dr. Cole. PX9 at 45-46. He also wholly disagreed with the opinions of Dr. Konowitz. PX9 at 86. Interestingly, although Dr. Silver is an orthopedic surgeon and he testified that he was qualified to diagnose RSD while he is not a pain specialist, he refused to opine on cross examination whether Petitioner's problems emanated from the thoracic spine and he deferred to the opinion of a thoracic spine specialist whereas on direct examination he testified that he "generally" agreed with the diagnoses made by Dr. Piska that related to the thoracic spine and willingly opined that those conditions could have been caused or aggravated by Petitioner's injury at work even though he did not recall Petitioner's November 18, 2010 thoracic spine MRI. PX9 at 85-86, 52.

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[4] The only "other doctor" that refers to Budapest criteria is Respondent's Section 12 examiner, Dr. Konowitz. RX1.

[5] Dr. Konowitz physically examined Petitioner during an independent medical evaluation at Respondent's request. RX1.

[6] Dr. Cole physically examined Petitioner at Respondent's request on four occasions. PX5 at 7-18, 23-24, 27-28, 148-150, 153-166.

The Arbitrator notes that Dr. Silver remained obstinate during the remainder of his cross examination testimony. PX9 at 86-91. On re-direct examination, Dr. Silver resumed pliancy in his responses and maintained that his recollection about Petitioner's circumstances was "exquisite" (where it was not exquisite on cross examination) because of the terribly frustrating situation that Petitioner was in while being unable to obtain appropriate treatment. PX9 at 91-92.

Continued Medical Treatment

Petitioner testified that she reported color changes in both hands to Dr. Marcotte on June 4, 2012. Tr. at 38. Dr. Marcotte records reflect Petitioner saw her for medication refill and bilateral hand pain. PX6 at 62-63. Petitioner reported numbness and burning in her hands and that her fingertips were turning blue. *Id.* On examination, Dr. Marcotte noted no deformity, no clubbing, no cyanosis, no edema, and no tremors. *Id.* She noted that Petitioner "showed me a recent photo of her hands with fingertips turning blue (scanned) Not precipitated by the cold." *Id.* Notwithstanding, Dr. Marcotte diagnosed Petitioner with unspecified chest pain, color changes in the bilateral hands, and maintained her diagnosis of RSD. *Id.* The photo of Petitioner's blue hands and fingertips referenced by Dr. Marcotte was not submitted at trial.

Petitioner testified that Dr. Marcotte referred her to Dr. Nicholas. Tr. at 38. Petitioner testified that when she saw Dr. Nicholas her hands were purple, and that the right hand was worse on the left. Tr. at 38-39, 55. After a sustained objection was posed by Respondent's counsel to a leading question, Petitioner testified that she noticed a temperature change in both of her hands when she saw Dr. Nicholas on January 4, 2012. Tr. at 39. Petitioner then testified that her hands felt as if they were in a bucket of ice. Tr. at 39.

Dr. Nicholas' records reflect that Petitioner presented for an initial evaluation of "blue hands" and reported that the blue color came and went in both hands. PX14. She reported undergoing three shoulder surgeries and having subsequent nerve damage. *Id.* Petitioner also reported experiencing numbness and tingling in both arms and hands and that when she has the blue color, her hands are not always cold. *Id.* Petitioner reported that she exercised daily. *Id.* Dr. Nicholas noted that Petitioner's past medical history included RSD, nerve damage, bulging discs, and migraine headaches. *Id.* On examination, Dr. Nicholas noted joint stiffness, muscle pain, and numbness and tingling neurologically. *Id.* Dr. Nicholas did not note clinical finding of skin color changes or temperature changes at the time of his examination. *Id.*

Dr. Nicholas diagnosed Petitioner with Raynaud's, CRPS, RSD, migraine headaches, bulging discs most significant at T7-8, and history of tobacco use. *Id.* He ordered continued medication use as prescribed and noted a possible referral to a rheumatologist. *Id.* On cross-examination, Petitioner testified that she did not recall Dr. Nicholas diagnosing her with Raynaud's Syndrome. Tr. at 73.

Petitioner returned to Dr. Marcotte on February 22, 2012. PX6 at 64-65. Petitioner reported that she "has seen Dr Nicholas said pt could have RSD, pt has another appt with Dr Nicholas in may 2012, pt states that Dr Nicholas told pt to keep taking her b/c. pt states that shes [sic] gets hot and cold sweats x couple years getting worse." *Id.* Dr. Marcotte diagnosed Petitioner with unspecified chest pain, fatigue, and anxiety. *Id.*

Dr. Silver referred Petitioner to a pain doctor, Dr. Cupic. Tr. at 39-40; PX4 at 378-379. Petitioner initially saw Dr. Cupic on May 9, 2012. Tr. at 39; PX4 at 379; PX15. The medical records reflect Petitioner reported "[i]njured in 1999 lifting something heavy. *Ever since has had muscle spasms to back of neck* [right] shoulder blade. *Has numbness/tingling/burning down both arms, fingertips to both hands turned purple. Face + lips go numb and feeling of swelling to lips. Has feelings like having a heart attack. [Right] hand worse than [left]*

hand. Sometimes hands feel like icebergs. Profuse body sweating at times. C/o occas. numbness in [right] foot [illegible] [left] hand." Id., (*emphasis* added). Petitioner also reported a history of three right shoulder surgeries, a right hip surgery in 2001, cortisone injections into the shoulder, blood pressure issues when having " 'spells' " and " 'bulging discs in thoracic spine' [.]" *Id.*

Dr. Cupic noted that Petitioner's cervical MRI was within normal limits, her EMG was normal, she had weakness in the right hand, and decreased pinprick sensation in the right hand. *Id.* He diagnosed Petitioner with CRPS and Raynaud's Syndrome. *Id.* Petitioner testified that at this time she had severe pain, numbness, tingling, burning, clamminess, goose bumps, and discoloration in both hands. Tr. at 40. On cross examination, she further testified that she complained about numbness in her face and lips. Tr. at 59.

Petitioner testified that she continues to receive pain medication as needed for her right shoulder pain from Dr. Marcotte. Tr. at 41.

Petitioner last saw Dr. Silver on September 21, 2012. Tr. at 41; PX31. Dr. Silver noted that Petitioner had 90° of forward flexion and 85° of lateral abduction with a positive impingement sign, maintained his prior prescriptions, and maintained his prior recommendations including keeping Petitioner off work. *Id.*

On cross-examination, Petitioner testified that she complained that her left arm was causing her problems when she saw Dr. Silver and she estimated that she first complained about symptoms in the left arm and hand to Dr. Silver sometime in 2005 or 2006. Tr. at 56-57. Petitioner testified that while Dr. Silver examined her left arm each time she complained to him about left arm symptoms, but he did not treat her left arm. Tr. at 57-58.

Temporary Total Disability Benefits

Petitioner testified that she did not receive temporary total disability benefits for May 24 2002, but did receive benefits from May 24, 2002 through November 16, 2004. Tr. at 13. Petitioner submitted evidence of Respondent's payment of temporary total disability benefits from November 17, 2004 through August 31, 2006 and again from February 13, 2010 through September 3, 2010. PX28. Petitioner testified that she received her first check on December 17, 2004 for benefits from November 17, 2004 through December 7, 2004. Tr. at 13, 15. Then Petitioner received a check dated January 25, 2005 for benefits from December 8, 2004 through January 25, 2005. Tr. at 15. Petitioner testified that she continued to receive temporary total disability benefits after June 3, 2005. Tr. at 17-18. Petitioner testified that she stopped receiving temporary total disability benefits as of September 20, 2005. Tr. at 18. Petitioner testified that she later received a check dated January 19, 2006 for temporary total disability benefits from September 21, 2005 through January 17, 2006. Tr. at 19.

Petitioner testified that she received temporary total disability benefits for the period beginning November 17, 2004 through August 31, 2006. Tr. at 21. Petitioner testified that she did not receive vocational rehabilitation benefits after August 31, 2006 through the date of trial. Tr. at 21.

Petitioner testified that she looked for work between March 3, 2008 and July 21, 2008 and between January 5, 2009 and January 14, 2009. Tr. at 25-26. Petitioner submitted job search logs that she maintained during these periods of time. PX29. Petitioner noted 139 contacts with various employers during this time. *Id.* On cross-examination, Petitioner testified that she did not look for work or return to Respondent requesting work during the second half of 2002 or in 2003. Tr. at 50-51. Petitioner testified that the only job searches that she performed are reflected in the job search logs offered at trial. Tr. at 51. Petitioner further testified that she did

not return to Respondent or ask about work. Tr. at 51. On redirect examination, Petitioner testified that she was terminated by Respondent approximately three days after her accident. Tr. at 76.

Petitioner testified that she did not receive any temporary total disability benefits after August 31, 2006, but she did receive a temporary total disability benefits check dated February 15, 2010 for the period from December 13 through December 19, 2010. Tr. at 28-29. Petitioner testified that she did not receive any temporary total disability benefits between September 1, 2006 and February 12, 2010. Tr. at 29.

Petitioner was paid temporary total disability benefits from February 13, 2010 through September 3, 2010. Tr. at 35. She testified that she has not received temporary total disability benefits since December 4, 2010 through December 14, 2012. Tr. at 35.

Medical Bills

Petitioner testified that to her knowledge Dr. Silver's bills have not been paid in full. Tr. at 41-44. She also testified that the following bills have not been paid: Dr. McComis' bills, the February 13, 2010 Instant Care bill for Petitioner's right shoulder surgery, Dr. Piska's bills, Ameritox's bills, the emergency room bills from St. Mary's Hospital, the emergency room physician's bills from November 9, 2010 and November 18, 2010, Dr. Cupic's bill for May 9, 2012 has not been paid, but he was paid out of pocket by Petitioner, and one Lowell Physical Therapy bill for service on May 12, 2010. *Id.*

Petitioner testified that she has been receiving assistance from her mother to pay for her medications as well as from various pharmacies. Tr. at 44-45.

Regarding her out-of-pocket expenses, Petitioner testified that from July 27, 2001 through May 20, 2012 she has paid $1,797.59 for prescription medications, $275 to Dr. Piska, $460 to Dr. Cupic, and $265 to Dr. Nicholas totaling $2,797.59. Tr. at 45. On cross-examination, Petitioner testified that she did not have any canceled checks or receipts to establish her payment of the out-of-pocket expenses; only the payment credits reflected in the bills that she submitted. Tr. at 74-75.

Additional Information

Regarding her current condition, Petitioner testified that she continues to experience numbness, tingling, burning, muscle spasms, periodic discoloration in both hands more so on the right, cold sweats, hot sweats/flashes, and pain on a daily basis. Tr. at 46-47. She also testified that she has minimal strength in her right shoulder as compared to her left, that she has minimal mobility in the right shoulder as compared to her left, and that these deficiencies affect her day-to-day activities in that she cannot carry or lift things that she normally would, she cannot blow dry her hair, and she cannot bathe herself without certain modification. Tr. at 47-48.

Petitioner further testified that she does do cardio exercise on elliptical, treadmill, and arc trainer machines as authorized by Dr. Silver, Dr. Marcotte, and Dr. Cupic. Tr. at 48-49. She testified that this exercise gives her more energy and helps her deal with the muscular pain from RSD. Tr. at 49. On cross examination, testified that she works out 3 to 5 days a week depending on how she feels. Tr. at 65-66. She testified that she utilized the arc trainer machine approximately twice a week for 30 to 45 min. depending on how she feels, which involves back and forth ski-like arm movements at shoulder level. Tr. at 66-67. Petitioner testified that she alternates the machines that she uses. Tr. at 67-68. Petitioner also does light weight exercises within her

restrictions and uses weight machines that involve her upper extremities to strengthen her shoulder blades. Tr. at 68-70.

Petitioner testified on cross-examination that she continues to drive her mother's car, which is a mid-sized SUV. Tr. at 64-65. On redirect examination, Petitioner testified that no doctor has ever restricted her from driving. Tr. at 77. She also testified that she participated in a marathon in 2010 in which she walked 13.1 miles. Tr. at 70-71.

On cross-examination, Petitioner also testified that since May 24, 2002 she does "nothing" with the rest of her time other than going to the gym. Tr. at 72. She clarified that she watches television, does laundry and some light household cleaning, operates a riding lawn mower to mow the grass, and trims bushes with a hand trimmer. Tr. at 72-74.

Petitioner testified that she wants to follow up with Dr. Cupic for additional pain treatment in the future. Tr. at 40-41.

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:

Petitioner claims that her current condition of ill being in the right shoulder, cervical spine, thoracic spine, and elsewhere in the body as it relates to a CRPS/RSD diagnosis is causally related to her injury at work in 1999. The Arbitrator agrees, in part. In so finding, the Arbitrator does not find Petitioner's testimony to be credible after careful observation of Petitioner during her testimony, given the disparity between her testimony at trial compared to the documentary evidence submitted, and in light of the vast evidence of Petitioner's subjective reports of pain and symptoms that simply do not correlate to objective medical evidence. Additionally, the Arbitrator finds the opinions of Respondent's Section 12 examiners, Dr. Cole and Dr. Konowitz, to be persuasive and reliable given the entirety of the record as their opinions are based on objective medical evidence and not solely Petitioner's subjective reports.

First, the Arbitrator addresses Petitioner's claimed continued causal connection between her right shoulder condition after May 24, 2002 and her injury at work in 1999. The law of this case is set by an affirmed Commission decision finding that Petitioner had a torn right shoulder labrum condition that was causally related to her accident at work in 1999. However, the torn labrum condition never existed. Dr. Silver performed Petitioner's first shoulder surgery on November 17, 2004 and intraoperatively noted that the "labrum was intact." Years later, an April 30, 2007 MRI confirmed an intact glenoid labrum, which the interpreting radiologist noted was similar in appearance to her December 14, 2005 right shoulder MRI. Dr. Silver again noted that Petitioner's labrum was intact when he operated on Petitioner's right shoulder for the third time on February 13, 2010.

Notwithstanding, Dr. Silver has amended his diagnoses of Petitioner's right shoulder condition to fit his sometimes undocumented objective findings and maintains that Petitioner ultimately had rotator cuff impingement. While the Arbitrator is not persuaded by Dr. Silver's opinions in this case, Respondent's Section 12 examiners do not definitively opine that Petitioner's continued right shoulder condition was due to anything other than the 1999 work accident or the sequelae of that accident and the Arbitrator finds that Petitioner's continued right shoulder condition is causally related to her accident—to the extent opined by Dr. Konowitz.

Dr. Konowitz's diagnoses related to Petitioner's right shoulder condition, his opinion that Petitioner has reached maximum medical improvement, and his opinion that Petitioner can work full duty are persuasive because they are based on his objective findings, objective medical evidence contained in the treating medical records that he reviewed, and Petitioner's subjective reports, but not merely the latter. For example, Dr. Konowitz noted that Petitioner had sufficient motor strength on the date of her independent medical evaluation to swing/lift herself onto the examining table twice while lifting her whole body with her shoulders and moving backwards. While these movements are not indicative of the above-shoulder level difficulties and diminished range of motion noted in Petitioner's treating medical records and at the time of her independent medical evaluations, they demonstrate excellent stability and limitations-limited pain as noted by Dr. Konowitz. This ability is one example of objective evidence that Petitioner's limitations are subjectively perceived, which taken in conjunction with the record as a whole, reflects a patient that reported inordinate amounts of pain and weakness

during physical therapy, for example, despite objective evidence to the contrary. Petitioner also made reports to various providers about her medical history and then-current condition that are simply not corroborated by medical evidence (i.e., she had a metal plate in her back, she had a thoracic spine surgery, and she had years of sweating/discoloration in the hands/temperature changes/changes in her nails, etc. that no physician actually observed over more than a decade of medical treatment). The Arbitrator finds that Petitioner's subjective reports are not credible and that the medical opinions of Petitioner's treating physicians based solely on such reports are not reliable. Thus, the Arbitrator finds that Petitioner's right shoulder condition is causally related to her injury at work in 1999 to the extent opined by Dr. Konowitz.

Second, the Arbitrator addresses Petitioner's claimed cervical spine, thoracic spine, and CRPS/RSD conditions of ill being and finds that Petitioner failed to prove that any such conditions are causally related to her injury at work in 1999. In so finding, the Arbitrator notes that Petitioner's medical records are devoid of any reported mechanism of injury directly affecting her neck, cervical spine or thoracic spine on the 1999 date of accident. Petitioner's November 2, 1999 cervical spine x-ray shortly after her accident was completely normal. Months later, on April 9, 2001, Petitioner did report to Dr. Mehl that she had secondary pain into the neck and shoulder, and he diagnosed her with a right shoulder labral tear and secondary neck/shoulder muscle strain. However, Petitioner did not report any neck or cervical spine complaints to any physician until almost seven years later when she saw Respondent's Section 12 examiner, Dr. Cole, for her third independent medical evaluation on March 10, 2008 and no objective medical evidence during this period of time reflect pathology confirming Petitioner's subjective reports, if any, in the neck.

Petitioner did eventually complain of neck stiffness and pain to Dr. Cole on March 10, 2008. Dr. Cole noted a positive Spurling test and he diagnosed Petitioner with cervical pain for which he recommended a cervical spine MRI and possible EMG study given Petitioner's large amount of distal and proximal complaints to the shoulder that could not be explained by a primary shoulder condition and appeared secondary to her primary ongoing shoulder problem. Petitioner underwent the recommended cervical MRI four days later on March 14, 2008. The MRI was completely normal.

Petitioner then saw Dr. McComis, a neurologist referred by her primary care physician Dr. Marcotte, ten days after the March 10, 2008 IME and six days after the normal cervical spine MRI. Dr. McComis noted tenderness at the mid-cervical level on the right, but good range of motion without limitation, and a negative Spurling's test. Again, Petitioner's subjective reports during her physical examination were out of proportion with other objective findings. Dr. McComis diagnosed Petitioner with a right shoulder condition without any cervical problem and ordered an EMG/NCV. Petitioner underwent that EMG/NCV on February 16, 2009. The results were also completely normal showing no evidence of mononeuropathies, cervical radiculopathy, or brachial plexus neuropathy.

It was not until March 5, 2009 that any objective test showed any suspected pathology in the neck. Petitioner underwent a cervical spine x-ray on this date per her primary care physician, Dr. Marcotte's, orders which showed straightening of the cervical spine. Nonetheless, Petitioner did not report any symptomatology in the neck for years thereafter and when Petitioner underwent her last Section 12 examination with Dr. Konowitz on August 6, 2010, she did not report any cervical spine symptomatology whatsoever.

Some months thereafter on October 1, 2010 Petitioner saw Dr. Piska, a pain management specialist to whom she was referred by Dr. Marcotte. Petitioner reported pain in the thoracic spine and a "new" constant problem in the neck of moderately severe pain with subjectively reported associated symptoms extending down the right upper extremity, but his examination of the cervical and thoracic spine was normal with the exception of a possibly

elevated right shoulder blade compared to the left and Petitioner had no tenderness on examination. Dr. Piska made a variety of differential diagnoses including: (1) pain in the thoracic spine; (2) myalgia and myositis unspecified; (3) pain in joint involving shoulder region; (4) adhesive capsulitis of the shoulder; (5) other affections of the shoulder region not elsewhere classified; (6) thoracic outlet syndrome; and (7) brachial plexus lesions. Petitioner saw Dr. Piska for the second and last time one week later at which time his physical examination findings were almost identical to the findings at Petitioner's first visit. He maintained his diagnoses recommending an MRI despite an "X-Ray of the chest [that] did not show much difference in the shoulder blades." Petitioner's October 4 and 11, 2010, x-rays were also completely normal with the exception of a thoracic spine x-ray that showed minimal degenerative changes. In any event, no testimony or opinion was offered at trial from Dr. Piska regarding the connection, if any, of his diagnoses of any thoracic outlet syndrome, myalgia, myositis, or brachial plexus condition to Petitioner's injury at work in 1999.

By November 9, 2010, Petitioner testified that she was in such severe, paralyzing pain with upper body numbness that she had to go to the emergency room. On cross examination, Petitioner denied reporting that she had any prior neck surgery to anyone at the hospital, but the medical records reflect otherwise. Petitioner reported bilateral upper extremity numbness and tingling, pressure in her head/neck, pain to the shoulder/jaw, and intermittent symptoms over the past 10 years from an old shoulder injury including a medical history positive for neck bone spurs in the past, for thoracic problems, and "NECK BONE SPURS SX IN FEB 2010, THORACIC PROBLEMS[.]"

Petitioner did not report any cervical or thoracic spine symptoms again until January and March of 2011. Petitioner returned to her primary care physician, Dr. Marcotte, reporting continued pain in the back around the chest and occasional feeling of numbness in the body, which resulted in a diagnosis of cervical back pain among others. Notably, Petitioner reported a painful bulging knot on her neck that was still painful after she pushed it in and felt bone rubbing, very bad neck pain, chest pains on the right side under her arm into her chest, pain which Petitioner reported was due to her shoulder placement, pain behind both ears, and a tingling pulsing pain over her incision. On examination of the neck, however, Dr. Marcotte noted no obvious mass and made no thoracic spine examination or clinical findings notations. Simultaneously, Petitioner reported going to the gym and doing an hour of cardio exercises (albeit with pain) while working out but that she pushed through it and used an elliptical and arc trainer machine with her legs going back and forth and then she was done for the day. She testified to this effect at trial as well.

In addition to the aforementioned reports of minimal or purely subjective symptomatology in the cervical or thoracic spine over large gaps of time that were largely excluded by objective medical evidence, the Arbitrator finds no credible evidence that her claimed cervical or thoracic spine conditions are causally related to her injury at work in 1999. The only treating physician that opined that Petitioner's claimed cervical or thoracic spine conditions were causally related, or possibly causally related, to her injury at work in 1999 is Dr. Silver who did not treat or examine Petitioner for any cervical or thoracic spine condition.

Dr. Silver opined that Petitioner's cervical conditions were causally related to her injury at work in 1999 because "[i]f indeed she had some cervical issues that had been part of this pain picture of hers and that's where they come from, she had no other injury to cause it." Dr. Silver also "generally" agreed with Dr. Piska's June 26, 2011 diagnoses, but offered no explanation for his agreement. He opined that Dr. Piska's diagnoses were causally related to Petitioner's injury at work in 1999, but on questioning about whether Petitioner's thoracic spine MRI findings on November 18, 2010 were causally related to Petitioner's injury at work he requested to go "[o]ff the record[,]" then testified that he did not "remember them" despite later testimony on re-direct about an "exquisite" recollection of Petitioner. Nonetheless, he opined that these conditions could have been caused

or aggravated by Petitioner's injury at work. Dr. Silver's causal connection opinions regarding Petitioner's claimed cervical and thoracic spine conditions are contradicted by objective medical evidence in the record, based on speculation, and wholly lack credibility.

To the contrary, the Arbitrator finds the opinions of Respondent's Section 12 examiners, Dr. Cole and Dr. Konowitz, that Petitioner's cervical and thoracic spine conditions, if any, are not causally related to her injury at work to be persuasive and adopts those opinions. Before concluding, however, the Arbitrator addresses the opinions of Petitioner's treating physician, Dr. Silver, related to Petitioner's claimed CRPS/RSD condition.

Indeed, at his deposition Dr. Silver opined that every subjective complaint made by Petitioner related to every body part was absolutely causally related to a medical condition that she developed as a result of her injury at work in 1999 because, essentially, every such report by Petitioner to him or any other treating physician (but certainly not any Section 12 examiner) was never made before her injury at work. Dr. Silver relies heavily on the subjective complaints of Petitioner as his patient and heralds all of her reported symptoms as absolute truths regardless of whether Petitioner reported the symptoms to him, whether he examined Petitioner related to the reported symptoms on which he was asked to opine (but only on direct and re-direct examination), whether he noted any objective findings regarding the body part in which Petitioner reported the subjective symptomatology, or whether he is even a specialist qualified to diagnose the medical conditions related to that body part.

It is clear from Dr. Silver's deposition testimony that he has an infallible certitude about his abilities as a doctor (and as a lawyer, for that matter, although he does not appear to be one) despite his apparent inability to alleviate Petitioner of her myriad subjective complaints. This is not surprising, however, as many of Petitioner's subjective complaints fail to correspond with objective medical evidence even assuming that Dr. Silver actually examined Petitioner from head-to-toe or "elucidated" his objective findings during Petitioner's treatment related to Petitioner's right shoulder or any other body part.

Dr. Silver maintained a blanket disagreement with any opinion contrary to his own and commented on, essentially, the ridiculousness and bias of Dr. Cole and Dr. Konowitz's conclusions given that they were not treating physicians, incorrectly noting that these physicians had not examined Petitioner, and sometimes disagreeing without offering any explanation for the disagreement. Notwithstanding, he billed Petitioner, a patient referred to him by her attorney (a fact that might equally bear on his credibility or bias, but which he seems to ignore), for no less than three shoulder surgeries and the associated costs of diagnosing and treating Petitioner's right shoulder condition which ultimately revealed a wholly intact labrum and despite physical therapists continually reporting to him that Petitioner was able to do much more physically than she claimed.

Clearly, a physician must take into account the history and subjective reports provided by a patient in order to fully understand the patient's condition and provide appropriate medical treatment. In viewing the record as a whole, however, it is evident that Dr. Silver based his opinions almost exclusively on the subjective complaints of a young woman whose credibility is questionable, at best. Petitioner's subjective symptomatology reports are contradicted by objective medical evidence and Petitioner inconsistently reported symptoms to a variety of doctors, physical therapists, emergency room personnel, and two arbitrators. The Arbitrator does not find the opinions of Dr. Silver in this case to be persuasive or credible under the circumstances and assigns no weight to his opinions except where objective medical evidence is otherwise documented or where the law of this case requires the Arbitrator to do so.

However, Petitioner also saw other physicians who diagnosed her with CRPS or RSD or possible RSD—Dr.

Marcotte, Dr. McComis, Dr. Nicholas and Dr. Cupic—and the Arbitrator addresses these physicians' diagnoses in turn.

The first such diagnosis came from Dr. Marcotte on March 16, 2010 (almost 10 ½ years after Petitioner's injury at work) when she noted that "*Pt states P.T. thinks she has RSD [illegible] nubness [sic], burning, swelling weakness hot and cold flashes dizziness.*" *Id.*, (*emphasis* added). Incredibly, without noting any objective indicia of the symptoms of RSD, apparently based on the Petitioner's report that a physical therapist thought that she had RSD, and without any testimony proffered from Dr. Marcotte about how she reached her diagnosis or her qualifications to do so, Dr. Marcotte diagnosed Petitioner with "? RSD."

A few days later on March 19, 2010, Dr. Silver seemingly adopted Dr. Marcotte's diagnosis. He did not document any objective indicia of RSD or even Petitioner's subjective reports relative to any RSD symptoms on this date. He then testified that at his deposition that he did not note any of the foregoing until one month later on April 16, 2010 because to do so would be "redundant" and that while it was important to those in the legal profession to write such findings down, "we know what we are treating...." The Arbitrator finds it difficult to believe that any physician is able to readily obtain payment for medical services rendered on diagnoses made with regard to any patient within or outside of the workers' compensation realm from any insurance company without documenting the basis for such diagnoses. Certainly, the Arbitrator is disinclined to accept the diagnoses or causal connection opinion of Dr. Silver in this case when he was unable or unwilling to simply document objective clinical evidence to support his medical conclusions under the circumstances.

Petitioner's other treating physicians also seemed to latch on to Petitioner's subjective reports about RSD symptoms, if any, and Dr. Marcotte and Dr. Silver's RSD diagnoses without determining whether there was objective medical evidence to support their diagnoses.

On October 1, 2010, Dr. Piska noted that Petitioner's medical history was positive for RSD, presumably based on the diagnoses of Dr. Marcotte and Dr. Silver, but he noted no objective findings of the subjectively reported indicia of RSD made by Petitioner. No testimony was offered by Dr. Piska about how he reached any of his diagnoses, but in any event, Dr. Piska did not diagnose Petitioner with CRPS or RSD.

On June 4, 2012, Dr. Marcotte noted no deformity, clubbing, cyanosis, edema, or tremors, but noted that Petitioner "showed me a recent photo of her hands with fingertips turning blue (scanned) Not precipitated by the cold." Petitioner did not offer this photograph into evidence, testify about the photograph, or explain its absence from the documentary evidence provided at trial. There is no evidence about this photograph, when it was taken, who took it, the conditions under which it was taken, or what it reflects. Petitioner has waived her right to provide such evidence. Notwithstanding, no testimony was proffered from Dr. Marcotte about how she reached her RSD diagnosis, why she maintained an RSD diagnosis in 2012, whether it was based on any objective medical evidence or clinical findings made by her during a physical examination of Petitioner, Dr. Marcotte's qualifications to render such a diagnosis, of whether the RSD was somehow related to Petitioner's injury at work in 1999.

Petitioner then went to see Dr. Nicholas on June 4, 2012 for an initial evaluation of "blue hands" and she subjectively reported that the blue color came and went in both hands. Petitioner also reported experiencing numbness and tingling in both arms and hands and that when she had the blue color, her hands were not always cold. Simultaneously, Petitioner reported that she exercised daily. Dr. Nicholas noted that Petitioner's past medical history included a diagnosis of RSD. On examination, Dr. Nicholas noted joint stiffness, muscle pain, and numbness and tingling neurologically, but he did not note any clinical finding or objective evidence of skin

color changes or temperature changes as reported by Petitioner. He diagnosed Petitioner with Raynaud's, CRPS, and RSD among other diagnoses. Notably, on cross-examination, Petitioner testified that she did not recall Dr. Nicholas diagnosing her with Raynaud's Syndrome. Notwithstanding, as with Dr. Marcotte and Dr. Piska, Dr. Nicholas noted no objective findings or medical evidence corroborating the coloration and temperature changes subjectively reported by Petitioner and no testimony was offered from Dr. Nicholas explaining how or why he reached his CRPS or RSD or Reynaud's diagnoses, whether he believed that Petitioner had one or all of these conditions, or whether one or any of these conditions were somehow related to her injury at work in 1999.

Petitioner returned to Dr. Marcotte on February 22, 2012 and reported that she "has seen Dr Nicholas said pt could have RSD, pt has another appt with Dr Nicholas in may 2012, pt states that Dr Nicholas told pt to keep taking her b/c. pt states that shes [sic] gets hot and cold sweats x couple years getting worse." The Arbitrator notes that Petitioner's treating medical records from 2010 through 2012 are devoid of any chronic reports of temperature changes (i.e., hot and cold sweats) as subjectively reported by Petitioner in 2012 or at trial and that these subjective reports were not objectively correlated by Dr. Marcotte in clinical findings.

Petitioner also saw Dr. Cupic, a pain doctor, as referred by Dr. Silver. Petitioner initially saw him on May 9, 2012 at which time she reported that she was "[i]njured in 1999 lifting something heavy. *Ever since has had muscle spasms to back of neck* [right] shoulder blade. *Has numbness/tingling/burning down both arms, fingertips to both hands turned purple. Face + lips go numb and feeling of swelling to lips. Has feelings like having a heart attack. [Right] hand worse than [left] hand. Sometimes hands feel like icebergs. Profuse body sweating at times. C/o occas. numbness in [right] foot [illegible] [left] hand.*" (*emphasis* added). Dr. Cupic noted no objective evidence of these symptoms other than decreased pinprick sensation in the right hand or of the severe pain, numbness, tingling, burning, clamminess, goose bumps, and discoloration in both hands that Petitioner testified that she had at this visit. Dr. Cupic nonetheless diagnosed Petitioner with CRPS and Raynaud's Syndrome. As with the aforementioned physicians, he documented no objective findings of the subjectively reported indicia of RSD made by Petitioner at the time of his examination, no testimony was offered from Dr. Cupic explaining how or why he reached his CRPS or Reynaud's diagnoses, whether he believed that Petitioner had one or both of these conditions, or whether either of these conditions were somehow related to her injury at work in 1999.

The Arbitrator finds the opinions of Dr. Cole and Dr. Konowitz are persuasive given the totality of this record. Dr. Cole and Dr. Konowitz plausibly explained the sources of Petitioner's subjective complaints that could be correlated to objective medical evidence (i.e., in Petitioner's right shoulder) and noted the lack of medical evidence to support any finding of a causally related cervical spine, thoracic spine or CRPS/RSD condition. The Arbitrator finds that these medical opinions plausibly comport with the evidence contained in the record as a whole. With regard to Petitioner's claimed CRPS or RSD condition, the Arbitrator specifically finds the opinion of Dr. Konowitz to be credible. Dr. Konowitz plausibly opined that Petitioner did not have CRPS or RSD on the basis of objective medical evidence. He testified that a CRPS diagnosis was only appropriate where the subjective criteria reported by a patient could be correlated with a physician's objective findings according to very specific "Budapest criteria" and in the absence of any other objective medical explanation for the symptomatology, which was not evident in Petitioner's case. Dr. Konowitz opined that Petitioner had reached maximum medical improvement with regard to pain management, that no further surgical intervention was warranted with regard to Petitioner's shoulder or any other condition, that there was no evidence of a cervical plexus injury, brachial plexus injury, or thoracic outlet syndrome and that Petitioner could work full duty work. Thus, the Arbitrator adopts the opinions rendered by Dr. Cole and Dr. Konowitz.

Based on all of the foregoing, the Arbitrator finds that Petitioner failed to prove by a preponderance of credible evidence that she her claimed cervical, thoracic, CRPS or RSD conditions are causally related to her injury at work in 1999.

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:

As explained above, Petitioner failed to establish a causal connection between her claimed current condition of ill being and her injury at work in 1999. In so finding, the Arbitrator finds the opinions rendered by Dr. Cole and Dr. Konowitz to be persuasive and adopts those opinions. Dr. Konowitz found that Petitioner had reached maximum medical improvement for her right shoulder condition on August 16, 2010. All of the submitted medical bills are inclusive of medical care rendered to Petitioner after this date and/or for cervical/thoracic/ CRPS/RSD conditions that the Arbitrator finds are not causally related to her injury at work in 1999. Thus, Petitioner's claim for payment of any outstanding medical bills submitted into evidence is denied.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to TTD benefits, the Arbitrator finds the following:

Petitioner's claim to entitlement to temporary total disability or maintenance benefits is premised upon her claim, essentially, that every condition with which she has been diagnosed is causally related to her injury at work in 1999. Respondent disputes Petitioner's claim to almost 10 ½ years of such benefits conceding that she is entitled to temporary total disability from November 17, 2004 through August 31, 2006 and again from February 13, 2010 through September 3, 2010.

While the Arbitrator is bound by the law of the case through the date of the last trial ending May 23, 2002, the Arbitrator finds that Petitioner has failed to prove that she is entitled to temporary total disability or maintenance benefits beyond the periods of time conceded by Respondent. Again, the Arbitrator does not find the opinions of Dr. Silver to be credible or persuasive, nor does the Arbitrator finds the testimony of Petitioner to be credible. Petitioner did not ultimately have a torn labrum in her right shoulder and there is no reasonable explanation why Petitioner could not have performed work, albeit with restrictions, related to the right shoulder or overhead work as noted by Dr. Cole.

Petitioner has remained off work for approximately one third of her life and the majority of her adult life based on subjectively reported pain complaints to Dr. Silver or other treating physicians that cannot be correlated with objective medical evidence and based on which they kept her off work. Certainly, by the time that Dr. Konowitz examined Petitioner in August of 2010 Petitioner had reached maximum medical improvement with regard to her right shoulder condition, which is the only condition that the Arbitrator finds to be causally related to her injury at work and only to the extent opined by Drs. Cole and Konowitz.

For some of the period during which Petitioner seeks maintenance benefits, she offered job search logs. She testified that she looked for work between March 3, 2008 and July 21, 2008 and between January 5, 2009 and January 14, 2009. She submitted job search logs reflecting her contact with 139 employers. It is notable that these job search logs are for very few job contacts made over an extended period of time and that they lack in detail. Given that Petitioner testified that she did essentially "nothing" other than go to the gym 3 to 5 times per week, perform light household duties, walk (not run) 13.1 miles during a half marathon on one occasion, and ride her bike during the majority of her 10 ½ years off work. Many of the job contacts are for unidentified

positions with unidentified job duties, although Petitioner found the time to note the jobs that fell outside of the restrictions indicated by her functional capacity evaluations or physicians. The Arbitrator finds that Petitioner failed to establish by a preponderance of credible evidence that she engaged in any diligent job search entitling her to maintenance benefits and that there is no credible evidence establishing Petitioner's entitlement to the requested temporary total disability benefits for the remainder of the 10 ½ year period based on the medical evidence addressed above.

Based on the facts and conclusions explained in detail above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from November 17, 2004 through August 31, 2006 and again from February 13, 2010 through September 3, 2010 and denies any other requested temporary total disability or maintenance benefits.

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 claimed conditions of ill being were causally related to her injury at work in 1999. Respondent repeatedly required Petitioner to submit to Section 12 examinations and did so no less than five times throughout Petitioner's treatment after the conclusion of the last hearing in this case in May of 2002. Based on the facts and conclusions explained in detail above, the Arbitrator finds that 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.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

Petitioner requests prospective medical care for treatment of a claimed CRPS/RSD condition. The Arbitrator finds the opinions of Dr. Cole and Dr. Konowitz to be persuasive as explained in detail above and also finds that Petitioner failed to establish a causal connection between any claimed current condition of ill-being and her work injury in 1999 based on those opinions. Thus, Petitioner's claim for any prospective medical care is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Claude Taylor,
Petitioner,

vs. NO: 10 WC 03095

14IWCC0573

Intertech Group,
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 Petitioner's issues of temporary total disability, permanent partial disability, causal connection, medical expenses and penalties and attorneys' fees, and Respondent's issue of credit for 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 Juen 11, 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.

14IWCC0573

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,000.00. 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: JUL 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-07/02/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TAYLOR, CLAUDE
Employee/Petitioner

Case# **10WC003095**

INTERTECH GROUP
Employer/Respondent

14IWCC0573

On 6/11/2013, 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:

0579 FRIEDMAN & SOLMOR LTD
GARY B FRIEDMAN
200 N LASALLE ST SUITE 2750
CHICAGO, IL 60601

0238 WOLF & WOLFE LTD
WILLIAM JENSEN
25 E WASHINGTON ST SUITE 700
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

ARBITRATION DECISION

CLAUDE TAYLOR
Employee/Petitioner

Case #10 WC 3095

14IWCC0573

v.

INTERTECH GROUP
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. ☒ 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 January 6, 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.

- 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 $26,632.00; the average weekly wage was $416.00.

- At the time of injury, the petitioner was 52 years of age, *married* with no children under 18.

- The parties agreed that the respondent paid $13,866.51 in temporary total disability benefits.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $277.33/week for 42 weeks, from January 7, 2010, through October 27, 2010, which is the period of temporary total disability for which compensation is payable.

- The respondent shall pay the petitioner the sum of $249.60/week for a further period of 25 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 5% loss of use of the person as a whole.

- The respondent shall pay the petitioner compensation that has accrued from January 6, 2010, through April 30, 2013, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his neck and right shoulder was reasonable and necessary. The respondent is responsible for payment of the Woodridge Medical bill for $718.00, Dr. Gandhi's bill for $720.30, Good Samaritan's bill for $538.40 and $2,063.40. The medical care rendered the petitioner for his lumbar spine and right foot was not reasonable or necessary and is denied. 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.

- The petitioner's claim for penalties and fees 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.

Robert E. Williams

6/10/13
Date

JUN 11 2013

FINDINGS OF FACTS:

On January 6, 2010, the petitioner, a security supervisor, sustained injuries to his right shoulder moving a gate. He sought immediate treatment at Alexian Brothers and reported right shoulder and rib pain after slipping and catching himself on a gate while moving it. He was discharged with modified duty, a sling and medication. On January 8, 2010, petitioner saw Dr. Vijay Patel of Woodridge Clinic and reported right shoulder pain radiating to his arm. The diagnosis was right shoulder and neck pain for which he was given medication and a no-work release. On January 12th, the petitioner reported no improvement with medication or home exercise program. He was released to limited duty beginning January 18, 2010. He was evaluated for physical therapy for his right shoulder at Midwest Rehabilitation Services on January 14, 2010. On January 19th, the petitioner saw Dr. Pranjal Shah of Lilac Park Medical Center for redness of his eyes and fatigue. Dr. Patel released the petitioner to light duty on February 8, 2010. On January 21st, Dr. Umang Patel of Lilac Park Medical Center took the petitioner off work through January 25, 2010. Dr. Vijay Patel released the petitioner to light duty on February 8, 2010, and noted that the petitioner's back was normal on February 9, 2010.

An MRI of his right shoulder on February 16, 2010, revealed a partial tear or tendinitis of the supraspinatus tendon, a small amount of fluid in the subacromial subdeltoid bursa, a 6 mm cyst associated with the posterior aspect of the glenoid labrum and mild to moderate impingement on the supraspinatus tendon at the anterior peripheral curve of the acromion. Dr. Kumar Raigaga treated the petitioner on February 17, 2010, for right foot pain. The petitioner reported slipping and twisting his right foot. X-rays were negative for fractures. The doctor felt that the petitioner had some acute capsulitis

and pain in his 1st MPJ. He followed up with Dr. Raigaga on March 3, 2010. He reported foot and right shoulder pain at a follow-up with Dr. Patel on February 18th.

The petitioner sought care with Dr. Vikram Gandhi on February 23, 2010, and reported right shoulder pain with radiation to right arm and numbness in his right hand, increasing right-sided neck pain and headaches. The doctor noted that x-rays of his cervical spine revealed degenerative changes at the C5-6 level. The petitioner had fifteen physical therapy sessions for his right shoulder through March 17, 2010. The petitioner reported right hip pain to the physical therapist on March 19, 2010.

On March 23, 2010, the petitioner reported right buttock and lower back pain, a right leg problem and tingling and numbness in his right shoulder and neck to Dr. Gandhi. The doctor noted that the petitioner's neck had improved but his back had a very limited range of motion with muscle spasm. From March 29 through April 9, the petitioner received five physical therapy sessions for his lower back. An MRI of his lumbar spine on April 16th revealed a right paracentral disc protrusion at L5-S1 abutting the descending S1 nerve root, multilevel degenerative damages of the lumbar spine, severe spinal canal stenosis at L4-5, mild spinal canal stenosis at L2-3 and mild to moderate spinal canal stenosis at L3-4. An MRI of his cervical spine the same day revealed multiple disc osteophyte complexes, worse at C4-5 that also included a slight posterior cord displacement by the disc, severe canal stenosis and neuroforamina narrowing at multiple levels.

On June 10, 2010, the petitioner was evaluated by Dr. Gunnar Andersson at the request of the employer. An FCE August 30th was an invalid representation of the petitioner's physical capabilities based on inconsistencies with gripping, heart rate

variations, weights achieved and selective pain reports and pain behaviors. Dr. Gandhi opined that the petitioner could only work at the sedentary physical demand level. At the request of the respondent, the petitioner's right shoulder was evaluated by Dr. Mark Neault on October 27, 2010. The petitioner had physical therapy for his back and followed up with Dr. Gandhi through February 8, 2011, at which time he reported receiving treatment for stomach cancer and placing other medical care on hold. He elected to be evaluated by Dr. Siobodian Vucicevic on February 2, 2012, who opined that the petitioner had some pre-existing arthritis prior to his injury.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his neck and right shoulder was reasonable and necessary. The respondent is responsible for payment of the Woodridge Medical bill for $718.00, Dr. Gandhi's bill for $720.30, Good Samaritan's bill for $538.40 and $2,063.40.

The medical care rendered the petitioner for his lumbar spine and right foot was not reasonable or necessary and is denied. The medical bills of Metro Foot and Ankle for $810.00 and Good Samaritan for $1,609.00 are denied.

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 cervical spine and right shoulder is causally related to the work injury. The petitioner failed to prove that his current condition of ill-being with his lumbar spine and right foot is causally related to the work injury. The petitioner reported only neck and right shoulder symptoms to Alexian Brothers,

Woodridge Clinic, Dr. Gandhi and the physical therapists from January 6 through March 23, 2010. The petitioner's Application for Adjustment of Claim on January 27, 2010, reported only a right arm injury. The petitioner is not credible. The opinions of Dr. Gandhi are not supported by the medical evidence and are conjecture. The petitioner's claim for benefits for his condition of ill-being with his back is denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The therapist noted in her report to Dr. Patel on March 24, 2010, that the petitioner was able to lift up to 45 pounds, lift and pull 60 pounds with the assistance of a pulley, pull down 50 pounds and was capable of returning to work. Dr. Neault opined on October 27, 2010, that the petitioner was at maximum medical improvement for his right arm and could return to work without restrictions. Dr. Andersson opined on June 10, 2010, that the petitioner was at maximum medical improvement and was capable of working. The FCE in August 2010 was invalid. The petitioner failed to prove that he was entitled to temporary total disability benefits after October 27, 2010.

The respondent shall pay the petitioner temporary total disability benefits of $277.33/week for 42 weeks, from January 7, 2010, through October 27, 2010, 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 suffered strains to his right shoulder and neck. The respondent shall pay the petitioner the sum of $249.60/week for a further period of 25 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 5% loss of use of the person as a whole.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's claim for penalties and fees is denied. There was a genuine dispute regarding the causal relationship of the petitioner's condition of ill-being with his work injury and regarding his ability to return to work.

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

Patty Holland,
Petitioner,

vs. NO: 12 WC 35454

14IWCC0574

Gilster-Mary Lee,
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, temporary total disability, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

14IWCC0574

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,600.00. 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: JUL 15 2014

Daniel R. Donohoo

o-05/27/14
drd/wj
68

Charles J. DeVriendt

Ruth W. White

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

HOLLAND, PATTY
Employee/Petitioner

Case# **12WC035454**

12WC039745

GILSTER-MARY LEE
Employer/Respondent

14IWCC0574

On 9/4/2013, 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:

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

0693 FEIRICH MAGER GREEN RYAN
BRANDY L JOHNSON
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

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)

Patty Holland
Employee/Petitioner

v.

Gilster-Mary Lee
Employer/Respondent

Case # 12 WC 35454

Consolidated cases: 12 WC 39745

14IWCC0574

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 24, 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 and manifestation, respectively, September 28, 2011, and October 10, 2012, Respondent was operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship did exist between Petitioner and Respondent.

On these date, Petitioner did sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents was given to Respondent.

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

In the year preceding the injuries, Petitioner earned $25,487.70; the average weekly wage was $544.61.

On the dates of accident, Petitioner was 57 years of age, married with 0 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 $6,680.40 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $6,680.40.

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 1, 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. Lander, including, but not limited to, a total knee replacement surgery.

Respondent shall pay Petitioner temporary total disability benefits in the amount of $363.07 per week for 61 weeks commencing October 24, 2011, through March 11, 2012, and October 11, 2012, through July 24, 2013.

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

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

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)

August 30, 2013
Date

SEP 4 - 2013

Findings of Fact

Petitioner filed three Applications for Adjustment of Claim which alleged that she sustained accidental injuries arising out of and in the course of her employment for Respondent. In both 12 WC 27885 and 12 WC 35454, Petitioner alleged that she sustained a work-related accident on September 28, 2011. Case 12 WC 27885 was filed prior to Petitioner retaining counsel to represent her and, by agreement of the parties, that case was dismissed. The Amended Application filed in 12 WC 35454 alleged that Petitioner injured her left leg/knee when twisting while scrubbing steps. In case 12 WC 39745 the Application alleged a date of accident (manifestation) of October 10, 2012, and that Petitioner sustained an aggravation of a pre-existing condition which resulted in further injuries to the left leg/knee. At trial, the parties agreed to a consolidation of 12 WC 35454 and 12 WC 39745.

These cases were tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent stipulated that Petitioner sustained a compensable accident in regard to 12 WC 35454 and paid both medical and temporary total disability benefits. Respondent disputed liability in regard to 12 WC 39745 on the basis of accident and causal relationship.

Petitioner worked for Respondent as a custodian and, prior to September 28, 2011, Petitioner had some bilateral knee pain; however, most of the prior symptoms were in respect to the right knee. Further, Petitioner did not have any claims for injuries to the left knee any time prior to September 28, 2011. Petitioner testified that on September 28, 2011, she was kneeling on a concrete step while she was in the process of scrubbing the steps with a brush. When Petitioner stood up, she felt pain and a burning sensation in her left knee.

Petitioner initially sought medical treatment from Dr. Lisa Lowry-Rohlfing, her family physician, who saw her on October 24, 2011. At that time, Petitioner informed Dr. Lowry-Rohlfing that she had experienced left knee pain for some time but that it had been getting worse, in particular, when she had to kneel or squat while at work. Dr. Lowry-Rohlfing suspected meniscal pathology and ordered an MRI scan. The MRI was performed on October 26, 2011, and it revealed a torn medial meniscus and a degenerative signal within the lateral meniscus.

At the direction of the Respondent, Petitioner was examined by Dr. Lyndon Gross, an orthopedic surgeon, on November 17, 2011. Dr. Gross reviewed medical reports provided to him by Respondent and examined the Petitioner. Dr. Gross opined that Petitioner had chronic thinning of the cartilage in the patella and subchondral edema that were not significantly aggravated by the injury; however, he also opined that Petitioner had a degenerative tear of the medial meniscus made symptomatic by her work activities. Dr. Gross further opined that most of Petitioner's symptoms were because of the meniscal tear and that arthroscopic surgery consisting of a partial medial meniscectomy and chondroplasty of the patella was appropriate.

Dr. Lowry-Rohlfing referred Petitioner to Dr. Robert Lander, an orthopedic surgeon, who initially saw Petitioner on December 7, 2011. Dr. Lander reviewed the MRI and examined Petitioner and opined that she had sustained a torn medial meniscus and that surgery was indicated. On December 12, 2011, Dr. Lander performed arthroscopic surgery on the left knee

consisting of a partial medial meniscectomy. Petitioner remained under Dr. Lander's care following surgery and received physical therapy.

Dr. Lander released Petitioner to return to work on March 12, 2012, but with restrictions of no ladder climbing and no kneeling. Petitioner did return to work at that time but continued with her home exercises. When Dr. Lander saw Petitioner on April 11, 2012, he continued the restriction in regard to ladder climbing, but stated she could kneel so long she had knee pads. When Dr. Lander saw Petitioner on July 11, 2012, he opined that she was at MMI and that she had permanent restrictions of no ladder climbing or kneeling.

Petitioner testified that when she returned to work, she was still required to climb stairs and that her left knee kept hurting. In spite of the fact that Petitioner had a restriction of no ladder climbing, she still had to climb both stairs and a ladder to clean ceilings. The ladder that Petitioner climbed when performing this task lead to a platform that had a metal railing around it. While Petitioner was cleaning the ceiling, she leaned forward with her knees pressed against the metal railing. Petitioner testified that, over a period of time, this caused increased pain and swelling of her left knee. On October 10, 2012, Petitioner was seen by Dr. Lander and, at that time, she complained of severe left knee pain. Dr. Lander opined that Petitioner had severe degenerative arthritis and that this is what was causing her complaints of pain. He recommended that Petitioner have a total knee replacement and authorized her to be off work.

At the direction of the Respondent, Petitioner was re-examined by Dr. Gross on December 6, 2012. Dr. Gross reviewed additional medical records and again examined Petitioner. Dr. Gross opined that Petitioner's continued left knee symptoms were related to the underlying degeneration in her knee caused by the normal aging process and not by a work injury. Dr. Gross opined that if Petitioner continued to have knee symptoms that further treatment was appropriate, either a unicompartmental or total knee arthroplasty.

At trial Petitioner testified that her left knee hurts, swells and that she experiences tightness in the knee joint. Petitioner has problems walking and is unable to squat. Petitioner testified that she has no stairs in her residence. She does want to proceed with the knee surgery as recommended by both Dr. Lander and Dr. Gross.

Respondent brought Brad Bruns, the safety/sanitation supervisor to the trial but he was called by Petitioner's counsel to testify. Bruns testified that he never directed Petitioner to climb any ladder; however, he did not know if Petitioner was told to clean ceilings or not. He agreed that Petitioner was a good employee and that he had no reason to disbelieve her testimony.

Dr. Lander was deposed on April 11, 2013, and his deposition testimony was received into evidence at trial. Dr. Lander's testimony was consistent with his medical records and he acknowledged that when he saw Petitioner in July, 2012, that she was at MMI and that he released her to return to work with permanent restrictions. Dr. Lander noted that Petitioner had degenerative arthritis at the time of the initial injury and that removal of the meniscus had a 50% chance of making her better. He also opined that Petitioner's degenerative symptoms were aggravated by her work activities. He reaffirmed his opinion that Petitioner should undergo total knee replacement surgery.

Dr. Gross was deposed on June 21, 2013, and his deposition testimony was received into evidence at trial. Dr. Gross' testimony was consistent with his narrative medical reports and he reaffirmed his opinion that Petitioner's current condition was due to the degenerative changes and not related to her work activities. However, Dr. Gross opined that Petitioner's ongoing knee problems were caused by the "work restrictions" imposed by Dr. Lander in regard to climbing and kneeling and that someone with arthritis will have pain if they engaged in those activities. Dr. Gross agreed that subsequent to September 28, 2011, Petitioner's left knee symptoms never resolved and that he had no specific information as to what Petitioner was doing between the time she was released at MMI in July, 2012, and October, 2012, but that he did know that her pain was increasing during that period of time.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury arising out of and in the course of her employment that manifested itself on October 10, 2012.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that when she returned to work with restrictions in March, 2012, that she was still required to climb stairs and that her knee symptoms got progressively worse. Even though Petitioner had a restriction of no ladder climbing, she had to do so to clean ceilings. While performing this task, Petitioner had to lean forward with her knees against a metal railing and, over a period of time, her left knee symptoms increased. On October 10, 2012, Petitioner was seen by Dr. Lander who opined that she had severe degenerative arthritis that was causing her pain.

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 her work-related accident of September 28, 2011, and her work-related repetitive trauma injury of October 10, 2012.

In support of this conclusion the Arbitrator notes the following:

As stated herein, there was no dispute that Petitioner sustained a work-related injury on September 28, 2011, which ultimately required meniscus surgery. Petitioner did experience some relief following the surgery; however, her left knee condition never returned to its pre-injury state. When Petitioner was determined to be at MMI and released to return to work in July, 2012, it was with permanent restrictions.

When Petitioner returned to work the job duties she performed were many times outside her work restrictions, which continued to aggravate her left knee symptoms. This included the task of clean ceilings which required Petitioner to climb a ladder and then lean forward with her knees pressed against a metal railing.

Petitioner's treating physician, Dr. Lander, testified that Petitioner's degenerative symptoms were aggravated by her work activities. Respondent's Section 12 examiner, Dr. Gross, opined that someone with degenerative arthritis will have pain symptoms if they engage in climbing and kneeling.

Petitioner credibly testified that her left knee condition never returned to its pre-accident state and that upon her being found to be at MMI and returning to work in July, 2012, her job duties continued to aggravate her left knee symptoms.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services 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 (K) the Arbitrator makes the following conclusion of law:

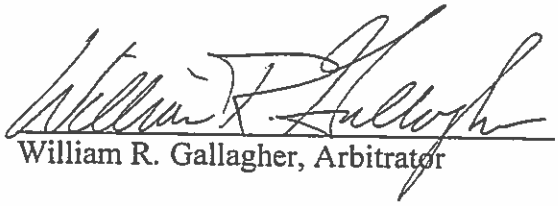
The Arbitrator concludes that Petitioner is entitled to prospective medical treatment including, but not limited to, the total knee replacement surgery recommended by Dr. Lander.

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

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 61 weeks commencing October 24, 2011, through March 11, 2012, and October 11, 2012 through July 24, 2013.

In support of this conclusion the Arbitrator notes the following:

There was no dispute as to Petitioner's entitlement to temporary total disability benefits from October 24, 2011, through March 11, 2012. Further, the evidence is clear that Petitioner has been totally disabled from October 11, 2012, through July 24, 2013.



William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM THORPE,

Petitioner,

vs. NO: 10 WC 41734

PREFERRED MEAL SYSTEMS,

Respondent,

14IWCC0575

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, temporary total disability, 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).

Although we affirm the Arbitrator's finding of causation relating to Petitioner's bilateral knee conditions, we find that Petitioner failed to prove that his cervical and lumbar conditions of ill-being are causally related to his July 27, 2010 work accident. Although Petitioner's testimony is somewhat confusing and evasive on this issue, he ultimately admitted that the first time he complained about his neck and back was when Dr. Freedberg prescribed the x-rays, which was on January 19, 2011. This was six months after his work accident. The initial medical record on July 27, 2010, indicates that "a stove fell on his knees. **He did not fall to the ground afterwards**, but he is c/o knee pain bilat, L > Rt. **He denies injury otherwise.**" [Emphasis added.] Despite multiple follow ups with Advocate Occupational Health, two visits (8/16/10 and

9/20/10) to his personal physician, Dr. Yunez, and two previous visits with Dr. Freedberg (11/30/10 and 12/8/10), there is no mention of any neck or back problems until January 19, 2011. We also note that Petitioner's Application for Adjustment of Claim, filed on October 27, 2010, only lists "both legs" as the affected body parts.

Dr. Freedberg's January 19, 2011 record indicates that Petitioner had neck and back pain due to a work related injury. Petitioner told him that he had neck and back pain at the time but he didn't think it was going to be serious. Although his previous medical records don't mention this, Petitioner told Dr. Freedberg that "when he fell his back, neck and head hit the concrete steps."

Dr. Freedberg testified that Petitioner's cervical and lumbar injuries are causally related to the accident because of the mechanism of injury and that it seemed reasonable to him that Petitioner wasn't focused on his neck and back initially because he was worried about his knees. However, Petitioner's claimed mechanism of injury is not supported by the medical records. Furthermore, even Dr. Freedberg admitted that "it's more unusual than usual but not unheard of" for there to be a six-month gap between an accident and a patient's complaints. He also limited his opinion to the two month gap between when he first saw Petitioner (in Nov. 2010) and when Petitioner told him about his neck and back symptoms (in Jan. 2011). Dr. Freedberg admitted that he did not review any previous records and also testified that, "Every piece of information is important. And I will tell you that it's a relatively lengthy time for him. I think you would have to ask him why he waited that long where he thought it was going to get better." (Px8 at 34). Despite this delay in complaints, Dr. Freedberg felt comfortable with his causation opinion.

On the other hand, Respondent's Dr. Hennessy opined that there was no causal connection due to the lack of neck and back complaints for several months, Petitioner's relatively normal exam, and "essentially normal" MRIs.

Petitioner testified that he hit his back and his neck on the steps. We find that the lack of documented complaints for six months and the actual denial of any other injuries at the time of his initial treatment on July 27, 2010, weigh against a finding of causation. The July 27th record indicates that Petitioner denied falling to the ground but, on January 19, 2011, Petitioner told Dr. Freedberg that he hit his back, neck, and head on the concrete steps. We find that this is not credible and find that Dr. Hennessy's opinion is more credible in this case than that of Dr. Freedberg regarding Petitioner's spine conditions. For these reasons, we reverse the Arbitrator's finding of causation regarding the cervical and lumbar spine.

Therefore, we hereby deny the medical expenses related to Petitioner's spine treatment and reduce the medical award accordingly. Respondent is only responsible for medical bills related to Petitioner's bilateral knee condition.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $380.00 per week for a period of 90-2/7 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 Respondent shall pay to Petitioner the medical expenses relating to his bilateral knee condition under §8(a) of the Act subject to the fee schedule in §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for a series of hyaluronic acid knee injections bilaterally, as recommended by Dr. Freedberg.

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 $42,000.00. 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: JUL 16 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 6/18/14
49

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

THORPE, WILLIAM
Employee/Petitioner

Case# **10WC041734**

PREFERRED MEAL SYSTEMS
Employer/Respondent

14IWCC0575

On 6/17/2013, 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:

1747 LAW OFFICES OF STEVEN J SEIDMAN
TWO FIRST NATIONAL PLAZA
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
JEFF REDICK
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

14IWCC0575

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)

William Thorpe
Employee/Petitioner
v.
Preferred Meal Systems
Employer/Respondent

Case # **10 WC 41734**

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 **April 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. ☒ 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 **July 27, 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 **$29,640.00**; the average weekly wage was **$570.00**.

On the date of accident, Petitioner was **47** 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 **$21,751.64** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$21,751.64**.

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 **$380.00**/week for **90 2/7^{ths}** weeks, commencing **July 27, 2010** through **December 14, 2010**, commencing **September 14, 2011** through **January 2, 2012**, and commencing **April 16, 2012** through **April 29, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **July 27, 2010** through **April 29, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$21,751.64** for temporary total disability benefits that have been paid.

Respondent shall pay **$36,830.84** for medical services for treatment to Petitioner's knees and spine, as provided in Section **8(a)** of the Act. Respondent is to pay any unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule or the negotiated rate and shall provide documentation with regard to said fee schedule or negotiated rate calculations to Petitioner. Respondent is to reimburse Petitioner directly for any out-of-pocket medical payments.

Respondent shall authorize and pay for a series of hyaluronic acid knee injections bilaterally, as recommended by Dr. Freedberg.

No benefits are awarded for Petitioner's claimed bilateral carpal tunnel syndrome, because Petitioner has not proven by a preponderance of the evidence that his accident was a cause of his claimed bilateral carpal tunnel syndrome.

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 17, 2013
Date

JUN 17 2013

FACTS

On July 27, 2010, Petitioner was employed as a driver for Respondent. Petitioner testified that on that date he was working with three other employees moving a large oven up a narrow school staircase in Cicero, Illinois. Petitioner testified that he was at one end of the oven pulling up like a wrench while the three other employees were at the other end. Petitioner testified that the stove fell on his knees and causing him to hit his back and head on the cement stairs.

Petitioner testified that he received treatment at the Advocate Occupational Health company clinic on July 27, 2010. He was seen with complaints of knee pain greater on the left than on the right. Petitioner treated at Advocate Occupational Health until August 10, 2010, when he was given work restrictions.

Petitioner initiated treatment with Dr. Howard Freedberg, an orthopedic surgeon, on November 4, 2010. Petitioner gave a history of having a stove fall on his knees and having an onset of bilateral knee pain. According to Dr. Freedberg's records and the doctor's evidence deposition testimony, Petitioner's initial complaints were limited to his bilateral knee pain. Dr. Freedberg diagnosed the Petitioner's condition as bilateral knee sprain and bilateral degenerative joint disease. An MRI of the Petitioner's knees revealed a left knee medial meniscus tear with degenerative joint disease and lateral meniscus degeneration as well as early patella chondromalacia. Additionally, on the right side it was noted to have a suspected medial meniscus tear with medial chondromalacia and osteophytes as well as lateral meniscal degeneration and patellar

chondromalacia. According to Dr. Freedberg's records, Petitioner had injured his knees in 2008, but that that condition had resolved. Dr. Freedberg recommended bilateral arthroscopic knee surgery.

On January 19, 2011, Petitioner first complained to Dr. Freedberg of neck and back pain. X-Rays of the Petitioner's cervical spine reveal at C5 vertebral compression fracture.

On April 8, 2011 Petitioner was examined at Respondent's request by Dr. Ryon Hennessy, an orthopedic surgeon. Dr. Hennessy opined that the Petitioner's meniscal tears could be related to the July 27, 2010 incident and recommended that the Petitioner undergo the recommended bilateral arthroscopic knee surgery.

On June 24, 2011, Dr. Freedberg performed an arthroscopy of the right knee which revealed medial and lateral meniscus tears as well as Grade II chondromalacia of the medial femoral condyle and trochlear. On August 12, 2011, Dr. Friedberg performed an arthroscopy of the left knee, which revealed medial and lateral meniscus tears and Grade II chondromalacia of the medial femoral condyle and patella with loose bodies.

Petitioner continued treatment with Dr. Freedberg including cortisone injections on the knees. On November 22, 2011 Dr. Freedberg's note reveals that the Petitioner has bilateral carpal tunnel syndrome. In January of 2012 Petitioner underwent a series of cervical and lumbar epidural injections.

Petitioner had a repeat examination with Dr. Hennessy on May 18, 2012. Dr. Hennessy opined that the Petitioner had osteophyte formations and degenerative changes prior to the July 27, 2010 accident. In an evidence deposition, Dr. Hennessy testified that Petitioner's ongoing knee problems would require additional treatment including but that those ongoing knee problems were unrelated to the accident of July 27, 2010. He opined that the treatment and disability were a natural progression of preexisting degenerative joint disease. Dr. Hennessy testified that trauma might aggravate pre-existing arthritis, that he did not see pictures of the surgery, and that surgery could aggravate a pre-existing condition. Dr. Hennessy opined that the Petitioner's cervical, thoracic and lumbar pain and radiculopathy were unrelated to the July 27, 2010 accident. Dr. Hennessy felt that

there was symptom magnification.

On September 14, 2011, Petitioner underwent a functional capacity evaluation. It was determined that he was capable of working as a truck driver, but not yet the very heavy physical demand, which was his job requirement.

Dr. Freedberg testified at an evidence deposition that he was recommending a series of hyaluronic acid knee injections bilaterally. He testified that at some point Petitioner may need to undergo knee replacement surgery. Dr. Freedberg opined that the cervical thoracic and lumbar spine problems were causally connected to the accident. Dr. Freedberg based his opinion upon the mechanism of injury and upon Petitioner's initial focus on his greater bilateral knee pain. Dr. Freedberg further opined that Petitioner's bilateral carpal tunnel complaints were the result of possibly falling or driving a truck with a lot of vibratory motions.

On December 13, 2011 Petitioner visited Dr. Neeraj Jain at the referral of Dr. Freedberg. He received treatment for persistent spine pain. Petitioner was tender to palpation with limitation of range of motion. Dr. Jain prescribed and administered bilateral lumbar facet joint injections. Petitioner was diagnosed with lumbar facet syndrome, lumbar discogenic pain, and lumbosacral radiculopathy.

Dr. Freedberg recommended medications, home exercise, possible more physical therapy, and possible more facet injections. Petitioner testified that he has ongoing bilateral knee pain, that his spine pain has persisted, and that he has numbness in his hands.

CAUSATION

The Arbitrator finds that Petitioner's ongoing bilateral knee complaints are causally related to the accident. The Arbitrator bases this finding on Petitioner's testimony, the mechanism of the injury the medical records, and Dr. Freedberg's medical opinion. The Arbitrator notes that Dr. Hennessy testified that trauma might

aggravate pre-existing arthritis

The Arbitrator finds that Petitioner's spine complaints are causally related to the accident. The arbitrator bases this finding on Petitioner's testimony, the mechanism of the injury, and Dr. Freedberg's medical opinion. The Arbitrator is not persuaded by Dr. Hennessy's contrary medical opinion.

The Arbitrator finds that Petitioner's complaints of bilateral carpal tunnel syndrome are unrelated to a work accident. Dr. Freedberg's opinion in this regard is based upon uncertain possibilities, such as possibly falling.

PAST MEDICAL SERVICES

Respondent does not object to the medical care relating to Petitioner's meniscal tears. Respondent disputes the necessity of ongoing bilateral knee treatment and spine treatment on the basis of causal connection. The Arbitrator has found that these conditions are causally related to Petitioner's accident.

Therefore, the Petitioner's claim for unpaid medical bills relating to his knees and spine are awarded.

TEMPORARY TOTAL DISABILITY

Petitioner and Respondent agree that temporary total disability benefits are payable for an initial period from July 27, 2010 through December 14, 2010, and for a second period from September 14, 2011 to January 2, 2012, and for a third period commencing on April 16, 2012. Petitioner claims that he is entitled to benefits to the hearing date of April 29, 2013; Respondent claims benefits should end on June 24, 2012. Respondent's dispute on this issue is premised upon liability for causation, which has been resolved in favor of Petitioner.

Therefore, the claimed temporary total disability benefits are awarded.

PROSPECTIVE MEDICAL CARE

Petitioner claims that he is entitled to bilateral knee replacement surgery and certain diagnostic spine testing. However, there is no specific medical prescription for the claimed prospective care. Dr. Freedberg

testified that he was recommending a series of Hyaluronic acid knee injections bilaterally and that at some point Petitioner may need to undergo knee replacement surgery.

Based upon the foregoing, respondent shall authorize and pay for a series of Hyaluronic acid knee injections bilaterally, as recommended by Dr. Freedberg.

No other specific prospective medical care is ordered this time, without prejudice to any future prescribed medical treatment for the knees and spine that is reasonable, necessary, and causally related to the accident.

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Williams,
Petitioner,

vs.

Flexible Staffing, Inc.,
Respondent,

No. 11WC 46390
14IWCC0576

ORDER

This matter comes before the Commission on its own Petition to Recall the Commission Decision to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated July 16, 2014, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Charles J. DeVriendt.

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

Charles J. DeVriendt

DATED: JUL 22 2014

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

Frederick Williams,

Petitioner,

vs.

NO: 11WC 46390
14IWCC0576

Flexible Staffing, Inc.,

Respondent,

CORRECTED DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County with instructions "to the Commission for clarification of which facts/evidence support its conclusion." The Arbitrator's decision, dated November 20, 2012, awarded Petitioner 75.9 weeks of permanent partial disability for the 30% loss of use of his right arm. On May 29, 2013, the Commission reduced the award to 25% loss of use of the right arm. On remand, the Commission makes the following clarifications to support its conclusion, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator.

We understand Respondent's argument that Dr. Levin's A.M.A. impairment rating of 6% of the upper extremity was not given enough weight by the Arbitrator. However, we do not agree with the great weight that Respondent wants placed on this rating because to do so would be to disregard the other factors and give them no weight at all. Section 8.1b of the Act requires the consideration of five factors in determining permanent partial disability:

1) Reported level of impairment;
2) Occupation;
3) Age at time of injury;
4) Future earning capacity;
5) Evidence of disability corroborated by treating medical records.

Section 8.1b also states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the

level of impairment as reported by the physician must be explained in a written order." We initially note that the term "impairment" in relation to the A.M.A. rating is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

Regarding the second factor, we find that Petitioner was employed in a physically demanding occupation. His unrebutted testimony was that he was a welder/fabricator and that he considered it a "physically demanding job." (T.8). We find that Petitioner's upper extremity impairment is more significant for a person with Petitioner's heavier job duties than someone with a lighter-duty job and that this supports a finding of increased disability compared to the impairment rating.

Regarding the third factor, we find that Petitioner was only 45 years old and will live longer with his disability than someone who is older. We find that this warrants an increase in the level of disability in this case.

Regarding future earning capacity, Petitioner testified that he was released to full duty by Dr. Aribindi on March 8, 2012, even though he was still feeling pain and was lacking range of motion in his arm. Despite this full duty release, Petitioner's unrebutted testimony was that, when he took the release form to Respondent the next day, he was told that he no longer had a job there. Petitioner testified that he has been looking for employment as a welder, which is what he has done for the majority of his professional life. Petitioner testified that he tries to do welding work on the side from his garage, but that he still finds it difficult to do. We find that Petitioner's future earning capacity has been diminished and his upper extremity impairment makes him more prone to future injury with an associated loss of income.

As for the fifth factor, evidence of disability corroborated by treating medical records, Petitioner testified that he is right-hand dominant. Petitioner testified that he still has 4 or 5 out of 10 pain, which is consistent with what is reported in his last physical therapy record on February 29, 2012. On March 7, 2012, when Dr. Aribindi released Petitioner to return to work, the assessment still included "elbow pain." Petitioner testified that his primary care doctor, Dr. Ahmed, has prescribed Norco, which he takes three times a week. However, the Commission notes that Dr. Ahmed's records are not in evidence so there is no corroborating medical record for Petitioner's use of Norco for his arm pain. Petitioner testified that he still does not have full range of motion and he has difficulty welding in certain positions. This is corroborated by the March 7th record of Dr. Aribindi who noted that Petitioner had "almost" full extension of the right elbow but lacked full supination of the right forearm. On May 8, 2012, Dr. Levin reported that Petitioner's elbow lacked 3 degrees of full extension. He lacked 15 degrees of pronation and 15 degrees of supination. His right wrist had 75 degrees of flexion compared to 80 degrees on the left. His extension was 85 degrees on the right and 90 degrees on the left. His ulnar deviation on the right was 30 degrees while it was 45 degrees on the left. His mid-forearm circumference measured 26 cm on the right compared to 26.5 cm on the left. We find that these medical records support Petitioner's disability of decreased range of motion. Petitioner testified that he still has numbness in the area of the incision and has tingling sensations in his arm and fingertips. Although Dr. Aribindi reported that Petitioner denied numbness or paresthesias, Dr. Levin noted that Petitioner had decreased pinprick sensation over the ulnar aspect of the right elbow.

Based on the above, the Commission finds that the 6% impairment rating by Dr. Levin does not adequately represent Petitioner's actual disability in this case. When considering the other four factors, we find that Petitioner's permanent partial disability is 25% loss of use of the right arm. The Commission modifies the Arbitrator's Decision, to decrease Petitioner's partial

disability award from 30% to 25% loss of use of the right arm pursuant to Section 8(e) of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $435.27 per week for a period of 23.14 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 $391.75 per week for a period of 63.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the petitioner a 25% loss of use of his right arm.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,900.00. 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: JUL 2 2 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth White

SE/
O: 6/24/14
049

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

Mark Drake,
Petitioner,

vs.

NO: 11 WC 1360
11 WC 1361

State of Illinois/Department of Human Resources,
Respondent.

14IWCC0577

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 employer/employee relationship, accident, notice, medical expenses 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 Commission finds that there was an employer/employee relationship that existed on June 19, 2009.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on January 17, 2008 and June 19, 2009 his claims for compensation are hereby denied.

DATED: JUL 17 2014

MB/jm

O: 5/29/14

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DRAKE, MARK
Employee/Petitioner

Case# **11WC001360**

11WC001361

IL DEPT OF HUMAN SERVICES
Employer/Respondent

14IWCC0577

On 3/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH 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

MAR 20 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0577

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

MARK DRAKE
Employee/Petitioner

v.

ILLINOIS DEPT. OF HUMAN SERVICES
Employer/Respondent

Case # **11** WC **01360**

Consolidated cases: **11 WC 01361**

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 **HERRIN**, on **01/15/13**. 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? (2009 date of loss only)
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 **01/17/08 and 06/19/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

On January 17, 2008, an employee-employer relationship ***did*** exist between Petitioner and Respondent. As of June 19, 2009, the petitioner had retired and was no longer employed by the respondent.

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

Timely notice of these accidents ***was not*** given to Respondent.

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

In the year preceding the 2008 injury, Petitioner earned **$58,248.00**; the average weekly wage was **$1120.15**. In the year preceding the 2009 injury, Petitioner earned **$60,048.00**; the average weekly wage was **$1,154.77**.

On each asserted date of accident, Petitioner was **59** 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 $ for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$All bills paid** 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

3-13-13
Date

MAR 20 2013

14IWCC0577

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK DRAKE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Nos. 11 WC 01360
	)	11 WC 01361
ILLINOIS DEPT. OF HUMAN SERVICES,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

These matters were consolidated and tried jointly. The parties requested that a singular decision regarding these claims be issued, and given the overlapping evidence regarding these claims, the Arbitrator concurs with this approach.

STATEMENT OF FACTS

The petitioner is a right-hand dominant man, 63 years old on the date of trial, who worked as an office administrator at the Illinois Department of Human Services from August 1988 until his retirement on May 31, 2009. His job duties there were described as those consistent with administrative duties, including preparation and completion of reports, conducting performance evaluations, review of documents and case files, and staff communication and oversight. The petitioner reported substantial computer usage in the course of these duties, including email, document preparation, and data analysis. On January 13, 2011, approximately eighteen months after he retired, he filed two Applications for Adjustment of Claim, each asserting repetitive trauma as his accident theory with assertion of injuries to his arms and hands, with effective dates of loss of January 17, 2008 and June 19, 2009.

The medical records submitted show that the petitioner was seen by Dr. Conrad Weihl, a neurologist, on January 17, 2008, pursuant to a referral from a Dr. Juergens. PX3. The petitioner provided a history of foot pain, worse on the right, which had begun approximately three years prior. He also related pain radiating down the back of his leg, worsened by sitting for prolonged periods. Over the two months before this appointment, he began noticing numbness in his fingers, more on the right side. He described being able to golf, but required use of a cart. He had a history notable for hypertension, coronary artery disease, and a hip replacement. Dr. Weihl noted sensory neuropathy, but also noted a past lumbar MRI demonstrating L5 nerve root impingement. Dr. Weihl recommended EMG studies and a cervical MRI.

On January 17, 2008, the EMG study was performed demonstrating mild sensorimotor polyneuropathy and right ulnar neuropathy. See PX3. Laboratory work was also conducted that date. PX4. On February 8, 2008, the cervical spine MRI demonstrated disk bulging at C5-6 and C6-7, but no stenosis was observed. PX5.

On August 28, 2008, Dr. Weihl noted persistent foot complaints, but further noted that "an extensive workup for reversible causes" had found nothing. Dr. Weihl diagnosed the petitioner had axonal and sensory motor neuropathy, but the etiology was unclear. Dr. Weihl discharged him to return as needed. PX3.

On June 10, 2009, the petitioner sought care with Dr. Fakhre Alam. He described recent numbness and tingling in the middle finger of his right hand, as well as foot numbness of a ten year duration, first on the right foot and later on the left as well. Dr. Alam noted that the petitioner had been diagnosed with right ulnar neuropathy by the EMG, but did not have fourth or fifth digit symptoms in the right hand. Dr. Alam further noted a history of low back nerve entrapment involving an L5-S1 herniated disk and epidural injection or injections. The petitioner noted a history of neck pain (no duration is noted) and Dr. Alam noted the cervical spine MRI findings. The petitioner complained of nighttime numbness in his hands, but denied radiating pain in his arms. Dr. Alam then performed an EMG study on June 16, 2009, and interpreted the results as demonstrating bilateral carpal and cubital tunnel syndrome. Dr. Alam then referred the claimant to Dr. Richard Morgan, an orthopedist who had previously treated the petitioner relative to his hip complaints. See generally PX6.

On July 28, 2009, the petitioner saw Dr. Morgan. Dr. Morgan noted complaints in both hands over the course of approximately one year. He also noted findings of idiopathic neuropathy in the feet. Dr. Morgan assessed carpal tunnel syndrome, and also noted positive ulnar nerve findings but that no symptoms correlated with such. He prescribed night splints and told the petitioner to follow up in six months. See PX7.

On December 15, 2009, Dr. Morgan's physician assistant saw the claimant. The petitioner had previously advised that he did not want surgery, but now desired carpal tunnel release. No change in symptoms or diagnosis appears to have prompted this. The surgical intervention was scheduled. PX7. On February 3, 2010, Dr. Morgan performed right carpal tunnel release. On February 25, Dr. Morgan noted the petitioner "is doing fine, no problems" and told him to follow up in a year. PX7, 8.

On April 1, 2010, Dr. Morgan saw the petitioner for complaints of shoulder adhesive capsulitis, which the petitioner noted was a recurrent problem for which he had previously had therapy and injection treatment. Following examination, the petitioner was diagnosed with bilateral adhesive capsulitis. Repeat injections were performed and he was prescribed home exercise. On June 1, 2010, the petitioner followed up for his shoulders. Repeat injections were performed. See PX7.

On June 29, 2010, the petitioner followed up with Dr. Morgan for his shoulder complaints. He also described sciatica. He was told to follow up with Dr. Juergens for

epidural injection for the shoulders and to get imaging studies. MRIs of each shoulder on July 6, 2010 noted tendinopathy or partial tearing of the rotator cuff, bilaterally. On July 13, he was prescribed physical therapy for the shoulders. PX7. He thereafter underwent physical therapy as prescribed. PX9.

On October 12, 2010, he saw Dr. Morgan, who noted the petitioner was doing fine relative to the right sided carpal tunnel syndrome. No complaints are noted in this record, but Dr. Morgan stated the petitioner would ultimately require cubital tunnel surgery on the right side, and scheduled left sided carpal and cubital tunnel surgery. These release procedures were performed on December 3, 2010. PX7, PX8. On December 14, 2010, he was instructed to begin postoperative range of motion exercise.

On March 3, 2011, Dr. Morgan noted the petitioner presented; the medical history at this time was related to the 1985 hip replacement. Dr. Morgan noted the claimant was playing golf "pretty much every day and doing fine." He instructed the petitioner to follow up in two years for a checkup.

The respondent secured a Section 12 examination with Dr. James Emanuel on May 16, 2011. Dr. Emanuel took a history and reviewed the petitioner's records in addition to examining the claimant. Following his evaluation, Dr. Emanuel noted that the peripheral neuropathy as a potential source of the diagnosis and that the conditions had progressed after the petitioner ceased his employment. Dr. Emanuel concluded that the petitioner's work activities may have provoked symptoms, but that his work activities were not the cause of the carpal or cubital tunnel syndrome.

Dr. Emanuel testified in deposition in support of his opinions on March 26, 2012. See PX11, RX7. Dr. Morgan testified in deposition on June 14, 2012, opining that the work activities of the claimant were a cause of the condition. PX12.

At trial the petitioner testified that he had reported his diagnosis to his supervisor after the first EMG, prior to his departure from employment. However, the actual written reports of injury were not filled out until December 20, 2010. The petitioner acknowledged familiarity with the workers' compensation reporting process, having prepared reports of injury for other staffers. See RX8. The petitioner testified that he did not fill one out while he was employed because supervisors and managers were discouraged from doing such.

OPINION AND ORDER

A claimant must prove by the preponderance of credible evidence all elements of a claim to receive compensation under the Act. See, e.g., *Orsini v. Industrial Commission*, 117 Ill.2d 38, 44-45 (1987).

When performance of the employee's work involves constant or repetitive activity that gradually causes deterioration of or injury to a body part, the case may be

compensable, provided it can be medically established that the origin of the injury was the repetitive stressful activity. However, it is required that the claimant prove that the injury is related to the employment and not the result of the normal degenerative aging process, as simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased risk to the petitioner. See, e.g., *Peoria County Bellwood,* 115 Ill.2d 524 (1987); *Quaker Oats Co.* v. *Industrial Commission,* 414 Ill.2d 326 (1953).

The medical records of Dr. Weihl, Dr. Alam and Dr. Morgan do not specify the petitioner's work activities or provide any suggestion of a non-idiopathic cause. Dr. Morgan's causal opinion in deposition relied on a work history provided two weeks before the deposition rather than on any information secured during the diagnostic or treatment process. Moreover, he does not provide adequate explanation of why removal of the stressors of work apparently caused the symptoms to advance rather than recede.

The claimant performed a number of activities during his work history. While computer usage did play an important aspect of his employment duties, he also had administrative tasks and oversight requirements, and he did not testify with any great detail regarding the force he had to exert or his posture, other than an assertion that he would have preferred ergonomic desks for additional support. The reliability of the medical causal relationship opinion has therefore been called into serious question, especially since there appears to be a dearth of information provided to the medical provider during the initial treatment course.

In addition to these concerns, multiple other aspects of this claim suggest non-work-related bases for this claimant's medical condition. The petitioner has a history significant for hypertension and obesity, conditions often related to carpal tunnel syndrome, and a further history of progressive neuropathy which Dr. Emanuel credibly notes could have caused this condition.

The petitioner has not credibly shown a manifestation date for repetitive trauma injuries or notice of an injury within 45 days of that time. He testified he provided verbal notice of a work injury after the first EMG, but that both he and his superior simply decided not to fill out the required paperwork; this strains credulity. Indeed, their office had other people who filed similar claims without apparent repercussion. Taken as a whole, the evidence provided is legally insufficient to sustain a claim for benefits.

Medical expenses and permanent partial disability are moot.

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

Tracy Howell,
Petitioner,

vs. NO. 09 WC 039531
14 IWCC 0578

State of Illinois/Menard Correctional Center,
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 Order of the Commission dated July 17, 2014, having been filed by Respondent. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

The Commission finds that the original decision was issued with the case number 08 WC 039531 and the correct number is case number 09 WC 039531.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Order dated July 17, 2014 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein. The parties should return their original Orders to Commissioner Mario Basurto.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Order shall be issued simultaneously with this Order.

DATED: AUG 15 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/jm
43

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

Tracy Howell,
Petitioner,

vs.

NO: 09 WC 39531
14 IWCC0578

State of Illinois/Menard Correctional Center,
Respondent,

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

The Commission finds that the original decision was issued with the case number 08 WC 039531 and the correct number is case number 09 WC 039531.

The Commission finds that there was no violation of Petitioner's rights pursuant to the Equal Protection Act. Furthermore, the Commission views this case differently than the Arbitrator and finds Petitioner permanently lost 20% of the use of each foot under Section 8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $627.03 per week for a period of 66.8 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use of 20% of each foot.

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: AUG 15 2014

MB/jm
O: 5/28/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOWELL, TRACY
Employee/Petitioner

Case# **09WC039531**

14IWCC0578

STATE OF ILLINOIS/MENARD C C
Employer/Respondent

On 11/2/2012, 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:

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH 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

NOV 2 2012

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)SS.

COUNTY OF WILLIAMSON)

14IWCC0578

- [ ] 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

TRACY HOWELL
Employee/Petitioner

v.

STATE OF ILLINOIS/MENARD C.C.
Employer/Respondent

Case # 09 WC 39531

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 **Gerald GRANADA**, Arbitrator of the Commission, in the city of **HERRIN**, on **August 14, 2012**. By stipulation, the parties agree:

On the date of accident, **08/17/09**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $ **54,342.00** and the average weekly wage was $**1,045.04**

At the time of injury, Petitioner was **45** years of age, ***single*** with **0** dependent children.

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

14IWCC0578

ORDER

Respondent shall pay Petitioner the sum of $627.02/week for a further period of 33.4 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused **10% loss of use of right and left feet.**

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

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

Signature of Arbitrator

10/29/12
Date

NOV - 2 2012

14IWCC0578

The Arbitrator finds the following facts:

The issue in dispute is nature and extent of injury. This case was previously tried pursuant to Section 19(b) and found to be compensable. Said decision was affirmed by the Commission. Petitioner is a 48 year old employee of the State of Illinois at the Menard Correctional Center. Petitioner testified that he worked as a correctional officer.

Petitioner was diagnosed with bilateral Achilles tendinosis. Petitioner underwent surgical release by Dr. John Krause on September 21, 2010 on the right Achilles tendon and November 30, 2010 on the left Achilles tendon.

Following the February 21, 2011 visit with Dr. Krause, Petitioner was released to return to work full duty with no restrictions. Petitioner completed physical therapy at Carbondale Memorial Hospital. At trial, Petitioner testified to having difficulty in his feet after work. Petitioner testified to having cramping and less mobility after work. Petitioner has changed job duties at work and is now the knit shop officer. Petitioner current job duties are easier on his feet than were the duties of correctional officer. Petitioner noted that the surgeries he underwent helped immensely.

Therefore, the Arbitrator concludes:

1. Respondent shall pay reasonable and necessary medical services if any as provided in Sections 8(a) and 8.2 of the Act.

2. As a result of his injury, Petitioner has sustained the 10% loss of use of each foot pursuant to Section 8(e). This is based on Petitioner's complaints corroborated by the medical evidence.

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 DUPAGE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rita Holden,
Petitioner,

vs.
St. Patrick's Residence,
Respondent,

NO: 09 WC 24006

14IWCC0579

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Arbitrator indicated that none of Petitioner's treating doctors expressed a causation opinion. Contrary to the Arbitrator's findings, on November 9, 2009 Dr. Rabin stated as follows: Petitioner has asked her attorney to contact me. We discussed the nature of her injury and the likely inciting events of her repeated bending-lifting activity at work that certainly contributed to the progressive degeneration in her lumbar spine. As such the Commission modifies the Arbitrator's decision to include this opinion. However, having done so and having weighed the evidence, the Commission assigns more weight to Dr. Singh's causation opinion than to Dr. Rabin's causation opinion.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment her 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: JUL 17 2014

MB/jm
O: 6/5/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOLDEN, RITA
Employee/Petitioner

Case# **09WC024006**

14IWCC0579

ST PATRICK'S RESIDENCE
Employer/Respondent

On 10/31/2013, 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:

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

1109 GAROFALO SCHREIBER HART ET AL
DEREK STORM
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RITA HOLDEN,
Employee/Petitioner
v.
ST. PATRICK'S RESIDENCE,
Employer/Respondent

Case # 09 WC 24006

14IWCC0579

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 Kurt Carlson**, Arbitrator of the Commission, in the city of Wheaton, on **September 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 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 _____

14IWCC0579

FINDINGS

On **December 28, 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 accident *wasnot* given to Respondent.

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

In the year preceding the injury, Petitioner earned $**33,696.00**; the average weekly wage was $**648.00**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

The petitioner's request for the payment of medical expenses is denied because the petitioner did not sustain accidental injuries that arose out of her employment with the respondent; notice of the accident was not provided to the respondent within the requisite time frame required by the Act; and, the petitioner's condition of ill-being is not causally related to a work accident.

The petitioner's claim for payment of temporary total disability benefits is hereby denied for the same reasons as set forth above.

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

- **ON DECEMBER 28, 2007 THE PETITIONER DID NOT SUSTAIN ACCIDENTAL INJURIES THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH THE RESPONDENT. IN ADDITION, THE PETITIONER DID NOT PROVIDE NOTICE OF AN ALLEGED ACCIDENT WITHIN THE TIME FRAME REQUIRED BY SECTION 6(c) OF THE ACT. MOREOVER, THE PETITIONER'S CURRENT CONDITION OF ILL-BEING, IF ANY, IS NOT CAUSALLY RELATED TO THE ALLEGED WORK ACCIDENT OF DECEMBER 28, 2007. SEE MEMORANDUM OF DECISION ATTACHED HERETO AND MADE A PART HEREOF AS THOUGH FULLY SET FORTH HEREIN.**
- **THE RESPONDENT SHALL PAY $0 FOR MEDICAL SERVICES AS PROVIDED IN SECTION 8(a) OF THE ACT.**
- **THE RESPONDENT SHALL PAY $0 IN TTD BENEFITS TO THE PETITIONER AS PROVIDED IN SECTION 8(b) OF THE ACT.**
- **THE RESPONDENT SHALL PAY $0 IN PERMANENCY BENEFITS 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.

Kurt Carlson 10·31·13

Honorable Arbitrator Kurt Carlson — Date

OCT 31 2013

14IWCC0579

STATE OF ILLINOIS)
)SS
COUNTY OF DuPAGE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RITA HOLDEN,	)	
	)	
Petitioner,	)	
	)	NO: 09 WC 24006
	)	
VS.	)	
	)	
ST. PATRICK'S RESIDENCE,	)	
	)	
Respondent.	)	

MEMORANDUM OF DECISION

I. INTRODUCTION

This MEMORANDUM OF DECISION is attached to the IWCC ARBITRATION DECISION and is made a part thereof as though fully set forth therein. The issues in dispute in the above captioned matter were as follows:

C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
E. Was timely notice of the accident given to the respondent?
F. Is the petitioner's current condition of ill being causally related to the injury?
J. Were the medical services that were provided to the petitioner reasonable and necessary? Has the respondent paid all appropriate charges for all reasonable and necessary medical services?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

II. FINDINGS OF FACT

- **Petitioner's Testimony**

The petitioner has worked for the respondent for thirty-one years, the majority of time she has worked as a CNA. In 2007 she was working for the respondent as a CNA. (R.8). The petitioner's job duties as a CNA consisted of helping care for the residents of the respondent's facility. She helped the residents perform their activities of daily living which included grooming, bathing, and feeding the residents. According to the petitioner, the majority of her time was spent working on the Alzheimer's floor where the residents had special needs. (R.11-13). She would have to help move and lift the residents sometimes up to three time per day to help them with their activities of daily living. (R.11-13).

When moving a resident there were two types of machines that would do the actual lifting. One was the Easy Stand. When using this machine, the resident would be hooked up to the machine and then after the resident was secured to the machine the petitioner would press a button which would raise the resident. The resident would then hold onto the machine and would be rolled by the petitioner to the appropriate place. When lowering the resident the machine would lower the resident into a chair or wheelchair. (R.58).

The other type of machine that was used by the petitioner was referred to as the Easy Lift. This machine would require two CNAs to place a sling underneath the resident. The sling would then be attached to the Easy Lift by a series of hooks. The CNA would then press a button and the machine would lift the resident. The other CNA would guide the resident via the use of hand guides attached to the sling. The resident would then be rolled to the appropriate area and then the machine would lower the resident. (R.58-60).

The entire time that the petitioner worked at the respondent the Easy Stand and Easy Lift machines were used to lift and transport the residents. (R.46).

Well prior to the alleged accident date of December 27, 2007 the petitioner began seeking medical care for pain and problems involving her low back with radiation of the pain into the left leg. (R.14). Specifically, the petitioner sought medical care at Silver Cross Hospital on September 8, 2004 for complaints of low back pain with radiation into the left leg. At that point in time the petitioner stated that she could recall no specific reason for the pain in her back. She stated that she did work as a nurse's aid and performed "some lifting" and a lot of walking, but the petitioner did not state that these activities caused or aggravated the pain in her back. To the contrary, the petitioner stated that the symptoms in her low back were "aggravated" by sitting. (Resp.Ex.#2). The petitioner was prescribed Naprosyn, Flexeril, and Vicodin for her low back condition. (Resp.Ex.#2).

Thereafter, the petitioner sought care with Dr. Hindo. The petitioner's first examination with Dr. Hindo took place on December 16, 2004. At no time did the petitioner relate the pain and problems in her low back to her employment activities. At no time did Dr. Hindo opine that there existed a causal relationship between the condition in the petitioner's lumbar spine and her employment activities. (R.15; and, Resp.Ex.#3, p.136).

Pursuant to Dr. Hindo's recommendation the petitioner underwent an MRI of her lumbar spine on December 18, 2004 at Silver Cross Hospital. The MRI demonstrated degenerative changes at multiple levels in her lumbar spine, but no evidence of any type of acute disc herniation causing nerve root compression. (Resp.Ex.#3, p.110).

Subsequent to the MRI the petitioner underwent physical therapy for her low back and was taking prescription medication. (Resp.Ex.#2).

On May 10, 2005 the petitioner sought care with Dr. Brian Couri. At that point in time the petitioner complained of low back pain with radiation of the pain into the left leg. The petitioner stated that the pain began in September or October of 2004 when she "awoke with low back pain." (R.55; and, Resp.Ex.#5). At no time did the petitioner state to Dr. Couri that her employment activities caused or aggravated the condition in her low back. At no time did Dr. Couri opine that there existed a causal relationship between the condition in the petitioner's lumbar spine and her employment activities. Dr. Couri recommended and performed an epidural steroid injection to the petitioner's lumbar spine. (Resp.Ex.#5).

During the years 2005, 2006, and 2007 the petitioner continued to undergo physical therapy for her low back. She continued to receive injections into her lumbar spine. (R.57; Resp.Ex.#3; and, Resp.Ex.#4).

Sometime in 2007, the petitioner claims to have had a conversation with Sister Jean an administrator at the respondent. During this conversation petitioner alleges that she told Sister Jean about her back problems. The petitioner was unable to indicate when in 2007 this alleged conversation took place. (R. 24-26).

The petitioner alleges that she had a separate conversation with Lynn Gronwick, the Director of Human Resources for the respondent, in November of 2007. The petitioner claims to have told Ms. Gronwick about her back condition. (R. 29-30). The petitioner, however, did not tell Ms. Gronwick how she allegedly injured her back. (R.31).

On February 13, 2008 the petitioner admits that she contacted The Pain Centers of Chicago to set an appointment to address her complaints of low back pain. (R.62). The petitioner denies stating to The Pain Center of Chicago that her condition was not due to a work related accident, but the Arbitrator notes that on

a New Patient Intake Form dated February 13, 2008 it expressly indicates that the petitioner's condition was not due to a work related injury. The petitioner provided her group health insurance through Aetna as the primary payer. (Resp.Ex.#6).

The petitioner was seen at The Pain Centers of Chicago by Dr. Martini on February 26, 2008. At that point in time the petitioner was required by complete a questionnaire. The petitioner admitted that she did complete the questionnaire and signed the questionnaire on February 26, 2008. (R.63).

On the questionnaire, the petitioner was expressly asked whether the condition in her back was related to an accident or personal injury and in response the petitioner stated that it was not. In addition, the petitioner was asked whether her condition was due to a work related injury and she did not respond to this question. The petitioner provided her group health insurance through Aetna as the primary payer. (Resp.Ex.#3, p.138).

On February 26, 2007 the petitioner was examined by Dr. Martini at The Pain Center of Chicago. At no time during this examination did the petitioner state that any act or phase of her employment activities caused or aggravated the condition in her low back. At no time did Dr. Martini opine that the condition in the petitioner's lumbar spine was due to her employment activities. Dr. Martini diagnosed the petitioner as suffering from spondylolisthesis and lumbar degenerative disc disease as well as neuroforaminal stenosis. (Resp.Ex.#3, pp.37-38).

On October 14, 2008 the petitioner sought chiropractic care at the Ostir Chiropractic Center. (R.64). At that point in time the petitioner was asked to complete a questionnaire. The petitioner admitted that she completed the questionnaire and signed the questionnaire on October 14, 2008. (R.64). On the questionnaire, the petitioner was asked when her low back problems began and in response she stated 2004. In addition, the petitioner was asked to describe in her own words how her problems began, and in response she stated "woke up with back pain, leg pain." (Resp.Ex.#8, p.7). At no time did the petitioner state that the condition in her back was caused or aggravated by her employment activities. (Resp. Ex#8).

Also on October 14, 2008 the petitioner completed a document entitled CASE HISTORY. The petitioner admitted that she completed this document and signed same on October 14, 2008. (R.66). On the case history, the petitioner was expressly asked whether her condition was due to "work comp.". The petitioner left this section blank. Instead, she provided her group health insurance through Aetna as the primary payer. (Resp.Ex.#8, p.6).

At no time did the chiropractor opine that the petitioner's employment activities caused or aggravated the condition in her lumbar spine. (R.8). According to the petitioner, the chiropractic care did initially alleviate her symptoms, but they would later return. (R.35).

Due to the continuation of her symptoms, the petitioner sought care with Dr. Rabin on February 23, 2009. (R.35). When the petitioner was first examined by Dr. Rabin on this date, she completed a document entitled PATIENT HISTORY FORM. (R.68-69). On this form, the petitioner was asked to state when her pain began and in response she stated 2005. (Resp. Ex#9, p.14)

In addition, the petitioner was asked to state, in her own words, what happened and why she was there to see the doctor. In response, the petitioner stated "got up one day out of bed, and start having pain in my back. I went to the ER, and they gave me a pain shot. I have been dealing with back pain for three to four years." (Resp.Ex.#9, p.14). On this same document, the petitioner was asked whether her condition was due to a work injury and the petitioner left the section blank. (Resp.Ex.#9, p.14).

At no time did the petitioner indicate to Dr. Rabin that the condition in her low back was caused or aggravated by her employment activities. At no time did Dr. Rabin opine that the condition in the petitioner's lumbar spine was caused or aggravated by her employment activities. (Pet.Ex.#2; Pet.Ex.#6; and, Resp.Ex.#9).

Dr. Rabin performed surgery to the petitioner's lumbar spine consisting of a lumbar fusion on September 23, 2009. (R.38; Pet.Ex.#2; Pet.Ex.#3; and, Resp.Ex.#9).

Subsequent to the surgery the petitioner did return to work as a CNA for the respondent on December 7, 2009. She continued to work full duty as a CNA for the respondent through March 31, 2012 at which time she voluntarily resigned her employment at the respondent. (R. 73).

On May 17, 2010 the petitioner was examined at the request of the respondent by Dr. Singh of Midwest Orthopaedics at Rush. (R. 73 and Resp. Ex.# 7).

After resigning her employment with the respondent in March of 2012 the petitioner began working in Alabama as a nurse's assistant. (R.43). As of the date of trial, she continued to work in this position which required her to take care of patients and assist them with their activities of daily living. (R. 44).

At trial, the petitioner stated that she continues to experience pain in her low back. She indicated that she was approximately forty percent better than at the time of the surgery. She wears a pain patch and takes Norco. (R. 42-44).

- ***Testimony of Lynn Gronwick***

Ms. Gronwick testified that she is the Human Resources Director for the respondent and has been in that position for seven years. As the Human Resources Director she is responsible for the overall staffing of the respondent's facility, and managing the benefits including FMLA and workers' compensation. (R.99-100).

For the entire time that Ms. Gronwick worked at the respondent there has been in effect a standard procedure which requires all employees to immediately report any work related injury to their supervisor. The supervisors are trained to complete an Incident Report. The general procedure is made known to the individual employees through orientation meetings and mandatory in-service meetings. The in-service meetings are mandated by the State of Illinois. (R.100).

Ms. Gronwick testified that at no time in November of 2007 did she have a conversation with the petitioner during which the petitioner told her that she had injured her back. If a conversation had taken place, Ms. Gronwick would have completed the appropriate paperwork including the Incident Report and the Employer's First Report of Injury (Form #45). (R.102).

According to Ms. Gronwick, the petitioner did not report an accident to her in November of 2008. There was no Incident Report or Form #45 completed at this point in time per the standard procedure at the respondent. (R.103).

The petitioner worked full duty as a CNA for the respondent from 2004 through 2009. According to Ms. Gronwick, at no time prior to May of 2009 did the petitioner report a work injury to her or anyone else in management at St. Patrick's Residence. (R.100-103).

On May 26, 2009, Ms. Gronwick testified that she was contacted by telephone by the petitioner. At that point in time the petitioner indicated that she wanted to report a work related accident. Ms. Gronwick told the petitioner that she would need to come in and fill out the appropriate paperwork. (R.103-104).

On May 27, 2009 the petitioner did come to the respondent's facility and completed the Incident Report. Ms. Gronwick indicated that this was the petitioner's handwriting on the document introduced into evidence as Respondent's Exhibit #10. On this document, the petitioner stated that she had notified the respondent of a work related injury in November of 2008. (R.104; and, Resp.Ex.#10).

After the petitioner had completed the Incident Report, Ms. Gronwick completed the Employer's First Report of Injury and reported the alleged accident to her workers' compensation insurance carrier. (R.106; and, Resp.Ex.#11). All of these

activities would have been completed by any member of management had the petitioner reported an accident prior to May 27, 2009. (R.107).

As previously mentioned, Ms. Gronwick testified that as part of her job duties she would oversee the FMLA program at the respondent. In connection therewith, Ms. Gronwick testified that in August of 2009 the petitioner wished to take time off work under FMLA. In connection therewith, the petitioner and her medical providers were required to complete various FMLA documentation which was introduced into evidence as Respondent's Exhibit #12. On the documents that were provided by the petitioner to Ms. Gronwick to support the FMLA leave, it indicates that the condition in the petitioner's lumbar spine began in 2005. (R.108-109; and, Resp.Ex.#12).

In February, 2012 Ms. Gronwick had a conversation with the petitioner during which the petitioner stated that she was voluntarily resigning her employment at St. Patrick's Residence to care for sick relative out of state. (R.110).

- **Testimony Of Ms. Denise Kostelec**

Ms. Kostelec testified that she has been employed with the respondent for approximately thirty-one years. Her current position is director of nursing and she has been in that position since 2007. Her job duties included overseeing the residents including supervising the nurses and CNAs. (R.118-119).

Prior to being the director nursing, Ms. Kostelec held several other positions at the respondent's facility including a supervisory nurse and a unit charge nurse. She is familiar with the job duties of a CNA and has actually performed and taught the job duties to other nurses. The job duties of a CNA at the respondent's facility have remained relatively constant over the past twenty years. (R.119-120).

The job duties of a CNA include helping the residents with their activities of daily living which include feeding, bathing, and transferring the patients in and out of bed. (R.121).

Most of the CNAs are assigned eight residents to work with on a daily basis. Approximately fifty percent of the residents on the Alzheimer's floor where the petitioner did work for a period of time, are independent with fifty percent requiring assistance in standing or being transported. (R.122, 128-130). Thus when the petitioner worked on the Alzheimer's floor she would have to help four residents stand and/or be transported during the course of a day. This would usually occur three to four times per day. Each transfer would take approximately five to fifteen minutes. (R.121-130).

During the entire time that the petitioner worked at the respondent, the lifting and transporting of the residents would be done by a mechanical device, either the Easy Stand or the Easy Lift. In each case, the actual lifting and lowering of

the resident would be done by the machine. The CNA would not perform any lifting of the resident as part of this process. Once the resident had been lifted either via the Easy Stand or the Easy Lift, then they would be rolled to the appropriate area. The use of the Easy Lift always mandated two CNAs. One would press the button to lift the resident while the other would guide the resident. (R.122-125).

According to Ms. Kostelec, approximately twenty-five percent of the CNAs workday would require the transferring of patients via one of the two machines. The remainder of the seventy-five percent of the workday would not require any lifting on the CNAs part. (R.138-139).

III. ANALYSIS – CONCLUSIONS OF LAW

A. ACCIDENT; and,
B. CAUSAL CONNECTION

Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent? Is the petitioner's current condition of ill-being causally related to the injury?

1. Law

The petitioner bears the burden of establishing by a preponderance of credible evidence all elements of her claim. Even though the petitioner is alleging a repetitive trauma injury she still must prove all elements of her case and meet the same standard of proof as a claimant who is alleging a specific identifiable accident. *Durand v. Industrial Commission*, 224 Ill.2d 53 (2006).

Specifically, the petitioner must establish that she sustained accidental injuries arising out of and in the course of her employment; and, that her condition is causally related to her employment activities and not the result of a normal degenerative aging process or other cause. *Peoria County Bellwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524 (1987).

The requirement that the petitioner prove by a "preponderance of evidence" all elements of her claim, means that she must present evidence which is more credible and convincing to the mind; and, when viewed as a whole establishes the facts sought to be proved as more probable than not. *In Re: K.O.* 336 Ill.App.3d 98 (2002). In the present case, for the reasons discussed below, the Arbitrator finds that the petitioner has failed to establish by a preponderance of evidence that she sustained accidental injuries arising out of and in the course of her employment and that the condition in her back was causally related to her employment activities.

2. Analysis

- Petitioner's Version

The petitioner alleges that her employment activities were repetitive in nature and resulted in a condition in her low back which manifested itself on December 28, 2007. The petitioner's position, however, has been impeached by her own statements and actions; and, by the documentary evidence introduced by both parties.

In addition, the petitioner has failed to present this Court with any expert opinion to establish that her employment activities caused the condition in her low back. Consequently, the Arbitrator finds that the petitioner has failed to establish that she sustained accidental injuries arising out of and in the course of her employment; and, that the condition in her back is causally related to a work related accident.

- The Petitioner's Inconsistent Statements And Actions

As noted above, the petitioner alleges that her low back condition is related to her employment activities and she has selected December 28, 2007 as the date of accident. The evidence introduced at arbitration, however, establishes that this petitioner had a long history of treating for back problems well prior to December 27, 2007 and at no time during this treatment did she ever relate her back problems to her employment activities.

For example, the petitioner was examined at Silver Cross Hospital on September 8, 2004. At that point in time the petitioner complained of low back pain which radiated into the left leg that had been present for six days prior to her arrival. The petitioner could not recall any specific reason for the pain. The petitioner did mention that she worked as a nurse's aid and performed "some lifting," and a lot of walking, but she did not state that these activities aggravated the symptoms in her low back. To the contrary, the petitioner stated that the symptoms in her low back were aggravated by "sitting." (Resp.Ex.#2).

Subsequent to her examination at Silver Cross Hospital the petitioner came under the care of Dr. Hindo on December 16, 2004. At no time during her examination with Dr. Hindo on this date did the petitioner in any way relate the symptoms in her low back to her employment activities. At no time did Dr. Hindo opine that the condition in the petitioner's low back was related to her employment activities. At the end of this examination Dr. Hindo recommended that the petitioner undergo an MRI of her lumbar spine. (Resp.Ex.#3, p.136).

The MRI of the petitioner's lumbar spine was performed on December 28, 2004 at Silver Cross Hospital. The MRI demonstrated degenerative changes at multiple levels in the lumbar spine, but no evidence of any acute herniated disc. (Resp.Ex.#3, p.110).

Subsequent to the MRI, Dr. Hindo prescribed physical therapy for the petitioner's low back. The physical therapy was commenced on March 28, 2005 at Silver Cross Hospital. During the initial evaluation, the petitioner again stated that she could not recall any specific incident that caused her back pain. At no time did the petitioner relate the pain in her back to her employment activities. The petitioner began a course of physical therapy. (Resp.Ex.#2).

On May 10, 2005, the petitioner began treating with Dr. Couri. At that point in time the petitioner continued to complain of low back pain with radiation into her left leg. The petitioner stated that the pain began in September or October, 2004 when she "awoke with low back pain." (Resp. Ex.#5).

At no time did the petitioner relate the condition in her low back to her employment activities. At no time did Dr. Couri opine that there existed a causal relationship between the condition in the petitioner's low back and her employment activities. Dr. Couri did recommend that the petitioner undergo an epidural steroid injection which was administered this same date. (Resp.Ex.#5).

The petitioner continued to treat for low back pain with Dr. Hindo and her primary care physician in 2006 and into 2007. On February 9, 2007 the petitioner stated that she was still experiencing low back pain with radiation into her left leg. Dr. Hindo diagnosed the petitioner as suffering from chronic low back pain "secondary to lumbar disc disease, spondylolisthesis." At no time during this examination did the petitioner relate her complaints of low back pain to her employment activities. At no time did Dr. Hindo opine that there existed a causal relationship between the condition in the petitioner's low back and her employment activities. (Resp.Ex.#3, p.132).

On March 26, 2007 the petitioner was again examined by Dr. Hindo complaining of low back pain. The petitioner stated that the prescription medication Skelaxin and the prior epidural steroid injections did not provide any relief. The only thing that helped was Darvocet. Again, Dr. Hindo diagnosed the petitioner as suffering from chronic low back pain with disc disease. He prescribed Darvocet. At no time did the petitioner relate the condition in her back to her employment activities. At no time

did Dr. Hindo opine that the petitioner's employment activities were causing the condition in the petitioner's low back. (Resp.Ex.3, p.131).

The petitioner was again seen by Dr. Hindo on December 14, 2007 with complaints of low back pain. The doctor noted the petitioner's history of spondylolisthesis. Neither the petitioner nor Dr. Hindo stated that the petitioner's employment activities were in any way causing or aggravating the condition in her back. (Resp.Ex.#3, p.129).

As previously mentioned, the petitioner has selected December 28, 2007 as the date of accident in this matter. As the discussion set forth above illustrates, for a substantial period before this date the petitioner had been under medical care for complaints of low back pain with radiation into her left leg and at no time did the petitioner mention her employment activities as causing or aggravating the condition in her low back. None of the physicians who treated the petitioner during this period of time opined that there existed a causal relationship between the condition in the petitioner's low back and her employment activities. During this entire period of time the petitioner also continued to work full duty without restriction at the respondent. This evidence does not support a conclusion that the petitioner sustained accidental injuries arising out of her employment and that her employment activities caused the condition in her low back.

Even after the date of the alleged accident of December 28, 2007, the petitioner did not indicate that she had suffered a work injury or that the condition in her low back was related to her employment activities. In particular, the Arbitrator notes that the petitioner contacted The Pain Centers of Chicago on February 13, 2008 to schedule an appointment. According to the records of The Pain Center of Chicago, the petitioner was asked whether her complaints of low back pain were caused by a work related injury. In response, according to the records from the Pain Center of Chicago, the petitioner stated that they were not. (Resp.Ex.#6). The petitioner also indicated that the examination would be paid by her group health insurance through Aetna and she was scheduled for an examination on February 26, 2008. (Resp.Ex.#6).

The petitioner was examined at The Pain Centers of Chicago on February 26, 2008. At the time of that examination the petitioner was asked to complete a questionnaire. On the questionnaire, the petitioner was asked whether the condition in her back was related to an accident or personal injury, and in response she indicated that it was not. Moreover, the petitioner was expressly asked whether the condition in her back was due to a "work related injury." The petitioner did not answer this question. Again, the petitioner provided her group health insurance through Aetna as the payer for the examination. (Resp.Ex.#3, p.138).

The petitioner was examined by Dr. Martini of The Pain Centers of Chicago on February 26, 2008. At no time during this examination did the petitioner relate the condition in her low back to her employment activities. At no time did Dr. Martini opine that there existed a causal relationship between the petitioner's employment activities and the condition in her low back. To the contrary, Dr. Martini diagnosed the petitioner as suffering from spondylolisthesis and lumbar degenerative disc disease. (Resp.Ex.#3, pp.37-28).

On October 14, 2008 the petitioner sought care with Ostir Chiropractic Center. In connection therewith, the Arbitrator notes that once again the petitioner did not relate the condition in her low back to her employment activities. To the contrary, when the petitioner was first examined at the Ostir Chiropractic Clinic she was required to complete a document entitled PATIENT HEALTH QUESTIONNAIRE. The petitioner admitted that she completed this document and signed the document on October 14, 2008. On the document, the petitioner was asked when the condition began and in response she stated 2004.

In addition, the petitioner was asked how the problems began, and in response she stated that she woke up with back and leg pain. (Resp.Ex.#8, p.7). At no time did the petitioner state to Dr. Ostir that her employment activities were causing or aggravating the condition in her lumbar spine. (Resp.Ex.#8, p.7).

Rather, when the petitioner was asked whether her condition was due to a workers' compensation accident, the petitioner did not answer this question. She did not provide workers' compensation as the primary payer in this matter, but instead listed her group carrier Aetna as the primary payer. (Resp.Ex.#8, p.6).

Nowhere in the Ostir Chiropractic records did the chiropractor opine that the condition in the petitioner's lumbar spine was causally related to her employment activities. This, despite the fact that the chiropractor knew that the petitioner worked as a CNA. (Resp.Ex.#8, p.26).

As late as February, 2009 there was still no indication that the petitioner's condition was related to her employment activities. Specifically, when the petitioner sought medical care with Dr. Rabin on February 23, 2009 she was asked to complete a document entitled PATIENT MEDICAL HISTORY FORM. On this document, the petitioner was asked when the pain started and in response she stated 2005. (Resp. Ex. 9, p. 14)

The petitioner was also asked to describe, in her own words, what happened to cause the pain. In response, the petitioner stated as follows:

> **Got up one day out of bed, and started having pain in back. I went to ER, and they gave me a pain shot. I've been dealing with back pain for three to four years. (Resp.Ex.#9, p.14).**

The petitioner was expressly asked whether the condition in her back was related to a work accident and she did not answer this question. (Resp.Ex.#9, p.14).

At no time did Dr. Rabin opine that the condition in the petitioner's lumbar spine was causally related to her employment activities. This, despite the fact that the petitioner clearly indicated on the Patient Medical History Form that she was employed as a CNA. (Resp.Ex.#9, p.14).

As the discussion set forth above establishes, from 2004 through February of 2009 the petitioner complained of low back pain with radiation of the pain into her left leg. She sought medical care with numerous medical providers, but at no time did she relate the condition in her low back to her employment activities. To the contrary, the petitioner provided other explanations for the condition in her low back.

None of the physicians diagnosed the petitioner with any type of injury arising out of her employment. Rather, all of the physicians diagnosed her with a degenerative condition in her lumbar spine. The statements of the petitioner and the treatment rendered during this period of time do not support her allegation of having sustained a work related injury arising out of her employment which caused the condition in her back.

- Medical Opinions

Whether an activity, be it occupational or non-occupational, caused a subsequent medical condition is inherently a medical question outside the realm of common knowledge of a lay person and must be addressed by a qualified physician. Yet, in this case, the petitioner has not presented this Arbitrator with a single medical opinion from any physician that the condition in her back was caused by her employment activities. To the contrary, a close review of the medical opinions offered by the petitioner point to a different cause of the condition in her low back, that being that the condition was due to a degenerative deterioration of her lumbar spine.

The Arbitrator notes that the petitioner had plenty of medical providers from whom to choose to render an opinion that her employment activities played a causative role in the condition in her lumbar spine yet, as noted above, she did not present a single medical opinion establishing that there existed such a causal relationship. Specifically, the petitioner treated with Dr. Hindo for complaints of low back pain for at least seven years. Notwithstanding, Dr. Hindo did not provide an opinion stating that the condition in the petitioner's lumbar spine was causally related to her employment activities. (Pet.Ex.#7).

In addition, the petitioner was examined and treated by Dr. Brian Couri. Dr. Couri did not opine that the condition in the petitioner's lumbar spine was causally related to her employment activities. (Rexp.Ex.#5).

Moreover, the petitioner sought care with Dr. Chawla of Primary Care Physicians of Essington. Dr. Chawla did not opine that the condition in the petitioner's lumbar spine was related to her employment activities. (Resp.Ex.#3, p.135).

Further, the petitioner sought medical care with Dr. Martini of The Pain Centers of Chicago. At no time did Dr. Martini opine that the condition in the petitioner's lumbar spine was causally related to her employment activities. (Resp.Ex.#3, p.37; Pet.Ex.#5; and Pet.Ex.#8).

The petitioner also sought chiropractic care at the Ostir Chiropractic Center. At no time did chiropractor Ostir opine that the condition in the petitioner's lumbar spine was related to her employment activities. (Resp.Ex.#8).

Finally, even Dr. Rabin, the petitioner's surgeon, did not render an opinion that the condition in the petitioner's lumbar spine was causally related to her employment activities. (Resp.Ex.#9, p.13; Pet.Ex.#2; and, Pet.Ex.#6).

The only physician who rendered an opinion on the issue of causation was Dr. Singh. Dr. Singh is a board certified orthopaedic surgeon specializing in the care and treatment of patients with spinal injuries. He is an assistant professor of orthopaedic surgery at Rush University Medical Center. He has published numerous articles and given multiple presentations dealing with the care and treatment of patients with spinal injuries. (Resp.Ex.#7).

Dr. Singh was expressly asked whether the condition in the petitioner's lumbar spine was causally related to her employment activities as a CNA. In response, Dr. Singh stated as follows:

> **It appears that the patient has a chronic longstanding history of low back pain, as well as spinal stenosis and spondylolisthesis. It appears to me that these symptoms are not causally related to her job duties and are a normal function of age and progression of the disease. (Resp.Ex.#7, p.4).**

Given the fact that none of the petitioner's six treating physicians rendered an opinion that the condition in the petitioner's lumbar spine was causally related to her employment activities; and, that the only expert opinion on this issue was rendered by Dr. Singh who opined that the petitioner's condition was not causally related to her employment activities, the preponderance of the credible evidence does establish that the petitioner's condition in her lumbar spine is not causally related to her employment activities.

After examining all of the evidence presented, the Arbitrator finds that the petitioner failed to establish by a preponderance of credible evidence that she sustained accidental injuries arising out of and in the course of her employment; and, that the condition in her lumbar spine is causally related to her employment activities.

E. NOTICE

Was timely notice of the accident given to the respondent?

1. Law

As previously mentioned, the petitioner bears the burden of establishing by a preponderance of credible evidence all elements of her claim. Even though this petitioner is alleging a repetitive trauma injury, she still must meet the same standards of proof as a claimant was alleging a specific identifiable accident. *Durand v. Industrial Commission*, 224 Ill.2d 53 (2006).

One requirement that the petitioner must establish is that she provided notice of the accident to her employer within forty-five days of the alleged accident. Specifically, Section 6(c) of the Act provides as follows:

> Notice of the **accident** shall be given to the employer as soon as practical, but no later than forty-five days after the **accident**. 820 ILCS 305/6(c).

The providing of notice of a work related accident to the employer within the requisite forty-five days of the alleged date of accident is jurisdictional and a prerequisite to the right to the right to maintain proceedings under the Act.

Ristow v. Industrial Commission, 39 Ill.2d 410 (1968); and, *Fenix-Scisson Construction Company v. Industrial Commission*, 27 Ill.2d 354 (1963). If the employee does not provide notice of the alleged accident to the employer within the requisite forty-five days, then the Commission does not possess jurisdiction to hear the claim and cannot award any workers' compensation benefits to the employee. *Ristow*, supra.

An employee who provides notice of a **medical condition** to the employer, but does not provide notice of a work related **accident**, has not met the requirements of Section 6(c) of the Act and is not entitled to workers' compensation benefits. *Ristow* and *Fenix-Scission*, supra.

In the present case, for the reasons outlined below, the Arbitrator finds that the petitioner failed to provide notice of a work related accident to the employer within the requisite forty-five days of the accident date as required by Section 6(c) of the Act. Therefore, the Arbitrator does not possess jurisdiction to award the petitioner any workers' compensation benefits.

2. Analysis

- Petitioner's Testimony

  The only evidence presented by the petitioner to establish that she provided notice of a work related accident within the requisite forty-five days of the date of accident as required by the Act, was her own testimony. The petitioner points to two conversations that she allegedly had with individuals at the respondent which constitute notice of a work related accident. Specifically, the petitioner alleges that she had a conversation with Sister Jean an administrator at the respondent, and a second conversation with Ms. Lynn Gronwick the Director of Human Resources. (R.24-31).

  With respect to the alleged conversation with Sister Jean, the petitioner was asked the following questions and gave the following responses:

  Q: First of all, who is Sister Jean?

  A: Sister Jean is our administrator, St. Patrick's Residence.

  Q: And when did you mention to Sister Jean that you had problems with your low back?

  A: Oh, it was during – I don't know the exact date but I know it was in the process – I can't give you the exact date.

  Q: Do you have a timeframe?

A: Timeframe around 2007.

(R.25-26).

With respect to the alleged conversation with Ms. Gronwick, the petitioner was asked the following questions and gave the following answers:

Q: I am going to ask you when you spoke to Lynn regarding your back condition?

A: I spoke to Lynn one day I was leaving early to go home because my left side was giving out on me, I was limping.

Q: When was that?

A: That was – you want the year, the date?

Q: Correct.

A: Like November of 2007. Close to around Thanksgiving time.

Q: Why do you believe it was close to Thanksgiving?

A: Because I remember us giving away baskets. That's what makes me remember, they was giving away Thanksgiving baskets.

(R.29-30).

Later, the petitioner was asked what she specifically told Ms. Gronwick and she testified as follows:

A: I told her I hurt my back and I needed to go to therapy, leave early.

Q: Did you tell her how you hurt your lower back?

A: No.

(R.30-31).

This is the full extent of the evidence introduced by the petitioner to establish that she gave notice of a work related accident to her employer within forty-five days of the alleged accident date as required by Section 6(c) of the Act. For the reasons outlined below, the Arbitrator finds that this testimony does not meet the requirements of Section 6(c) as

interpreted by the Illinois Supreme Court and that the testimony of the petitioner is unreliable and not trustworthy.

- Legal Requirements

Even if the Arbitrator was to accept that the conversations outlined above did take place as the petitioner alleges, it is clear in reviewing the petitioner's testimony that she did not provide her employer with notice of a work related accident as required by Section 6(c) of the Act; but rather, provided the employer with notice of a medical condition in her back. The Illinois Supreme Court has made it very clear that notice of a medical condition does not constitute notice of a work related accident. *Ristow* and *Fenix-Scisson*, supra; and, *White v. IWCC*, 374 Ill.App.3d 907 (2007).

The petitioner has provided absolutely no evidence to establish that she provided notice of a work related accident within forty-five days as required by Section 6(c) of the Act. Specifically, the Arbitrator notes that during the alleged conversation with Sister Jean, the petitioner testified that she told Sister Jean about the problems in her lower back. The petitioner did not, however, testify that she told Sister Jean that she was having problems in her low back due to a work related accident which is the information that she must provide to meet the notice requirements of Section 6(c) of the Act. (R.25).

With respect to the alleged conversation that the petitioner had with Ms. Gronwick, the Arbitrator notes that the petitioner again indicated that she told Ms. Gronwick of her back condition, but she expressly testified that she did not tell Ms. Gronwick how she hurt her back. (R.30-31). There was no testimony provided by the petitioner that she told Ms. Gronwick in November of 2007 that she had injured her back as a result of a work related accident which is the information that must be provided by the petitioner to meet the notice requirements of Section 6(c) of the Act.

The facts of the *Fenix-Scisson* case which was decided by the Illinois Supreme Court are very illustrative and similar to the facts of the present case. In *Fenix-Scisson*, the claimant's wife telephoned the foreman at the employer and notified him that her husband had been injured and was suffering from a medical condition as a result of an injury. The wife did not state that the injury was the result of a work related accident.

Based upon these facts, the Illinois Supreme Court stated that the telephone call from the wife to the foreman, in which the foreman was notified of the claimant's medical condition, did not constitute notice of a work related accident as required by Section 6(c) of the Act. Thus, the Illinois Supreme Court found that the claimant was not entitled to any

workers' compensation benefits based upon his failure to meet the requirements of Section 6(c). *Fenix-Scisson*, supra.

Recently, the Illinois Appellate Court had occasion to apply the notice requirement of Section 6(c) to a repetitive trauma situation. Specifically, in the case of *White v. IWCC*, 374 Ill.App.3d 907 (2007), the Appellate Court had occasion to address a very similar factual situation to the current case. In *White*, the claimant was employed for fifteen years performing manual labor including roof bolting, running a scoop, driving a tractor and shoveling. The claimant alleged that as a result of his repetitive employment activities he developed a condition in his right shoulder and low back both of which required surgery. The petitioner further alleged and established that his employer knew of the medical conditions, and therefore was on notice of a work related accident as required by Section 6(c) of the Act.

In reviewing the facts outlined above, the Appellate Court first stated that the notice requirements of Section 6(c) of the Act applies to employees who are alleging a repetitive trauma injury. The fact that the claimant was alleging a repetitive trauma injury did not remove the requirement that he must provide notice of an alleged accident within forty-five days as required by Section 6(c) of the Act. *White*, supra.

The Appellate Court went on to find that the employer had knowledge of the claimant's medical condition and that the claimant had been injured, but there was no evidence to establish that the claimant had notified the employer that his injuries were due to a "industrial accident" as required by Section 6(c) of the Act. The Court stated that the employer's "mere knowledge" of "some type of injury" does not establish the statutory notice under Section 6(c) of the Act. Consequently, the Appellate Court found that the claimant had not provided notice of a work related accident within forty-five days as required by Section 6(c) of the Act, and therefore, the claim for workers' compensation benefits was denied. *White*, supra.

Applying the Supreme Court's rationale as articulated in *Fenix-Scisson* and the rationale of the Appellate Court as articulated in *White*, to the facts of the present case, does clearly indicate that the petitioner has failed to establish that she provided notice of a work related accident to the respondent within forty-five days of the alleged accident date. According to the petitioner, during both of the alleged conversations she notified the employer of her medical condition, but in neither conversation did she state that she had suffered a work related accident. In fact, the petitioner testified that she did not tell Ms. Gronwick how she had injured her back. (R.31).

As stated by the Supreme Court, notice of a medical condition does not constitute notice of a work related accident under Section 6(c) of the Act. *Fenix-Scisson, supra.* Accordingly, the Arbitrator finds that the petitioner failed to provide notice of a work related accident to the employer within the requisite forty-five days as required by Section 6(c) of the Act and thus her claim for workers' compensation benefits is hereby denied.

- Impeachment of the Petitioner's Testimony

The petitioner claims to have provided notice of an alleged accident to her employer in 2007 and she points to the two conversations which are outlined above. The petitioner's testimony in this regard, however, has been impeached by her prior inconsistent statements and the direct testimony of Ms. Lynn Gronwick.

It is the respondent's position that the petitioner did not report the alleged accident of December 28, 2007 within 45 days as required by the Act. The respondent's position is supported by the written documents completed by this petitioner on May 27, 2009 introduced into evidence as Respondent's Exhibit #10. In reviewing these documents, which the petitioner admitted that she completed on May 27, 2009, the Arbitrator notes that on Respondent's Exhibit #10, the petitioner was asked when she "notified" the respondent of a work related accident. In response, the petitioner stated that she notified the respondent in "November of 2008." (R.70-71; Resp.Ex.#10).

Obviously, the petitioner's testimony that she provided notice of an accident in November of 2007 is not consistent with her statement on Respondent's Exhibit #10 which the petitioner completed on May 27, 2009. This Commission has always accorded greater weight to contemporaneous statements of a witness over later statements or versions of events. *Shell Oil v. Industrial Commission*, 2 Ill.2d 590 (1954) and *Vargas v. Millard Maintenance Services*, 03IIC18 (2003). In short, the petitioner's testimony that she provided notice of a work related accident in November of 2007 has been impeached by her own written statement which she completed in May of 2009.

Obviously, notice to the employer in November of 2008 of an alleged work accident occurring on December 28, 2007 is outside the forty-five day notice period as required by Section 6(c) of the Act. For this additional reason, the Arbitrator finds that the petitioner has failed to establish that she provided notice within the requisite timeframe required by the Act.

Yet other evidence cast doubt upon the petitioners' testimony that she provided notice of a work related accident to the respondent within forty-five days. Specifically, while the petitioner alleges that she provided notice of an accident to Ms. Gronwick in November 2007, Ms. Gronwick steadfastly denied that such a conversation took place. (R. 102). Ms. Gronwick stated that had the petitioner notified her of a work related accident in November, 2007, she would have completed the appropriate paperwork which included the Incident Report and the Employer's First Report of Injury (Form #45). (R.100-103). The Arbitrator notes that when the petitioner did report an accident on May 27, 2009 this was the exact procedure followed by Ms. Gronwick. (Resp.Ex.#10; and, Resp.Ex.#11).

The Arbitrator also notes that the petitioner's allegation of having reported a work related accident in November 2007 to Ms. Gronwick is contradicted by her testimony at trial. Specifically, the petitioner testified at trial that the reason she did not tell the physicians at the Pain Center of Chicago in February of 2008 that her condition was related to employment activities, was that she was unsure as to whether her employment activities played a causative role in the condition in her back. (R. 82).

The petitioner further testified that the reason she did not indicate to the chiropractor at Ostir Chiropractic Clinic in October of 2008; or to Dr. Rabin in February 2009, that her condition was related to employment activities was that she was unsure as to whether her employment activities played a causative role in the condition in her back. (R. 83).

Thus, by the petitioner's own testimony, she was unsure as to whether her employment activities played a causative role in her back condition in February of 2008; October of 2008; and February of 2009, yet, the petitioner claims to have told Ms. Gronwick in November of 2007 that she had suffered a work related injury involving her back. The testimony of the petitioner as outlined above, is inconsistent and cannot be reconciled. The petitioner's inconsistency in this regard cast further doubt upon her allegation of having reported a work related accident to Ms. Gronwick in November of 2007 as she now alleges.

Finally, the Arbitrator notes that it defies logic that the petitioner could have reported an accident of December 28, 2007 to Ms. Gronwick in November of 2007.

At the end of the day, after reviewing all of the evidence presented at trial, the Arbitrator finds that the petitioner failed to prove that she provided notice of a work related accident to the respondent within forty-five days of the alleged accident date as required by Section 6(c) of the Act. Thus,

the Arbitrator does not possess the authority to award the petitioner any workers' compensation benefits.

J. MEDICAL EXPENSES;
K. TEMPORARY TOTAL DISABILITY BENEFITS; and,
L. NATURE AND EXTENT OF THE INJURY

Is the respondent liable for the medical expenses; TTD benefits; and, permanency benefits claimed by this petitioner?

The Arbitrator adopts the findings of fact and conclusions of law as set forth in the preceding sections of this Decision. Consequently, since the Arbitrator has found that the petitioner did not sustain accidental injuries arising out of and in the course of her employment; that the petitioner did not provide notice of the alleged accident within the timeframe required by the Act; and, that there does not exist a causal relationship between the condition in the petitioner's back and the alleged accident, the Arbitrator hereby denies the petitioner's request for all workers' compensation benefits.

IV. CONCLUSION

After examining all of the evidence presented at trial, the Arbitrator makes the following findings:

- **That the petitioner failed to prove by a preponderance of credible evidence that she sustained accidental injuries arising out of and in the course of her employment with the respondent on December 28, 2007.**
- **The petitioner failed to provide notice of an alleged accident within the timeframe required by the Act.**
- **The condition in the petitioner's back is not causally related to the alleged accident.**
- **Based upon the findings set forth above, the petitioner's request for workers' compensation benefits is hereby denied.**

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

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

HONORABLE ARBITRATOR KURT CARLSON

10·31·13
DATE

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

Torrie Harper,
Petitioner,

vs.

NO: 12 WC 13241

Village of University Park,
Respondent.

14IWCC0580

DECISION AND OPINION ON REVIEW

Arbitrator Falcioni issued one decision for the above captioned claim and for Claim No. 11 WC 8754. Respondent appealed the Arbitrator's decision and contended that the Arbitrator neglected to issue two separate decisions and/or address each accident and the liability connected thereto separately. At issue on Review are whether there is a causal relationship between the December 10, 2011 work accident and Petitioner's present condition of ill-being, and if so, the extent of Petitioner's permanent disability. The Commission, after reviewing the entire record, finds that Petitioner sustained an accidental injury arising out of and in the course of Petitioner's employment on December 10, 2011. The Commission finds that said accident resulted in no loss time from work, $1,481.17 in medical expenses and no permanency, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified that on December 10, 2011 he was moving a big fish tank with a volunteer when the volunteer moved too fast causing him to step off a step and causing his left knee to pop. Petitioner said he didn't miss any time for work after the accident.

14IWCC0580

2. On December 15, 2011 Petitioner saw Dr. Payne. He reported that he was at work trying to move a fish tank when he went down and something popped. Dr. Payne diagnosed Petitioner's condition as a left knee problem, which was probably a lateral meniscus tear. He ordered a left knee MRI and prescribed physical therapy.

3. On January 10, 2012, Petitioner followed up with Dr. Payne. At that time he stated that his left knee felt better and he needed to go back to work. Dr. Payne released Petitioner to return to full duty work on January 12, 2012.

The Commission finds that there are only two medical entries pertaining to December 10, 2011 work accident. Given the above, the Commission find Petitioner sustained an accidental injury arising out of and in the course of his employment on December 10, 2011. Petitioner lost no time from work after the December 10, 2011 accident. Petitioner incurred $1,481.17 in medical expenses and Petitioner sustained no permanency as a result of the work accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to $1,481.17 in medical expenses under Section 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $1,481.17 under Section 8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

DATED: JUL 17 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/jm

6/5/14

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11 WC 8754
14 IWCC 0581

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

Torrie Harper,
Petitioner,

vs. NO. 11 WC 8754
14 IWCC 0581

Village of University Park,
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 Order of the Commission dated July 17, 2014, having been filed by Respondent. 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 Order dated July 17, 2014 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein. The parties should return their original Orders to Commissioner Mario Basurto.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Order 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 the Circuit Court.

DATED: OCT 31 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/jm
43

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

Torrie Harper,
Petitioner,

vs.

NO: 11 WC 8754
14 IWCC 0581

Village of University Park,
Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Falcioni finding that Petitioner sustained an accidental injury on October 18, 2013 (sic- should be 2010). As a result Petitioner was temporarily totally disabled from March 25, 2011 through September 7, 2011 and October 11, 2011 through November 30, 2011 for 33 weeks (sic-should be 31 weeks) under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to $40,090.94 in medical expenses under Section 8(a) of the Act and permanently lost 20% of the use of his left leg under Section 8(e) of the Act. The issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of his employment on October 18, 2010 whether a causal relationship exists between Petitioner's current condition of ill-being and the alleged October 18, 2010 work accident, and if so, the extent of temporary total disability and the nature and extent of Petitioner's permanency. The Commission, after considering the entire record, finds Petitioner sustained an accidental injury arising out of and in the course of his employment on October 18, 2010. The Commission further finds Petitioner's condition of ill-being was causally connected to the October 18, 2010 work accident up to and including October 29, 2010 but was not causally connected thereafter, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSION OF LAW

The Commission finds:

1. Petitioner testified he was the assistant manager of an animal park. His duties consisted of giving tours, letting the animals out, cleaning up after the animals, and dealing with their food. On October 18, 2010 his boss told him to lock all of the animals on the outside gate/to lift all of the doors up so the kids could get a glimpse of the animals. As he opened the bull's door, the bull looked like it was coming straight through the gate and coming toward the families on the tour. Petitioner said he stepped down onto the soil with his arms outstretched and he twisted/popped his left knee. The next morning he called Ms. Kelly Childress, the director, about the accident. He went to University of Chicago's emergency room.

2. The October 20, 2010 University of Chicago emergency records shows Petitioner reported he was experiencing left knee pain. He further reported that he awoke with the pain around 3 a.m. and there was no trauma. He reported that he has a history of dislocating his knee in past but it popped back in place. Petitioner's left knee x-ray showed trace knee joint effusion. Petitioner was diagnosed with a knee sprain. It was further noted that there was no trauma and no evidence of dislocation. Petitioner was instructed to follow up with his doctor in the next two days.

3. On October 22, 2010 Petitioner saw Dr. Yallavarthi and told him he twisted his left knee while he was sleeping on a couch two days ago at his girlfriend's place in the city. He heard something pop and went to the emergency room. He denied any direct trauma or fall. Dr. Yallavarthi opined that Petitioner possibly had a sprained left knee. He gave him a prescription for a knee brace and crutches and instructed him to follow up in one week.

4. On October 29, 2010 Petitioner followed up with Dr. Yallavarthi. At that time Petitioner reported that his pain had completely resolved and he is anxious to return to work. On physical examination, Dr. Yallavarthi noted that there was no apparent distress. There was no swelling redness or increased warmth in the left knee. Petitioner's range of motion for the left knee was normal. There was no instability. His drawer sign was negative. Dr. Yallavarthi diagnosed Petitioner as having a left knee strain that was resolving. He instructed Petitioner to continue to use the knee brace. He released him back to work on November 1, 2010 and told him if he has any further problems to contact their office.

5. On November 2, 2010 a Form 45 report of accident report was completed. In the history section it states Petitioner was giving a tour to a group of kids, try to get the ox back in the fence and away from the tour group when he twist and sprain his left knee. He further stated that his bone popped-out and he dislocated his knee. An undated/unsigned Supervisor's report indicates that the date of the accident was October 20, 2010. It further states that he had no idea what happened. He received a telephone call on Wednesday, October 20, 2010 from Petitioner that his leg was in pain and he would not be coming to

work. He suggested that Petitioner go to the doctor. Then Petitioner stated he hurt it on Monday at work in the barn trying to put the bull up. The bull got out of fence and was coming near a tour group.

6. On February 21, 2011 Petitioner returned to see Dr. Yalavarthi. Petitioner stated he lifts a lot of weights at work and had pain in left knee that started a couple of weeks ago. He had a similar episode in October of 2010 and it resolved with conservative management. He states he has not fallen or twisted his knee recently but his regular work is making his knee hurt and it is difficult to go up and down stairs. He states his leg is giving out when he is stepping down. A left knee MRI was ordered and Petitioner was instructed to wear a brace, was prescribed medication and was instructed to use ice/heat on his left knee.

7. The February 22, 2011 left knee MRI was found to be negative.

8. On March 3, 2011 Petitioner saw Dr. Payne. Petitioner provided a history that while working on his job an ox was coming to get in the gate. The patient tried to push the ox back and he injured his left knee. Dr. Payne diagnosed Petitioner with a left knee medial meniscus tear.

9. An addendum MRI report was issued. It stated that, upon request of Dr. Payne, the MRI images were re-reviewed by Dr. Mishra on March 4, 2011 and there was there was no evidence of a medial meniscal tear. The findings were discussed with Dr. Payne on March 4, 2011.

10. On March 18, 2011 Petitioner followed up with Dr. Yallavarthi. Dr. Yallavarthi noted that Petitioner has been experiencing pain off and on since he twisted his left knee in October of 2010. Petitioner reported he is a laborer and he carries lots of heavy loads and feels like his knee is giving out. Dr. Yallavarthi diagnosed Petitioner as having left knee internal derangement.

11. On March 25, 2011 Dr. Payne performed surgery on Petitioner's left knee consisting of a left knee arthroscopy with partial medial meniscectomy and limited chondrolplasty. The post operative diagnosis was a left knee medial meniscal tear as well as chondromalacia.

12. Petitioner underwent post operative physical therapy at ATI. On April 16, 2011 Petitioner told the therapist that he was conducting a Hearst Fort Tour when an ox came out of a stall. The people were freaked out and when he tried to plant knee he twisted it into the ground.

13. On April 29, 2011 Petitioner underwent an evaluation by Dr. Garelick. At that time Petitioner reported that he had sustained an injury on October 18, 2010 when he was

taking some adults and their children around for a tour. He stepped off a platform onto the floor of the ox's pen and twisted his left knee. On October 29, 2010 he told Dr. Yallavarthi that his pain was completely resolved. His examination at that time demonstrated no swelling, redness or increased warmth, normal range of motion and no instability. He was given a note to return to work on November 1, 2010 and was discharged from care. Petitioner alleges his knee continued to bother him from time to time but he was eager to get back to work in order to provide for his family. Due to persistent pain he followed up with Dr. Yallavarthi on February 21, 2011 at which time he said he had left knee pain that had started a couple of weeks ago. However, there was no intervening injury. He was sent for an MRI which was completed on February 24, 2011 and it was read as normal. Petitioner was then seen by Dr. Payne who read the MRI and interpreted it as demonstrating a medial meniscus tear. Dr. Payne spoke with Dr. Mishra, the radiologist, who felt that there was no meniscus tear. Petitioner underwent a left knee arthroscopy surgery on March 25, 2011. Dr. Garelick noted that unfortunately he had no operative report or MRI to review and as such his report is somewhat incomplete. He opined that Petitioner had reached maximum medical improvement on October 29, 2010 when he was released from care by Dr. Yallavarthi. Dr. Garelick stated that given the fact that Petitioner was completely asymptomatic as of October 29, 2010 he believed that it was more probably true than not that the injury that necessitated surgery occurred subsequent to October 29, 2010 office visit with Dr. Yallavarthi. He further opined that it is more probably true than not that because Petitioner was completely asymptomatic and returned to full duty work on October 29, 2010 his current complaints are due to some sort of subsequent intervening condition. Lastly he stated that given that there was no reported work injury and subsequent injury, the need for surgery should be considered as non work-related.

14. During a July 26, 2011 follow up appointment with Dr. Payne, Petitioner reported that his knee gave way and he fell down on Saturday while he was climbing the stairs.

15. In an August 10, 2011 IME Addendum Report, Dr. Garelick stated that since his initial evaluation he had been supplied with Petitioner's surgery report, MRI and additional medical records. Specifically, he was supplied with the October 20, 2010 emergency room records, the February 22, 2011 MRI report and the March 25, 2011 surgery records. At the time of the initially evaluation he needed to rely on Petitioner's testimony. Since then he has reviewed the MRI and found it shows no evidence of a medial or lateral meniscus tear. He commented that while the Petitioner described a work injury to his left knee on October 18, 2010, his history was not borne out by the medical records. Specifically, during the University of Chicago emergency room visit on October 20, 2010 Petitioner provided a medical history that he awoke from a sleep while staying at his girlfriend's house and he had left knee pain. More specifically, Petitioner did not describe any work-related injury. Further he told Dr. Yalavarthi on October 22, 2010 that he

twisted his left knee while sleeping on his girlfriend's couch in the city. He did not describe any type of injury occurring at the petting zoo. Therefore, his conclusion is that there is no objective evidence to support Petitioner's claim of a work related injury.

16. On August 23, 2011 Dr. Payne noted that Petitioner is going to return to work on September 23, 2011. On September 13, 2011 Dr. Payne noted that Petitioner is going to return to work on September 20, 2011 with modified duties of no lifting , pushing or pulling over 50 pounds.

17. On October 11, 2011 Petitioner reported to Dr. Payne that he is experiencing tightness and pain from left knee to his hamstrings since being back at work seven days ago. He reported that he is experiencing popping and clicking. If he sits too long, he gets cramping in his hamstring. On examination, Dr. Payne noted that Petitioner is tender to touch in the thigh. His pain is relieved with hypodrocodone liquid. He noted that Petitioner had not attended work conditioning since September 18, 2011. At that time, Dr. Payne ordered another MRI to rule out an adductor/ hamstring tear. He also prescribed physical therapy and medication.

18. On October 1, 2011 Dr. Payne noted that the Petitioner is complaining of left knee pain. The Petitioner reported that two days ago he slipped on the porch and fell and injured his left knee while at work. Dr. Payne noted that Petitioner re-injured his left knee. He ordered physical therapy and told Petitioner to return in two to three weeks for a recheck. He placed Petitioner on light duty. He indicated that Petitioner could return to work with restrictions of no lifting pushing or pulling over 50 pounds.

19. On November 29, 2011 Petitioner again saw Dr. Payne who noted that Petitioner is reporting he is without any complaints and he says his left knee feels much better. Dr. Payne noted that Petitioner is doing well and he released him to return to regular duties at work.

20. Petitioner said his supervisor was not present on October 18, 2010 and he was the acting supervisor. Petitioner said he went to the emergency room at University of Chicago on October 20, 2010 which was the same day he called Ms. Childress and said it was the bull that caused the accident. He agreed that at the emergency room he said he had knee pain upon awakening. He did not tell the emergency room doctor that he was injured when he woke up. Rather, he told him that he was in pain when he woke up. He thinks on October 22, 2010 Dr. Yalavarthi misconstrued the events as to how the accident happened. He denied telling Dr. Yalavarthi that he twisted his left knee while he was sleeping two days ago at his girlfriend's house in the city. Rather, he told Dr. Yalavarthi that he suffered an injury at work. He thinks that on April 29, 2011 Dr. Garelick misconstrued the work accident. He does not recall telling him that he stepped off a

platform onto the floor of an ox pen. He denied that on October 29, 2010 he told Dr. Yalavarthi that his knee pain completely resolved and that he wanted to go back to work. He subsequently testified that he wanted to go back to work on October 29, 2010 because they were behind on their bills and they were not getting any money coming in. He told the doctor that his pain resolved because he needed the money. He testified that after he returned to work and through March of 2011 he was not pain free. He guesses that the statement that he made to Dr. Yalavarthi that his knee pain had completely resolved was untrue. Petitioner said he was terminated by Respondent on April 11, 2013.

21. Petitioner entered PX1, a Blue Cross Blue Shield statement indicating that $3,949.62 was bill for the October 20, 2010 medical services provided to the Petitioner by the University of Chicago.

Based on the above the Commission finds Petitioner sustained an accidental injury arising out of and in the course of his employment on October 18, 2010. The Commission further finds Petitioner's condition of ill-being was causally connected to the October 18, 2010 work accident up to and including October 29, 2010 but was not causally connected thereafter.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $3,949.62 for medical expenses under §8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove a causal relationship exists between the accident of October 18, 2010 and Petitioner's condition of ill-being after October 29, 2010 and as such Petitioner is not warranted any compensation thereafter related to the above captioned claim.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove he sustained any permanent disability as a result of the October 18, 2010 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $15,201.47 under §8(j) of the Act' provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

DATED: OCT 3 1 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/jm

6/5/14

43

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly Ray,

Petitioner,

vs.

NO: 10 WC 30182

National Express Corp.,

14IWCC0582

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 and 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 is adding the alleged date of accident, June 2, 2010, to the findings prepared by the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 19, 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.

DATE: JUL 17 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

HSF
O: 5/21/14
049

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

RAY, KIMBERLY
Employee/Petitioner

Case# **10WC030182**

NATIONAL EXPRESS CORPORATION
Employer/Respondent

14IWCC0582

On 4/19/2013, 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 0.09% 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:

0009 ANESI OZMON RODIN NOVAK KOHEN
ADAM RETTBERG
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
DANIEL J CODY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

14IWCC0582

☐ 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)

Kimberly Ray
Employee/Petitioner

v.

National Express Corporation
Employer/Respondent

Case # 10 WC 30182

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Woodstock**, on **February 8, 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 _____

14IWCC0582

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$16,250.14**; the average weekly wage was **$406.25**.

On the date of accident, Petitioner was **44** 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

No benefits 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

4/16/13
Date

ICArbDec19(b)

APR 19 2013

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

14IWCC0582

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY RAY,	)	
	)	
vs.	)	No. 10 WC 30182
	)	
NATIONAL EXPRESS CORPORATION,	)	

In support of his Decision, the Arbitrator notes the following:

MEMORANDUM IN SUPPORT OF DECISION

STATEMENT OF EVIDENCE

The petitioner testified that she worked as a bus driver for Durham Bus Service, a division of National Express Corporation. She explained that as a bus driver she would have to do daily inspections before and after each run and that her job required bending and lifting. She indicated she drove a bus year round and is currently taking Norco and Nortriplyline and therefore is unable to obtain her commercial driver's license.

She testified that on June 2, 2010 she was beginning the afternoon route about 1:15 in Grayslake and was regularly assigned to the same bus. She testified that she felt fine when she went there and did an inspection. Her daughter was there as was allowed by the company and this happened about twice a week. The petitioner's daughter was sitting in the front seat behind the driver's seat when the petitioner went to the back of the bus to retrieve a sign. She testified she turned around and tripped on a passenger seatbelt that she hadn't seen before. She caught herself and did not fall to the floor and didn't say anything. She testified that her daughter helped her up and she felt right leg numbness from her hip to her big toe and pain in the knee down on the right side. She did not feel a problem with her back and drove her route. She testified that it felt like burning, like a charlie horse. She used her right foot normally, but drove with her left foot for the brake.

The petitioner testified she didn't report the matter right away because she thought it would go away. She said the next morning that there were pins and needles. Then she went to Dr. Chander, who was not her regular doctor. When she saw Dr. Chander the day after the alleged event at work, the petitioner admitted she said she had mowed her lawn but claims that she was okay after that until she had tripped. She also admitted that she didn't tell Dr. Chander about the seatbelt incident because she was in so much pain and just wanted to get her pain medication.

The petitioner testified that she underwent an MRI and chiropractic treatment and saw Dr. Alleva and also admitted that she did not tell Dr. Alleva about the seatbelt incident. She testified that it was not until August 2 that she described a work injury involving a seatbelt.

On cross-examination the petitioner again admitted that the first time she mentioned anything about a seatbelt was not until August 2 when she saw Dr. Alleva. She further admitted that that was the same day that she filed her Application for Adjustment of Claim. She denied that she advised Dr. Chander on June 3 that her problem had been going on for a few days or that it occurred while she was mowing her lawn. She admitted that she denied any trauma, heavy lifting or fall at the time she saw Dr. Chander and claimed it was because she just wanted to get her pain medication and leave. The petitioner further admitted on cross-examination that when she first reported needing to be off work for a back problem to her employer, she did not make any mention that it was work-related. Testimony from Alana Gielcyzk confirmed this was very close to the date on the work slip which was June 3, 2010 although she could not remember a specific date.

The petitioner denied any prior back history except for a 1987 back pain while working for Walgreens and doesn't remember any treatment before 2010. The petitioner remembered seeing Dr. Bernstein at the request of her employer and admitted that she denied any prior back problems. She denied telling Dr. Chander that she had any prior back problems or that she had previously been diagnosed with a herniated disk in her back. The medical records from Deerfield South where the petitioner was first treated by Dr. Chander note that petitioner told the doctor both those things (RE 8, p 7 of 10). The petitioner denied back treatment in 2008. When asked about the medical records from Glenbrook Hospital showing a lumbar spine x-ray, she claimed that the back problem she was having at the time in 2008 was in her thoracic area. The submitted medical records of Glenbrook Hospital confirmed that the complaint was low back pain and the x-rays were taken of the lumbar spine. (RE 7).

The petitioner also saw Dr. Alleva for injections. She first saw Dr. Alleva on July 19, 2010 and reported back pain for over a month with no event. (PE 2, p. 4 of 6). On Dr. Alleva's second visit on August 2, 2010, the petitioner told him that the problem was work-related. According to the records, the petitioner did not inform Dr. Alleva of it being work-related on the first visit because she was on medications. (PE 2, p. 2 of 6). The petitioner's testimony was she was there to get medication and that was why she didn't tell Dr. Alleva about the seatbelt incident, the same reason given as to why she didn't inform Dr. Chander at the first visit after the accident.

The petitioner admitted that she eventually told her employer that the back problem was work-related and admitted to completing paperwork for her licensing renewals. She confirmed her signature on the School Bus Driver Application Certification and an authorization to allow Durham to obtain her driving record, both of which were executed by her on July 15, 2010. The petitioner could not recall filling out paperwork about the back injury, but when presented with Respondent Exhibit 1, she admitted that that was her signature and further that the Incident Report she completed on July 15, 2010 indicated she was standing up from her seat when she felt pain down her right leg. She further admitted to filling out an Employee's Report of Work Injury on that same day, providing a history also of standing up and feeling pain down her leg. She further admitted that as of July 15, she had not told either her doctors or her employer about the alleged seatbelt incident. She further admitted that the first time that that appeared in the records was the day that she signed her Application for Adjustment of Claim.

With respect to the event, the petitioner testified on cross that she was approximately two steps in front of the back door when she tripped. She did not feel that it was a safety issue to be driving with the left foot on her brake because of problems that she was having with her right. She did not feel it was necessary to contact a supervisor at that time before going out and picking up the students on the afternoon run.

On re-direct, the petitioner explained that she didn't tell the doctors about the seatbelt injury, again claiming she was on her medications and just wanted to get them and leave. She further stated that when she reported it to the employer, she didn't feel that she had to go into detail but admitted on re-cross that the report specifically asked her to complete the form in detail.

The petitioner also submitted the testimony of her daughter Sara Ray. Sara testified that she would sometimes just ride along with her mother and was sitting in the seat directly behind the driver's seat playing on her phone. She claimed that she heard a noise and went back to see what had happened and saw that her mother had fallen on a seat and there were seatbelts all over the aisles. She testified that her mother was approximately four seats in front of the back door when this happened. Sara Ray was 16 at the time of the event and was currently 18 at the time of her testimony.

The respondent submitted the testimony of Alana Gielczyk. Ms. Gielczyk indicates that she works in the Safety Department at Durham and that the petitioner turned in a work slip indicating that she was not able to drive. Ms. Gielczyk could not remember the specific date but said it was very close to the date on the work slip. At that time, the petitioner made no mention of how the back injury occurred. Ms. Gielczyk further testified that she then began to contact the petitioner about renewal for her upcoming license expiration and was working on a physical for the petitioner. Ms. Gielczyk testified that she left messages for the petitioner but never actually spoke to her after the day that she received the work slip in June. She confirmed that the phone messages were listed on the tracking sheet identified as Respondent's Exhibit 5.

The respondent also submitted the testimony of Michael Pontacelli. Mr. Pontacelli also worked in the Safety Department at the respondent. He testified that on July 15, 2010 he did discuss re-certification with the petitioner. The tracking sheet noted that this occurred on July 15. Mr. Pontacelli further testified that he could not remember any conversations regarding the petitioner's back at that time. He has not spoken with Ms. Ray since that date.

The respondent also submitted the testimony of George Davison. Mr. Davison was the manager of the Grayslake location for the respondent and knew Ms. Ray from her work there. He testified that on July 15, 2010 the petitioner reported to him that she was walking from her bus to her car when she felt pain down her right leg. He asked her to complete the Driver's Incident Report and the Employee's Report of Work Injury. He testified that this was the first he knew that the petitioner was reporting an injury that occurred on the employer's premises. He has not spoken with Ms. Ray since that day.

The respondent further submitted the Employee's Report of Work Injury that was signed by the petitioner on July 15, 2010. The form asked the petitioner to "describe how the injury occurred in SPECIFIC detail." The petitioner wrote "finished p.m. route, got up out of my seat and my (R) leg went numb." (RE 3). Respondent also submitted the Driver's Incident Report

completed by the petitioner on July 15, 2010. Under description of incident, she reported that she was exiting the bus when "I got up from my seat, I felt my right leg, (from my hip to my toe) got numb." (RE 4).

The petitioner stated she followed up for medical care with Dr. Karaikovic who recommended surgery and the petitioner then saw Dr. Karahalios and underwent surgery on September 24, 2010. The petitioner testified that she was not to drive while on medications and had therapy at Athletico. She testified that by the end of January she had no radicular pain but felt this was due to the medications which were to be taken as needed, but she advised she took them three times a day. The petitioner testified that Dr. Karahalios placed her at baseline neurologically on April 27, 2011 but then she followed up with Dr. Viloch on July 22, 2011 with the same back pain and radiation down the right leg. She has undergone two injections and remains on pain medications. She has testified that she has not returned back to work and claimed that she contacted Durham in July of 2011, but was unable to drive. On the Stipulation Sheet, the petitioner claimed temporary total disability through April 27, 2011.

Her current complaints include being stiff if she sat too long and her right leg feeling like a rubberband is wrapped around above the knee. She reported an inability to bend down and burning in her right leg, reporting that she knows when it would snow or rain based on the burning. She testified that she was no longer able to do the chores and is currently looking for office work and that her doctor told her she shouldn't drive.

The petitioner submitted records from Advanced Pain Relief Specialists, North Shore University Health System, Dr. Christine Villoch, Evanston Hospital, Dr. Dean Karahalios, Athletico, Skokie Hospital, Dr. Manu Chander and unpaid medical bills. These medical records document the petitioner's report of back pain. It documents the petitioner's treatment and eventual back surgery. The first mention in any of these medical records of a seatbelt incident was not until August 2, 2010 when the petitioner saw Dr. Alleva.

Respondent presented the Section 12 report of Dr. Avi Bernstein, a cervical and lumbar reconstructive spinal surgeon. The report indicates that the petitioner was examined on November 14, 2011 and Dr. Bernstein had the opportunity to review medical records and MRI films in conjunction with the examination. Dr. Bernstein noted subjective complaints in the right lower extremity and radiculopathic symptoms following an apparently successful lumbar microdiscectomy. He noted the normal EMG and the inconsistent pain behaviors and findings on physical examination suggesting magnification or exaggeration of symptoms. Dr. Bernstein also noted the June 3, 2010 report where the petitioner reported to Dr. Chander that there was no history of trauma and that she developed right lower extremity sciatica after mowing her lawn. Dr. Bernstein felt that the petitioner's condition was due to a routine progression of her degenerative condition from L4 to S1 and was not a result of any work incident.

Respondent also submitted the medical records of Deerfield South Internal Medicine. The records reflect that the petitioner first saw Dr. Manu Chander on June 3, 2010, the day after the alleged work incident. The complaints indicated that the petitioner had right lower back pain radiating from the frontal lateral leg to the large toe for the past few days, which started after she was mowing her lawn. The petitioner denied any trauma or heavy lifting or any weakness or falls. The petitioner also reported a history of an L4-5 disc herniation but reported no recent attacks and denied any past physical therapy. (RE 8, p. 7 of 10). On July 19, 2010 the petitioner

followed up with Dr. Chander who reported an issue for over a month with no event. The petitioner denied any prior history of back pain during this visit.

Respondent further submitted the records from North Shore Health System which reflect that on June 3, 2008 the petitioner had x-rays at Glenbrook Hospital. The reason for the x-rays was listed as low back pain and the x-rays revealed disc space narrowing at L4-5 and L5-S1 with osteophytes with an impression of degenerative disc disease for the lower lumbar spine. (RE 7).

CONCLUSIONS

(C) Did an accident occur that arose out of and in the course of petitioner's employment by respondent?

With respect to issue (C) on accident, the Arbitrator finds that the petitioner did not sustain a compensable accident while working for the respondent. The Arbitrator finds persuasive that the petitioner had pre-existing back problems noted in her medical records, though she denied same. The petitioner's credibility with respect to her prior back problems is not credible in light of the contemporaneous and prior medical records. The Arbitrator further finds that the petitioner's testimony that she did not tell any of her doctors or her employer about a seatbelt incident until the day she filed her Application for Adjustment of Claim was probative on how the injury occurred. The petitioner's testimony on how the accident occurred was not credible in light of the other testimony and the contemporaneous medical records.

The Arbitrator finds persuasive that the petitioner had an aggravation of her underlying degenerative condition while she was mowing the lawn a few days before she went to see Dr. Chander, as reported to Dr. Chander in his medical notes no the first visit after the alleged accident. The Arbitrator further notes that the petitioner herself, six weeks after the alleged accident, reported a different history to her employer – both on the Driver's Incident Report and the Employee's Report of Injury. On that history she indicated that she was rising from her seat when she felt pain down her leg. The Arbitrator notes that even if this history was accepted as valid, this would not constitute an accident arising out of and in the course and scope of petitioner's employment. See *Procopio v. Home Depot*, 04 WC 20342, 11 IWCC 0708 (IWCC 71911). In that case the petitioner testified that she got up from her stool and twisted when she froze and couldn't move. The Commission held that simply getting off of a stool and turning is not an accident under the Act. The Arbitrator further notes the third version of the petitioner's incident reported to George Davison that the petitioner was walking from her bus to her car when she felt pain down her leg. This also would not be an accident as defined under the Act. The Arbitrator finds it significant that the petitioner did not report to anyone of the involvement of a seatbelt until the day she signed her Application for Adjustment of Claim.

The Arbitrator notes that the petitioner's testimony that she walked by a seatbelt lying on the floor and didn't see it until she turned around and tripped was not credible given the daughter's testimony that there were seat belts all over. The petitioner also was inconsistent with her daughter as to where the fall occurred. The petitioner testified that she was one or two seats from the back of the bus and the daughter testified that she was four seats form the back of the bus. Additionally, the petitioner's own testimony was inconsistent with her own reports to her employer on July 15, 2010 both as to how the accident took place and when it took place (before or after her afternoon route).

None of the three versions reported by the petitioner prior to what was reported on August 2, 2010 would be compensable and the evidence does not support the version of petitioner tripping over a seatbelt reported that day when she also filed her Application for Adjustment of Claim. The Arbitrator denies that the petitioner suffered an accident as defined under the Act.

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

With respect to the relationship of the current condition of ill-being being causally related to the injury, the Arbitrator hereby adopts his conclusions with respect to Issue (C) and incorporates same herein. The Arbitrator also finds persuasive the testimony of Dr. Bernstein which held that the petitioner's back condition was a natural progression of her pre-existing degenerative condition and not causally related to her employment.

(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?

With respect to the reasonableness and necessity and relationship of the medical services to the petitioner's work injury, the Arbitrator adopts his conclusions with respect to Issue (C) finding no accident. Because there was no accident as defined under the statute and case law, no medical benefits are due the petitioner for either past or prospective medical.

(L) What temporary benefits are in dispute? TTD.

With respect to what temporary benefits are due, the Arbitrator adopts his findings from Issue (C) finding no accident and as a result, awards no temporary benefits to the petitioner.

_____

Arbitrator Edward Lee

Date: _____

04 IL.W.C. 20342, 11 I.W.C.C. 0708, 2011 WL 3528331 (Ill.Indus.Com'n)

14IWCC0582

Illinois Workers' Compensation Commission
State of Illinois
County of Du Page

LINDA PROCOPIO, Petitioner
v.
HOME DEPOT, Respondent

No. 04 W.C. 20342, No. 11 I.W.C.C. 0708

July 19, 2011

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, prospective 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 April 20, 2010 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 probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

David L. Gore

James F. DeMunno

Mario Basurto

Attachment 1

NOTICE OF ARBITRATOR DECISION

PROCOPIO, LINDA, Employee/Petitioner

HOME DEPOT, Employer/Respondent

Case No. 04WC020342

14IWCC0582

On April 20, 2010, 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 0.22% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Attachment 2

STATE OF ILLINOIS

COUNTY OF DUPAGE

ARBITRATION DECISION

Linda Procopio, Employee/Petitioner

v.

Home Depot, Employer/Respondent

Case No. 04 WC 20342

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 Wheaton, on March 16, 2010. 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

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

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

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?

FINDINGS

On April 10, 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 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, the average weekly wage was $476.00.

On the date of accident, Petitioner was 44 years of age, *married* with no dependent children.

ORDER

Petitioner's claim for compensation is denied.

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.

Anthony C. Erbacci
Arbitrator

Date April 15, 2010

April 20, 2011

Attachment 3

ATTACHMENT TO ARBITRATION DECISION
Linda Procopio v. Home Depot

Case No. 04 WC 20342

FINDINGS OF FACT

In April of 2004 the Petitioner was employed by the Respondent as a cashier. On April 10, 2004 she was assigned to assist customers at the self checkout lane. The Petitioner testified that she was seated on a metal stool as a customer approached the checkout area and she got up from the stool to assist the customer. The Petitioner testified that when she got up from the stool she twisted and "I froze. I couldn't move. I was in pain." The Petitioner could not remember whether she twisted to the left or to the right but testified that she had pain in her low back which went down into her right leg.

The Petitioner testified that she just stood there for a while and then walked very slowly to the break room and sat down. She testified that in the break room she noted pain in her back and right leg that was so extreme she basically could not move. She indicated she left the store early that day after notifying her employer of her claimed injury. The Petitioner testified that she worked for a few more days but continued to have pain in the back of her leg.

On April 15, 2004, the Petitioner sought medical treatment with Dr. Marie Kirincic at Hinsdale Orthopaedics. X-

rays were taken of the lumbar spine which showed spondylolisthesis between L4 and L5; indirect spondylolisthesis L5 with narrowing disc space between L4-5 and possible foraminal narrowing at L4-5 and L5-S1 as well as degenerative changes in the SI joint. The doctor's impression at the initial visit was 1) L4-5 spondylolisthesis Grade 1; 2) degenerative joint disease L4-5 with possible foraminal narrowing L5-S1; 3) rule out acute pars fracture at L4-5 and right L5-S1 nerve root impingement with MRI and bone scan.

An MRI ordered by Dr. Kirincic revealed 1) Grade I spondylolisthesis L4 on 5 associated bilateral spondylosis at the L4 level as seen on conventional radiographs; 2) L4-5 disc narrowed and desiccated; 3) mild narrowing between exit foramina L4 root bilaterally related to the spondylolisthesis; 4) L4 root nerve root involvement cannot be excluded; 5) no evidence of spinal stenosis; 6) no evidence of focal disc protrusion or disc extrusion. A bone scan performed on April 21, 2004 showed no recent acute fracture.

Dr. Kirincic recommended conservative care including transforaminal epidural steroid injections at the L4 interspace, physical therapy, and chiropractic care. An MRI of the pelvis was performed at Hinsdale Orthopaedics on July 30, 2004 and was deemed normal. On September 1, 2004, a right sacroiliac injection was administered by Dr. Cohen at LaGrange Memorial Pain Management Center upon referral of Dr. Kirincic. Dr. Kirincic's impression remained the same throughout her course of treatment and the Petitioner was eventually referred to Dr. Zindrick for possible surgical options and discography.

On September 8, 2004 the Petitioner came under the care of Dr. Zindrick. The doctor's impression after examination was probable disc herniation at the L4-5 level, intraforaminally with preexisting degenerative spondylolisthesis at L4-5. Dr. Zindrick recommended a myelogram/post myelogram CT and indicated that the Petitioner was a candidate for a decompression laminectomy and foraminotomy, probable discectomy at the L4-5 level with stabilization and internal fixation.

On September 27, 2004 Dr. Zindrick performed a myelogram and post myelogram CT. His impression spondylolisthesis and herniated nucleus pulposus at L4-5 as well as segmental instability. The treatment recommendation was a lumbar laminectomy and fusion at the L4-5 level and on October 13, 2004 Dr. Zindrick performed the following surgical procedure: 1) decompressive laminectomy and foraminotomy L4-5 bilaterally; 2) 360-fusion L4-5 with cages; 3) infused iliac crest bone graft; 4) posterolateral fusion; 5) internal fixation L4-5 with black stone pedicle screws; 6) right iliac crest bone graft; 7) SSEP/EMG monitoring. The Petitioner followed up with Dr. Zindrick post surgically and on April 21, 2005 Dr. Zindrick opined that the fusion appeared to be solid and he diagnosed trochanteric bursitis. The Petitioner continued a course of physical therapy and continued to treat with Dr. Kirincic through 2006. On February 6, 2006 Dr. Kirincic noted trochanteric bursitis pain as well as ongoing discogenic pain and an MRI of the left hip was performed which revealed no major pathology.

Dr. Kirincic referred the Petitioner to Dr. Gourinei for hip pain. After examination Dr. Gourinei recommended articular injections and an MRI to rule out avascular necrosis. MRI of the hip was done February 20, 2006 and on March 8, 2006, Dr. Gourinei noted good relief from the pain and diagnosed pincer impingement. The Petitioner returned to Dr. Gourinei on April 25, 2006 for the hip problem and the doctor noted calcification of the labrum and recommended an arthroscopic procedure.

The Petitioner last saw Dr. Zindrick on May 25, 2006 with complaints of ongoing pain, and Dr. Zindrick referred her to Dr. Chudik since Dr. Gourinei had left Hinsdale Orthopaedics. Petitioner followed that referral and saw Dr. Chudik on August 31, 2006. At that time Dr. Chudik performed an inter articular injection with fluoroscopic guidance.

On October 6, 2006 Dr. Chudik performed a left hip arthroscopy including left hip debridement, ligamentous teres and cartilage damage noted on the femoral head. A chondroplasty as well as an anterior labral repair of femoral osteoplasty was performed. Dr. Chudik saw the Petitioner in follow up on November 14 and opined she was doing well after the hip scope and recommended additional physical therapy. The Petitioner continued to follow up with Dr. Chudik and on April 19, 2007 additional injections into the hip were performed and continued physical therapy was recommended. At that time, Dr. Chudik opined the Petitioner could only return to sedentary type office work due to ongoing low back right and left leg problems. On January 14, 2008 Dr. Chudik diagnosed IT band syndrome and recommended additional therapy.

On April 17, 2008 the Petitioner was examined by Dr. Mark Lorenz at the request of her attorney. Dr. Lorenz testified via deposition that there was a causal relationship between the events that occurred at work in April of 2004 and the subsequent condition of ill being. On April 24, 2008 Petitioner underwent a functional capacity evaluation at the Athletic and Therapeutic Institute. The functional capacity evaluation was deemed valid and the therapist opined that the Petitioner could return to work in a light physical demand level. The therapist opined that her position as a cashier met her current physical abilities and recommended that she attempt to return to work with her doctor's approval.

On May 12, 2008 Dr. Chudik occurred at which time he opined that the Petitioner was at maximum medical improvement. Thereafter, Dr. Chudik authored a narrative report and his deposition was taken. Dr. Chudik opined to a reasonable degree of medical and surgical certainty, that more likely than not, the Petitioner's limitations, altered mechanisms and gait associated with her persistent back pain exacerbated her acetabular impingement of the left hip and contributed to her anterior labral and IT band symptoms which required surgery in October of 2006.

On November 15, 2006 Petitioner was examined by Dr. Alexander Ghanayem at the request of the Respondent. Dr. Ghanayem confirmed that Petitioner suffered from spondylolisthesis at L4-5 and that the condition preexisted her work injury of April 10, 2004. Dr. Ghanayem also opined that the surgical procedures performed on the Petitioner were medically reasonable from a diagnostic standpoint but he disagreed that the events at work on April 10, 2004 were a work injury.

The Petitioner testified that prior to her work injury of April 10, 2004 she had not injured her lower back or hip area. She also testified that subsequent to that date of injury she had not had any injuries to her lower back or hips. The Petitioner testified that she presently continues to experience pain in her back upon awakening; inability to lift or bend; inability to comfortably lift more than 10 pounds; pain in the lower back; inability to walk more than 15 to 20 minutes comfortably; inability to sit for more than an hour comfortably; difficulty bending and twisting when performing daily activities of daily living including housework, yard work and leisure activities. The Petitioner testified that she did not have any of these problems prior to the work injury of April, 2004.

In Support of the Arbitrator's Decision relating to (C), Did an accident occur that arose out of and in the course of the Petitioner's employment by the Respondent, the Arbitrator finds and concludes as follows:

On April 10, 2004, the Petitioner was employed by the Respondent as a cashier and was sitting on a stool at the "self check-out" counter. A customer came to the register and as she stood up off the stool and turned or twisted to go help the customer, she felt a pain sensation in her lower back and into her right leg, and then "froze." Petitioner could not remember if she turned to the left or the right.

When Petitioner was getting off the stool and turning toward the customer, she was not holding or carrying any-

thing in her arms or hands, nor was she engaged in any lifting activities. As she was getting off the stool and turning toward the customer, she was not in a hurry and there was no urgent need to help the customer Petitioner did not fall. She did not trip over any debris, nor did she slip on any substance. She was not ascending or descending any stairs at the time she felt lower back pain. Petitioner simply got off a stool, turned and felt lower back pain.

The "accident" element of "arising out of refers to the requisite causal connection between the employment and the injury. In other words, the injury must have had its origin in some risk inherent in or incidental to the employment. Iglehart v. Meijer, 05 1WCC 0247, quoting Eagle Discount Supermarket v. Industrial Commission, 82 Ill.2d 331 (1980). In this case, the Petitioner got off a stool, turned and felt lower back pain. She failed to identify any risk inherent in or incidental to her employment that caused or subjected her to an increased risk of sustaining a lower back injury.

Based upon the testimony of the Petitioner and the applicable case law, the Arbitrator finds that the Petitioner failed to prove she sustained an accident that arose out of her employment on April 10, 2004. Although Petitioner was in the course of her employment when she experienced lower back pain on that date, she failed to prove that her lower back pain was caused by an increased risk of her employment by Respondent. The mere fact that an individual experiences an onset of pain while at work is not, in itself, sufficient to constitute and accident arising out of the employment.

The Petitioner's claim for compensation is denied. Determination of all remaining disputed issues is moot.

04 IL.W.C. 20342, 11 I.W.C.C. 0708, 2011 WL 3528331 (Ill.Indus.Com'n)

END OF DOCUMENT

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

Vance McClenton,

Petitioner,

vs.

NO: 07 WC 33257

Joey's Moving & Trucking/All Source One,

Respondent,

14IWCC0583

DECISION AND OPINION ON RESPONDENT'S 19(h) PETITION

Timely Petition for a 19(h) having been filed by the Respondent's herein and notice given to all parties, the Commission, after considering the issue of whether Petitioner's disability has materially decreased since the time of arbitration and being advised of the facts and law, finds that Respondent has failed to prove a decrease in Petitioner's disability.

Respondent's offered into evidence a Dr. Ghanayem Report. (Respondent's Exhibit 1) In that report dated June 18, 2012, the Doctor found that Petitioner sustained a lumbar strain on the date of accident with no other traumatically induced injury. He further opined that Petitioner should be able to return to work at his pre-injury status but for the renal dialysis fistula and his need for dialysis. It was his opinion that those conditions were preventing Petitioner from returning to his pre-injury work status.

Dr. Chen, who had previously treated the Petitioner and who the Arbitrator found to be persuasive, on October 11, 2012 confirmed the diagnosis of Cauda Equine Syndrome. (Petitioner Exhibit 1)

Dr. Chen had previously found on August 12, 2009 that P could only return to work at light duty with no lifting over 25 pounds, no climbing or standing at heights on ladders or platforms and no significant bending. Dr. Chen indicated at that time that these restrictions were permanent.

141WCC0583

Doctor Chen indicated that on October 11, 2012 Petitioner had some limited improvement in his condition, but still reports impairment of his bladder, bowel and sexual dysfunction. Petitioner also reported low back pain after strenuous activity and after dialysis when he has been sitting for prolonged period of time. "Due to the nature of his injury, I had recommended that Mr. McClenton be restricted from heavy lifting and the work he previously performed when he was injured, and it is my recommendation that these restrictions be permanent and are due to the injury sustained in July 2007." (Petitioner Exhibit 1)

The Commission finds that Dr. Chen's report is more credible than that of Dr. Ghanayem. Dr. Ghanayem does not mention anything about Cauda Equine Syndrome in which the Arbitrator found was causally connected to this accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Respondent has failed to prove Petitioner's disability has materially decreased, Respondent's claim for a reduction of Petitioner's 8(d) (1) under §19(h) 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: JUL 17 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

HSF
O: 5/22/14
049

STATE OF ILLINOIS)
) SS.
COUNTY OF DEKALB)

☐ 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

Frank Camelin

Petitioner,

vs.

NO. 05 WC 00187

Lake County Grading Company

14IWCC0584

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to an order of remand from the Circuit Court of Winnebago County. In accordance with the order of the Circuit Court entered September 7, 2012 the Commission considers the issue of maintenance benefits from January 27, 2008 through November 16, 2009 and vocational assessment and finds that Petitioner is entitled to Maintenance Benefits as stated below.

The Commission further remands this matter to the Arbitrator of the Workers Compensation Commission for determination of a further amount, if any, pursuant to Thomas v. Industrial Commission 78 Ill.2d 327, 399 N.E. 2d 1322, 35 Ill Dec. 794 (1980)

Petitioner was a 51 year old heavy equipment operator who sustained injury when he slipped off a double barrel scraper on September 29,2003 and landed on his feet twisting his right knee as he landed. He was seen that same day in the Emergency Department and referred to an orthopedic surgeon, Dr. Shawn Palmer. An MRI was performed which revealed a "horizontal" tear of the medial meniscus, a "complex tearing" of the lateral meniscus and a complete rupture of the anterior cruciate ligament. Additionally, the MRI demonstrated "large joint effusion, prominent suprapatellar plica and a large Baker's cyst containing internal debris

and/or loose bodies." On October 2, 2003 Dr. Palmer repaired the lateral meniscal tear but not the ruptured ACL.
As early in treatment as November 11, 2003, Dr. Palmer noted "There is a distinct possibility that his knee will not provide him the range of motion stability to climb in and out of the cab of his truck, in which case we may have to re-evaluate his job status requirements." This clinical note was highlighted by the Arbitrator in his Findings of Fact.

Petitioner returned to work at another employer on November 24,2003. On February 11,2004 Petitioner underwent a second surgery on his right knee by Dr. Palmer. At that time a reconstruction of the ACL, repair of the medial meniscus and chondroplasty of the medial femoral condyle were performed. After a course of physical therapy Petitioner returned to work as a heavy equipment operator in June 2004.

Petitioner continued to be troubled by right knee pain and Dr. Palmer ordered another MRI which now showed a complete tear of the medial meniscus. Further surgery was recommended and a Section 12 examination was performed by Dr. Brian Cole who concluded the tear was work related.
Petitioner switched his care to Dr. Howard Freedberg . On January 19,2005, Dr. Freedberg performed a third surgery on Petitioner's right leg which entailed partial medial and lateral menisectomies , and chondroplasties of the patella and medial femoral condyle.

On February 24, 2005 Dr. Freedberg recorded complaints of burning pain in Petitioner's left leg due to compensating for the right knee injury. Petitioner underwent surgery to the left knee on April 18,2005 which consisted of partial medial and lateral menisectomies and chondroplasties of the left patella and medial femoral condyle.

A second Section 12 examination was performed by Dr. Brian Cole on June 5, 2005 the report stated in relevant part:
After review of the above documentation regarding the left knee and the fact that the left knee apparently has no prior history before the postoperative therapy ensued for the right knee, I would qualify the left knee as indirectly causally related to the right knee injury of 9-23-03. This may very well be an aggravation of a pre-existing condition, but nonetheless the overuse compensatory load on the left knee most likely caused the aggravation and led to the left knee arthroscopy by Dr. Freedberg.

Additional physical therapy was undertaken and Petitioner was released to regular work on July 11, 2005. Dr. Freedberg cautioned Petitioner that his knees would continue to degenerate and he would likely require bilateral knee replacements. In December 2005 a series of Suparz injections were administered bilaterally for symptomatic relief pending bilateral joint replacements.

In May 2006, Petitioner was seen by another section 12 physician selected by Respondent, Dr. Ammar Anbari M.D. who concurred with Dr. Freedberg's treatment plan and

determined that the right knee condition was related to the accident and the left knee condition was due to favoring the right knee.

On June 22, 2006 Petitioner began to lose time from work as no light duty was available. The injections were providing no lasting relief and Dr. Freedberg recommended surgery.
Knee replacement surgery was performed on Petitioner's left knee on January 12 ,2007. The right knee joint replacement was performed on May 25, 2007. On October 3, 2007 Petitioner consulted his treating orthopedic surgeon with complaints that his knees were "not working right". A series of steroid injections were administered to both knees. Petitioner was released to return to work at light duty.

The Arbitrator found as a material fact that by reasonable inference from the most persuasive medical evidence (save Dr Jay Levin, Respondents 3rd Section 12 examiner whose practice focuses on spinal care) that a causal connection exists between the accident as alleged in the case at bar and the Petitioner's necessity for knee surgery, replacements plus his current condition of ill-being.

Petitioner reached maximum medical improvement on January 16, 2008 having been discharged from care by Dr. Freedberg. Petitioner was placed under permanent restriction to sedentary duty. The Petitioner testified at hearing that he was never contacted by his employer and vocational rehabilitation was never started. A 4th Section 12 examination was conducted on Petitioner by Dr. Robert Daley M.D. on February 15, 2008. Respondent terminated TTD benefits on June 22, 2008.

Dr. Daley testified at deposition to the conclusion that all the treatment stemmed from the original accident and that all the treatment received was reasonable. He concurred with Dr. Freedberg that permanent restriction to sedentary duty was appropriate.
A Petition for Vocational Assessment was filed on January 15, 2009. Respondent did not provide the requisite vocational evaluation or rehabilitation as mandated by Section8 (a) of the Act or Rule 7110.10

At hearing Arbitrator Andros found as a matter of fact and conclusion of law that the Petitioner sustained an accident arising out of the course and scope of his employment on September 29, 2003.

The Arbitrator further found that as matter of fact and conclusion of law there is a causal connection between the accident of September 29, 2003 and the condition of ill-being in the left knee and right knee of the Petitioner.
The Arbitrator ruled that the Petitioner was entitled to maintenance payments from January 17, 2008 through November 16, 2009. Arbitrator Andros filed his decision on March 8, 2010 and a corrected award was entered on March 29, 2010.

Petitioner and Respondent filed cross appeals and the Commission filed its decision on October 27, 2011 affirming in part the award of the Arbitrator but vacating the award of maintenance benefits in its entirety citing to the testimony of Petitioner that he had not engaged in any job search and that he was incarcerated for an aggravated DUI and driving on a revoked drivers license and unavailable to work from February 20, 2009 through September 18, 2009.
This matter came before the Circuit Court on cross-appeals filed on the October 27, 2011 Worker's Compensation Commission adjudication. The Circuit Court affirmed all issues brought on appeal with the exception of the Commission's denial of maintenance. The Circuit Court reversed that portion of the Commission's decision citing to the following undisputed facts; Petitioner's treating physician gave him permanent sedentary restrictions, the restrictions prevented Petitioner from doing his regular job duties, Respondent Lake County Paving Company did not have any accommodated position for Petitioner and Petitioner requested a vocational assessment from Respondent. Therefore, the award of vocational assessment and award of vocational rehabilitation is not against the manifest weight of the evidence. The Circuit Court order provided that the Petitioner should not receive benefits for the 7 month period that he was incarcerated.

The Circuit Court denied Respondent's Motion for Reconsideration and motion for finding under 304 (a), 306 or 308 on October 18, 2012.

IT IS THEREFORE ORDERED BY THE COMMISSION that having considered the procedural history and the facts in evidence it concludes that the amount owed for Maintenance Benefits under Section 8(a) of the Workers' Compensation Act; maintenance benefits of 65 4/7 weeks for the periods of 1-17-08 through 11-16-09, minus the period of incarceration extending from 2-20-09 through 9-18-09, using the Petitioner's maintenance benefit rate of $1,012.01 the award of Maintenance benefits equals $66,358.94 (65 4/7 x 1,012.01).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Maintenance from 1-18-08 through 2-20-09 and 9-18-09 through 11-16-09.

IT IS FURTHER ORDERED BY THE COMMISSION that bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $66,500.00. 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 the Circuit Court.

DATED: JUL 17 2014
SJM/msb
o-5/1/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

Kristine Isern,

Petitioner,

vs.

No. 12WC026238

14IWCC0585

United Airlines, Inc.,

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 whether the accident arose out of and in the course of Petitioner's employment, notice, causal connection, medical expenses, temporary disability, permanent disability, penalties pursuant to sections 19(l) and 19(k), attorney fees pursuant to section 16 and "TTD 8(j) credit and medical bill stipulation," and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

BACKGROUND

The Petitioner, Kristine Isern, filed an application for adjustment of claim against her employer, United Airlines, Inc. (hereinafter Respondent) seeking workers' compensation benefits for an injury she sustained to her left knee on September 13, 2011.
Page 2

The claim proceeded to an arbitration hearing under the Worker's Compensation Act on July 23, 2013. At the conclusion of the hearing, the Arbitrator found that there was a compensable accident that arose out of and within the course and scope of Petitioner's employment and also found that the medical condition and treatment were

causally connected to the incident. The arbitrator cited to Susanne Larson v. United Airlines, Inc., 2005 Ill. Wrk. Comp. LEXIS 265 (finding that the petitioner, a flight attendant, was entitled to the status of a traveling employee while commuting from her home to her work domicile) in support of his findings.

Respondent, United Airlines filed a timely notice of appeal to the Illinois Workers' Compensation Commission on October 2, 2013 arguing *inter alia* that the Petitioner was not a traveling employee at the time when she sustained an injury to her right knee and for that reason the alleged injury is not compensable thereby rendering the remainder of the arbitrator's findings moot.

This appeal comes before the Illinois Worker's Compensation Commission for ruling on the threshold issue as to whether Petitioner was a traveling employee at the time of the incident as this finding forms the necessary predicate for the resolution of all other issues pending on appeal.

FACTS

The facts in this case are undisputed. On September 13, 2011 Petitioner drove from her home in Boulder, Colorado to the Denver Airport. She was to fly from Denver to her home base or "domicile" in New York City to work a flight scheduled to depart from New York's JFK Airport the following day, September 14, 2011. She was attired in her flight attendant's uniform in order to allow her to pass through security and to permit her to carry the baggage necessary to make her trip, including her flight manual, (which she was required to carry when working as crew aboard a flight). Her airport parking was paid for by her employer as it would have been at any airport of her choosing, including JFK if she chose to reside in New York.

Upon arriving at the airport in Denver the Petitioner cleared security using her airline identification. She boarded the United airplane that was scheduled to depart at around 2:00 pm to New York, La Guardia airport. After boarding the aircraft she changed out of her airline uniform and into "civilian" wear for personal comfort. She was assigned a regular seat.

As Petitioner was returning to her seat with her tote bag after changing her clothing, her foot caught on the assembly which bolted the seats to floor. She heard an audible "pop" and her left knee collapsed.

The Petitioner reported the incident to the purser aboard the flight and continued her travel to New York. The Petitioner took aspirin and upon arrival to New York left the aircraft by wheelchair.

The Petitioner testified that she arrived in New York at around 8:00 pm. She was scheduled to fly out the next morning on a flight crew. She intended to spend the night at the Pan American Hotel, a commuter pad. The hotel was neither selected by, nor paid for by the Respondent.

The Petitioner sought emergency medical treatment upon arrival in New York. She contacted the Flight Attendant Service Center in the early morning hours of

September 14, 2011 in order to notify her employer that she would not be able to work her scheduled flight and would have to go on "sick list". The Petitioner received treatment, including surgical reconstruction of her ACL and torn lateral meniscus. She was released to full duty work on April 10, 2012 and underwent mandatory re-certification on May 2, 2012.

At the time of the incident, Petitioner was a 16 year employee of Respondent employed as a flight attendant and resided in Boulder, Colorado. She was based out of New York City and regularly flew internationally out of Kennedy Airport. She customarily drove her private vehicle from her home in Boulder to Denver Airport where she would park in the employee parking lot, board a United Airlines flight and commute to New York City where she was "domiciled".

The Petitioner flew as a non-revenue passenger on United Airline flights to reach her base of employment. She was not compensated for her "commuting time", she did not wear her uniform and had no responsibilities aboard these flights from her place of residence to her home base or "domicile". The Petitioner's duties to her employer did not begin until she joined a flight crew in her domicile city.

The Respondent was aware that many flight attendants chose to reside in locations other than where they were domiciled. The Respondent did not require that the Petitioner, or any other flight attendant, live in any particular location or within any specific proximity to their domicile. Where the Petitioner chose to reside was entirely within her discretion and was not influenced by or under the control of the Respondent.

The Respondent derived no benefit from the Petitioner's choice of residence. In 2006 the Respondent offered Petitioner a transfer to Denver which she declined, choosing instead to continue commuting. The Respondent provided the Petitioner with unlimited leisure flight passes which allowed her to travel without cost anywhere in the world, including from Denver to New York.

The Petitioner used a free leisure travel pass provided by the Respondent for her commute from Denver to New York City on September 13,2011. This leisure travel pass did not guarantee the Petitioner a seat on this or any flight. The Petitioner made the flight selection herself. She did not receive any compensation, reimbursement or vouchers for meals or personal expenses incurred the evening prior to her scheduled flight on September 14, 2014.

At trial the Respondent called Robert Krabbe who is employed as a Human Resources Generalist for United Airlines. He testified that flight attendants are not compensated for the time they spend commuting to base airports even if they fly on a United aircraft. Flight attendants are paid on a per-trip basis. Pay commences when the aircraft departs a gate until the flight arrives at its destination.

All airline employees are given the same travel pass privileges, which include unlimited world-wide pass travel that is free in main cabin seats. A commuting flight attendant is given no priority in the use of travel passes. Respondent United Airlines does not control where any employee lives or how they get to work.

ANALYSIS

The Arbitrator noted in his decision the paucity of any Appellate or Supreme Court case law explaining the doctrine of the traveling employee. For that reason the Arbitrator cited and followed the holding in Susanne Larson v. United Airlines, Inc.,case number 03 WC 966 and 05 ILWCC 0298. The arbitrator's decision was filed on August 15, 2013.

On December 19, 2013 the Illinois Supreme Court filed its decision in The Venture- Newburg-Perini, Stone & Webster v. Illinois Workers' Compensation Commission 2013 IL 115728, Docket No. 115728. The Illinois Supreme Court determined that the Petitioner in Venture-Newberg was not a traveling employee at the time of the accident and explained the criteria for what constitutes a traveling employee within the meaning of the Workers' Compensation Act. The Court's analysis is instructive for the instant case while the facts are not identical.

The Venture- Newberg case arose out of a vehicle accident which occurred when two workers were driving from a motel where they were temporarily lodged while working on a project located about 200 miles from their Local 137 union territory in Springfield, Illinois. Petitioner Daugherty and his co-worker McGill were affiliated with Pipefitters Local 137 in Springfield, Illinois. Due to a lack of available work in the local area both men took positions with Venture at their Cordova plant. While working at the plant Petitioner Daugherty was expected to work 12 hours per day, 7 days a week for the duration of the temporary job.

At hearing, Petitioner Daugherty testified that Venture-Newberg wanted workers to be within an hour's drive from the plant, so that they would be available to work as needed. Daugherty and McGill took accommodations at a motel located about 30 miles from the Cordova plant. Venture did not direct employees where to stay or what route to take to work. Daugherty was not compensated for his travel expenses or his travel time. In Venture- Newberg the Supreme Court discussed two seminal Illinois cases dealing with the issue of "traveling employees".

In Wright v. Industrial Comm'n, 62 Ill. 2d 65(1975) and Chicago Bridge & Iron,Inc. v. Industrial Comm'n, 248 Ill.App.3d 687 (1993). The Supreme Court has found that injuries arising from three categories of acts are compensable:1) acts the employer instructs the employee to perform; 2) acts which the employee has a common law duty to perform while performing the duties for his employer; and 3) acts which the employee might reasonably be expected to perform incident to his assigned duties. Petitioner claims the third category applies to her case. The Supreme Court in Venture-Newberg applied the analysis in both the Wright and Chicago Bridge & Iron cases, but distinguished Venture-Newberg on its facts.

In both the Wright and Chicago Bridge cases, the Petitioners were regular employees who were required to travel to remote locations for their job and were reimbursed for travel. The Supreme Court noted that the Venture-Newberg Petitioner was

not required to travel to remote locations and was not reimbursed for his travel from the lodge to the work-site, noting that "nothing in Daugherty's contract required him to travel out of his union's territory to take the position with Venture."

Similar to the facts in Venture- Newberg, Petitioner Isern made a personal choice to live in Boulder, Colorado and to travel from Denver to New York which was her home base or domicile.

The Respondent received no benefit from the Petitioner's choice of residence and exerted no control as to where the Petitioner chose to reside. There is no evidence that the Respondent offered employment to the Petitioner only out of the New York domicile. On the contrary, the Petitioner acknowledged that Respondent had offered to relocate her domicile to Denver and she declined.

The Respondent did not direct the Petitioner to reside hundreds of miles from her domicile. Petitioner accepted the employment and selected her residence with full knowledge that she would be commuting hundreds of miles to her home base. When offered a domicile close to her residence, Petitioner declined.

Similar to the Venture- Newberg situation the Respondent did not compensate the Petitioner for her time or travel expenses associated with her voluntary commute from Denver to New York City. The Petitioner selected her own flight utilizing leisure travel passes available to all airline personnel. The Respondent did not offer preferential utilization of the passes based on Petitioner's status as a commuting employee.

The Petitioner selected and paid for her own hotel accommodations, transfers and meals in New York on the evening prior to her assigned flight. She flew into LaGuardia on September 13, 2011 and was scheduled as flight crew the following day, September 14, 2011 out of JFK. The Respondent, United Airlines exerted no control over what modality of transportation the Petitioner chose to arrive at her domicile to report for work. As with any employee the expectation was that Petitioner would arrive on time and fit for service.

The evidence did demonstrate that the Respondent was aware that the Petitioner resided in Colorado. The evidence further showed that flight attendants routinely availed themselves of the privilege of free leisure passes in order to commute from their homes to their domiciles to report for service. There was no evidence presented however that the Petitioner's travel from Denver to New York on September 13, 2011 was determined by the demands or exigencies of her job. Her travel on that date arose out of the personal choice she made to maintain her residence in Colorado and maintain her domicile in New York.

It is important to note that in this case the Petitioner was also not assigned by her employer to travel from some location, Chicago O-Hare, by way of example and join her flight crew in her domicile. If such were the case Petitioner would be a traveling employee and she would be acting at the instruction of or benefiting the employer as a result of her travel to her domicile. This was not the circumstance in the present case. Here, the Petitioner was traveling due to her personal choice only.

Clearly, the Petitioner's job required that she travel for her employer. The employee is designated as "traveling" when she travels away from her employer's

premises. Hoffman v. Industrial Comm'n 109 Ill 2d 194,199(1985). Here, the segment of travel that was a function of the Petitioner's personal choice rather than her work

assignment terminated when she would report to work at her domicile at JFK. The employer's "premises" for purpose of this analysis would be JFK rather than Denver.

The Supreme Court of Illinois held that the Venture- Newberg claimant was not a traveling employee because he made the personal decision to accept a position with Venture at a plant located approximately 200 miles from his home and Venture did not direct the claimant to accept the position at the Cordova plant. The Supreme Court explained that the claimant "made the personal decision to accept the position at Cordova and the additional travel and travel risks that it entailed." Likewise, in the case at bar, the Commission finds that Petitioner was not a traveling employee when she injured her left knee on September 13, 2011. Petitioner made the personal decision to accept a position with Respondent as a flight attendant based in New York although she lived in Colorado. Respondent did not direct Petitioner to accept the position. By accepting a position that required her to travel from Colorado to New York for work, Petitioner also accepted the travel risks that were entailed, including the risk of injury during the commute.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on August 15, 2013, is hereby reversed.

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 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: JUL 17 2014
SM/msb
o-05/01/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

ISERN, KRISTINE
Employee/Petitioner

Case# **12WC026238**

UNITED AIRLINES INC
Employer/Respondent

14IWCC0585

On 8/15/2013, 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:

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

0560 WIEDNER & MCAULIFFE LTD
KAREN COON
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KRISTINE ISERN
Employee/Petitioner
v.
UNITED AIRLINES, INC.
Employer/Respondent

Case # 12 WC 26238

14IWCC0585

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 **July 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **9-13-11**, 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 $**43,999.80**; the average weekly wage was $**846.15**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** 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 $**0**.

Respondent is entitled to a credit of $**11,749.83** under Section 8(J) of the Act, Medical Benefits
Respondent is entitled to a credit of $4,080.00 under 8(J) of the act for a non-occupational disability benefits.

ORDER

Credits

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

Respondent shall be given a credit of $**11,749.83** 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 be given credit for $4,080.00 for non-occupational disability benefits paid under Section 8(J) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $564.10 /week for 33-1/7 weeks, commencing 9-14-11 through 5-2-12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 9-13-11 through 8-15-13, and shall pay the remainder of the award, if any, in weekly payments.

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

Medical benefits

Respondent shall pay reasonable and necessary medical services of $(see attached).73, as provided in Section 8(a) of the Act, pursuant to the medical fee schedule.

Respondent shall be given a credit of $11,749.83 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.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $507.69/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the left leg , as provided in Section 8(e) of the Act.

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

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

David A. Kane
Signature of Arbitrator

August 15, 2013
Date

AUG 15 2013

(I) BRIEF SUMMARY OF THE RELEVANT LAY TESTIMONY

(Ia) THE TESTIMONY OF KRISTINE ISERN

Ms. Isern has been employed for the last 16 years as a flight attendant for respondent. (TR.pg. 14) On 9-13-11, Petitioner was based in New York City but resided in Boulder, Colorado. (See TR. pg. 15) She was based in New York City as a flight attendant for respondent for almost 16 years. During that entire time period she made her home was in Boulder, CO. (TR. pg. 15)

At all times herein relevant, Ms. Isern would travel on a United Airlines flight from Denver, CO to her New York domicile/base. (TR. pg. 16) At no time did anyone ever tell the petitioner that she shouldn't be living in Colorado and commuting to New York. (TR. pg 16) There is no job requirement written at United Airlines requiring a flight attendant who is based in New York City which required her to reside in the New York area. (TR. pg. 16) At the time of petitioner's injury, 80% of the New York based flight attendants commuted to New York from other areas outside the New York Area. (TR. pg. 19)

On 9-13-11, Ms. Isern was flying from Denver, Colorado to New York's La Guardia Airport. (TR. pg. 19) Ms. Isern's flight was scheduled to arrive in New York at around 8:00pm. (TR. pg. 20) Ms. Isern was scheduled to work a flight out of New York in the early morning hours of 9-14-11. (TR. pg. 20)

When Ms. Isern arrived at the Denver Airport, she parked her vehicle in the Landslide Employee Lot. (TR. pg. 20) Ms. Isern uses a

United swipe card to gain access to the United Airlines employee only parking lot, the Landslide lot. (TR. pg. 20-21) Ms. Isern does not pay anything for her parking privileges in the United Landslide lot. (TR. pg. 21) United allows Ms. Isern to park for free in Denver and also allows Ms. Isern to board a United flight from Denver to New York free of charge. (TR. pg. 22) Ms. Isern always flew 100% of the time on United, when going from Denver to New York. (TR. pg.22) As mentioned, previously, Ms. Isern paid nothing toward her airline ticket from Denver to New York, United provided that benefit. (TR. pg. 23) Ms. Isern could not have afforded to purchase her own airline tickets to commute from Denver to New York and back. (TR. pg. 25-27)

Ms. Isern commutes back and forth from Denver to New York between two and eight times per month. (TR. pg. 28) Ms. Isern wears her United work uniform when a boarding flight from Denver to New York as it provides her with baggage exemptions and security ease. (TR. pg. 28-30)

On the 9-13-11 flight from Denver to New York City, and while attempting to get into her seat, Ms. Isern's left foot got caught on the area where the seats are bolted to the airplane floor causing her left knee to move sideways. (TR. pg. 30) When Ms. Isern's left knee moved sideways, she heard a loud pop in her left knee. (TR. pg. 30) As the flight progressed, Ms. Isern's left knee got worse and she eventually reported what had occurred to the purser on the flight, Loucona Cornio. (TR. pg. 32)

When the plane arrived in New York City, Ms. Isern tried to stand up and her entire left knee collapsed. (TR.pg.33) Ms. Isern was taken off the flight by United Airlines personnel in a wheel chair. (TR. pg. 33) Ms. Isern let her United domicile know that very day, 9-13-11, how her accident had occurred. (TR. pg. 34)

Ms. Isern stays at the Pan American Hotel routinely on the night before the flights she works. (TR. pg. 34) Ms. Isern was taken from the airport to the Hotel and then to the Elmhurst Memorial Hospital by the Pan American's Hotel shuttle. (TR. pg. 39) From the Elmhurst Memorial Hospital emergency room, Ms. Isern phoned the flight attendant service center letting them know how her accident occurred and that she would not be able to work her flight on 9-14-11.(TR.pg. 35-39) After being discharged from the emergency room, Ms. Isern went back to the Pan American Hotel. (TR.pg. 40)

From the Pan American Hotel, Ms. Isern called her supervisor at her United domicile, Patti Troy, and reported her injury and how it had occurred. (TR. pg. 40) Ms. Isern also faxed her supervisor on 9-15-11, a hand written accident report. (TR. pg. 44-44 and petitioner's exhibit #9)

Her injury to the left knee caused Ms. Isern to come under the care and treatment of Dr. McCarthy an orthopedic surgeon. Dr. McCarthy restricted Ms. Isern's ability to work from 9-14-11 through 4-10-12. (TR. pg. 47) Ms. Isern underwent a complete reconstruction of her left knee on 10-18-11 at the Boulder Surgery Center to repair a

complete anterior cruciate ligament (ACL) rupture as well as a meniscal tear. (TR. pg. 47-48)

Ms. Isern needed to attend a required requalification course for United after she concluded treatment before United allowed her to return to work. This completed this retraining or requalification course on 5-2-12 (TR. pg. 51 & 52)

(IIb) A SUMMARY OF THE TESTIMONY OF ROBERT CRABBE

Mr. Crabbe admitted that United Airlines travel benefits are used by United employees to commute to and from there domicile. (TR. pg. 142)

United Airlines employees routinely use there travel passes to commute to and from where they live and where they work. (Tr. pg. 144) This is a fact acknowledged by all Senior United Executives. (TR. pg. 144) Ms. Isern was also provided with a free parking pass at the United Airlines employee parking lot in Denver, Colorado, which helped facilitate her ability to commute.

(II) APPLICABLE LAW

The issue of law in this case is whether a flight attendant traveling from where she lives to her work domicile qualifies her as a traveling employee for workman's compensation purposes when injured going to her work domicile. This issue has been decided previously by the Illinois Workers Compensation Commission on several previous occasions. Most recently and the controlling case

law can be found in Susanne Larson v. United Airlines, Inc., Case No. 03 WC 966 & 05IWCC0298. (Please see attached Decision)

Commissioner Pigatt, DeMunno and Basurto all found that petitioner in the Larson case was entitled to the status of traveling employee while commuting from her home to her work domicile. This Arbitrator notes that the facts in this matter at bar are almost identical to the facts in the Susanne Larson case.

In Larson, the Commission stated:

"...In so doing the Commission rejects the position that Petitioner was merely "in transit" and on her way to work so as to take her out of the course of her employment at the time of her fall. Rather, the record supports a finding that Petitioner is properly considered a traveling employee under the Act in that her work for Respondent clearly created the necessity for travel."

"In support, the Commission notes that in order to make her international flight Petitioner was required to fly from Colorado to Chicago. This Commission notes that Petitioner chose to live in Colorado. Nevertheless, Respondent approved the arrangement, reimbursed a majority of the monthly parking expense as a matter of course and supplied Petitioner with unlimited flight passes to use on her flight to Chicago with a diminimus portion of the flight cost taken out of Petitioner's pay."

"Petitioner's parking at the Colorado airport up to a set limit of $25.00. Petitioner pays $10.00 per month out of her own pocket to park at the airport in Colorado in order to fly to Chicago and catch her next international flight. (T.11) Petitioner is not paid while flying to Chicago. Petitioner is paid only for the international leg of her trip."

These facts in Larson, as previously mentioned by this Arbitrator, are exactly similar to the facts of Ms. Isern's case.

As such this Arbitrator finds the Larson case on point and controlling and as such finds Ms. Isern at the time of her injury to be entitled to the status of a traveling employee.

The Arbitrator notes, however, that while bound by Commission precedent to decide this issue in favor of Petitioner, the only case law on this rather narrow point of law is Commission precedent; there is no Appellate or /supreme Court case law on point. In the absence of Commission case law, the Arbitrator may well have found Respondent's arguments persuasive. However, Commission precedent is binding on the Arbitrator.

(III) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING THE ACCIDENT THE ARBITRATOR FINDS AS FOLLOWS:

Due to the legal precedent contained in the body of paragraph (II) of this decision, the Arbitrator finds petitioner to have been a

traveling employee on 9-13-11. The question surrounding the accident concerning a traveling employee is whether the conduct leading up to the accident was reasonable and foreseeable.

The Arbitrator again notes that despite the Respondent's cogent arguments, the Commission case law supports Petitioner's claim and the Arbitrator finds petitioner to have incurred a compensable accident that arose out of and in the course of her employment on 9-13-11.

(IV) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING CAUSAL CONNECTION THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes respondent's contention and dispute in this case was really only based on whether petitioner's accident out of and in the course of her employment. It is quite obvious to the Arbitrator when looking at petitioner's exhibits #1 and 2 that proper histories of petitioner's injury to her left knee on 9-13-11 are duly recorded. Dr. McCarthy, petitioner's treating surgeon, clearly relates petitioner's left knee injury with internal derangement to the accident 9-13-11 which is detailed on her first visit. No other doctor indicates a contrary opinion. (See pet#2)

As such the Arbitrator finds petitioner's left leg injury is causally related to her compensable accident of 9-13-11 as previously described herein.

(V) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING NOTICE THE ARBITRATOR FINDS AS FOLLOWS:

Notice in this case was given to the respondent by petitioner on numerous occasions. First, petitioner let the purser on her flight know shortly after the occurrence how the accident occurred. In addition, petitioner was taken off the flight by the United Airlines flight attendants. Second, she was taken by the personnel to the emergency room. Third, she explained to the service center that she would be unable to work her 9-14-14 flight. Fourth, in the morning hours of 9-14-11 petitioner called Patti Troy her supervisor in New York and explained how the accident occurred. Fifth, Ms. Isern faxed into her domicile on 9-15-11 a written accident report.

For all of these reasons the Arbitrator finds petitioner gave proper notice on numerous occasions.

(VI) IN SUPPORT OF THE ARBITRATOR'S FINDING CONCERNING TTD, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes both sides stipulated that petitioner was temporarily and totally disabled at least from 9-14-11 through 4-10-12. Respondent's only dispute with respect to this period was concerning liability which has been previously found by the Arbitrator. Petitioner testified to needing to attend a requalification course before being able to return to flying. She completed the first available retraining course following her 4-10-12 medical release on 5-2-12. Petitioner returned to work on 5-3-12.

As such, the Arbitrator finds petitioner to have been temporarily and totally disabled from 9-14-11 through 5-2-12.

(VII) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING MEDICAL EXPENSES THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that Respondent did not introduce any evidence to rebut Petitioner's claim that the medical bills submitted were reasonable and necessary to cure or relive her condition of ill-being.

The Arbitrator awards the petitioner $35,699.73 in medical expenses pursuant to the fee schedule less respondent's 8(j) of $11,749.83 for a total due in unpaid medical of $23,949.90. These amounts are for the amounts submitted and Respondent is only liable for the amounts as set forth in the medical fee schedule.

(VIII) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING NATURE AND EXTENT THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and after considering the entire record, the Arbitrator finds that Petitioner sustained the complete and permanent loss of use of the left leg to the extent of 25% thereof under section 8(e) of the Act.

(IX) IN SUPPORT OF ARBITRATOR'S DECISION CONCERNING PENALITES AND FEES THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has carefully considered whether penalties and attorney's fees should be imposed. Despite the Commission precedent, the Arbitrator believes that Respondent has reasonable arguments regarding the compensability of this case. The Arbitrator therefore declines to impose penalties or fees.

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

Wayne Hoffmann,

Petitioner,

vs.

NO: 11 WC 3718

14IWCC0586

City of Des Plaines Fire Department,

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, temporary total disability, permanent partial 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.

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.

14IWCC0586

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: JUL 18 2014
TJT:yl
o 7/8/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

HOFFMANN, WAYNE
Employee/Petitioner

Case# **11WC003718**
09WC014508
08WC042590

CITY OF DES PLAINES/FIRE DEPT
Employer/Respondent

14IWCC0586

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:

1747 STEVEN J SEIDMAN LAW OFFICES
TWO FIRST NATIONAL PLAZA
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0863 ANCEL & GLINK
BRITT ISALY
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

14IWCC0586

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

M.B.

Wayne Hoffmann
Employee/Petitioner

v.

City of Des Plaines/Fire Dept.
Employer/Respondent

Case # **11** WC **003718**

Consolidated cases: **08 WC 42590/09 WC 14508**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **July 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. ☐ 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

14IWCC0586

FINDINGS

On **8/16/10**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$103,446.52**; the average weekly wage was **$1,989.36**.

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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$6,647.20** 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's cervical spinal condition is causally related to the accident of August 16, 2010. Petitioner is entitled to total temporary disability of **$94,645.57** representing 76&1/7 weeks at a rate of $1,243.00 per week (which is the maximum rate for August 16, 2010 for the time period of 8/16/2010 through 2/1/2012. Petitioner is additionally entitled to a wage differential, from February 1, 2012 until the cessation of his disability, of **$1,024.31 per week** pursuant to Section 8(d)(1), for the duration of his disability. Respondent is entitled to a credit of $6,647.20. SEE ATTACHED.*

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.

Walter Black

Signature of Arbitrator

Date April 1, 2013

APR 1 - 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

Wayne Hoffmann,

Petitioner,

vs.

NO: 09 WC 14508

14IWCC0587

City of Des Plaines Fire Department,

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, temporary total disability, permanent partial 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.

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.

14IWCC0587

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: JUL 18 2014
TJT:yl
o 7/8/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

HOFFMANN, WAYNE
Employee/Petitioner

Case# **09WC014508**
08WC042590
11WC003718

CITY OF DES PLAINES/FIRE DEPT
Employer/Respondent

14IWCC0587

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:

1747 STEVEN J SEIDMAN LAW OFFICES
TWO FIRST NATIONAL PLAZA
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0863 ANCEL & GLINK
BRITT ISALY
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CHICAGO, IL 60603

14IWCC0587

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Wayne Hoffmann
Employee/Petitioner

v.

City of Des Plaines/Fire Dept.
Employer/Respondent

Case # 09 WC 14508

Consolidated cases: 08 WC 42590/11 WC 3718

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

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

FINDINGS

On **2/27/09**, 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 **$103,476.40**; the average weekly wage was **$1,447.85**.

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*** 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

*Petitioner's cervical spinal condition is causally related to the accident of February 27, 2009. Petitioner is entitled to **$6,157.05** representing 5 weeks at a temporary total disability rate of $1,231.41, which is the maximum temporary total disability rate for February 27, 2009, for the time period of 4/6/2009 through 5/10/2009. SEE ATTACHED.*

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 April 1, 2013

APR 1 - 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

Wayne Hoffmann,

Petitioner,

vs.

NO: 08 WC 42590

14IWCC0588

City of Des Plaines Fire Department,

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, temporary total disability, permanent partial 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.

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.

14IWCC0588

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: JUL 18 2014
TJT:yl
o 7/8/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

HOFFMANN, WAYNE
Employee/Petitioner

Case# **08WC042590**
09WC014508
11WC003718

CITY OF DES PLAINES/FIRE DEPT
Employer/Respondent

14IWCC0588

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:

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CHICAGO, IL 60603

0863 ANCEL & GLINK
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CHICAGO, IL 60603

14IWCC0588

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

AM. 6?

Wayne Hoffmann
Employee/Petitioner

v.

City of Des Plaines/Fire Dept.
Employer/Respondent

Case # **08** WC **42590**

Consolidated cases: **09 WC 14508/11 WC 3718**

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

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

FINDINGS

On **8/28/08**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$95,944.28**; the average weekly wage was **$1,845.00**.

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

Respondent shall be given a credit of **$3,697.60** 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's lower back condition is causally related to the accident of August 28, 2008. Petitioner is entitled to **$4,345.54** representing 3&4/7 weeks at a temporary total disability rate of $1,216.75, which is the maximum temporary total disability rate for August 28, 2008, for the time period of 8/29/2008 through 9/22/2008. Respondent has issued **$3,697.60** in TTD payments. Therefore, Petitioner is entitled to **$647.94** additional TTD. SEE ATTACHED.*

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 April 1, 2013

APR 1 - 2013

Wayne Hoffmann v. City of Des Plaines/Fire Dept.
Cases No. 08 WC 42590; 09 WC 14508; 11 WC 3718

ORDER

For the August 28, 2008 date of accident, Respondent shall pay Petitioner the sum of **$1,216.75** /week for a period of **3&4/7** weeks, representing August 29, 2008, through September 22, 2008, as total temporary disability payment, totaling **$4,345.86**.

Respondent is due a credit of **$3,697.60**, which it has already paid in TTD. By stipulation of the parties, Respondent shall pay any unpaid medical bills.

For the February 27, 2009 date of accident, Respondent shall pay Petitioner the sum of **$1,231.41** /week for a period of **5** weeks, representing April 6, 2009, through May 10, 2009, as total temporary disability payment, totaling **$6,157.05**.

Respondent is due a credit of **$5,366.65**, which it has already paid in TTD.

For the August 16, 2010 date of accident, Respondent shall pay Petitioner the sum of **$1,231.43** /week for a period of **76&1/7** weeks, representing August 16, 2010, through February 1, 2012, totaling **$94,645.57**.

Respondent is due a credit of **$5,366.65**, which it has already paid in TTD, and **$6,647.20**, which it has paid as a PPD advance.

Petitioner is additionally due a wage differential payment of **$1,024.31** /week, beginning on February 1, 2012, until his disability ceases.

FINDINGS OF FACT

On August 28, 2008, Petitioner was 52 years old, working as a firefighter and paramedic for Respondent. (Tr., 100). On that date, Petitioner lifted a patient weighing approximately 350 pounds in order to transfer the patient onto an ambulance cot. Petitioner immediately noticed that his back "was not right." Later that day, Petitioner was walking in Respondent's fire station when he experienced a severe back spasm, leaving him unable to sit or lay down. (Tr., 101-2).

He was treated immediately at the fire station and was transferred to Lutheran General Hospital's emergency department. The emergency department note shows Petitioner had strained his lower back moving a heavy patient. Petitioner was diagnosed with a right lower back strain, and was referred to Dr. Thomas Reese of Alexian Brothers.

Petitioner saw Dr. Reese on September 3, 2008. Dr. Reese noted that Petitioner had been transferring a 350 pound patient onto a cart when he felt a twinge in his lower back, which at the fire station a few hours later, developed into a severe back spasm. There was still pain in the lower back, though the symptoms had improved somewhat. The pain was right-sided, and was

exacerbated by standing, sitting, or not changing positions for too long. Dr. Reese assessed a sacroiliac strain, and took Petitioner off work.

On September 8, 2008, Petitioner saw Dr. John S. Balocki. On physical examination, the doctor found right paravertebral muscle tenderness at the L4-S1 area on the right. Dr. Balocki assessed a lumbar strain and took Petitioner off work.

Petitioner saw Dr. Salvador Cabanit on September 9, 2008. The doctor noted that Petitioner hurt his lower back while lifting up a patient, and diagnosed a lumbosacral strain and right sided sacroiliac strain. He kept Petitioner off work and ordered an MRI, which Petitioner underwent on September 10, 2008. This MRI revealed diffuse mild degenerative disc disease and diffuse disc bulges, mild facet joint disease at L2-3, mild diffuse disc bulging and osteophyte combination and some facet joint disease at L3-4, and mild facet joint disease with mild diffuse disc bulging at L4-5.

Dr. Balocki released Petitioner to full duty on September 22, 2008. His annual physical at Alexian Brothers on December 20, 2008 shows Petitioner was able to work without restrictions.

Petitioner testified that on February 27, 2009, Petitioner, still 52 years old, was handling a stretcher, upon which rested a 200 pound patient, when he felt a pop in his neck during the lift. (Tr., 107). Petitioner lost feeling in his left arm, causing him to drop the patient. After this incident, Petitioner testified to missing five weeks of work. He returned to work full duty on December 22, 2009. (Tr., 108-9).

Petitioner was taken to the Lutheran General Hospital emergency department. That note discloses that Petitioner had developed neck pain that radiates to his left shoulder with tingling in his left forearm and numbness in his left upper arm. Dr. Jon Olsen assessed a cervical disk herniation and cervical radiculopathy, and took Petitioner off work.

Dr. Bauer, in a report on March 2, 2009, diagnosed cervical spondylosis and left cervical radiculopathy. On that date, he ordered an MRI of the cervical spine. This showed no significant change in the spondylosis, disc protrusions at C3 through C7, or multilevel stenosis. Dr. Bauer ordered physical therapy and released Petitioner to light duty work on March 5, 2009.

Petitioner returned to Dr. Bauer on April 6, 2009. Petitioner's pain was mostly in the shoulder area with tenderness of the left trapezius. Petitioner was to continue physical therapy and pain medication. On May 6, 2009, Dr. Bauer assessed cervical radiculopathy and released Petitioner to full duty as of May 11, 2009.

On March 6, 2010, Petitioner saw Dr. Balocki complaining of left sided neck pain and left arm pain which had persisted for approximately two to three weeks. Upon physical exam, Dr. Balocki noted tenderness in the left trapezius muscle.

On August 13, 2010, Petitioner saw Dr. Jack Perlmutter. Dr. Perlmutter reviewed Petitioner's history after the February 27, 2009 accident, namely that Petitioner was complaining

of pain in his cervical spine and into the left shoulder, with continuing flares of the problem. Dr. Perlmutter noted that Dr. Bauer had recommended a four level decompression and fusion in order to improve. On physical examination, Dr. Perlmutter noted continuing decreased strength in Petitioner's left hand and radicular pain from the left shoulder into the anterolateral aspect of the left forearm. Given the physical nature of Petitioner's position as a firefighter, Dr. Perlmutter felt that Petitioner could no longer perform this work. Dr. Perlmutter felt that it would be possible to perform foraminotomies on the left side at C4-5 and C5-6 in order to relieve Petitioner's left upper extremity radicular symptoms. The doctor believed another option to be a total disc replacement of C5-6 and C6-7.

On August 16, 2010, Petitioner, then 54 years old, was carrying a heavy patient, weighing approximately 500 pounds, with four co-workers, Eric Chipman, Rob Prieto, Mike Copeland, and Robert Johnson. While carrying this patient, Petitioner felt pain in his neck, shoulder, and arm. Despite this, Petitioner finished his shift.

Petitioner testified that on August 16, 2010, he experienced great difficulty lifting the 500 pound woman. (Tr., 117). At the point where Petitioner and his cohorts lifted over the threshold in the door and lowered her to the ramp, Petitioner, from a standing position, was required to bend over to lift at a point 6 to 8 inches above the ground. He felt pain at this point. While lifting the patient into the hospital bed, his pain increased severely: "As I picked up the patient, now I've got the shooting pain down my arm, and the numbness returned from what I recognized from the previous incident that happened to me in '09. I had numbness in [the left side of my neck] and in the general area of my neck and left arm." This pain increased after lifting the patient. Petitioner testified to reporting the pain to Lieutenant Copeland, and telling the others, "That [] hurt." (Tr., 122)(Profanity omitted).

During Petitioner's hearing, three of his coworkers testified, and another's statement was proferred by Petitioner's attorney. On August 16, 2010, Petitioner, in lifting the 500 pound patient, was assisted by Robert Prieto, Robert Johnson, Lieutenant Michael Copeland, and Eric Chipman.

At the hearing, Mr. Prieto testified that on August 16, 2010, he along with his colleagues were called to the house of a patient who weighed approximately 500 pounds. (Tr., 28). They were required to lift the patient at multiple points: The patient needed to be lifted out of her chair onto a cot, which needed to be lifted over a threshold point over the door and down onto a ramp, later the cot needed to be lifted into the ambulance, and finally the patient needed to be transferred from the cot into a hospital bed. Mr. Prieto testified that this was extremely difficult, and caused pain and soreness to the 27-year-old Mr. Prieto. Mr. Prieto testified that at the hospital he heard Petitioner say "that hurt," and he told Mr. Prieto that he needed to go home, take painkillers, lie down, and rest his back. (Tr., 38).

Mr. Johnson testified that on August 16, 2010, he remembers Petitioner saying "well, that hurt," and stretching out his back. Petitioner's attorney proffered that Mr. Chipman would have testified that he witnessed and overheard Petitioner exclaim, "That [] hurt." (Tr., 55).

Lieutenant Copeland, who was Petitioner's immediate supervisor on August 16, 2010, testified that he recalls the patient being weighed 260 kg at the hospital scale, which he estimated at 525 to 535 pounds. (Tr., 66). In reality, 260 kg translates to over 573 pounds. Lieutenant Copeland testified that this patient is very uncooperative, and will not assist the lifters by supporting any of her weight. Lieutenant Copeland remembers hearing Petitioner grunt and moan while lifting the patient, and exclaim "that hurt" on multiple occasions. (Tr., 70). After lifting the patient, Lieutenant Copeland asked Petitioner if he was okay, to which Petitioner responded "I'm a long way from okay." (Tr., 76). Petitioner told Lieutenant Copeland "I'm hurting" and "I'm in pain." (Tr., 83).

Petitioner then reported to Dr. Theresa Walden on August 24, 2010. She assessed cervical radiculopathy. She noted the date of the original injury as February 26, 2009, and took Petitioner off work. Petitioner underwent an MRI on August 25, 2010, which was compared to the March 2, 2009 exam by the radiologist, Dr. Brian Herman. This revealed no significant interval change in mild to moderate multilevel cervical spine degenerative changes, central disc protrusion at C3-4 which continued to produce mild spinal canal stenosis, left paracentral disc bulges versus broad-based left paracentral disc protrusions at C4-5 and C5-6 which, in combination with spurring, continued to produce borderline to mild spinal canal stenosis. Additionally, a right paracentral disc extrusion at C6-7 continued to result in mild spinal canal stenosis, and thickening of the posterior longitudinal ligament at the C4 to C6 levels also mildly narrowed the thecal sac and was unchanged from the prior exam.

Petitioner then saw Dr. Bauer on August 27, 2010, with neck pain that radiated to the left upper arm. This note shows that the injury originated on February 27, 2009. Dr. Bauer released Petitioner to light duty work, with restrictions of no operating motorized equipment due to the prescribed narcotics, no wearing the SCBA pack, no lifting over 50 pounds and no continued overhead work for greater than 10 to 15 minutes. In correspondence by Dr. Bauer on that same date, the doctor noted chronic left-sided neck pain radiating towards the shoulder but not all the way down the left arm, with numbness in the lateral aspect of Petitioner's left forearm and slight weakness in his left arm. Petitioner additionally had chronic neck pain on the left side. Physical examination revealed reduced range of motion in the neck and subtle weakness in the left arm. Dr. Bauer reviewed an MRI done on August 25, 2010. This MRI showed a central disc protrusion at C3-4 without spinal cord compression, disc herniations at C4-5 and C5-6 on the left side and on the right at C6-7. Dr. Bauer assessed disc herniations in Petitioner's neck which were causing chronic neck pain and radicular pain in the left arm. Dr. Bauer told Petitioner that he was not capable of performing his duties as a firefighter, as he could not carry 50 pounds, should avoid overhead work, was not capable of wearing an air pack weighing 70 pounds, and the doctor was concerned about Petitioner's use of narcotics while working.

Petitioner saw Dr. Balocki on October 19, 2010. Dr. Balocki noted Petitioner still had neck pain and believed it to be chronic at that point. Dr. Balocki decided to continue with the conservative treatment plan Petitioner was already pursuing.

During Dr. Bauer's deposition, the doctor related that when he saw Petitioner on January 23, 2008 and March 2, 2008, Petitioner's degenerative cervical spinal changes were asymptomatic. (Dep. of Dr. Bauer, p9). In fact, Petitioner had been asymptomatic for a year

prior to the February 2009 accident. However, during the visit after the February 2009 accident, when Dr. Bauer assessed cervical spondylosis and radiculopathy, Petitioner reported having become symptomatic contemporaneously with the accident. These subjective complaints were objectively seen in physical exam in weakness of the left arm and tenderness across the back of the neck and paracervical muscles, with pain on extension and tilting of the head to the left. Based on this, Dr. Bauer opined that the February 2009 accident had been a cause and contributing factor to Petitioner's disability. (Dep. of Dr. Bauer, p10). Dr. Bauer did have independent recollection of Petitioner relating his August 16, 2010 accident involving a 500-pound woman during the August 27, 2010 visit: "And I remember we in a halfhearted sense joked about how difficult it was to carry these heavy people on stretchers, and how difficult it is to carry them down the stairs. So I do recall that. . . . I remember we did discuss it. And I'm not quite sure why I didn't include it in my record." (Dep. of Dr. Bauer, p23). The doctor further opined that if an incident had occurred on August 16, 2010 that involved lifting a large patient, this incident would also be a direct cause of either aggravating or causing Petitioner's radiculopathy. (Dep. of Dr. Bauer, p20). Dr. Bauer also based that opinion on Petitioner having had been asymptomatic for over a year until that episode occurred. On the August 27, 2010 visit Petitioner was disabled from duty. Dr. Bauer felt that the August 16, 2010 accident led to a permanent aggravation of his condition.

Dr. Jesse P. Butler performed an independent medical examination on September 29, 2010, reviewing Petitioner's history and radiographs. Dr. Butler assessed cervical spinal stenosis, cervical spondylosis without myelopathy, and a lumbar strain, and found that the current cervical spinal symptoms and treatments were not related to the August 2008 nor the February 2009 cervical spinal injuries, but instead were temporary aggravations of underlying degenerative conditions. Additionally, Dr. Butler did not believe there to have been an injury that occurred in August 2010. The doctor noted a significant lapse in treatment from May 2009 until August 2010 that would indicate a return to baseline, but did not explain why Petitioner's cervical spinal condition suddenly deteriorated in August 2010. Despite this return to baseline before August 2010, Dr. Butler felt that Petitioner was permanently disabled from duty due to his cervical spinal condition.

Dr. Miledones N. Eliades performed an independent medical examination for Respondent on March 24, 2011. He did not note a history of trauma preceding Petitioner's November 30, 2007 visit to Dr. Bauer. Dr. Eliades assessed significant cervical degenerative disease. Dr. Eliades believed that the upper extremity pain may be entirely from facet or disk symptoms. Dr. Eliades believed Petitioner to be disabled due to the severe cervical degenerative changes putting him at "significant risk of sudden disability due to pain or weakness[.]" Dr. Eliades believed that Petitioner's work accidents may have led to increased symptoms.

In his deposition, Dr. Eliades believed that the February 27, 2009 accident caused a temporary aggravation of Petitioner's symptoms. Dr. Eliades believed that Petitioner's strenuous work activities over his 25 years as a firefighter, such as lifting, pulling, and crawling, in combination with Petitioner's life events have led to Petitioner's disability: "It's a culmination of all of his life events, which includes his work events and his outside." (Dep. of Dr. Eliades, p43). Later in the deposition, Dr. Eliades reiterated that the cumulative effects of Petitioner's activities, including his work activities, could have contributed to his degenerative changes: "Q:

[W]hen you have that line that said his life-long activities, you do mean that the cumulative effects from job-related activities could be a contributing factor to his degenerative disease? A: Yes." (Dep. of Dr. Eliades, p54).

Dr. Daniel G. Samo performed an independent medical examination for Respondent on April 5, 2011. Dr. Samo is not board certified in neurosurgery or orthopedic surgery. Dr. Samo did not note an August 16, 2010 injury. Notably, Dr. Samo's review of Petitioner's records did not include the August 24, 2010 visit to Dr. Walden, shortly after the first missed day of work. Dr. Samo noted that he "[did] not have any records about the incident of 8/16/10 (lifting the 500 lb patient)[.]" Dr. Samo assessed multilevel cervical spinal stenosis with a disc herniation at C6-7, chronic neck pain with radiating pain to the left upper arm, and then-asymptomatic recurrent lower back pain. Dr. Samo believed Petitioner had temporary flare-ups of pain from pre-existing spinal stenosis that did not increase any damage to Petitioner's degenerative spine condition.

In his deposition, Dr. Samo opined that the August 2008, February 2009 and August 2010 accidents caused aggravations of Petitioner's degenerative spinal condition in that they caused Petitioner's back to become symptomatic: "[The accidents] caused a flare-up of symptoms. . . ." (Dep. of Dr. Samo, p21). Dr. Samo did not, as a matter of science, believe that day-to-day activities could accelerate underlying disc conditions, but that only traumatic events could. (Dep. of Dr. Samo, p22). Dr. Samo testified that, hypothetically, if Petitioner had been able to work as a firefighter and then on August 16, 2010, had lifted a 500 pound patient, resulting in neck pain that left that firefighter unable to perform his work duties, than that accident would have caused his present symptoms. (Dep. of Dr. Samo, pp36-8). The doctor also believed to a reasonable degree of medial certainty that the February 27, 2009 accident was a cause of, or an aggravating or contributing factor to, the neck pain that radiated to Petitioner's left shoulder and left forearm tingling. (Dep. of Dr. Samo, pp45-6).

Dr. Vikram C. Prabhu performed an independent medical examination for Respondent on April 6, 2011. Dr. Prabhu believed Petitioner's degenerative disc disease and spondylosis of the cervical spine was not the result of the February 2009 or August 2010 accidents, due to their predating the February 2009 and August 2010 incidents.

In his deposition, Dr. Prabhu opined that the work accidents of February 2009 and August 2010 could have aggravated or exacerbated Petitioner's degenerative disc disease and/or spondylosis of the cervical spine:

Q: In your opinion did the accident of August 16, 2010, aggravate the degenerative disc disease and/or spondylosis of the cervical spine?
A: It could have, yes.
Q: And it could have because of the incident as described or the incident as described of lifting the 500 pound patient with cohorts, correct?
A: Yes.
Q: Similarly, with regard to the February 27, 2009 incident, it is your opinion I presume that the 2-27-09 incident . . . could have aggravated that condition; is that correct?
A: That's correct.

(Dep. of Dr. Prabhu, pp25). The doctor based this on there being no symptoms and a normal examination with Dr. Bauer in January 2008, and no records related to the cervical spine until Petitioner saw Dr. Bauer after the February 2009 incident. The doctor repeated this opinion when questioned by Respondent's counsel:

A: . . . . I think it's possible that [the 2-27-09 incident] could have aggravated a pre-existing condition.
* * *
A: . . . I think it's again possible that this was the event that – that this is an event that could have aggravated or caused his symptoms to recur so I think it's possible.
* * *
Q: When you just indicated that you thought it was possible that that 2009 event created his later symptoms, when you say possible, *you mean within a reasonable degree of medical certainty*?
A: *Yes.*

(Dep. of Dr. Prabhu, pp26, 31, 32)(emphasis added).

Vocamotive performed an initial evaluation report and a labor market survey for Petitioner. The evaluation noted some of the physical symptoms Petitioner continues to struggle with. Prolonged durations of sitting or standing cause Petitioner pain. The report noted Petitioner had difficulties stooping, bending, kneeling on his left knee, and was unable to crawl. Petitioner had not lifted more than fifty pounds since his injury in 2010. The report noted Petitioner had continued difficulties with his shoulders and neck.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATED TO:

I. <u>Petitioner sustained an accident on August 28, 2008 that aggravated his lumbar spinal condition.</u>

On August 28, 2008, Petitioner lifted a patient weighing approximately 350 pounds in order to transfer the patient onto an ambulance cot. Petitioner immediately noticed that his back "was not right," and later experienced debilitating lower back pain. Petitioner was referred to Dr. Reese on September 3, 2008. Dr. Reese diagnosed a sacroiliac strain and kept Petitioner off work. Petitioner then went to see Dr. Balocki on September 8, 2008. Upon examination, Dr. Balocki noted muscle tenderness at the L4-S1 area on the right and diagnosed Petitioner with a lumbar strain.

Additionally, Dr. Samo opined during his deposition that the August 2008 accident caused an aggravation of Petitioner's degenerative spinal condition. (Dep. of Dr. Samo, p21). Thus, the evidence plainly shows that Petitioner's degenerative lumbar spinal condition was aggravated by the August 28, 2008 accident.

The Arbitrator further finds that Petitioner's earnings during this period were $95,944.28, which corresponds to an average weekly wage of $1,845.00 pursuant to Section 10 of the Act. In the event that there are any unpaid medical bills, by stipulation of the parties, Respondent is responsible for these unpaid bills. Finally, Petitioner is entitled to temporary total disability for a period of August 29, 2008, through September 22, 2008, for a period representing 3 and 4/7 weeks. Respondent has paid $3,697.60 in TTD.

II. Petitioner's cervical spinal condition is causally related to both the February 27, 2009, and August 16, 2010 accidents.

The Arbitrator notes that Petitioner's cervical spinal condition was asymptomatic before the February 27, 2009 accident, per the medical evidence of his treating physician, Dr. Bauer. (Dep. of Dr. Bauer, pp9, 10). The medical evidence discloses, and all physicians agree, that this accident caused an aggravation of Petitioner's cervical spinal condition. The Arbitrator additionally finds that Petitioner sustained an accident on August 16, 2010, which also aggravated his cervical spinal condition. The Arbitrator finds that the credible testimony of the Petitioner and his cohorts, and Dr. Bauer, establishes that there was such an accident.

Not every physician believed there to have been an accident occurring on August 16, 2010. Having found that an accident did take place on August 16, 2010, the Arbitrator discounts the opinions of those physicians who did not take into account this accident, specifically Drs. Butler and Eliades.

All the doctors agree that at present Petitioner is permanently disabled from his work as a firefighter and paramedic due to his cervical spinal condition. When Petitioner last saw Dr. Bauer, on August 27, 2010, he complained of neck pain that radiated to his left arm through his shoulder, with numbness in the lateral aspect of his left forearm, and some weakness in the arm. When Petitioner saw Dr. Balocki on October 19, 2010, the doctor believed that Petitioner's symptoms were permanent.

The Vocamotive report reveals that prolonged durations of sitting or standing continue to cause Petitioner pain. The report noted Petitioner had difficulties stooping, bending, kneeling on his left knee, and was unable to crawl. Petitioner had not lifted more than fifty pounds since his injury in August 2010. He experiences ongoing difficulties with his shoulders, especially his left shoulder, which is connected to his neck injuries.

Petitioner's cervical spine had been asymptomatic when he presented to Dr. Bauer on January 23, 2008. Petitioner did not treat for his neck after March 2008 until the February 2009 accident. Petitioner credibly testified that as a result of both the February 2009 and August 2010 accidents, his cervical symptoms immediately were, and currently are, far worse than before these accidents.

Relying on Petitioner's credible testimony, along with the opinions of Petitioner's treating physician, Dr. Bauer, along with Respondent's examining physicians, Drs. Prabhu and Samo, the Arbitrator finds that the February 2009 and August 2010 accidents both combined to have caused Petitioner's current condition of ill-being. In other words, both accidents caused

Petitioner's cervical spinal condition to permanently deteriorate. Alternatively, again relying on Drs. Bauer, Prabhu, and Samo, the Arbitrator finds that both accidents alone were sufficient to have caused the present state of Petitioner's cervical spinal condition.

a. The February 27, 2009 accident

On February 27, 2009, Petitioner, handling a stretcher with another heavy patient, felt a pop in his neck, and his left arm became immediately numb. Petitioner was taken to the Lutheran General Hospital emergency department. That note discloses that Petitioner had developed neck pain that radiates to his left shoulder with tingling in his left forearm and numbness in his left upper arm. Dr. Jon Olsen, assessed a cervical disk herniation and cervical radiculopathy. On August 13, 2010, Petitioner reported to Dr. Perlmutter with continuing pain. On physical examination, the doctor found decreased strength in Petitioner's left hand, and radicular pain from the left shoulder into the forearm. On this date, Dr. Perlmutter recommended cervical spinal surgery. Thus, Petitioner's condition dramatically changed contemporaneously with the February 27, 2009 accident.

Dr. Bauer testified that Petitioner's injury on February 27, 2009 was causally related to his cervical spondylosis and radiculopathy. (Dep. of Dr. Bauer, pp9, 10). Dr. Bauer believed the incident aggravated or exacerbated Petitioner's condition because Petitioner was asymptomatic for over a year until that episode occurred. (Dep. of Dr. Bauer, p9). Dr. Samo similarly testified that the February 2009 accident aggravated Petitioner's cervical spinal condition. (Dep. of Dr. Samo, p21). Dr. Prabhu testified that the incident on February 27, 2009 could have aggravated or exacerbated Petitioner's condition. (Dep. of Dr. Prabhu, pp25, 26, 31, 32).

No doctor, including Respondent's examining physicians, disputes that the February 27, 2009 accident caused an aggravation of Petitioner's cervical spine. The Arbitrator further relies on the testimony of Dr. Bauer, along with Respondent's examining physicians, Drs. Prabhu and Samo, that the February 2009 accident caused a permanent aggravation of Petitioner's cervical spinal condition. The Arbitrator further notes that these opinions are most consistent with Petitioner's symptoms: As Petitioner credibly testified, Petitioner had not received neck treatment prior to February 27, 2009, since May 2008. Before February 27, 2009, Petitioner was able to work full duty without problem, but was caused to miss five weeks as a result of his symptoms after that date. After this accident, Petitioner's cervical condition had worsened to the point where Dr. Perlmutter recommended that Petitioner cease working as a firefighter, and undergo major surgery. Thus, the Arbitrator finds that the February 27, 2009 accident was causally related to Petitioner's current condition of ill-being.

The Arbitrator further finds that Petitioner's earnings for the year preceding this injury were $103,476.40, representing an average weekly wage of $1,989.93. By stipulation of the parties, Petitioner was totally temporarily disabled from April 6, 2009, until May 10, 2009, for five weeks. $5,366.65 has been paid in TTD for this accident.

b. The August 16, 2010 accident

Petitioner credibly testified as to incurring an injury on August 16, 2010. He and his colleagues testified to lifting a woman weighing over 500 pounds with four other coworkers. This patient was especially uncooperative, and did not support any of her own weight. This job involved lifting the patient from her chair onto a cot, over a 6 to 8 inch threshold between the front door and a ramp in front of the patient's house, into the ambulance, and from the ambulance cot into the hospital bed. Petitioner credibly testified that at several points he was required to lift this patient in compromising positions, such as while lifting the patient over the low threshold between the door and the ramp, and while transferring the patient onto the hospital bed. After this incident, Petitioner immediately felt neck and arm pain. All of his four cohorts on that date recall Petitioner exclaiming some version of "that hurt." His supervisor, Lieutenant Copeland, testified that, when asked if he was okay, Petitioner responded "I'm a long way from okay[,]" and additionally told Lieutenant Copeland "I'm hurting" and "I'm in pain." Mr. Preito testified that he personally found the lift painful despite his relative youth and strength. Dr. Bauer testified to having independent recollection of discussing this incident with Petitioner. (Dep. of Dr. Bauer, p23). Thus, the Arbitrator finds that Petitioner gave timely notice of the accident to Lieutenant Copeland, his immediate supervisor.

The Arbitrator finds that the August 2010 accident was also causally-related to Petitioner's current condition of ill-being. In doing so, the Arbitrator relies on the testimony of Dr. Bauer, along with Respondent's examining physicians, Drs. Prabhu and Samo, who testified that the August 2010 accident caused Petitioner's current symptoms. (Dep. of Dr. Samo, pp37-8). The Arbitrator discounts the opinions of Dr. Butler, who did not believe that Petitioner was involved in any incident in August 2010, and failed to explain why his condition suddenly deteriorated at that time. Before August 16, 2010, Petitioner was able to work and maintain the strenuous duties of a firefighter and paramedic. Only after August 16, 2010, did Petitioner complain of significant pain that prevented his return to work. Thus, the Arbitrator finds the August 16, 2010 incident is causally related to Petitioner's current state of ill-being.

The Arbitrator further finds that Petitioner's earnings in the year preceding the injury were $103,446.52, for an average weekly wage of $1,989.36, pursuant to Section 10 of the Act. Petitioner was totally temporarily disabled from August 16, 2010, until February 1, 2012, for a period of 76 and 1/7 weeks.

IV. Petitioner is entitled to a wage differential.

The medical records clearly show that Petitioner is permanently disabled from his work as a firefighter and paramedic due to his cervical spinal condition. Petitioner earns $23,550 per year as a police officer. In this job, he does not need to carry 70 pounds of gear on his back as he did as a firefighter. Instead, the physical requirements of a police officer are far less strenuous on Petitioner's cervical spine.

Vocamotive's labor market survey estimates that Petitioner's "most probably wage earning potential is between $11.00 and $18.00 hourly." Therefore, according to Vocamotive, Petitioner's annual salary should fall between $22,880 and $37,440, if Petitioner was to work 40 hours per week. Petitioner's current job as a police officer is within this range. This is especially notable given the current weak labor market.

The labor market survey further details various positions for which Petitioner would be qualified. As a security guard, the listed average hourly salary is $12.35 in the state of Illinois, and $12.20 in the Chicago metropolitan area. The listed hourly salaries are "between $11.50 and $13.00 per hour" at Contegra Hospital, "between $10.75 and $11.25 per hour" at Dunbar Armored Inc., $10.50 per hour at Premier Security Corp., and $10.38 for the Village of Schaumburg. Thus, Petitioner's current position compares favorably with these positions.

Vocamotive's report notes that "[t]he consultant attempted to find fulltime Police Officer positions available for Mr. Hoffman [*sic*], however; the labor market in this industry appears to be diminished and job openings appear to be limited." Nevertheless, the report lists two police officer positions: a $15.46 per hour position for the Forest Preserve District of Kane County, and a $18.33 per hour position for Harper College. Given that the current labor market in this area is diminished, and positions are very competitive, Petitioner's current position compares favorably with these speculative positions.

The labor market survey also lists various computer-based positions, including dispatcher positions at Aldridge Electric and Graebel Van Lines, and a Hospital Admitting Clerk at Mercy Health Systems, and Alexian Brothers Medical Center. Not only are these positions far from Petitioner's current expertise, but are especially ill-suited for Petitioner, whom "denie[s] having any keyboarding skills."

Therefore, the Arbitrator finds that Petitioner is entitled to a wage differential of $1,024.31 per week pursuant to Section 8(d) (1) of the Act (79,896.52 x 2/3rds / 52wks), beginning on February 1, 2012, which was Petitioner's last TTD date, until the cessation of his disability. This figure reflects his decrease in wages of 79,896.52: from $103,446.52, which he earned his last year as a firefighter, to $23,550, which he currently earns as a police officer. The Arbitrator further notes that Respondent has paid $6,647.20 as a PPD advance, and is entitled to a credit for the same.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARY O'KEEFE,

Petitioner,

vs.

NO: 09 WC 01182

14IWCC0589

SODEXHO,

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, medical expenses, temporary disability benefits and permanent disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator awarded Petitioner permanent partial disability benefits of 50% loss of the person as a whole. We modify the Arbitrator and award the Petitioner permanent partial disability benefits of 20% loss of the person as a whole.

Petitioner suffered a work related injury and her condition of ill being is causally connected to her current medical condition. She herniated a disk in her lumbar spine, and it is likely she would improve with surgery or epidural steroid injections; however, she refuses to have such treatment. Petitioner's credibility with respect to her current symptoms is very questionable and we do not believe Petitioner is as disabled as she claims, based on her inconsistent testimony and surveillance video.

14IWCC0589

Her testimony is contradictory and when confronted with her inconsistencies, Petitioner offers inadequate or illogical explanations. Petitioner claims she needs to walk with a cane but only uses it at home. Yet, if she really had balance issues, a cane would be more necessary outside of the home where the ground is uneven. She claims to have not improved and claims her condition worsened, yet her physical abilities have improved. At first Petitioner testified she could only walk half a block and never left her house. Yet at the time of the hearing, Petitioner said she was able to walk a greater distance and for a longer period of time.

Additionally, the surveillance video submitted into evidence also demonstrates that Petitioner is capable of ambulating and carrying more than she claimed at the hearing. Petitioner testified that she walks very slowly and cannot walk for great distances. She also said she has trouble getting in and out of cars. However, the video demonstrates Petitioner getting in and out of her car both on the driver and passenger side several times without issue. She was also seen walking several times at a normal pace and not struggling. One video showed Petitioner walking at a normal pace while carrying a gallon of bleach and a 12-pack of soda. Further surveillance video and private investigator testimony confirmed that Petitioner was able to perform to a greater extent than she testified. Personal Investigator Carli credibly testified that he saw Petitioner and her husband walking around Home Depot for 45 minutes without having to stop and rest. This video contradicts Petitioner's testimony regarding her physical capabilities.

All doctors agree that Petitioner needs permanent restrictions if she continues to refuse further treatment, which is her right. Yet, Petitioner is capable of working and capable of doing more than she leads many to believe. It is difficult to determine what Petitioner is actually able to do and what her true restrictions are without additional testing, such as a functional capacity evaluation or additional medical treatment. Overall, we find Petitioner is not as disabled as she claims. Petitioner's own primary care physician, Dr. Vetrone, expressed her concern that Petitioner was as injured as she claims. The record is replete with inconsistencies and strong suggestions that Petitioner is exaggerating her current symptoms. We therefore modify the Arbitrator's award and award Petitioner permanent partial disability benefits of 20% loss of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent pay to Petitioner the sum of $538.46 per week for a period of 75 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 $484.61 per week for a period of 100 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 20% loss of the person as a whole.

14IWCC0589

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $3,183.23 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 $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: JUL 18 2014
TJT: kg
O: 5/6/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

O'KEEFE, MARY
Employee/Petitioner

Case# **09WC001182**

SODEXHO
Employer/Respondent

14IWCC0589

On 1/8/2013, 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 0.10% 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:

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SUITE 3700
CHICAGO, IL 60601

1832 ALHOLM MONAHAN KLAUKE ET AL
STACEY HILL
221 N LASALLE ST SUITE 450
CHICAGO, IL 60601

14IWCC0589

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

Mary O'Keefe,
Employee/Petitioner

v.

Sodexo,
Employer/Respondent

Case # **09** WC **1182**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Chicago**, on **9/25/12 and 10/9/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0589

FINDINGS

On **12/16/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$42,000.00**; the average weekly wage was **$807.69**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$26,588.14** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$54,727.06** for other benefits, for a total credit of **$81,315.20**. (Arb.Ex.#1).

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 $538.46 per week for 75 weeks, commencing 12/17/08 through 5/25/10, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 12/17/08 through 9/25/12, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $26,588.14 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $3,183.23, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $484.61 per week for 250 weeks, because the injuries sustained caused the 50% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

1/4/13
Date

JAN 8 – 2013

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STATEMENT OF FACTS:

Petitioner, 48 year old catering manager, testified that as of the date of the alleged accident she had worked for Respondent since January 1997, starting out as a demonstration cook and changing job titles many times over the years. She indicated that as a catering manager her job included running cafeterias and catering special events in office buildings, serving from 1 to 500 people. She noted that her duties involved running the cafeteria and catering operations, from doing paperwork to supervising the set-up of catering operations to occasionally assisting with baking and other food-service and preparation activities. Petitioner testified that she did not have any problems with or receive any medical treatment for her lower back prior to December 16, 2008, and that she did not for did not have any problems performing her job duties for same.

Petitioner testified that on December 16, 2008 she was assisting in putting away boxes of turkeys, each box containing two to four turkeys and each turkey weighing approximately 30 to 40 pounds. She indicated that when she picked up and threw a box she felt shooting pain down her left leg, wet her pants and fell backwards. She noted that she sat on the ground for a few minutes following the incident, to regain her composure, before putting on her coat to cover up her wet pants and sitting in the parking lot for about 45 minutes. Petitioner indicated that everyone knew about the accident, including her manager, Marilee Ferg.

For her part, Ms. Ferg testified that on the date of the alleged incident she saw Petitioner putting away an order when she fell. Ms. Ferg also claimed that she had previously asked Petitioner whether the latter would be going to the Christmas party, to which Ms. O'Keefe allegedly said that she was not, and that she had an appointment to see a doctor because her back had been hurting. Ms. Ferg also recalled a conversation on December 8, 2008 wherein she asked Petitioner how the doctor's appointment went, and that Petitioner indicated that the doctor wanted to do more tests, which had yet to be scheduled. Petitioner later denied telling Ms. Ferg on December 5, 2008 that her back was hurting her and that she was going to see a doctor. However, she agreed she visited Dr. Vetrone on that date and gave a history of back ache for two weeks following a twisting injury at work. Petitioner noted that she had pulled two muscles while loading coolers onto and off a refrigerated truck. She indicated that she did not report the injury and did not miss any time from work following this incident. She also stated that she did not seek any further treatment following this one visit and that the muscle ache resolved after about 10 days.

Petitioner testified that following the incident on December 16, 2008 she told Ms. Ferg that she hurt her back and that was she leaving. She subsequently went home, took a shower and made a doctor's appointment with her primary care physician, Dr. Laura Vetrone. According to the medical records, Petitioner called Dr. Vetrone and reported "really bad lower back pain" with hip and inner thigh pain. (RX11). She reported that the pain was "like a firecracker", and started after lifting at work, that her back went out on her and that she urinated in her pants. (RX11). Dr. Vetrone advised that she see an orthopedic specialist, Dr. Steven Mash at M&M orthopedics, and that she remain off work. (RX11).

Petitioner noted that she was unable to make her appointment with Dr. Vetrone on that date due to a bad snow storm, and instead was seen in the emergency room at Advocate Good Samaritan Hospital. (PX1, RX11). At the emergency room, Petitioner reported that she had been lifting turkeys at work earlier that day and felt pain in her lower back, shooting into her buttocks and across her thigh, and that she had leaked a little urine. (PX1). She was given a shot of Prednisone and told to follow up with her doctor. (PX1).

Petitioner did not improve and followed Dr. Vetrone's recommendation to see Dr. Mash at M&M Orthopedics on December 26, 2008. (PX3). Petitioner reported no prior history of back problems and described her condition as starting with the lifting incident on December 16, 2008. (PX3). At the time of this visit it was

noted that Petitioner was complaining "bitterly" of low back discomfort and left radicular symptoms. (PX3). Dr. Mash recommended a lumbar MRI and kept Petitioner off work. (PX3).

And MRI performed on January 13, 2009 revealed degenerative disc disease at L1-2, L3-4 and L5-S1, but also a disc herniation at L4-5 with moderate disc pace narrowing. (PX3). Petitioner returned to Dr. Mash following the MRI on January 26, 2009. (PX3). At that time, she reported that she had been having problems with urinary incontinence. (PX3). Dr. Mash diagnosed Petitioner with a broad-based disc herniation at L4-5 and referred her to Dr. Mather in his practice group for a surgical consultation, which she declined. (PX3). Dr. Mash urged her to consider a consultation with an orthopedic or neurosurgical surgeon, considering the potential seriousness of her condition. (PX3). Petitioner testified that she did not want to consider surgery, out of fear that she would not be made better by the surgery, but that her condition would get worse.

The workers' compensation nurse case manager Carla Willy then sent Petitioner to Dr. Stavros Maltesos at CNS Neurological Surgery. (PX4). Petitioner reported the same history. (PX4). Dr. Maltesos reviewed the MRI and found that Petitioner had an annular tear at L3-4 and a broad-based disc bulge at L4-5 with moderate neuro-foraminal narrowing bilaterally. (PX4). Dr. Maltesos diagnosed Petitioner with a lumbar strain with radiculitis. (PX4). Dr. Maltesos felt that Petitioner was not a surgical candidate and suggested that Petitioner's complaints of incontinence were stress-related as opposed to neurological. (PX4). Dr. Maltesos kept Petitioner off work and recommended Prednisone and physical therapy, and, if that did not provide relief, epidural steroid injections. (PX4). Dr. Maltesos also suggested that if she does not improve, she should get a CT scan and consider epidural lumbar injections and/or a nerve root block. (PX4).

Shortly thereafter, Petitioner started a course of physical therapy at Accelerated Rehabilitation. (PX5). She went approximately three times a week for the next two months. (PX5). Petitioner noted that she did not experience any relief from the physical therapy.

Dr. Maltesos also referred Petitioner for a gynecological examination with Dr. Denise Elser. Petitioner visited Dr. Elser on February 2, 2009 at which time Dr. Elser noted that she was not able to determine if Petitioner was having incontinence due to pelvic floor muscle dysfunction (stress) or neurological involvement. (PX4).

Petitioner followed up with Dr. Maltesos on March 24, 2009 at which time she reported "intractable, horrible pain." (PX4). It was noted that Petitioner had not been to the pain clinic for epidural injections or a nerve block because she was afraid to have injections. (PX4). She also reported no relief with the oral steroid or physical therapy at that time. (PX4). Dr. Maltesos again recommended injections and a nerve block, and if these failed to provide relief, a lumbar CT scan. (PX4).

Per Dr. Maltesos' recommendation, Petitioner visited Dr. Patel at Advocate Good Samaritan on March 25, 2009 to discuss injections. (PX1). However, Petitioner once again indicated that she did not want to have said injections. (PX1). Petitioner returned to Dr. Patel on April 22, 2009 at which time Dr. Patel advised that she continue with medications if she did not want injections. (PX1).

Petitioner then returned to Dr. Maltesos on April 30, 2009 at which time she reported severe and unchanged pain. (PX4). Dr. Maltesos suggested a CT scan; however, since Petitioner would not consider invasive treatment, he declined to order the test and found that Petitioner was at maximum medical improvement. (PX4). At that time Dr. Maltesos returned Petitioner to sedentary work, pending a functional capacity examination (FCE), and noted that once the evaluation was performed, Ms. O'Keefe would be released to return to work within the restrictions outlined in the FCE. (PX4).

The FCE was started on May 5, 2009 at Accelerated Rehabilitation, but aborted due to an elevated heart rate. (PX5). It was repeated successfully on May 27, 2009. (PX5). The test was found to be valid, and Petitioner was determined to be able to perform work in the light to light-medium category. (PX5). It was noted that Petitioner exhibited moderate difficulty standing for more than 2 hours and mild difficulty walking. (PX5). Her catering manager position was considered medium duty, so she did not fit the demands of her pre-injury job.

Petitioner returned to Dr. Vetrone on May 28, 2009 and reported increased pain as a result of the FCE. (RX11). Petitioner also returned to Dr. Maltesos on June 11, 2009. (PX4). Dr. Maltesos mentioned that Petitioner had undergone an examination with a Dr. Ross, who had suggested an upright MRI and an EMG. (PX4). Dr. Maltesos felt that Petitioner did not need another MRI if she was not considering surgery, but that he would order an EMG. (PX4). Dr. Maltesos also felt that hip pathology should be ruled out by x-ray. (PX4). At that time, Dr. Maltesos released Petitioner to return to work within the restrictions outline in the FCE. (PX4).

Petitioner returned to Dr. Maltesos on July 21, 2009 having had the pelvis x-ray and the EMG, both at Advocate Good Samaritan. (PX1, PX4). The x-ray revealed mild degenerative joint disease, and the lumbar EMG was normal. (PX1). At the time of this visit Petitioner reported that her pain has been unchanged since the time of the accident. (PX1). Dr. Maltesos felt that Petitioner would still benefit from injections and possible surgery, and suggested that she consider a CT scan as well. (PX4). However, Petitioner once again declined, and Dr. Maltesos discharged her at maximum medical improvement. (PX4).

On October 8, 2009, Respondent offered Petitioner a position as a cashier starting October 12, 2009. (PX12). Petitioner testified that she retuned to work on October 12, 2009, but left after two hours. She noted that she had to stand the entire time she was working, and that she could not tolerate standing that long, as well as walking, lifting and bending. She indicated that before she left for that day, she told her supervisor, Marilee Ferg, that she could not take the pain and that Ms. Ferg offered to allow Petitioner to continue working with a chair. However, Petitioner indicated that it was too late, as she was in a great deal of pain, and that she wanted to see her doctor. Respondent terminated Petitioner the next day. Petitioner never returned to work for Respondent or anyone else thereafter.

Ms. Ferg testified that Petitioner had been offered a cashier job given that there are really no light duty jobs with Respondent in the kitchen, given that you are expected to be on your feet all day. However, Ms. Ferg noted that the cashier job was modified to allow for lifting of only five (5) pounds, with instructions to request help for anything heavier. Ms. Ferg also noted that she offered Petitioner a chair, if she needed it, but that it was kind of low where she worked and it was a standing position for the most part. Ms. Ferg noted that Petitioner reported for light duty work on October 12, 2009 but by 9:10 am claimed to be in too much pain to stay. Ms. Ferg testified that she has not spoken to Petitioner since, and that Ms. O'Keefe has not returned any of her calls.

Petitioner returned to Dr. Vetrone on October 19, 2009 at which time she reported being in increased pain as a result of standing on her job. (RX11). Dr. Vetrone revised her work restrictions to reflect that Petitioner could not stand longer than 10 minutes per hour or lift greater than 8 pounds. (RX1).

Petitioner testified that her condition continued to deteriorate, and she continued to follow up with Dr. Vetrone. (PX11). On June 22, 2010, Dr. Vetrone once again urged Petitioner to consider surgery, which Petitioner refused. (RX11). Dr. Vetrone saw Petitioner for the last time on February 8, 2011. (RX11).

Sometime in 2010, Petitioner applied for long term disability benefits with Liberty Mutual. As part of that application process, Liberty Mutual put Petitioner under surveillance, had her records reviewed by Dr. Alfred Luppi, and had a transferrable skills report prepared by Gregory Watson.

Dr. Luppi prepared his initial report regarding Petitioner's disability on August 19, 2010. (PX9). He performed a review of Petitioner's medical records from Dr. Vetrone and Dr. Maltesos and the FCE of May 27, 2009. (PX9). He also had a conversation with Dr. Vetrone on August 13, 2010. (PX9). Dr. Luppi concluded that Petitioner's MRI findings would account for her complaints. (PX9). He further concluded that based upon her injury, she had restrictions consistent with the FCE for at least the next 12 months. (PX9). In addition to the restrictions of the FCE, he also added that Petitioner could do walking/standing combined for six hours out of an eight hour work day and continuous sitting. (PX9). He further clarified the sitting and standing restrictions by stating that she can sit up to 50 minutes at a time, with changes in position after 50 minutes up to eight hours per workday, and that she can only stand or walk up to 30 minutes at a time with a 10 minute break, up to two hours per workday. (PX9).

Dr. Luppi was asked by Liberty Mutual to verify the standing and walking restrictions and issued an addendum report on September 2, 2010, wherein he reiterated the restrictions and stated that they are based on the physical testing and FCE. (PX9).

Vocational rehabilitation counselor Gregory Watson testified that he was retained by Liberty Mutual to perform a transferable skills analysis. (RX10). Mr. Watson explained that when someone is not able to return to their prior employment due to a disability, he will review the individuals training, education, experience and physical limitations to determine if the person has skills that can transfer into another line of work. (RX10). Mr. Watson opined that Petitioner could perform a sedentary occupation based upon Dr. Luppi's restrictions. (RX10). He also felt that Petitioner had developed skills during the course of her work life that would translate to employment in customer service, rep supervisor, inside sales representative and an order clerk. (RX10). He further testified with respect to the range of salary one could expect from any of these occupations, based upon a review of Illinois Department of Labor statistics, combined with Petitioner's skill level. (RX10). On cross examination, Mr. Watson agreed that he did not do an analysis of actual employment opportunities for Petitioner in her job market, including a labor market survey. (RX10).

At the request of the Respondent, Petitioner visited Dr. Andrew Zelby on February 14, 2011 for purposes of a §12 examination. (RX9). Dr. Zelby indicated that Petitioner's current condition of ill-being was work-related, and that she has permanent work restrictions as a result, assuming she did not elect to have additional treatment. (RX9, p.22). Dr. Zelby also was of the opinion that Petitioner might benefit from a repeat MRI or CT scan. (RX9, p. 27). Dr. Zelby went on to opine that without a CT scan or MRI, Petitioner was at maximum medical improvement as of April 30, 2009. (RX9). Finally, Dr. Zelby testified that Petitioner could perform work at the medium-heavy level. (RX9, p.23).

Petitioner eventually sought a different primary care doctor and began treating with Dr. Umang Patel at Woodridge Clinic on February 21, 2011. (PX6). In a handwritten letter addressed "to whom it may concern", Dr. Patel noted that Petitioner was under his care "... for backache with radiculopathy and Sjogren's disease and is not able to work. She is unable to sit, stand, bend, pick up, reach above shoulder, walk, lift, push, etc." (PX6). The record shows that Petitioner last visited Dr. Patel on September 27, 2012 complaining of ear pain and diminished hearing; in addition, it was noted that Petitioner complained of low back pain in the form of a dull ache which she noted she has had since 2008 and which does not go away. (PX6). It was also noted that Petitioner denied bladder or bowel incontinence at that time. (PX6). There is no indication that Dr. Patel restricted Petitioner from work, with or without restrictions, at that time. (PX6).

In an undated "Bureau of Disability Determination Services Telephone Report" by call adjudicator "Julia H", the following medical information summary, based on a telephone conversation with Dr. Vetrone on March 22, 2010, contained the following: "... [Petitioner] has been recommended surgery but her anxiety prevents her

from having this surgery. She is afraid of having it because her husband had it and he is now disabled, and wheelchair bound... Her company gave her light duty based on a functional capacity but even this caused her pain so she did not return to work. Doctor Vetrone did not measure her flexion or extension of back but said she sat rigidly and can walk. Her main problem is her anxiety which interferes with making sound decisions about her physical condition. All her problems are mostly subjective." (RX11).

At the request of her attorney, Petitioner was examined by non-board certified occupational medicine physician Dr. Thomas Cronin on May 14, 2011. (PX13). Dr. Cronin testified on the date of his examination he noted that Petitioner arose from the chair with moderate difficulty, ambulated with a slow measured gait and exhibited poor sitting tolerance requiring multiple changes in position. (PX13, p.27). Dr. Cronin also observed what he termed "significant limitation of movement on extension and flexion", including side-to-side bending of only 10 degrees and the need to hold onto the wall so that she did not fall over while performing the heel and toe walk. (PX13, p.28). In addition, Dr. Cronin noted that she had a positive straight leg raise test on the left of only 5 degrees and that Petitioner exhibited "considerable difficulty, and notable discomfort" when lying down and getting up from the examining table. (PX13, p.29). Likewise, Dr. Cronin recorded diminished deep tendon reflexes on the left as opposed to the right, diminished sensation to sharp and light touch of the left calf and left dorsal and plantar surfaces of the left foot as well as a distinct purple to pink discoloration of the entire left foot. (PX13, p.31). Following his examination, Dr. Cronin's assessment was persistent low back pain, degenerative disk disease, herniated nucleus pulposus, L4-5, bilateral foraminal stenosis and severe L5-S1 radiculitis. (PX13, pp.31-32). Dr. Cronin went on to state that "... the causation of her present symptoms were the result of the injury she sustained lifting these turkeys on 12/16/08." (PX13, p.32). Dr. Cronin also opined that Petitioner was unable to work due to "... [c]ontinuing, unremitting severe pain, and also the fact that she was taking Norco, which is a narcotic.", and this inability to work was due to her work related accident. (PX13, pp.32-33).

Respondent called three private investigators to testify regarding surveillance of Petitioner. The first witness, Patrick Jenske, testified that he conducted surveillance of Petitioner on May 25, 2010. Mr. Jeske testified that he observed Petitioner driving a vehicle and arriving at her home, then exiting the home and returning with a bucket of cleaning supplies, including a mop. Mr. Jeske thereafter saw Petitioner go to a plumbing supply store with her husband, then standing outside talking to a neighbor. During the conversation with the neighbor, Petitioner is seen bending slightly at the waist. (RX6).

The second witness was Thomas Carli. Mr. Carli conducted surveillance of Petitioner on October 21, 2010 and observed Ms. O'Keefe going to a restaurant with her husband and walking around inside a Home Depot for about 45 minutes. Mr. Carli indicated during that time he did not see Petitioner sit down or walk with any difficulty. He also noted that he did not record footage of Petitioner inside the Home Depot at that time. (RX7).

Finally, private investigator Howard Hughes testified that he conducted surveillance on Petitioner on September 1, 2012 and recorded Petitioner walking with her husband while carrying a 12-pack of soda and a bottle of bleach while walking a dog weighing approximately 20-30 pounds on a leash. Petitioner is also seen getting into the driver's side of the car. (RX8).

Petitioner testified that she currently notices that her lower back has gotten worse, and that she is in terrible pain all the time. She noted that the pain causes her to lose track of things, that she has difficulty sleeping at night and that sometimes her left leg and knee goes numb and goes out on her. In addition, she indicated that she experiences pain across the left side of her butt down the side of her left leg to the top of her foot.

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

Petitioner testified that on December 16, 2008 she was assisting in putting away boxes of turkeys, each box containing two to four turkeys and each turkey weighing approximately 30 to 40 pounds. She indicated that when she picked up and threw a box she felt shooting pain down her left leg, wet her pants and fell backwards.

Respondent's own witness, general manager Marilee Ferg, testified that she was present on the date in question and that she witnessed the accident in question – specifically, that she saw Petitioner fall as she was putting away an order.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of her employment on December 16, 2008.

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

Petitioner initially testified that prior to the accident she had experienced no problems with her lower back, and had not received any prior medical treatment or lost any time from work for any low back problems.

General manager Marilee Ferg testified that prior to the accident (apparently on or about December 5, 2008), she had asked Petitioner whether she was going to the Christmas party and had been told that the latter was not due to the fact that she had a doctor's appointment because her back had been hurting her. Ms. Ferg testified that she had another conversation with Petitioner on December 8, 2008 at which time she asked Petitioner how the doctor's appointment went. Ms. Ferg noted that Petitioner responded that the doctor wanted more tests, which had not yet been scheduled.

Following Ms. Ferg's testimony, Petitioner was recalled by her attorney. At that time Petitioner agreed that she informed Ms. Ferg that she would not be attending the Christmas party, and that she indeed did not attend same. However, Petitioner denied that she informed Ms. Ferg at that time that her back hurt and that she was going to the doctor.

Dr. Vetrone's office records, specifically a handwritten office note dated December 5, 2009 reflects a history of back ache for two (2) weeks following a twisting injury at work while lifting a heavy bucket. (RX11).

Petitioner testified that she visited Dr. Vetrone on that day after pulling two muscles in her rib cage over the Thanksgiving holiday while unloading six (6) coolers and loading/unloading them on refrigerated trucks. Petitioner claimed that she did not report the injury and did not miss any time from work as a result of the incident.

The Arbitrator finds Petitioner's claim that she pulled two muscles in her rib cage at that time not to be credible. Dr. Vetrone's history clearly references back ache and the assessment portion of her note likewise refers to back pain. (RX11). There is no reference to any pulled rib muscle.

Be that as it may, Petitioner testified that she missed no time from work as a result of this injury and that the problem resolved in about 10 days. The fact that she did not miss any time from work following that incident, and that she did not start losing time from work until after the witnessed accident on December 16, 2008 leads

the Arbitrator to infer that Petitioner sustained an aggravation of a pre-existing condition relative to her lower back.

Along these lines, Petitioner's §12 examining physician, Dr. Cronin, opined that Petitioner's current condition of ill-being was causally related to said work accident on December 16, 2008. (PX13, p.32)

Similarly, Respondent's §12 examining physician, Dr. Zelby, agreed that Petitioner was injured in a work-related accident, and that she has permanent restrictions as a result of her injury, assuming she does not pursue any further treatment. (RX9, p.22).

Therefore, based on the above, and the record taken as a whole, including the chronology of events and the opinions of both Dr. Cronin and Dr. Zelby, the Arbitrator finds that Petitioner's current condition of ill-being relative to her lower back is causally related to the accident on December 16, 2008.

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:

Petitioner is claiming unpaid medical bills totaling of $1,975.00 from Dr. Maltesos of CNS Neurological Surgery (PX4; DOS = 2/5/09, 3/24/09, 4/30/09, 6/11/09 & 7/21/09) and $1,208.23 in out-of pocket prescription costs. (PX11).

Based on the above, and the record taken as a whole, including the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses totaling $3,183.23 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act. Furthermore, Respondent shall be entitled to a credit for any and all amounts paid in medical on behalf of Petitioner as a result of this injury.

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

The period of temporary total disability extends from the time the injury incapacitates the employee until the claimant has recovered as much as the character of the particular injury will permit. *Rambert v. Industrial Commission*, 133 Ill.App.3d 895, ___, 87 Ill.Dec. 836, 842, 477 N.E.2d 1364, 1370 (App. Crt. 2nd Dist. 1985). Therefore, compensation for such a disability will be awarded from the time of the injury until the employee's condition has stabilized. *Rambert*, 477 N.E.2d at 1370. The claimant must prove not only that he did not work, but that he was unable to work. *Gallentine v. Industrial Commission*, 201 Ill.App.3d 880, 559 N.E.2d 526 (1990).

Petitioner testified that she returned to work in a light duty capacity with Respondent on October 12, 2009, but that she left after two hours. She noted that she had to stand the entire time she was working, and that she could not tolerate standing that long, as well as walking, lifting and bending. She indicated that before she left that day, she told her supervisor, Marilee Ferg, that she could not take the pain and that Ms. Ferg offered to allow Petitioner to continue working with a chair. However, Petitioner indicated that it was too late, as she was in a great deal of pain, and that she wanted to see her doctor. Respondent terminated Petitioner the next day. Petitioner never returned to work for Respondent or anyone else thereafter.

Ms. Ferg testified that Petitioner had been offered a cashier job given that there are really no light duty jobs with Respondent in the kitchen, given that you are expected to be on your feet all day. However, Ms. Ferg noted that the cashier job was modified to allow for lifting of only five (5) pounds, with instructions to request help for anything heavier. Ms. Ferg also noted that she offered Petitioner a chair, if she needed it, but that it was kind of low where she worked and it was a standing position for the most part.

Petitioner returned to Dr. Vetrone on October 19, 2009. In a handwritten prescription slip on that date, Dr. Vetrone indicated that "Mary O'Keefe may return to work light duty, which involves no standing more than 10 minutes per hour and no lifting more than 8 pounds." (PX2, RX11).

In an undated "Bureau of Disability Determination Services Telephone Report" by call adjudicator "Julia H", the following medical information summary, based on a telephone conversation with Dr. Vetrone on March 22, 2010, contained the following: "… [Petitioner] has been recommended surgery but her anxiety prevents her from having this surgery. She is afraid of having it because her husband had it and he is now disabled, and wheelchair bound… Her company gave her light duty based on a functional capacity but even this caused her pain so she did not return to work. Doctor Vetrone did not measure her flexion or extension of back but said she sat rigidly and can walk. Her main problem is her anxiety which interferes with making sound decisions about her physical condition. All her problems are mostly subjective." (RX11).

On May 25, 2010 Petitioner was filmed by private investigator Patrick Jeske carrying a bucket of cleaning supplies, as a well as a mop, into and out of her home. (RX6).

On June 22, 2010, Dr. Vetrone once again urged Petitioner to consider surgery, which Petitioner refused. (RX11). Petitioner last saw Dr. Vetrone on February 8, 2011.

Private investigator Thomas Carli testified that he conducted surveillance on October 21, 2010 at which time he observed Petitioner walk around inside a Home Depot with her husband for 45 minutes without seeing her sit down or exhibit any difficulty walking.

At the request of the Respondent, Petitioner visited Dr. Andrew Zelby on February 14, 2011 for purposes of a §12 examination. (RX9). Dr. Zelby was of the opinion that Petitioner might benefit from a repeat MRI or CT scan. (RX9, p. 27). However, Dr. Zelby noted that without a CT scan or MRI, Petitioner was at maximum medical improvement as of April 30, 2009. (RX9). Finally, Dr. Zelby testified that Petitioner could perform work at the medium-heavy level. (RX9, p.23).

Petitioner eventually came under the care of Dr. Umang Patel at Woodridge Clinic on February 21, 2011. (PX6). In a handwritten letter addressed "to whom it may concern", Dr. Patel noted that Petitioner was under his care "… for backache with radiculopathy and Sjogren's disease and is not able to work. She is unable to sit, stand, bend, pick up, reach above shoulder, walk, lift, push, etc." (PX6). The record shows that Petitioner last visited Dr. Patel on September 27, 2012 complaining of ear pain and diminished hearing; in addition, it was noted that Petitioner complained of low back pain in the form of a dull ache which she noted she has had since 2008 and which does not go away. (PX6). There is no indication that Dr. Patel restricted Petitioner from work, with or without restrictions, at that time. (PX6).

At the request of her attorney, Petitioner was examined by non-board certified occupational medicine physician Dr. Thomas Cronin on May 14, 2011. (PX13). Following his examination, during which he noted that Petitioner at one point had to hold onto the wall while walking in order not to fall over, Dr. Cronin Petitioner

was unable to work due to "... [c]ontinuing, unremitting severe pain, and also the fact that she was taking Norco, which is a narcotic." (PX13, pp.32-33).

On September 1, 2012, private investigator Howard Hughes conducted surveillance and filmed Petitioner walking and carrying a 12 pack of Pepsi as well as a gallon of bleach in addition to holding the leash of a dog weighing approximately 20 to 30 pounds. (RX8).

Petitioner admittedly has not worked anywhere or sought employment elsewhere since her attempt to return to work for Respondent in a light duty capacity on October 12, 2009.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from December 17, 2008, or the day after her accident, through May 25, 2010, or the date Petitioner was filmed carrying a mob and a bucket of cleaning supplies, for a period of 75 weeks. Along these lines, the Arbitrator finds Petitioner's claim of ongoing, unremitting and debilitating back pain not to be credible, particularly in light of what is shown on the aforementioned surveillance videos. The Arbitrator notes that the videos in question, while admittedly not of the "smoking gun" variety, would seem to contrast sharply with the patient described by Dr. Cronin, in particular – namely, someone who could not walk heel to toe across the room without holding onto the wall in order to keep from falling over. Instead, the videos would appear to depict an individual who can ambulate and carry items within the restrictions outlined by her various physicians, and as reflected in the FCE, without any obvious signs of pain or discomfort.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

In order to prove entitlement to permanent total disability benefits for life pursuant to §8(f) of the Act, a claimant must prove such a claim either (a) by a preponderance of the medical evidence, (b) by showing a diligent but unsuccessful job search, or (c) by demonstrating that because of his age, training, education, experience and condition no jobs are available to a person in like circumstances. See *ABB C-E Services v. Industrial Commission*, 250 Ill.Dec. 60, 737 N.E.2d 682, 316 Ill.App. 3d 745 (5th Dist. 2000).

An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois v. Industrial Commission*, 77 Ill.2d 482, 487 (1979). The employee, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Commission*, 95 Ill.2d 278, 286-87 (1983). Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano v. Industrial Commission*, 282 Ill.App.3d 531, 534 (1996). If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for "odd lot" status. *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill.2d 538,546-47 (1981). An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Valley Mould*, 84 Ill.2d at 547.

If employees fail to make out a prima facie case that they fall into the "odd lot" category, then it remains incumbent upon them to demonstrate that, given their present condition and in light of their age, training, experience, and education, they are permanently and totally disabled. *ABB C-E Services v. Industrial Commission*, 737 N.E.2d 682, 685, 316 Ill.App.3d 745, ___, 250 Ill.Dec. 60, ___ (Ill.App. 5 Dist. 2000); citing *Valley Mould*, 84 Ill.2d at 547. They may accomplish this by a showing of diligent but unsuccessful attempts to find work or by proof that because of the above mentioned qualities they are unfit to perform any but the most

menial tasks for which no stable market exists. ABB C-E Services, 737 N.E.2d at 685. Thus, pursuant to the analytical framework set forth in Valley Mould, there are three ways by which employees can demonstrate that they are permanently and totally disabled: (1) by a preponderance of the medical evidence, (2) by showing a diligent but unsuccessful job search, or (3) by demonstrating that because of their age, training, education, experience, and condition, no jobs are available to a person in their circumstances. Id, at 686.

In the present case, the medical evidence, in conjunction with the video surveillance footage, would appear to call into question any opinion to the effect that Petitioner is medically permanently and totally disabled. Indeed, based on the evidence taken as a whole, including the opinion of not only Dr. Zelby but also the various treaters, including Dr. Vetrone, as well as the FCE, it would appear that Petitioner is at least capable of working in a sedentary capacity.

That being the case, the analysis turns to whether or not Petitioner has proven, by a preponderance of the credible evidence, that she falls within the "odd lot" category of permanent total disability. Along these lines, the Arbitrator notes that there is no evidence that Petitioner has looked for work within her restrictions since her attempt to return in a light duty capacity for one day on October 12, 2009. Thus, Petitioner failed to show that she conducted a diligent but unsuccessful job search within the restrictions set forth in the FCE – namely, in the light to medium category – so as to support a finding that she fell within the "odd lot" category.

Furthermore, the Arbitrator finds that Petitioner failed to prove that there is no stable labor market for her services given her age, training, education, experience and condition. Petitioner offered no opinion from a vocational rehabilitation counselor or the like to support her claim in this regard, specifically with respect to the job market for someone in her position. Respondent, on the other hand, offered the opinion of vocational rehabilitation counselor Gregory Watson who testified that based on the transferable skills analysis he performed, and considering Petitioner's work restrictions and background, that Ms. O'Keefe was capable of pursuing the following occupations: customer service representative or supervisor, inside sales representative, and order clerk or order taker. (RX10, p.21). While Mr. Watson admittedly did not conduct a labor market survey, or even research the availability of such jobs in Illinois, the Arbitrator notes Petitioner is the one who bears the burden of proving by a preponderance of the credible evidence that no stable labor market exists for her services under the circumstances. Only then, once that initial burden is met, does the burden shift to the Respondent to refute same. In this case, for the reasons previously enumerated, including the Arbitrator's belief that Petitioner can do more than she claims, the Arbitrator finds that Petitioner failed to prove that she fell within the "odd lot" category of permanent total disability.

As far as the nature and extent of the injury is concerned, the evidence shows that Petitioner continues to present with ongoing complaints relative to her back and that both treating and examining physicians have continued to recommended injections as well as possible surgical intervention, which Petitioner has declined, as is her right. Currently, Petitioner complains that she notices that her lower back has gotten worse, and that she is in terrible pain all the time. She noted that the pain causes her to lose track of things, that she has difficulty sleeping at night and that sometimes her left leg and knee goes numb and goes out on her. In addition, she indicated that she experiences pain across the left side of her butt down the side of her left leg to the top of her foot.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered the permanent partial disability to the extent of 50% person-as-a-whole pursuant to §8(d)2 of the Act.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Schmidt,

Petitioner,

vs.

NO: 11 WC 34214

City of Aurora Police Department,

14IWCC0590

Respondent.

DECISION AND OPINION ON REVIEW

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

14IWCC0590

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: JUL 18 2014
TJT:yl
o 7/8/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

SCHMIDT, DAVID
Employee/Petitioner

Case# **11WC034214**

14IWCC0590

CITY OF AURORA POLICE DEPT
Employer/Respondent

On 8/13/2013, 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 0.07% 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:

0657 TURNER LAW OFFICES
RICHARD L TURNER JR
107 W EXCHANGE ST
SYCAMORE, IL 60178

0560 WIEDNER & MCAULIFFE LTD
MARK MATRANGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC0590

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Schmidt
Employee/Petitioner

v.

City of Aurora Police Department
Employer/Respondent

Case # 11 WC 34214

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Geneva**, on **July 19, 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. [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. [ ] Is Petitioner entitled to any prospective medical care?

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

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

N. [x] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On the date of accident, **6/29/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **85,280.00**; the average weekly wage was **$1,640.00**.

On the date of accident, Petitioner was **45** 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 $ **13,119.96** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **13119.96**.

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

ORDER

The claim for compensation 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.

Albert E Dorn
Signature of Arbitrator

August 6, 2013
Date

ICArbDec19(b)

AUG 13 2013

FINDINGS OF FACT

14IWCC0590

Petitioner was a 45 year old police officer for the City of Aurora who was participating in a training exercise on June 29, 2011. Per his testimony, he was running, pulling a punching bag, and pushing a squad car when he strained his right calf and low back. He had undergone spinal surgery several years prior. He has had several prior workers' compensation claims, but none affecting the right lower leg.

History of Treatment following the date of occurrence and before August 16, 2011:

Petitioner sought care for his symptoms from his chiropractor, Dr. Carson, on the following day when he received a chiropractic adjustment to his cervical and lumbar spine. The doctors' records make it apparent that petitioner was an ongoing patient for his low back condition – there is no report of accident in the June 30, 2011 doctors' report, but petitioner did complain of left neck pain and pain and stiffness in his low back. Petitioner reported improvement of both neck and low back since his last treatment. Dr. Carson's records do not contain a history of or treatment to the right lower extremity. (PX 1)

After the visit to Dr. Carson on June 30, 2011, petitioner took a previously scheduled driving vacation to Colorado. He testified that while on route he took regular breaks to alleviate his symptoms and to walk his dog. While in Colorado, he experienced low back symptoms which caused him to present to Dr. Reason, a chiropractor, on July 15, 2011. Dr. Reason's records contain a history of L5 –S1 symptoms and treatment for the low back but make no reference to right lower extremity symptoms or treatment. (PX 2)

After returning from vacation, petitioner worked a regular shift from July 19 through July 30, 2011. (RX 1) He testified to having experienced right calf pain while giving chase to a suspect. Following his return to work in July, petitioner also returned to Dr. Carson for treatment. The doctor's records for July 18th, July 25th and August 15, 2011 reflect back symptoms and chiropractic adjustments but no history of right lower extremity symptoms or treatment to the right leg. (PX 1) Petitioner testified that he mentioned his right leg problems to the chiropractor, however.

Commencing August 2, 2011, petitioner was placed on sick leave. (RX 1) Per his testimony, he apparently began to experience flu like symptoms and diarrhea. His condition is also documented by the histories in the records of his personal physician, Dr. Leung, and of Edward Hospital when he presented on August 16, 2011. (PX 9, PX 3) He saw Dr. Leung on August 4, 2011 when he described his symptoms of diarrhea. Dr. Leung examined his extremities and noted no pedal edema. He also saw Dr. Chang at Dreyer Clinic on August 5, 2011 for other conditions including rhinitis and dermatitis. Dr. Chang's review of the musculoskeletal system reflects no complaints of pain, swelling, weakness or limitation of motion. The records from those dates do not reflect a history of symptoms of or treatment to the right lower extremity. (PX 9)

History of treatment on August 16, 2011 and after:

The Edward Hospital emergency room records from August 16, 2011 reflect a history of a right leg injury an undetermined number of months prior and that petitioner "was in bed X2 weeks due to diarrhea." (PX 3 – Emergency Department Integrated Progress Notes, p. 34) The Emergency Physician Report reflects a history of right lower extremity pain and swelling; petitioner had been "immobile" for

the prior two weeks because he had diarrhea. On the date of admission, he felt "like his right leg is going to burst." (PX 3, p. 27)

When petitioner saw Dr. Leung at the Dreyer Clinic after the emergency room visit, he provided a history that he began developing pain and swelling in the right leg on August 15th. He mentioned the June 29th incident; however, the doctor noted that "he did not even mention it at his last appointment here." He also told the doctor that his father had developed a DVT. (PX 9)

Petitioner presented to the Edward Hospital Emergency Room on August 16, 2011 with symptoms of right lower leg swelling for two days. An ultrasound performed on that date revealed a deep vein thrombosis located in the distal superficial femoral, popliteal, and anterior and posterior tibial veins of the right leg; also, there was a partial thrombus in the left proximal and mid-superficial femoral veins of the right leg. Testing also revealed a clotting disorder, Factor V Leiden which makes him more susceptible to clotting. (PX 3; PX 16, p. 13) Petitioner was treated with Coumadin therapy and Lovenox. (PX 3, PX 6,6a, 6b)

Petitioner came under the care of Dr. Bodner on August 17, 2011, and remains his patient. Dr. Bodner has been prescribing Coumadin therapy designed to prevent further blood clots. (PX 6,6a, 6b) He kept him off all work from August 17, 2011, but released petitioner to return to light duty work on April 6, 2013. He issued a causal connection report (PX 7) and testified to a causal connection between the June 29, 2011 incident and the deep vein thrombosis diagnosed on August 16, 2011. (PX16) Dr. Bodner held to the opinion that without the injury to the right calf on June 29, 2011, the blood clot would not have occurred. "The history was very important." (PX 16, p. 55)

Dr. Bodner testimony:

Dr. Bodner testified that the DVT was a direct result of the accident at work. A blood clot can form as a result of trauma to a blood vessel which produces stasis, a slowing of the circulation due to the swelling caused by the injury. Petitioner's hypercoagulable state, the pre-existing Factor V Leiden deficiency, also contributed to the DVT. The Factor V Leiden would expose him to an"eightfold increased risk for venous thrombosis…eight times the normal population." With the increased risk of the Factor V Leiden, a clot could have developed at home on August 15, 2011. (PX 16, p. 30-31, 47-48)

Per Dr. Bodner, a clot "isn't there" when there are no symptoms; it "develops just before symptoms occur." (PX 16, p. 40-41) He also stated that if one is put at bed rest, where they're not moving and walking, a clot could develop in a person with a Factor V Leiden. He would question a patient about that, "if he laid in bed all day or did he get out of bed." (PX 16, p. 50-51)

Dr. Bodner relied on the history that petitioner was injured on June 29, 2011 at work and "never healed completely" thereafter. He testified further that "Then he is out in his squad car…and then his leg starts all of a sudden acting strangely, hurting more and to the point where 'I got to do something.'" The doctor later qualified this statement, saying, "I don't know when he showed up or exactly what he was doing." (PX 16, p. 42-44) The doctor stated the history as he understood it to be that "after he injured himself pushing the vehicle, he went on vacation, where he rested some, went back to work with his leg still bothering him, compensated as best possible; and then about the 15th, two nights before he saw me, he had the acute onset of swelling and pain where he needed to be seen in the emergency room." (PX 16, p. 47-48)

Dr. Laikos report and testimony:

Dr. Laikos also stated a causal connection between the June 2011 occurrence and the DVT. (PX 8, PX 17) She issued a report which outlined a history of the describe incident, the trip to Colorado when petitioner's wife did most of the driving due to pain in his calf, a 'reinjury' on his first day back at work during a foot pursuit, and symptoms developing on August 11, 2011 which led to the emergency room admission on August 16th. (PX 8) Dr. Laikos did not know how acute petitioner's symptoms were after the incident as she did not see him during the period in question. But she agreed that the more pain there is, the more likely someone will be to seek medical treatment. (PX 17, p. 35-36)

Per Dr. Laikos, those with a Factor V Leiden are more prone to develop blood clots. They may not spontaneously clot; rather, typically is it a combination of factors such as surgery that "potentiates" the disorder. But even a change in activity, a flight on a plane, or a long time sitting, can cause a clot. Clots can also be idiopathic, can develop for no definable cause. (PX 17, p. 22-23)

Dr. Hantel report and testimony:

Dr. Hantel, a hematologist who participated in petitioner's treatment, stated a causal connection between the June 2011 occurrence and the formation of the DVT. (PX 5, PX 18) He testified that, by history, petitioner had "a significant amount of pain in the knee in and calf" at the time of the incident and then went on vacation, the entire time during which the leg continued to bother him. He then had an acute onset of swelling and pain which caused him to go to the emergency room on August 16, 2011. (PX 18, p. 8-9)

Dr. Hantel diagnosed post-phlebitic syndrome with anti-coagulants. On April 17, 2012 he recommended that petitioner continue on the anti-coagulant for one year. (PX 18, p. 13-14) As of September 2012, the doctor was of the opinion that petitioner could go off the anti-coagulant "reasonably soon" but continue to wear a compression stocking. (PX 18, p. 18-19, 22)

Dr. Hantel considered the Factor V Leiden a mild predisposition to clotting which is present in 4% of the Caucasian population. It is not inevitable that one with this mutation will develop a clot, but one can spontaneously clot if one has a Factor V Leiden. (PX 18, p. 21-23) But the likelihood is greatest for a clot to be brought on by some other factor that increases the risk – one needs more than just the genetic predisposition to clot. "You have to have immobility. You have to have dehydration. You have all the other factors that might make someone predisposed to a blood clot, anyway." (PX 18, p. 23)

When asked if a long drive such as petitioner took to Colorado, or sitting for a long time, was a risk factor for clotting, Dr. Hantel answered yes. And when asked if when looking at cause and effect whether one can take a long drive and then weeks later develop a clot, the doctor answered, "Typically not. It's going to occur shortly thereafter." (PX 18, p. 24)

Dr. Karlsson report and testimony:

Dr. Karlsson examined petitioner per Section 12 of the Act and issued a report wherein he stated that the cause of the DVT was not an the incident of June 29, 2011 but rather his predisposition to clot, the Factor V Leiden predisposition to clot coupled with being immobile and dehydrated during the two week period of August 2011 when he was ill with diarrhea. (PX 2A)

Dr. Karlsson was provided a history of injury on June 29, 2011, with immediate onset of pain and subsequent symptoms during a foot chase that day, a vacation to Colorado during which petitioner took breaks to walk his dog, a return to work when he experienced pain during another foot chase, and the visit to the emergency room on August 16, 2011. Petitioner also reported having had food poisoning with diarrhea for two weeks in August prior to going to the emergency room, but having moving and getting up to go to the toilet. Medical records Dr. Karlsson reviewed included a report of petitioner being immobile. (RX 2A; PX 3)

Per Dr. Karlsson, a DVT will develop with the first several weeks and fairly quickly after injury and immobilization. The risk of developing a DVT following an injury decreases with time. The highest risk is in the days to weeks immediately after the injury when there has been some recent trauma and when one is likely to be partially immobilized because of pain or because of treatment such as a cast. (RX 2, p. 4) He stated that it was unlikely the June 29, 2011 incident was a causative factor because there was no period of immobilization after the June incident. And the Factor V Leiden played a significant role. (RX 2, p. 16-18) The Factor V Leiden would make it unlikely that a clot would form slowly over six to eight weeks; it is a risk factor that would cause a clot to form faster. (RX 2, p. 19)

Dr. Karlsson testified that there was no correlation between the described injury and the deep vein thrombosis. The main bases for Dr. Karlsson's opinion were the medical records reviewed and the "other potential sources" which existed in "the very close proximity of time" to the period of immobility in August. (RX 2, p. 22-23) The doctor assumed there was immobility based on the history in the ER notes, despite petitioner feeling he was not immobilized because he was getting up to go to the toilet: the doctor was not sure if the history petitioner gave was more accurate than what he gave the ER. Whether the doctor at the ER misinterpreted the history he could not say; however, not too many people who are home with diarrhea for two weeks are very mobile. (RX 2, p. 38-39)

On cross-exam, Dr. Karlsson stated that a DVT most likely comes shortly after an inciting event whether it is an injury, immobilization, or compression. The cause does not always have to be an injury; in many cases the cause is not an injury. But most people present in the early days or weeks after initiation of a clot. The doctor disagreed that the risk of clotting two months after a surgery is the same as after one month – there is a risk but not as high. (RX 2, p. 39-40) Petitioner told Dr. Karlsson that he was relatively active while in Colorado, which would militate against his developing a DVT. But a car trip is relative immobility. (RX 2, 44-45)

As regards petitioner's then current treatment regimen, Dr. Karlsson responded that being on Coumadin for life is unusual. This is done only if someone has a life-threatening pulmonary embolus or repeated episodes of DVT. (RX 2 p. 23-24)

Lost Time and Sick Pay:

Petitioner testified that he has not returned to work since he appeared at the emergency room on August 16, 2011. This is verified by the testimony of Alisia Lewis, Human Resources Director for the City of Aurora. Petitioner was paid salary per the applicable statute (Public Employee Disability Act) until July 15, 2012. Following that date, he was paid sick leave per the Collective Bargaining Agreement. (RX 3) Per Ms. Lewis, if an officer makes a claim for injury that is disputed but later accepted, he will initially be paid salary under the designation 'Sick Self' but that designation will be changed to Workers' Compensation if it is later determined that the claim is work-related.

The reason why the designation would be changed from 'Sick Self' to Workers' Compensation is to preserve the 180 sick days an officer is entitled under the contract. Any sick days taken for a disputed period would be restored once the decision was made to accept the claim as work-related. There is no other provision for sick pay – no disability insurance plan – provided by the city. An officer is not permitted to accumulate sick pay from one year to the next or to accumulate sick days and be paid for these days upon retirement. Per Ms. Lewis, it is a 'use it or lose it' policy.

Petitioner was paid sick leave from July 16, 2012 through April 6, 2013, per his testimony, the Hours Detail History, and his statement to his superiors. His sick leave ws set to expire the first week of April. (RX 6) He agreed that he did not make a claim for sick pay during the period he was paid under the statute. Ms. Lewis testified that an officer cannot receive both sick pay and workers' compensation for the same claim. Petitioner did not testify that his understanding of the contract was that he could collect both.

Petitioner placed into evidence certain medical bills (PX 14, 14a, 14b), part of which were paid by the city through workers compensation and part of which were paid by the city's group carrier. The parties agree that credit shall be granted for payments made by workers' compensation and under Section 8(j) for those bills paid by the city's group carrier.

DISPUTED ISSUES 14IWCC0590

Regarding Issue C.: Did an accident occur which 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 makes the following findings:

Based on the foregoing, the arbitrator finds that petitioner sustained accidental injuries arising out of and in the course of his employment when he aggravated the pre-existing condition of his lumbar spine during a training exercise. However, there is no evidence to support a causal connection between petitioner's pre-existing low back condition and his current condition of ill-being as it relates to his low back. It is evident that petitioner had a long-standing low back condition for which he may have needed several visits to his chiropractor. But any aggravation of the pre-existing condition of his low back would have been temporary only – Dr. Carson stated as of June 30, 2011 that he was improving since his last treatment would have preceded the occurrence date in this case. There is no contemporary evidence that he is in need of treatment for or disabled from his low back condition.

The arbitrator also finds that petitioner failed to prove that he sustained an injury to his right lower extremity on June 29, 2011 during the described training exercise. Further, the arbitrator finds that petitioner failed to prove a causal connection between an alleged injury to the right lower extremity on June 29, 2011 and his present condition of ill-being as it relates to his right lower extremity and his current ability to work.

That there was an incident during the training exercise is unrebutted, and it was agreed that petitioner gave notice of an accident on June 29, 2011. However, that does not mean that the arbitrator must accept the premise that there was an injury to the right lower extremity at that time. It does appear that petitioner injured his low back. He sought out treatment for the low back with his chiropractor the day after the occurrence, and saw him on his return to work in July after a vacation. He also sought out treatment for the low back while on vacation. In none of these records is there a mention of the right lower extremity. Nor is there any mention of the right lower extremity in the chiropractor's records for the visits petitioner made upon returning from vacation.

The arbitrator finds it significant that the chiropractor's records make no mention of the right lower extremity either on the day after the occurrence or on those dates in July after petitioner returned from vacation – all appeared to be routine encounters for an established patient with an apparent chronic low back problem. Also significant is that on August 15, 2011, the day before petitioner presented to the emergency room and telling the doctor that his right leg felt like it was "going to burst," the chiropractor records remain silent as to the right lower extremity. The chiropractor's records make it appear as if the August 15th encounter was a routine one as well.

More significant are the absence in the Dreyer Clinic records of any right lower leg symptoms. Dr. Leung was petitioner's personal physician to whom one would have anticipated that he would have described the symptoms he was experiencing with the right leg when he saw him on August 4, 2011. This is especially so in light of petitioner's testimony that he had talked to the chiropractor about his leg was told that that it was not Dr. Carson's area of expertise. But yet petitioner did not seek out his personal physicians for right lower leg complaints in July, and when he did see the doctors in early August for diarrhea or rhinitis, he made no mention of the right lower leg. Dr. Leung noted on August

17th that petitioner did not mention the incident or any symptoms at his last appointment. Neither Dr. Leung nor Dr. Chang found right lower leg swelling when they examined him on August 4th and 5th.

Petitioner had no difficulty describing low back symptoms to the two chiropractors, yet there is no mention in any medical record before August 16th of right lower extremity symptoms. Further, petitioner made no complaint to his personal doctor of such symptoms. The first mention in the medical records is that given to the doctor at the emergency room on August 16th - a history of being immobile due to diarrhea and of right calf swelling for two days. These facts give rise to a strong inference that petitioner was, in fact, not experiencing any symptomology after June 29th until the second week of August, 2011 when his right calf began to swell during a period of confinement due to a non-related condition.

It is difficult for the arbitrator to accept petitioner's unsupported testimony that he was experiencing symptoms while on vacation and afterward. And it is obvious that he was not having any symptoms on August 4th and 5th when he saw Dr. Leung and Dr. Chang. This causes the arbitrator to conclude that he was not having symptoms related to the deep vein thrombosis until several days before the emergency room visit on August 16th.

If there were no other explanation for why or how petitioner's symptoms developed, the arbitrator might find a causal connection. However, Dr. Karlsson opined and testified to a plausible explanation of when and how petitioner's right lower leg symptoms developed. This theory has the advantage of being consistent with the history of the case prior to the emergency room visit and is based on a medically sound basis, that being immobile during the two weeks prior plus a pre-disposition toward clotting, the Factor V Leiden, caused the DVT to form. Added to this testimony is that of Dr. Hantel who mentioned both immobility and dehydration as factors causing a DVT. Dr. Hantel did state that a DVT will not form weeks after being immobile as a result of a long drive; rather, it develops "shortly thereafter" as opined by Dr. Karlsson. Further, it was permissible to infer that petitioner was dehydrated due to the diarrhea he had been suffering for two weeks prior to going to the emergency room.

Petitioner's doctors either did not consider the period of immobility or gave it short shrift. Dr. Bodner testified that petitioner was not bed-ridden in early August but the emergency room records contradict this contention–they state that he reported that he was immobile due to diarrhea at that time. Further, Dr. Hantel listed both immobility and dehydration – a natural consequence of diarrhea – as being factors precipitating a blood clot. And none of the doctors considered the histories taken by Dr. Leung and Dr. Chang or the results of their examinations 11 and 12 days before the emergency room admission.

Petitioner and his physicians understood the implications of immobility on the development of a DVT. He testified to having taken numerous breaks while travelling by auto on vacation. Dr. Bodner attempted to negate the contention that his patient was seated for long periods on route to Colorado as well. But petitioner admitted he was immobile for the first two weeks of August per his work history and statement to the emergency room doctor as well. Thus it is not possible to discount immobility as a factor in the development of the DVT in this case – petitioner and his physician were well aware of its importance and attempted to circumvent it.

The Arbitrator notes that petitioner claims that he was experiencing symptoms beginning the end of June and continuing through July and into August without reporting them to anyone. Dr. Laikos' report mentions his being "unable" to drive to Colorado with his wife doing most of the driving, yet while he found it necessary to visit a chiropractor with back complaints, there was no mention of the right lower leg. Petitioner and his physicians also refer to another alleged occurrence while chasing a suspect – Dr. Laikos stated this was on July 18th, his first day back from vacation. Yet it was that day that petitioner visited Dr. Carson for his back, and again made no mention of the right leg. And the exams of Dr. Leung

and Dr. Chang on August 4th and 5th stand in contrast to the history of pain and swelling upon which Drs. Bodner, Laikos, and Hantel relied. The absence of a verifiable history of right leg symptoms after June 29th and before August 16th is noted and found to be significant.

It is clear petitioner was not immobile and was not experiencing right leg symptoms until the beginning of August. That is when symptoms began to develop due to immobility and dehydration caused by diarrhea as he reported to the ER physician on August 16. This conclusion is consistent with the history given at the emergency room and the testimony of Dr. Karlsson and Dr. Hantel who specifically referred to inciting factors such as immobility and dehydration. Dr. Hantel did mention injury as a potential factor as well, but the arbitrator cannot infer from petitioner's unsupported testimony that an injury was an inciting factor in this case. There is no documentation of the condition of his right lower extremity from the end of June until August 16th.

The arbitrator has considered the opinions and testimony of Dr. Bodner and Dr. Liakos, and the causal connection opinion provided by Dr. Hantel, but does not find them compelling. None of these doctors took the period of immobility or the dehydration caused by diarrhea or the lack of findings in the reports of Dr. Leung and Dr. Chang into consideration and thus their opinions are incomplete. Both Dr. Bodner's and Dr. Laikos' opinions are compromised by this. And Dr. Hantel acknowledged that there needs to be a precipitating factor such as injury, immobility, or dehydration for a DVT to develop and that typically a clot will form shortly after a prolonged period of sitting. This is consistent with the clot forming as a result of immobility in the first part of August 2011.

What exactly happened to petitioner's right leg as a result of the alleged injury of June 29, 2011 is not entirely clear. Petitioner's theory is supported by his doctors but lacks independent and objective support for the condition of his leg during a crucial period of time when he otherwise sought out care for his back and for diarrhea and rhinitis. The theory most consistent with the entirety of the objective evidence is that even if the petitioner injured the right lower extremity in June, he did not develop a deep vein thrombosis as a result of the incident. His leg was not swollen on August 4th when he saw Dr. Leung or on August 5th when he saw Dr. Chang. Thus any injury in June did not cause symptoms before August. These began to develop during the two weeks of immobility and, more specifically, two days before he went to the emergency room on August 16th per the history petitioner provided. This development of symptoms is so remote from the date of the alleged accident and injury as to make it impossible to find that the injury of that date was the or even a, causative factor in the development of the blood clot at issue herein.

Therefore, the claim for compensation is denied as it relates to any temporary or permanent disability or medical treatment resulting from the deep vein thrombosis diagnosed on August 16, 2011. There is no evidence that the back injury petitioner alleges to have sustained at the time of the June 29, 2011 incident disables him from working at any time.

Regarding Issue J: Were the medical services provided to Petitioner reasonable and necessary, and whether Respondent paid all appropriate charges for reasonable and necessary medical services, the Arbitrator makes the following findings:

Based on the arbitrator's findings with respect to accident and causal connection, the arbitrator finds that Respondent is not liable for any medical services related to the deep vein thrombosis. The arbitrator finds further that Respondent shall be granted credit for all sums paid through workers' compensation for treatment related to the deep vein thrombosis.

Regarding Issue L: What temporary benefits are in dispute, the Arbitrator makes the following findings:

Based on the arbitrator's findings with respect to accident and causal connection, the arbitrator finds that Respondent is not liable for any temporary benefits under the Act for any period of disability related to the deep vein thrombosis. Respondent shall be granted credit for the worker's compensation payment of $13,119.96 and any other payment made under the auspices of the Public Employee Disability Act for duty related benefits made during the pendency of this case.

Regarding Issue N.: Is Respondent entitled to any credit, the Arbitrator makes the following findings:

There is a controversy over whether the City of Aurora is entitled to credit for sick pay Petitioner received during the period from July 16, 2012 through April 6, 2013. Although Petitioner is claiming that he is entitled to receive both sick pay and workers' compensation for the period in question, he did not testify that he is entitled to receive both for a work-related injury. And he agreed that he did not make a claim for sick pay for the period from August 16, 2011 to July 15, 2012 during which he was receiving worker's compensation benefits.

Respondent produced evidence in the form of testimony of Ms. Lewis, Human Resources Director for the city, and the Collective Bargaining Agreement. The contract in Article Nine describes the sick pay policy which calls for 180 days of pay for each non-occupational illness or injury. Ms. Lewis testified that police officers are not entitled to collect both sick pay and workers' compensation. Officers are not permitted to accumulate sick days for retirement. Sick days are strictly for use during an officer's tenure with the city.

Petitioner maintains that credit under Section 8(j) can be granted only if there is an insurance plan in place. But Section 8(j) does not refer to credit being granted only if there is an insurance plan. Rather, it is designed to give credit to an employer "In the event the injured employee receives benefits…under any group plan…which benefits should not have been payable if any rights of recovery existed under the Act…." A "group plan" is not defined as an insurance policy, and can be any policy an employer has in force which pays employees for non-occupational injury or illness.

Here, the city has in place a contract which, among other this contains a 'group plan' for police officers which compensates officers for non-occupational injury or illness. Testimony indicated that this sick pay was not payable when claimants were eligible to receive TTD. As no TTD was awarded herein, the sick pay was paid properly, and respondent is entitled to no credit for same.

Regarding Issue M: Should penalties or fees be imposed upon Respondent, the Arbitrator makes the following findings:

The Respondent has provided a substantial and good faith defense to the compensability of this claim. This defense is supported by the report and testimony of Dr. Karlsson as well as the arguments Respondent has made based on the statements of Dr. Hantel during his testimony. This defense not only tended to refute petitioner's contention that he was experiencing right lower leg symptoms during the period after the alleged injury and before he appeared at the emergency room some seven weeks later, but also established an alternative theory of how the deep vein thrombosis developed independent of any injry.

The defense offered by Respondent was not unreasonable or vexatious and not one made for delay. Therefore, there would be no basis for an award of penalties under Sections 19(k) or 19(l) or attorney's fees under Section 16 of the Act. Therefore, the claim for penalties and fees is denied.

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 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 Wind,

Petitioner,

vs.

NO: 11 WC 49137

14IWCC0591

Navistar, 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 issue of 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 October 31, 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.

14IWCC0591

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $29,800.00. 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: JUL 18 2014
TJT:yl
o 6/2/14
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would find the Arbitrator's award of 22.5% loss of use of the arm is not supported by a preponderance of credible evidence and is contrary to the recent amendments in the Act. When viewing the evidence as applied to Section 8.1 (b) of the Act I find the permanency award to be excessive and would modify the decision to 15% loss of use of the arm.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WIND, RUSSELL
Employee/Petitioner

Case# **11WC049137**

NAVISTAR INC
Employer/Respondent

14IWCC0591

On 10/31/2013, 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:

4606 SCHWEICKERT & GANASSIN
FREDERICK GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
DANIEL J UGASTE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS
COUNTY OF Kane)

14IWCC0591

☐ 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 Wind
Employee/Petitioner

v.

Navistar, Inc.
Employer/Respondent

Case # **11** WC **49137**

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 **Geneva, Illinois**, on **August 9, 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

14IWCC0591

On **November 28, 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 **$59,965.36**; the average weekly wage was **$1,153.18**.

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 **$11,861.18** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,861.18**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $691.91/week for 56.925 weeks, because the injuries sustained caused the 22-1/2% loss of the Right Arm, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services of $2,220.24, as provided in Section 8(a) of the Act.

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

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

Signature of Arbitrator

10/30/13
Date

ICArbDec p. 2

OCT 31 2013

FINDINGS OF FACTS:

Petitioner testified that he has worked for Respondent, Navistar, for 32 years as a material handler, which involves picking and packing parts. He is right hand dominant and never had any problems with his right arm before this accident.

On November 28, 2011, he was lifting a heavy bin. He dropped the bin and went to grab it and felt pain in his left elbow/forearm area. He did not seek immediate medical treatment.

The next day, he continued to work and reported the injury to Ron Sable, the Operations Manager for Respondent. Respondent sent him to the occupational health department at Physicians Immediate Care in New Lenox where he was examined by Physician's Assistant, Jim Kell. Petitioner reported a consistent history of injuring his right arm as he was lifting a heavy bin. Mr. Kell diagnosed Petitioner with a right biceps sprain/strain and returned Petitioner to full duty work. (PX-6)

Petitioner's testimony and the records from Physicians Immediate Care, show Petitioner followed up for several appointments with Physicians Immediate Care. Eventually he saw Dr. Bess Metrou, who ordered an MRI of the right upper arm. (PX-6)

Petitioner testified that prior to undergoing the prescribed MRI, he sought treatment with Barrett Chiropractic on December 16, 2011. Petitioner testified and the records show Dr. Barrett only examined his arm. (PX-3)

Petitioner underwent an MRI of his right arm on December 20, 2011 at Joliet Open MRI. The radiologist interpreted the MRI as showing a tear of the biceps tendon at its attachment to the radial tuberosity. The radiologist also found fluid around the distal tendon with a Grade I sprain in the distal biceps muscle. (PX-2)

On December 22, 2011, Petitioner reported to Physician's Immediate Care. At that time he was referred Hindsdale Orthopedics for further evaluation. (PX-6) Petitioner saw Dr. Puppala at Hinsdale Orthopedics on December 23, 2011. Dr. Puppala examined Petitioner and diagnosed him with right elbow biceps strain and possible biceps partial tear. Dr. Puppala's record indicates that he reviewed the MRI from Joliet Open MRI and felt that it was inadequate and that he was unable to see any detail. The doctor ordered a repeat MRI with better resolution. Dr. Puppala noted that if the update MRI showed a complete tear, surgery would be indicated. (PX-4)

Petitioner testified that he was contacted by Hinsdale Orthopedics later that evening and was told that Dr. Puppala wanted to perform surgery the following day. Petitioner felt uncomfortable and declined to undergo surgery with Dr. Puppala. Instead he sought treatment with Dr. Rhode at Orland Park Orthopedics.

Petitioner first saw Dr. Rhode on January 5, 2012. He was authorized off work and began receiving TTD. Dr. Rhode performed surgery on Petitioner on January 10, 2012. On that date, Dr. Rhode performed a right elbow distal biceps repair using the single incision bio-interference screw/Endobutton technique. (PX-5 and PX-7)

Subsequent to his surgery, Petitioner underwent physical therapy through Orland Park Orthopedics in their Ottawa facility at Newsome Therapy. (PX-5) Petitioner testified that after his surgery, he noticed numbness on the inside of his right lower arm. The February 2, 2012, chart note by Dr. Rhode indicated that it was improving somewhat at that time. (PX-5) Petitioner testified that Dr. Rhode indicated that his symptoms should lessen over time.

At the request of Respondent, Petitioner was evaluated by Dr. Brian Cole on April 16, 2012. Dr. Cole took a history from Petitioner including his present complaints. Petitioner complained of numbness and tingling over the thumb and lateral forearm of the right upper extremity. Dr. Cole examined Petitioner and reviewed his diagnostic films. He diagnosed Petitioner with resolving right elbow, three months status-post distal biceps tendon repair. Dr. Cole felt Petitioner's dysesthesias would continue to resolve, and he felt that Petitioner was roughly eight weeks out from full recovery. He recommended continued therapy and light duty. (RX-1)

Petitioner returned to light duty effective April 23, 2012. Petitioner testified that his therapy stopped in May of 2012.

Petitioner last saw Dr. Rhode on June 7, 2012. Petitioner reported that he has tolerated full duty. The examination revealed full range of motion both actively and passively. Dr. Rhode declared Petitioner at maximum medical improvement and to follow up on an as needed basis. (PX-5)

On July 11, 2012, Petitioner was seen by Dr. Rezin at the request of Respondent for an AMA Impairment evaluation. Dr. Rezin issued a report and testified via deposition. Dr. Rezin noted Petitioner had persistent pain with heavy lifting. He also noted Petitioner had some mild sensory changes in the forearm. Dr. Rezin indicated that he felt Petitioner would have an upper extremity impairment of 4% with a whole person impairment of 2% pursuant the American Medical Associate Guide, Sixth Addition. (RX-2)

Petitioner testified that he still has problems in his right arm and elbow including pain and sensory changes. He has complaints of his fingers going numb and getting a shooting pain when he grabs something as simple as a gas pump. He provided that he no longer participates in sporting activities such as fishing and golf. Petitioner testified that he still has to do a lot of lifting at work and testified to the various items that he needed to lift at work. Petitioner stated that he has not returned to see a doctor since he was discharged by his treating physician.

With respect to (L.) What is the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:
   (i) The reported level of impairment;
   (ii) The occupation of the injured employee;

(iii) The age of the employee at the time of injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by medical records.

With regards to paragraph (i) of Section 8.1(b) of the Act:

i. Dr. Rezin's AMA report and deposition were admitted as evidence. Dr. Rezin noted Petitioner had persistent pain with heavy lifting. He also noted Petitioner had some mild sensory changes in the forearm. Dr. Rezin indicated that he felt Petitioner would have an upper extremity impairment of 4% with a whole person impairment of 2%.

With regards to paragraph (ii) of Section 8.1(b) of the Act:

ii. Petitioner continues to be employed in his pre-injury employment as a material handler. Petitioner has been able to perform his job since his return to work on April 22, 2012. He has complaints of his fingers going numb and getting a shooting pain when he grabs something as simple as a gas pump. The Arbitrator takes judicial notice that this position is heavy work and any permanent partial disability ("PPD") awarded would be larger than an individual who performs lighter work.

With regards to paragraph (iii) of Section 8.1(b) of the Act:

iii. At the time of injury, Petitioner was 55 years of age. As a result, it does not appear Petitioner has a long work life left ahead of him, however, his advanced years could result in some additional difficulty with use of the arm.

With regards to paragraph (iv) of Section 8.1(b) of the Act:

iv. At the present time, there is no evidence that Petitioner's future earning capacity has diminished as a result of this injury. Petitioner continues to work with Respondent as a material handler in a full duty capacity.

With regards to paragraph (v) of Section 8.1(b) of the Act:

v. Evidence of Petitioner's disability show that Petitioner was evaluated by Dr. Brian Cole on April 16, 2012. Dr. Cole diagnosed Petitioner with resolving right elbow, three months status-post distal biceps tendon repair. Dr. Cole felt Petitioner's dysesthesias would continue to resolve and felt that Petitioner was roughly eight weeks out from full recovery. Petitioner last saw his treating physician, Dr. Rhode, on June 7, 2012. An examination revealed full range of motion both actively and passively. Dr. Rhode declared Petitioner at maximum medical improvement. On July 11, 2012, Petitioner was seen by Dr. Rezin for an AMA Impairment evaluation. Dr. Rezin noted Petitioner had persistent pain with heavy lifting. He also noted Petitioner had some tenderness and mild sensory changes in the forearm. Petitioner is right hand dominant. His testimony and the records show he still has problems in his right arm and elbow including pain and sensory changes. He has complaints of his fingers going numb and getting a shooting pain while grabbing objects.

As noted above, Pursuant to Section 8.1b of the Act, all five factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011. Consideration is not given to any single enumerated factor as the sole determinant. Therefore, after applying Section 8.1b of the Act. 820 ILCS 305/8.1b and considering the relevance and weight of all these factors, including Dr. Rezin's AMA impairment rating, the Arbitrator concludes that Petitioner sustained 22-1/2% permanent partial disability to the right arm under Section 8(e) of the Act.

With respect to (J.) Medical Expenses, the Arbitrator finds as follows:

Petitioner submitted into evidence Petitioner's Exhibit No. 1, which are copies of medical bills from Barrett Chiropractic and Orland Park Orthopedics and Chicago Surgical Solutions. At the time of the hearing, the parties indicated they would review these bills, attempt to determine what had been paid and reach an agreement on the amount owed, if possible. Otherwise, the Arbitrator would award the bills, subject to any credit to which Respondent may be entitled for prior payment of these bills.

Upon further review of the bills, the parties have reached an agreement. Specifically, the parties agree that Respondent shall pay $221.44 to Barrett Chiropractic, as this is the amount owed this facility pursuant to the fee schedule.

Respondent shall also pay Orland Park Orthopedics $1,998.80 for outstanding medical bills, pursuant to the fee schedule for various services rendered, but not previously paid.

Finally, the parties agreed that South Chicago Surgical Solutions was paid the full amount owed it under the Workers' Compensation Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Martin Mota,

Petitioner,

vs.

NO: 11 WC 28693
14 IWCC 592

Labor Network,

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 July 18, 2014, having been filed by Respondent herein. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated July 18, 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: OCT 0 3 2014
TJT:yl
51

Thomas J. Tyrrell

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN MOTA,

Petitioner,

vs.

NO: 11 WC 28693
14 IWCC 592

LABOR NETWORK,

Respondent.

CORRECTED 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 causation, temporary total disability ("TTD"), medical expenses and credit to Respondent, 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 vacates the Arbitrator's award of TTD benefits subsequent to October 29, 2012, the date the Petitioner underwent a functional capacity evaluation ("FCE") at Premier Physical Therapy (Petitioner's Exhibit 5). The Commission further modifies the Arbitrator's award with regard to medical expenses, finding that the Petitioner is not entitled to medical expenses incurred subsequent to September 16, 2012, the date of Dr. Bernstein's last report

(Respondent's Exhibit 2). Finally, the Commission modifies the Arbitrator's award of medical benefits prior to September 16, 2012 based upon the utilization review reports of Dr. Blum submitted into evidence by Respondent (Respondent's Exhibit 4), by which he found that the epidural injections performed on February 22 and April 18, 2012 were neither reasonable nor necessary.

The Petitioner initially underwent a Section 12 examination at the request of the Respondent on September 7, 2011 with Dr. Kern Singh, a board certified orthopedic surgeon. Dr. Singh opined that a July 21, 2011 lumbar MRI reflected minimal degenerative findings and no disc herniations, and that the Petitioner had displayed significant signs of symptom magnification based on pain complaints, pain diagrams he completed, and positive Waddell signs. (See Respondent's Exhibit 1). He also testified that he drafted a report on October 21, 2011 indicating that the same guidelines that treating anesthesiologist Dr. Vargas used to perform epidural injections, in fact, indicated just the opposite, i.e. that a lack of nerve compression per MRI and non-anatomic complaints of radicular symptoms dictate that epidural injections were not reasonable or necessary.

To resolve the differences of opinion regarding the treatment and care needed to alleviate the Petitioner of his pain and symptoms, the parties agreed to seek the services of Dr. Avi Bernstein. In effect, his opinion was to be a tie breaker, upon which all parties agreed to rely.(see August 3, 2012 e-mail from Petitioner's attorney to Dr. Bernstein and contained in Respondent's Exhibit 2).

Dr. Bernstein examined the Petitioner on August 30, 2012 and issued his last report on September 16, 2012. (Respondent's Exhibit 2). At that time Dr. Bernstein indicated that the lumbar MRI of July 21, 2012 showed minimal degenerative changes at L5/S1 with a very slight bulge/protrusion, no herniation and no evidence of spinal stenosis or nerve root compression. Additionally, he questioned the Petitioner's significant subjective complaints given the benign MRI. As noted above, Dr. Bernstein initially recommended the FCE. Following the FCE, the Petitioner testified that instead of returning to Dr. Bernstein, who had originally prescribed the FCE, he returned only to Dr. Erickson. He testified: "They've been treating me this whole time and I figured they knew me better than, you know, Dr. Bernstein." The Petitioner thus voluntarily chose not to provide the FCE report to Dr. Bernstein and failed to schedule a follow up visit with him. Given the dispute regarding treatment, leading up to the initial visit with Dr. Bernstein on August 30, 2012, the need to follow up with Dr. Bernstein should have been quite clear to the Petitioner.

The FCE indicated that the Petitioner was capable of light duty work. Dr. Erickson, on November 9, 2012, noted that he reviewed the FCE and was "in agreement with these findings based on my prior examinations of him." Nevertheless, he continued to hold the Petitioner off work without further explanation. Nothing prohibited the Petitioner from returning the FCE results to Dr. Bernstein.

The Respondent's general manager, Michelle Urbieta, testified that light duty would have been available at the time of the FCE, and continued to be available as of the hearing date. Petitioner never contacted the Respondent to determine if light duty was available (see Petitioner's testimony pp. 37-38). Thus, the Commission finds that had the Petitioner made an effort to return the FCE results to Dr. Bernstein or to contact his employer regarding the FCE restrictions, he would likely have been back to work following the FCE. It should be noted that about this time in late 2011 the Petitioner visited an emergency room several times, indicating that a level of abuse of alcohol and/or non-prescribed drugs was taking place.

Drs. Singh and Bernstein are credentialed orthopedic surgeons. As such, when dealing with questions regarding orthopedic surgery, their opinions may be given greater weight than practitioners who are credentialed in other medical disciplines.

Dr. Vargas is an anesthesiologist who specializes in pain management. His opinions regarding the efficacy of spine or orthopedic surgery are given less weight than those physicians that are credentialed in orthopedic and / or spine surgery.

Dr. Erickson is board certified in neurosurgery and as such he is competent to give an opinion regarding spinal surgery. He initially prescribed a discectomy to relieve the Petitioner of his discogenic pain. Thereafter, he propagated the need for a lumbar fusion. Such a procedure would result upon a positive discogram. Dr. Erickson noted that Dr. Bernstein had recommended a lumber fusion. Nowhere in the record is the Commission able to find a report from Dr. Bernstein, by which he suggests that the Petitioner undergo a discogram. From the Commission's perspective, Dr. Erickson ignored the reported findings and conclusions of two credentialed orthopedists, Drs. Bernstein and Singh. His refusal to explain the differences in his findings leads the Commission to find his (Dr. Erickson's) opinions less than credible and to rely upon the comments and opinions of Drs. Singh and Bernstein.

Dr. Erickson continued to hold the Petitioner off work despite an FCE which indicated the Petitioner was capable of light duty, and that his employer had the availability of same. The record reflects that the Petitioner has used illegal drugs, and declined a drug test, indicating he did so because he did not want prescription drugs to show up in the results. How proof of the use of prescription drugs that were properly prescribed would negatively impact his case is quite unclear to the Commission. The Commission instead believes that there may have been other reasons the Petitioner chose to avoid this test, noting that oftentimes the Petitioner visited emergency rooms to obtain medications beyond what was prescribed. It was not objectively reasonable for Dr. Erickson to rely solely on the Petitioner's subjective complaints and ignore the warnings received from Dr. Singh and Dr. Bernstein. This is supported by the reports of Dr. Belmonte in Petitioner's Exhibit 3, which reflect pain behavior with nothing to indicate the Petitioner had a surgical condition.

Under Section 8(a) of the Act, the Petitioner is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a Petitioner's injury. ***University of Illinois v. Industrial Comm'n***, 232 Ill.App.3d 154, 164, 596 N.E.2d 823, 173 Ill.Dec 199 (1992). The Petitioner has the burden of proving that the medical services were necessary and the expenses incurred were reasonable. ***F&B Manufacturing Co. v. Industrial Comm'n***, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill. Dec. 173 (2001). Whether an incurred medical expense was reasonable and necessary and should be compensated is a question of fact for the Commission. ***University of Illinois*, 232 Ill. App. 3d at 164.**

The Commission finds that the preponderance of the evidence reflects that the treatment rendered by the providers in this case after September 16, 2012 was unreasonable and unnecessary. For the same reasons, supported by the utilization reviews of Dr. Blum noted above and the testimony of Dr. Singh, the epidural injections performed by Dr. Vargas on February 22 and April 18, 2012 were neither reasonable nor necessary. Pursuant to Section 8.2(e) of the Act, neither the Petitioner nor the Respondent are to be held liable for the costs of treatment the Commission has determined to be unreasonable and unnecessary.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator is modified as indicated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $220.00 per week for a period of 67 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 causally related medical expenses awarded by the Arbitrator which were incurred through and including September 16, 2012 pursuant to Section 8(a) of the Act, except for the medical expenses associated with epidurals performed by Dr. Vargas on February 22, 2012 and April 18, 2012, which are denied; Petitioner is not entitled to medical expenses incurred subsequent to September 16, 2012.

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

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

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

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

DATED: OCT 0 3 2014
TJT: pvc
o 5/20/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

MOTA, MARTIN
Employee/Petitioner

Case# **11WC028693**

LABOR NETWORK
Employer/Respondent

14IWCC0592

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:

0293 KATZ FRIEDMAN EAGLE ET AL
DAVID BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
VALERIE J PEILER
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

14IWCC0592

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
19(b)

Martin Mota
Employee/Petitioner

Case # 11 WC 28693

v.

Consolidated cases: _____

Labor Network
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 **George Andros**, Arbitrator of the Commission, in the city of **New Lennox**, on **1-17-2013**. 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 _____

14IWCC0592

FINDINGS

On the date of accident, **7-6-2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$13,728.00**; the average weekly wage was **$264.00**.

On the date of accident, Petitioner was **28** 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 **$4340.00** for TTD, **$286.59** for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$4340.00 + 286.59**.

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

ORDER

Respondent shall be given a credit of **$4340.00** for TTD, **$286.59** for TPD, and $ for maintenance benefits, for a total credit of $.

Respondent shall be given a credit of $10,206.34 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $220.00/week for 78 2/7 weeks, commencing 7-18-2011 through 1-17-2013, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $82,323.88, 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

3-29-13
Date

ICArbDec19(b)

APR 1 - 2013

Martin Mota v. Labor Network
Case No.: 11 WC 28693

14IWCC0592

Statement of Facts

Petitioner, Martin Mota, was employed as a packer for Respondent, Labor Network. He was assigned to work at Profile Foods earning $8.50 per hour. Petitioner had worked as a machine operator but was laid off. He took the job with Respondent as his girlfriend was pregnant and he needed work. He testified that he was in excellent shape before he started working for Respondent and could bench press 210 lbs. He worked packing bags that weighted 30 and 50 lbs.

Petitioner was injured on July 6, 2011 when he lifted 20 50 lb bags. He felt a sharp pain in his low back when he lifted the last bag. He told his supervisor at Profile, Miguel. He was sent to Labor Network and they sent him to Physician's Immediate Care. Petitioner gave the same history to Physician's Immediate Care. He was diagnosed with thoracic and lumbar sprains and advised to work with restricted lifting. He apparently took a drug screen that was positive for marijuana. Petitioner testified that he had not smoked marijuana on the date of accident but may have done so within the few weeks beforehand. He did not find out about the failed test until shortly before trial.

Petitioner worked light duty in Respondent's office for a while and received some temporary partial disability compensation. He testified that he cleaned a bathroom and lifted 40 lb boxes. Michelle Urbieta testified that she is Respondent's general manager and that light duty workers neither lift boxes nor clean bathrooms. She admitted that she did not directly supervise light duty workers. She was responsible for all 5,000 workers for Labor Network. A different person in the office handled the light duty workers. She did not supervise Petitioner.

Petitioner went to St. Alexius Medical Center on July 13, 2011 and was instructed to lift no more than 10 lbs. He Began seeing Dr. Riera on July 19, 2011. Dr. Riera recommended physical therapy, an MRI, medication and no work. The MRI was done on July 21, 2011 and revealed a disc herniation at L5/S1. An EMG was done on August 23, 2011 and was seen as compatible with an L5/S1 radiculopathy. Petitioner began to receive temporary total disability compensation and treated with Dr. Riera. Dr. Riera referred Petitioner to Dr. Vargas. Dr. Vargas did a selective nerve root block and epidural steroid injection on August 31, 2011.

Respondent had Petitioner evaluated by Dr. Singh on September 16, 2011. Dr. Singh read the MRI as showing a loss of signal intensity at L5/S1 with a disc protrusion. However, he saw no stenosis and disagreed with the radiologist's interpretation that there had been a disc herniation. He felt petitioner could work at a 10 lb restriction. Dr. Singh wrote a note dated September 17, 2011 indicating that he wanted to review the MRI. He felt there had been symptom magnification. On October 21, 2011 he wrote that injections were not appropriate for axial back pain and that there was no nerve root issue. He recommended work conditioning.

Petitioner's compensation was terminated shortly after the appointment with Dr. Singh. Petitioner testified that he was in crippling pain and could barely get out of bed. He had numbness in both legs. His girlfriend was pregnant. Petitioner went to Alexian Brother's Medical Center a few times in the Fall of 2011 and was not his best self. He was intoxicated when he went to the hospital on September 24, 2011. He returned the next day and acted poorly. He returned on October 12, 2011 and was in pain and berated the staff. During this period Dr. Vargas wanted to perform additional injections but there was no insurance approval. He wrote in his chart on October 5, 2011 that he disagreed with any intimation that Petitioner was malingering. He wrote that the physical findings all correlated with the diagnostic testing. He continued to authorize Petitioner off of work.

In early, 2012 Petitioner was still awaiting approval of an injection and/or resolution of the disputes in this case. He was still authorized off work by Dr. Vargas. In May, 2012 Dr. Vargas referred Petitioner to a surgeon, Dr. Erickson. Dr. Erickson recommended surgery as a result of the July 6, 2011 injury.

The parties agreed to an outside examination with Dr. Avi Bernstein. Dr. Bernstein evaluated Petitioner on August 30, 2012. He had some question about positive Waddell signs but did not find flagrant evidence of obvious exaggeration. He reviewed the MRI and wrote a follow up letter dated September 6, 2012. He felt that the MRI did not support a surgical lesion. He recommended that a Functional Capacities Evaluation be performed. Petitioner brought this information to Dr. Erickson. Dr. Erickson felt Petitioner still needs surgery and suggested a discogram to determine if there was concordant disc compression. He agreed to have Petitioner undergo a Functional Capacities Evaluation.

Petitioner underwent a Functional Capacities Evaluation on October 29, 2012 at Premier Physical Therapy. That test yielded a valid result and indicated that Petitioner could lift 11 lbs from the floor to the waist, 14 lbs from 11 inches off of the floor to the waist and 11 lbs overhead. He could carry 15 lbs for 20 ft and push and pull 45 lbs for 20 ft.

Petitioner testified that he still has numbness and tingling in his left leg when he lies down. He has sharp pain in his back to his left leg. He sometimes feels as if his left leg is not connected to the rest of his body. The leg gives out. He testified that he has lost muscle tone the left leg. He still takes medication for pain. He has difficulty attempting to pick up his young son. Petitioner testified that mornings are worst. He has difficulty getting out of bed.

Petitioner testified that nobody has offered him work since he originally worked light duty in July, 2011. Ms. Urbieta admitted that she has not offered any light duty since July, 2011

In support of the Arbitrator's decision relating to F the Arbitrator finds the following facts:

The Arbitrator finds Petitioner's low back condition causally related to the accident of July 6, 2011. Petitioner has a herniated disc at L5/S1. Petitioner testified that he had no prior injury to his low back. He testified that he was in the best shape of his life before he started working for Respondent. This testimony is unrebutted and uncontradicted. Petitioner has testified to no new injuries to his low back. That testimony is similarly unrebutted and uncontradicted. Petitioner has testified to physical complaints since July 6, 2011. The medical evidence supports Petitioner's testimony. There is no evidence anywhere to rebut a causal relationship between Petitioner's low back condition and the accident of July 6, 2011.

In support of the Arbitrator's decision relating to J and L the Arbitrator finds the following Facts:

Petitioner remains temporarily totally disabled and in need of additional medical care. In reviewing the medical evidence it is clear that nobody has released Petitioner to full duty since the accident of July 6, 2011. Petitioner's doctors: Riera, Vargas and Erickson, have all taken him off of work. Dr. Erickson has stated this even after receiving the result of the Functional Capacities Evaluation. Respondent had Petitioner evaluated by Dr. Singh. Dr. Singh released Petitioner to work with a 10 lb restriction. This is pretty close to the result of the Functional Capacities Evaluation. Petitioner's work is well in excess of these restrictions. Light duty was allegedly offered. Petitioner did this "light duty" for a short while in July, 2011 and testified that he was lifting 40 lb boxes and cleaning a bathroom. This was disputed by Ms. Urbieta. However, she was not Petitioner's supervisor at that time and her testimony has significantly less weight than that of Petitioner or any actual supervisor. No such person was called to testify. Finally, Dr. Bernstein suggested the Functional Capacities Evaluation. He never said what Petitioner could or could not do.

The dispute over medical is tied to the dispute over medical care. The parties had no discord until the examination of Dr. Singh called into question the need for an injection. Over a year later, these issues have not been resolved. Drs. Riera, Vargas and Erickson find a disc injury that requires either injections or surgery. Dr. Singh finds only axial back pain. Dr. Bernstein does not see nerve compression that is seen by Drs. Erickson and Vargas. Dr. Erickson suggested a discogram to see if there is concordant discogenic pain. This suggestion seems reasonable. The Arbitrator orders Respondent to approve a discogram. Further medical care or whether the case is ripe for vocational rehabilitation will be determined pending either a positive or negative result of the discogram.

The medical bills submitted by Petitioner totaling $28,388.63 are awarded subject to the Fee Schedule in Section 8.2 of the Act. Respondent has submitted utilization review documents and Dr. Vargas has testified and written explaining his disagreement with the

utilization review. The real issue is whether petitioner has discogenic pain. The Arbitrator finds that Petitioner indeed has discogenic pain and the treatment rendered thus far is reasonable, necessary and causally related. However, the Arbitrator hedges that decision as regards any future care including any proposed surgery. The discogram can help clarify whether Petitioner is a candidate for surgery.

In support of the Arbitrator's decision relating to N the Arbitrator finds the following facts:

Respondent is entitled to a credit in the amount of $4,340.00 for temporary total disability compensation and an advance that had been paid. Respondent has paid $286.59 in temporary partial disability and the parties have agreed that this represents payment in full for any claim for temporary partial disability. This amount is separate from the $4,340.00. The $286.59 is not a credit against any claim for temporary total disability compensation.

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

Anthony Scialabba,
Petitioner,
vs.

ABF Freight Systems,
Respondent.

14IWCC0593

NO: 10 WC 1675

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses 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 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 $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: JUL 18 2014
KWL/vf
O-5/20/14
42

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would find that a preponderance of the evidence establishes Petitioner failed to meet his burden of proof. A thorough review of the record reveals numerous instances of contradictory evidence. A reasonable conclusion drawn from the surveillance video establishes a lack of credibility in Dr. Earman's testimony that Petitioner's hip condition and need for bilateral hip replacements is in any way related to Petitioner's fall at work. Dr. Earman believed bilateral hip replacement surgery was necessary based on Petitioners claims of infirmity and his own fleeting observation of Petitioners demonstrated disability. When viewed as a whole the record and the surveillance video cast a pall on the credibility of the Petitioner and dictate a finding reversing the Arbitrators award of bilateral hip replacement surgery.

Kevin W. Lamboth

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

14IWCC0593

SCIALABBA, ANTHONY
Employee/Petitioner

Case# **10WC001675**

ABF FREIGHT SYSTEMS
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:

2208 CAPRON & AVGERINOS PC
MICHAEL ROM 312-346-6211
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
TIM O'GORMAN 312-346-3721
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
19(b)

14IWCC0593

Case # 10 WC 01675

Consolidated cases: _____

Anthony Scialabba
Employee/Petitioner

v.

ABF Freight Systems
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **May 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. ☒ 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 _____

14IWCC0593

FINDINGS

On the date of accident, **10/23/09**, 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 $**49,187.84**; the average weekly wage was $**945.92**.

On the date of accident, Petitioner was **51** 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 $**117,475.49** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**117,475.49**.

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

ORDER

- Respondent shall pay to Petitioner the reasonable and necessary medical expenses incurred pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.
- Respondent shall authorize and pay reasonable and necessary medical costs for medical treatment prescribed by Petitioner's treating physician, Dr. William Earman, specifically bilateral hip surgery and any follow up treatment related to that procedure pursuant to Sections 8 and 8.2 of the Act.

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

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

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

Carolyn Doherty
Signature of Arbitrator

7/22/13
Date

ICArbDec19(b)

JUL 22 2013

FINDINGS OF FACT

Petitioner has been employed by the respondent for 35 years (30 years as a dock spotter). A dock spotter is required to lift up to 100-150 pounds while breaking down freight. On October 23, 2009, Petitioner suffered an undisputed accident when he fell from a forklift and landed flat on his back and striking his head on the ground. Petitioner testified that he was shaking and felt tingling in his hands. He also felt pain in his neck, back, hips, knees and legs. Notice is not in dispute. ARB EX 1. Respondent agrees it is responsible for a work related injury which occurred on 10/23/09 but disputes causal connection between the accident and Petitioner's current bilateral hip condition.

Petitioner testified that he never injured his neck, low back or hips prior to this accident. Petitioner testified that he was hit by a car in 1985 suffering injury to his lower legs, feet and ankles. He underwent surgery on both lower legs but fully recovered and returned to work full duty 2 years later as a dock spotter in 1987. Petitioner worked full duty as a dock spotter from 1987 up until the time of the accident on 10/23/09.

On 10/23/09, Petitioner was transported to Clearing Clinic, where he came under the care of Dr. Carlito Orig. PX 3. Dr. Orig performed a CT scan of the brain, cervical x-rays and a CT of the cervical spine at MacNeal Hospital on 10/23/09. The cervical testing showed degenerative changes of the cervical spine with bilateral narrowing of the intervertebral formina at C3-4 and a mild to moderate compression deformity at C-5 of indeterminate age, possibly chronic. PX 3. Petitioner was referred to a neurosurgeon for consult on his head and neck injury.

On October 28, 2009, Petitioner was seen by a neurologist, Dr. Andrew Zelby complaining of headache, neck pain, and numbness in both hands. A cervical MRI was ordered. There is no specific mention of any hip complaints in the initial treating records of Dr. Orig or Dr. Zelby. On October 30, 2009, Petitioner underwent an MRI of the cervical spine which showed chronic C5 vertebral body deformity; severe canal stenosis at C3-4 with associated cord deformity from a posterior disc-osteophyte complex suspicious for edema / myelomalacia; central canal and neural foraminal stenosis at several additional levels; and borderline spinal cord atrophy. PX 3, PX 4. Based on this MRI, Dr. Andrew Zelby recommended that Petitioner undergo an anterior cervical decompression and fusion at C3-4. PX 8. At the visit to Dr. Zelby on 11/6/09, Petitioner complained of the same cervical symptoms as well as developed low back and lower thoracic spine pain. PX 8. The same cervical condition was noted again on 11/20/09 and Dr. Zelby also noted that Petitioner's gait was spastic and that he was unable to walk in tandem. PX 8.

On 1/29/10, Dr. Zelby noted the same cervical condition as well as complaints of pain in the back which radiates across both shoulders and intermittently down both arms with numbness and weakness in the same distribution. The recommended surgery was postponed due to an unrelated illness Petitioner developed as well as Petitioner's desire to seek a second opinion with Dr. Earman. PX 8.

On 2/8/10, Petitioner saw Dr. Earman and reported a consistent history of accident and complaints in the cervical, upper and lower back areas. On exam, Dr. Earman noted significant antalgic gait with weight bearing on the right leg, tenderness across the cervical and lower

lumbar spine, and "hip range of motion is severely restricted in both internal and external rotation with pain toward the end ranges." PX 5. Dr. Earman concurred with Dr. Zelby on the cervical diagnosis and the need for surgery. Dr. Earman also diagnosed degenerative arthritis in both hips with loss of range of motion. PX 5. Dr. Earman noted, "Patient is suffering from a severe loss of range of motion of the hip and I will obtain x-rays of the pelvis to rule out any intrinsic problems with the hips which could be explaining his lower extremity symptoms." PX 5.

On February 23, 2010, Dr. Zelby performed a partial corpectomy C3-4 with C3-4 discectomy and decompression of the spinal cord with instrumentation at MacNeal Hospital. PX 3. Following surgery, Petitioner underwent a course of physical therapy at Newsome Physical Therapy. Petitioner continued to complain of post surgical pain as well intermittent complaints of low back and leg pain. PX 7. On 3/10/10, Dr. Zelby noted continued complaints of aching and soreness in Petitioner's low back. Physical therapy was prescribed only for the post surgical cervical condition. On 5/5/10, Dr. Zelby noted that Petitioner's cervical condition recovery was progressing and that an MRI was in order for the lumbar spine in four weeks if the low back pain persisted. PX8. On 6/2/10, Dr. Zelby noted complaints of pain encompassing the "entire aspects of both lower extremities." PX 8. A lumbar MRI was ordered.

On 6/7/10, the physical therapy notes are replete with complaints of pain in Petitioner's entire back and hips and pain with walking, sitting or standing greater than a few minutes. PX 7.
On June 7, 2010, an MRI of the low back revealed an annular tear at L4-5 with right sided disk bulge which contacts the transmitting right L5 nerve root and approaches the left L5 nerve root, mild disk bulges at L2-L4 and disc bulge osteophyte complex at L5-S1 approaching the left S1 nerve root and contributing to moderate left foraminal narrowing. PX 5. Dr. Zelby referred Petitioner for more physical therapy for the low back complaints and to Dr. John Hong for treatment of his low back. Dr. Hong performed a series of epidural steroid injections which did not provide adequate relief of low back pain. PX 2. Dr. Zelby recommended a discogram which Petitioner underwent in December 2010.

A report from Accelerated Physical Therapy dated December 10, 2010, indicated that Petitioner was not a good candidate for work hardening based on severe guarded behavior and severely limited tolerance for all activity based on pain complaints. PX 1. Petitioner returned to Accelerated for an FCE on 1/7/11. The results were "invalid secondary to the submaximal effort demonstrated by Mr. Anthony Scialabba during his performance of a variety of functional basis. ... the client demonstrates inconsistent reliability." PX 1. On January 12, 2011, Dr. Zelby released Petitioner to medium duty in regards to the neck.

Petitioner continued treatment with Dr. Earman and continued to complain of low back and leg pain. On October 11, 2011, Dr. Earman diagnosed avascular necrosis with degenerative arthritis of both hips and recommended bilateral hip replacement surgery. PX 5. Dr. Earman noted in his record of November 29, 2011, that Petitioner walked with a markedly restricted ability to ambulate as was noted by Dr. Zelby in November 2009.

On January 6, 2012, Dr. Earman indicated in his treating record that Petitioner had an aggravation of an underlying degenerative condition which had now progressed to the point that

the symptomatic condition of the avascular necrosis and degenerative change would require bilateral total hip replacement. Petitioner reported having no problems with his hips prior to the October 2009 fall at work. Dr. Earman opined that the accident of October 23, 2009, aggravated Petitioner's bilateral hip condition, thereby necessitating bilateral hip replacement. PX 5 and PX 12 p.16, 17. His opinion was based in part on the fact that Petitioner was working full time before this accident without any limping and was able to climb forklifts and ladders before the fall. PX 12, p. 17,41. Further, Petitioner had not received treatment for hip arthritis prior to the fall. PX 12, p. 19. As of 2/10/12, Petitioner began ambulating with a cane and occasionally a walker due to difficulty ambulating and a "tremendous" loss of range of motion in both lower extremities." Dr. Earman strongly recommended going forward with the hip replacement surgery. As of 3/19/12, Dr. Earman noted that Petitioner would likely become wheel chair dependent without the surgery. Petitioner continued to treat with Dr. Earman through date of trial and his condition remained unchanged. Dr. Earman strongly recommended bilateral hip replacement surgery as Petitioner sustained significant functional loss. PX 5.

On May 31, 2012, Petitioner was seen, at the request of the Respondent, for an independent medical examination by Dr. Kevin Walsh. Petitioner reported using a rolling walker to ambulate and that he spent most of the time in bed or in a recliner. Dr. Walsh opined that it was "not at all likely" that Petitioner's "current subjective complaints are causally related to the injury described in 2009. There is a paucity of any objective abnormalities present on physical examination to explain his subjective complaints as related to the event in 2009. He certainly has residual from his previous trauma and motor vehicle accident which predates the work –related event. The care and treatment proposed by Dr. Earman for his hips is for degenerative osteoarthritis and not caused, aggravated or accelerated by falling onto his back." RX 1.

Respondent presented video surveillance of Petitioner on 1/13/13. RX 6. Petitioner is depicted walking with a severe limp and waddling from side to side while walking to and from his car. The Arbitrator notes Petitioner is seen as obviously impaired in the video. Petitioner drags his legs into the driver's seat of the car. Petitioner purchased two cases of water at the store and loads them into his car. When he arrives home, another man comes out of the house to carry both cases of water from the car. The parties stipulated that Petitioner is wearing a black hat in the video. The man seen in the video wearing a red hat is not Petitioner but rather his brother in law.

Petitioner continues to treat with Dr. Earman and is in need of a bilateral hip replacement which he would like to undergo. Dr. Earman currently prescribes hydrocodone, zolipiden, tramadol and cyclobenzaprine in relation to the bilateral hip condition.

CONCLUSIONS OF LAW

F. Is Petitioner's current condition of ill-being causally related to the injury? K. Is Petitioner entitled to any prospective medical care?

The Arbitrator finds Petitioner to be credible and notes that the accident of October 23, 2009 is undisputed. Respondent has stipulated to the causal connection between this accident and

Petitioner's cervical and lumbar complaints and treatment. Respondent disputes Petitioner's hip condition and its relation to this accident. The Arbitrator notes that Petitioner was working full duty for at least 20 years prior to the undisputed work accident of October 23, 2009. There is no evidence that Petitioner suffered from any hip problems or treatment prior to this injury. Petitioner's job was physically demanding and required him to lift in excess of 100 pounds. Dr. Earman opined in his deposition, that since the time of the injury, Petitioner has had a progressive deterioration of his functional status related to the deterioration of his spinal condition as well as a further deterioration of his hip condition. The deterioration of his hips is documented throughout the medical records generated during his cervical treatment as cited above. Although secondary to his cervical complaints, Dr. Earman opined that Petitioner's accident aggravated the underlying degenerative changes and further progression of avascular necrosis in his hips bilaterally. PX 5, PX 12.

The Arbitrator agrees and finds that Petitioner's condition of ill-being in his bilateral hips and the recommended bilateral hip surgery are causally related to the injury of October 23, 2009. The Arbitrator's finding is based on the opinion of Petitioner's treating physician, Dr. Earman, the lack of symptoms prior to this accident and Petitioner's uninterrupted physical ability to work for several years as a dock spotter prior to the accident of 10/23/09. In so finding, the Arbitrator assigns greater weight to the opinion of Dr. Earman than to the opinion of Dr. Walsh. Accordingly, the Arbitrator further finds that that the treatment recommended by Dr. Earman is reasonable and necessary medical treatment, and Respondent is ordered to authorize and pay the reasonable and related costs associated with that surgery pursuant to Sections 8 and 8.2 of the Act.

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

Based on the Arbitrator's finding of causal connection for Petitioner's condition of ill-being, the Arbitrator further finds that Respondent is to pay Petitioner the reasonable and necessary medical expenses incurred pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

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

Emmett Sanders,

Petitioner,

14IWCC0594

vs.

NO: 04 WC 11280, 07 WC 17507,
07 WC 03141, 07 WC 03143,
07 WC 34482

ITT McDonald & Miller,

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 causal connection, medical benefits, permanent total disability, temporary total disability, penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator on the issues of permanent total disability and temporary total disability and otherwise affirms the Decision of the Arbitrator which is attached hereto and made a part hereof. The Commission finds that Petitioner is entitled to an award of 40% of the person as a whole for the work-related injuries sustained on November 25, 2003, March 3, 2005, April 14, 2005, December 16, 2005, and April 5, 2006. The Arbitrator issued one decision incorporating each of the five cases consolidated for hearing. The Arbitrator found that Petitioner is permanently and totally disabled as a result of his injuries. For the reasons set forth below, we disagree.

On November 25, 2003 Petitioner was a 38-year-old machine operator for Respondent. Due to previous bilateral carpal tunnel and ulnar nerve surgeries, Petitioner performed his job duties under permanent restrictions imposed in May of 2002. Petitioner's hand surgeon restricted Petitioner from lifting greater than eighteen pounds and from any repetitive grasping or rotation of his wrists and forearms. In August of 2003, several months prior to the accident, Petitioner was involved in a motor vehicle collision. He was treated by his primary care physician, Dr.

Mizuno, for neck and back pain. Petitioner was examined by Dr. Mizuno on October 14, 2003 had ongoing complaints of right-sided neck pain. He was diagnosed with "cervico-thoracic traumatic myofascial syndrome;" Dr. Mizuno noted some improvement.

On November 25, 2003 while in the course of his employment by Respondent, Petitioner sat down on what he described as the "metal pipe" armrest in a truck. He struck his tailbone and experienced immediate pain radiating into his back and legs. Petitioner continued working the rest of the day and then went on vacation until December 12, 2003. He first sought medical treatment on December 8, 2003 with the "company doctor" in the occupational medicine department of Swedish Covenant Hospital. He reported striking his tailbone on November 25, 2003; he was noted to limp and move slowly but his straight leg raise test was negative. Dr. Callangan issued work restrictions and advised Petitioner to sit on a donut to protect his tailbone. The following day he was examined by his primary care physician. A coccyx fracture was suspected and Petitioner was referred by Dr. Callangan to Dr. Wehner, an orthopedic surgeon. Petitioner was examined by Dr. Wehner on January 2, 2004. Dr. Wehner noted that Petitioner was no longer complaining of coccyxgeal pain. He had a mildly positive straight leg raise test and complained of back pain with bilateral leg pain. A January 9, 2004 lumbar MRI indicated disc degeneration at L5-S1 but there was no evidence of disc herniation or nerve root compression. On January 16, 2004 Dr. Wehner noted that Petitioner's gait was now normal and his straight leg raise was negative; he demonstrated full bilateral hip range of motion without pain. Dr. Wehner released Petitioner to full duty work. On February 18, 2004, having completed physical therapy, Petitioner was released by Dr. Wehner at maximum medical improvement for the November 25, 2003 accident.

Petitioner obtained a new primary care physician, Dr. Palmer, and was examined on March 5, 2004 for neck pain that he related to a car accident as well as symptoms of fatigue and weight gain. He was referred for a cervical spine MRI and an evaluation by Dr. Byrne, a neurosurgeon at the Chicago Institute of Neurosurgery. Petitioner gave Dr. Byrne a history of having sustained injuries to his neck and low back in a car accident. Petitioner began physical therapy at Rush Hospital on May 26, 2004, where he further mentioned a tailbone injury in November and unresolved pain therefrom. Petitioner returned to Dr. Palmer on August 19, 2004 and was referred to Dr. Buvanendran at the Rush Pain Center for his neck and back complaints. Petitioner gave a history to Dr. Buvanendran of neck and low back pain related to a motor vehicle accident in August of 2003 and a work injury in November of 2003. Finding that Petitioner's neck pain was the acute problem, Dr. Buvanendran recommended cervical epidural steroid injections; a series of three injections was completed in November of 2004. It is undisputed that Petitioner's neck condition and treatment is unrelated to the accidents.

Four more cases filed with respect to subsequent work-related accidents were consolidated with the November 25, 2003 back injury case (04 WC 11280). Petitioner alleged a second accident occurring on March 3, 2005 (07 WC 17507). He testified that he sustained a left shoulder injury while loading and unloading a machine. He was initially diagnosed with a rotator cuff strain and eventually underwent a subacromial decompression by Dr. Cole on August 9, 2006. Petitioner alleged a third accident, a repetitive trauma injury, manifesting on April 14, 2005 (07 WC 03141). He testified that he developed recurrent left carpal tunnel syndrome from repetitively handling "slippery" machine parts. Petitioner alleged a fourth accident occurring on December 16, 2005 (07 WC 03143). He testified that he strained his left elbow and forearm

while working. Petitioner alleged a fifth accident occurring on April 5, 2006 (07 WC 34882). He testified that he felt pain in his left groin while unloading a freight elevator; he was examined by a specialist but never diagnosed with acute hernias. Only the left shoulder injury of March 5, 2005 (07 WC 17507) resulted in any definitive treatment. We note that Petitioner was not cross-examined in regard to any of the subsequent accidents, nor did Respondent offer any evidence to rebut Petitioner's allegations. Petitioner did not claim any unpaid bills appearing to relate to treatment with respect to these subsequent accidents. We further note that on review before the Commission, Respondent's arguments pertain only to the low back injury and Petitioner's claim for permanent total disability benefits. Respondent argues that the Arbitrator erred in finding that Petitioner's current condition of ill-being is causally connected to the work related accident of November 25, 2003. Furthermore, Respondent argues that even if the Commission agrees with the Arbitrator's findings with respect to causal connection, Petitioner still failed to prove that he is permanently and totally disabled under the "odd-lot" category.

We note that Petitioner obtained no specific low back treatment following his release from Dr. Wehner until after he sustained another motor vehicle collision in July of 2005. On July 27, 2005, Petitioner was examined by Dr. Palmer and gave a history of having recently been in a motor vehicle accident where he was "jostled around a lot" and experienced increased neck, shoulder and back pain. He was diagnosed with a cervical and lumbar strain as well as chronic pain in the "same areas." There was a considerable gap in time before Petitioner returned to Dr. Byrne on April 26, 2006. He then complained of lower back pain related to the November 25, 2003 tailbone injury. Petitioner's straight leg raise was negative and his lumbar x-ray appeared to be normal. Dr. Byrne recommended a lumbar MRI which was subsequently performed on May 11, 2006. The MRI report indicated a left paracentral disc herniation at L5-S1 and minor bulges at L4-5 and L2-3. Petitioner underwent a series of lumbar epidural steroid injections by Dr. Buvanendran in July and August of 2006. On November 22, 2006, Dr. Byrne recommended an L5-S1 left lumbar microdiscectomy; surgery was performed on March 5, 2007.

Petitioner has not worked in any capacity since Respondent's facility closed in December of 2006. At the time of closure, Petitioner was working under temporary post-operative light duty restrictions from Dr. Cole for his left shoulder. He was also working under his preexisting permanent restrictions pertaining to his bilateral hands and arms. Petitioner was last seen by Dr. Cole for the left shoulder on January 20, 2007. Petitioner testified that he was not provided with any job placement assistance by Respondent following closure. Documentary evidence dated April of 2006, however, indicates that Petitioner was advised of his severance package provisions and scheduled for a resume writing class to occur in August of 2006. Petitioner denied that he ever received any vocational help from Respondent. As stated, Petitioner underwent lumbar surgery by Dr. Byrne on March 5, 2007, three months after the facility closed. Dr. Byrne testified on June 2, 2009 that Petitioner was not permanently and totally disabled from employment related to his low back condition; he indicated that some restrictions may be necessary and he recommended a functional capacity evaluation. Petitioner participated in a function capacity evaluation on August 12, 2009; the therapist recommended sedentary work for Petitioner. Petitioner did not return to Dr. Byrne. Petitioner testified that he tried to look for work on his own.

We find that Petitioner's testimony was vague and that he failed to describe any

substantial steps taken to find employment. Petitioner submitted into evidence five "email alerts" regarding job openings posted between March of 2007 and March of 2008, but he never testified that he applied for those jobs. In fact, he testified that he stopped actively looking for work after 2007.

Petitioner is not obviously unemployable and there is no medical evidence to support a claim of permanent and total disability. In fact, Dr. Byrne and Dr. Palmer opined that Petitioner is not permanently and totally disabled. Therefore the burden is upon Petitioner to prove that he fits into the "odd-lot" category. We note that there is no evidence that Petitioner's sedentary restrictions would not have been accommodated by Respondent had the facility not closed. As explained, Petitioner has not shown a diligent but unsuccessful attempt to find work. Petitioner knew at least as early as April of 2006 when he accepted a severance package that Respondent's facility would be closing. The December 9, 2006 closure occurred three months prior to Petitioner's back surgery and at a time when Petitioner was not under any restrictions for his back. There is no evidence that Petitioner took any steps to find new employment or obtain vocational assistance during the months prior to closure. Further, there is some evidence that Petitioner failed to take advantage of the resume assistance that was offered to him. Petitioner's vocational expert, Mr. Blumenthal, opined that vocational rehabilitation such as additional training or job placement was not recommended. Mr. Blumenthal believed that no stable labor market existed for Petitioner primarily due to the results of the functional capacity evaluation placing Petitioner at a sedentary level. He also considered Petitioner's pre-existing restrictions, age, skills, training and work history. He agreed that until Petitioner was laid off he was able to perform his job duties as a machine operator notwithstanding his preexisting restrictions. Mr. Blumenthal did not conduct a labor market survey. He opined that it was not realistic to think that any employer would be able to accommodate all of Petitioner's restrictions. We are not persuaded by Mr. Blumenthal's opinion alone and we find that Petitioner failed to prove that he is permanently and totally disabled from all employment as a result of the work injuries sustained.

The deposition of Dr. Byrne, Chair of the Department of Neurosurgery at Rush Hospital, was taken on June 2, 2009. Dr. Byrne last saw Petitioner on March 19, 2008, almost a year and a half prior to the functional capacity evaluation on August 12, 2009. Dr. Byrne examined Petitioner on March 19, 2008 and found no neurological deficits. He noted that Petitioner continued to complain of low back and bilateral lower extremity pain consistent with his diagnosis of radiculopathy. We note that the records and bills of Dr. Buvanendran indicate that Petitioner subsequently underwent spinal cord stimulator trials on August 26, 2008 and September 23, 2008. Petitioner was never recommended for a permanent implant. On April 20, 2009 Petitioner returned to Dr. Palmer and reported increased pain in his back, neck and arms after another motor vehicle that occurred a few weeks earlier, wherein he had been struck from behind,

Dr. Byrne testified that he did not believe that Petitioner was completely or permanently disabled at his last examination; he did not outline any specific restrictions for Petitioner but recommended a functional capacity evaluation. Petitioner did not follow up with Dr. Byrne subsequent to the August 12, 2009 functional capacity evaluation; we note that contrary to the assertion of "permanent restrictions" by Petitioner, there is no medical opinion in evidence

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adopting the recommendations of the functional capacity evaluation. In the absence of any medical opinion interpreting the functional capacity evaluation and in light of all of the evidence, we find that Petitioner reached maximum medical improvement by August 12, 2009 and that he failed to prove entitlement to temporary total disability benefits after that date.

Subsequent to the August 12, 2009 functional capacity evaluation, Petitioner returned to Dr. Palmer in September of 2009 and January of 2010 with acute unrelated illnesses; Dr. Palmer noted that Petitioner's chronic pain complaints were still present. The record shows that Petitioner did not seek any further medical treatment until he began seeing a chiropractor, Dr. Michaelec, on his own beginning in June of 2011. On February 8, 2010 Petitioner told Mr. Blumenthal, his vocational rehabilitation witness, that his back pain and leg pain fluctuated from a 3-4/10 to a 10/10 and that his left arm and shoulder pain was constant at 5/10. Petitioner reported having at least two episodes of muscles spasms per week and having to lie down three to four times per day. Petitioner testified at hearing that he has good days and bad days. He is able to perform jobs around the household including cleaning, but he avoids any work that requires him to reach forward with his arms. He complained of left hand numbness, left elbow stiffness and occasional groin pain with movement.

In conclusion, after considering all of the evidence, we modify the Decision of the Arbitrator on the issues of permanent total disability and temporary total disability. We find that Petitioner sustained a loss of 40% of the person as a whole as a result of the work-related injuries sustained. The remainder of Arbitrator's Decision is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed February 25, 2013 is modified as stated above and otherwise affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $483.34 per week for a period of 139 and 4/7 weeks, commencing December 9, 2006 and continuing through August 12, 2009 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 $435.00 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 40% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred by Petitioner through August 12, 2009 for treatment related to the accidents of November 25, 2003, March 3, 2005, April 14, 2005, December 16, 2005, and April 5, 2006 under §8(a) and §8.2 of the Act.

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

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

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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: JUL 2 1 2014
RWW/plv
o-2/20/14
46

Ruth W. White

Charles J. DeVriendt

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0594

SANDERS, EMMETT
Employee/Petitioner

Case# **04WC011280**

07WC003141
07WC003143
07WC017507
07WC034882

ITT McDONNELL & MILLER
Employer/Respondent

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:

2739 SMOLER LAW OFFICE PC
SMOLER, ROBERT J
415 N LASALLE ST SUITE 402
CHICAGO, IL 60654

2965 KEEFE CAMPBELL & BIERY
SHAWN R BIERY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Emmett Sanders
Employee/Petitioner

v.

ITT McDonnell & Miller
Employer/Respondent

Case # 04 WC **11280**

Consolidated cases: **07 WC 3141; 07 WC 3143; 07 WC 17507; 07 WC 34482**

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 **June 27, 2012, August 22, 2012, September 24, 2012, and December 28, 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 **November 25, 2003; April 14, 2005; December 16, 2005; March 3, 2005; & April 5, 2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to these accidents.

In the year preceding the injury, Petitioner earned **$37,700.00**; the average weekly wage was $725.00.

On the date of these accidents, Petitioner was **38, 39, 39, 40, and 40** years of age, ***single*** with **no** 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 **$0**.

Respondent is entitled to a credit of **$148,481.30** under Section 8(j) of the Act.

ORDER

Respondent shall be given a credit of **$148,481.30** 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 further reasonable and necessary medical services of **$13,875.37**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$483.34**/week for **311 5/7^{ths}** weeks, commencing **December 9, 2006** through **December 28, 2012**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **December 9, 2006** through **December 28, 2012**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner permanent and total disability benefits of **$483.34**/week for life, commencing **December 29, 2012**, 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.

Petitioner's claim for penalties is denied.

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

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

Signature of Arbitrator

February 22, 2013
Date

FEB 25 2013

In support of the Arbitrator's decision, the Arbitrator finds the following facts:

Petitioner's Testimony

The Petitioner was employed since August 9, 1988 for the Respondent. His duties for his employer varied over the years from assembler and tester to material handling to machining, assembly, testing and welding. His job duties required him to use air tools, lift heavy weights and basically perform a very strenuous job. In a May 17, 2002 report he was returned to work with a permanent light duty lifting restriction of 18 pounds by Dr. Daniel Nagle as a result of prior job injuries to his hands and arms. PX30.

The Petitioner sustained several subsequent accidents that are detailed later in this decision.

The Petitioner testified that he was laid off by the Respondent on December 8, 2006 when the facility where he was working was closed. He was not provided with any formal job placement. He has remained off of work since that date.

He currently notices pain and numbness in his left hand, left elbow and forearm and left groin and scrotum. He has persistent pain and discomfort in his low back and tailbone with numbness into his legs. He has difficulty with most activities of daily living. He is on a daily regimen of medications for pain, inflammation, muscle relaxation, anxiety and sleep.

Accident of November 25, 2003

The Petitioner testified he was getting on a forklift when he slipped and fell down with his tailbone hitting a metal pipe which served as the left armrest. He noticed immediate pain up his back and down his legs, especially the right leg and it was instantly severe. The company sent him to Swedish Covenant Hospital on December 8, 2003 with a history consistent with the accident. PX7. He was diagnosed with possible tailbone fracture and given conservative care and eventually prescribed an MRI of the lumbar spine. He sought care from his own physician, Dr. Eric Mizuno, on December 9, 2003. PX8. He presented with continuing pain down his legs which was supported on exam. He was continued with conservative care. The Respondent had Petitioner undergo an examination with Dr. Julie Wehner on January 2, 2004. Dr. Wehner confirmed continued complaints of pain into both legs, right over left. Again, examination supported his complaints. PX9. She prescribed conservative care and an MRI of the lumbar spine. He returned to her on January 16, 2004 with continued pain complaints. She reported that the MRI that was conducted on January 9, 2004 was unremarkable and did not explain why his right leg was giving out. She continued conservative care but returned him to full duty. The MRI report stated that an MRI of the pelvis and coccyx was advised. That was never done. Dr. Wehner saw the Petitioner for a third and final time on February 18, 2004 at which time she found him at MMI with no permanent impairment or disability and discharged him from her care.

The Petitioner presented to his personal physician, Dr. Henry Palmer, on April 27, 2004 complaining of chronic low back pain. PX 10-12. Dr. Palmer prescribed conservative care including referring him to Dr. Buvanendran at Rush for pain care. PX 16-17. His last visit with Dr. Buvanendran was December 17, 2004. He returned to Dr. Palmer on April 11, 2005 with complaints of chronic low back pain. An MRI of the pelvis and coccyx was prescribed but never authorized. He again returned on August 8, 2005 with continued complaints of chronic low back pain. He was referred by Dr. Palmer to Dr. Richard Byrne and on April 26, 2006 complained of problems with his low back since the fall at work on November 25, 2003 with continued numbness in his leg going into his foot. PX13. MRI and X-rays were ordered. On June 14, 2006, Dr. Byrne diagnosed a confirmed herniated disc L5-S1 to the left from the MRI which was confirmed on exam. He recommended epidural steroid

injections. Petitioner underwent the injections under the care of Dr. Buvanendran until September 22, 2006 at which time Dr. Buvanendran recommended return to Dr. Byrne for surgical intervention. On November 22, 2006, Dr. Byrne recommended surgery for his lumbar spine. He underwent a left lumbar microdiskectomy, L5-S1 on March 5, 2007 at Rush under the care of Dr. Byrne. Dr. Byrne referred the Petitioner back to Dr. Buvanendran for pain care on December 19, 2007. He underwent further pain treatment with Dr. Buvanendran through October 15, 2008 including more injections and two spinal cord stimulator trials.

Accident of March 3, 2005

The Petitioner was loading and unloading a machine when he felt a pop and burning in the top of his left shoulder and back. He was sent to the company clinic, Dr. Callangan at Swedish Covenant Hospital. He was diagnosed with left shoulder rotator cuff strain. He was treated conservatively. He was seen by Dr. Palmer and referred to Dr. Brian Cole of Midwest Orthopedics at Rush. Dr. Cole performed left shoulder surgery on August 8, 2006, which repaired the rotator cuff tendonitis, biceps fraying and impingement syndrome. PX14. He was released by Dr. Cole on January 27, 2007 full duty with no restrictions and placed at MMI.

Accident of April 14, 2005

The Petitioner was doing repetitive work on two machines when he noticed pain in his left hand. He was under the care of Dr. Cole who referred him for an EMG left upper extremity which was done on October 24, 2006. The report confirmed carpal tunnel in his left wrist. He was seen by Dr. Fernandez, on referral of Dr. Cole, who recommended against revision surgery. PX15.

Accident of December 16, 2005

The Petitioner was operating two machines when he strained his left elbow and forearm. He saw Dr. Palmer on December 19, 2005 and was referred to Drs. Byrne and Cole. On July 10, 2006 Dr. Cole diagnosed left lateral epicondylitis.

Accident of April 5, 2006

The Petitioner was unloading a freight elevator and attempted to move a metal tub and wooden pallet and when he stood up he felt pain in his left groin to his waist. He was seen by Dr. Palmer on April 18, 2006 for left inguinal pain and referred to a general surgeon for hernia evaluation if pain persists. He was seen by Dr. Callangan at Swedish on April 24, 2006 and diagnosed with left inguinal pain. He was seen by Dr. Wool.

Medical Records and Medical Opinions

The Petitioner underwent two FCE's, January 16, 2007 and August 12, 2009. PX18 and PX19.

Dr. Henry Palmer testified in support of the narrative report he authored wherein he rendered his opinion that the surgery for the low back was causally connected to the accident at work on November 25, 2003. PX20.

Dr. Richard Byrne testified in support of the narrative report he authored wherein he rendered his opinion that the surgery for the low back was causally connected to the accident at work on November 25, 2003. RX5.

Vocational Records and Vocational Opinions

Vocational expert, Steven Blumenthal, testified in support of the narrative report he authored wherein he rendered an opinion that there does not exist a stable labor market for the Petitioner to access any form of employment in a competitive labor market and that the Petitioner would not be a good candidate for a labor market survey based upon his restrictions and background and that he would not be a good candidate for additional training or job placement. PX2.

The Arbitrator finds in relationship to (F) whether the Petitioner's present condition of ill-being causally related to the injuries:

The Petitioner's present conditions of ill-being are related to his injuries. The Petitioner was a credible witness. The sequence of events is consistent. The medical records, medical reports, and medical opinions, viewed in their entirety, are corroborative. However, Dr. Wehner's opinions are not credible.

The Arbitrator finds in relationship to (J) whether the medical services that were provided to the Petitioner were reasonable and necessary:

The Respondent's dispute on this issue is premised on liability for causation, which has been resolved in favor of the Petitioner. Therefore, the claimed medical bills are awarded.

The Arbitrator finds in relationship to (K) amount of compensation due for Temporary Total Disability:

The Petitioner had sustained several accidents that have been detailed in this decision. Those accidents superimposed upon his prior condition rendered him incapable of full duty work. The Petitioner worked light duty until it was no longer offered to him, because the facility where he was working was closed. He was laid off on December 8, 2006 and not called back nor placed into a formal job placement or job training program. Based upon the foregoing, the Petitioner is entitled to the claimed temporary total disability benefits from December 9, 2006 through the date of arbitration, December 28, 2012, a period of 311 5/7^{ths} weeks.

The Arbitrator finds in relationship to (L) what is the nature and extent of the injury:

The Petitioner sustained indivisible injuries affecting his entire body, beginning with the first claimed accident, which occurred on November 25, 2003.

The Petitioner's vocational expert, Steven Blumenthal, testified unambiguously, professionally and credibly. His opinions withstood cross examination. He established, by a preponderance of the evidence, that there is no stable labor market for the Petitioner to access any form of employment in a competitive labor market and that the Petitioner is not a candidate for a vocational rehabilitation.

Based upon the foregoing, the Petitioner is permanently and totally disabled.

The Arbitrator finds in relationship to (M) whether penalties or fees should be imposed upon the Respondent:

The Respondent has disputed causal connection for all these claimed accidents. The Respondent alleges that the Petitioner's medical issues are related to pre-existing conditions for which the Petitioner had a permanent light duty lifting restriction. The Respondent did not prevent the Petitioner from receiving group medical

payments. While the Arbitrator disagrees with the Respondent's position on causation, that dispute can be deemed as reasonable.

Based upon the foregoing, the Petitioner's claim for sanctions is denied.

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

Elvia Cienfuegos,

Petitioner,

14IWCC0595

vs.

NO: 11 WC 02363

Culver's,

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 October 24, 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.

14IWCC0595

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: JUL 2 1 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/17/14
45

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

CIENFUEGOS, ELVIA
Employee/Petitioner

Case# 11WC002363

14IWCC0595

CULVER'S
Employer/Respondent

On 10/24/2013, 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:

0059 BAUM RUFFOLO & MARZAL LTD
JOEL HARRERA
33 N LASALLE ST SUITE 1710
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0595

Elvia Cienfuegos
Employee/Petitioner

v.

Culver's
Employer/Respondent

Case # 11 WC 2363

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 **Rockford**, on **8/9/13**. 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 _____

14IWCC0595

FINDINGS

On the date of accident, **11/7/10**, 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 $**16,401.32**; the average weekly wage was $**314.41**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**11,894.52** for TTD, $**0** for TPD, $**NA** for maintenance, and $ for other benefits, for a total credit of $**11,894.52**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 84.571 weeks, commencing 11/8/10 through 4/10/11 and from 4/29/12-7/22/13, as provided in Section 8(b) of the Act.

Temporary Partial Disability

Respondent shall pay Petitioner temporary partial disability benefits of $88.30/week for 54.714 weeks, commencing on 4/11/11-4/28/12, as provided in Section 8(a) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $80,062.14, as provided in Sections 8(a) & 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

10/22/13
Date

OCT 24 2013

As additional findings, the Arbitrator finds as follows:

The Arbitrator had the opportunity to observe the Petitioner and her behavior and demeanor during the course of the proceedings. The Arbitrator has reviewed all of the evidence and finds as follows:

1. The Petitioner, her testimony and the other evidence she introduced are credible.
2. The medical records corroborate Petitioner's testimony about the accident and the injuries.
3. The injuries reported are consistent with the type of accident the Petitioner reported.

Statement of Facts

At time of accident, Petitioner was a 60-year-old married female with no dependent children under the age of 18. She was employed by Culvers for 10 years.

On November 7, 2010, Petitioner was unstacking boxes of frozen products in the freezer when two 28 lb boxes fell on her. She lost her balance while trying to catch the boxes and fell backward landing on her buttocks and injuring her low back. She was taken to St. Anthony Hospital in Rockford by ambulance. She was prescribed hydrocodone and advised to stay off work through her follow-up visit with her primary physician, Dr. Villacorta.

Petitioner saw Dr. Villacorta on November 10, 2011. (PX 5, p18) He kept her off work and after a couple of visits, referred her to High Field MRI of Rockford. (id. p21) The MRI revealed L4-5 anterolisthesis with mild spinal stenosis, mild neural foraminal stenosis and degenerative disc disease at L5-S1. (PX 8, p10) Dr. Villacorta also prescribed physical therapy (hereinafter PT) at Accelerated. (PX 6, p12) During a therapy session in late January 2011, Petitioner injured her neck while doing a strenuous exercise on a bicycle. (RX 5)

At the request of Respondent, Petitioner was examined by Dr. David Zoellick for a section 12 exam in February 2011. Dr. Zoellick noted that Petitioner injured her low back at work and her neck during physical therapy. He diagnosed Petitioner with a lumbar strain, recommended work conditioning and placed her on 10 lb lifting restrictions. (RX 5)

Petitioner returned to work in a light duty capacity on April 11, 2011. (PX 10, p41)

She then began treating with Dr. Dangwoo Chang at Illinois Neurological Institute on August 4, 2011. Dr. Chang ordered PT and Epidural Steroid Injections (hereinafter ESI's). (PX 7, p 9) Prior to approving the ESI's, Respondent had Petitioner re-examined by Dr. Zoellick on November 1, 2011. Dr. Zoellick noted that the neck pain was still present but that it was not as severe as the lumbar pain. He diagnosed Petitioner with spondylolisthesis at L4 and L5 and a bulging disc at L5-S1. He opined that the ESI's were appropriate. If they did not provide relief, a fusion surgery would be recommended. (RX 6)

Petitioner underwent three ESI's in January and February of 2012 by Dr. Rosche at Advanced Pain Intervention. (RX 8) The injections did not provide relief and Dr. Chang prescribed surgery. Petitioner underwent pre-op testing in April 2012. On May 2, 2012, Dr. Chang performed a bilateral laminectomy, partial fasciectomies, foraminotomies and direct neural decompression at L4-5 and L5-S1 with posterolateral fusion and pedicle screw fixation at L4 thru S1, and bilateral autograft with bone marrow aspirate. (PX 4, p183) Petitioner remained at St. Anthony Medical Center for six days following the surgery.

Petitioner had post surgery visits with Dr. Chang and Michelle Nice, a nurse practitioner. Petitioner underwent post-surgery therapy at St. Anthony Hospital from July 27, 2012 – Oct 12, 2012. In October 2012, Petitioner returned to Dr. Zoellick for a 3rd time at the request of Respondent. Dr. Zoellick noted that Petitioner continued to have back pain even with simple activities such as lifting a gallon of milk. He recommended more aggressive PT, four weeks of work conditioning and opined that Petitioner was capable of sedentary work only. (PX 7)

Petitioner underwent therapy from January 18, 2013 through March 6, 2013. (PX 4, p6) She returned to see Dr. Chang on April 8, 2013 with continued complaints of back pain and Dr. Chang ordered another MRI. On April 15, 2013, Dr. Chang reviewed the MRI and found that it did not reveal any new mechanical issues. He prescribed additional PT. (PX 7, p185)

Petitioner was examined by Dr. Zoellick for a fourth time on May 9, 2013. Dr. Zoellick noted that Petitioner's shooting pain resolved with the surgery but the back pain persisted. He reviewed the recent MRI report and found that it revealed grade I spondylolisthesis at L4-5 with a broad based disc osteophyte protrusion and multi-level degenerative disc disease of the lumbar spine. He further stated that there was severe lumbar canal stenosis at L4-5 with associated hypertrophy of the facet joints. At L5-S1, he noted a broad based disc protrusion. Dr. Zoellick opined that Petitioner was at MMI but not capable of performing her regular work. He recommended an FCE to determine her functional capabilities. (RX 8)

On July 15, 2013, Petitioner returned to Dr. Chang and he prescribed continued PT. (PX 3)

During the course of her treatment, Petitioner was off work initially from November 8, 2010 through April 10, 2011. On April 11, 2011, Petitioner returned to work in a light duty capacity. (PX 10, p41) She worked in this capacity until April 28, 2012. During the year that she performed light duty work, Petitioner would clean tables and take food orders to customers. She worked Monday through Saturday two to five hours per day, depending on her pain levels.

Petitioner was again taken off work on April 28, 2012 in anticipation of her surgery. Michelle Nice, NP provided Petitioner with off work notes covering April 28, 2012 through August 2, 2012 and August 13, 2012 through October 25, 2012. (PX 2) Margarita Ortega, the general manager at Culvers, testified that Respondent offered Petitioner light duty work commencing on August 28, 2012 based on information that Culver's received indicating that Petitioner was released to return to light duty work. (See also RX 3, p2) Mrs. Torres testified that work was offered six hours per week on Tuesdays, Thursdays and Saturday's from 8 am to 10 am. The light duty work required that Petitioner be on her feet the entire two hours as Petitioner

was to open and prep the restaurant for business. Mrs. Ortega testified that no sedentary work was available.

Petitioner testified that she did not return to work as no specific return to work date was provided and because she was not yet released to work by her doctor. Petitioner was terminated as of August 31, 2013. (RX 3, p 2) A letter dated Sept 21, 2012 was mailed to Petitioner informing her that she failed to attend work on two occasions in August 2013 (PX 1). This was the only letter documenting that Petitioner was to return to work. Respondent terminated TTD benefits as of September 7, 2012. (RX 1, p1)

At the time of trial, Petitioner had not returned to work. She testified that her doctors had not released her to return to work. She testified that the low back pain continues and when it is severe, it forces her to lay down a few times per day. She testified that she wishes to continue therapy as ordered by Dr. Chang on July 15, 2013. (See PX 3)

With regards to the issue of causation (F), the Arbitrator finds as follows:

Petitioner sustained a low back injury on Nov 7, 2010, when frozen boxes fell on her causing her to fall backwards landing on her buttocks. She has continuously treated for her low back injuries from the date of accident through the date of trial. Dr. Zoellick causally related Petitioner's lumbar injuries to the work accident. Petitioner also testified that she injured her neck while doing a strenuous bicycle exercise during PT for her lumbar spine. The medical records corroborated her testimony regarding the neck injury.

For these reasons, the Arbitrator finds that Petitioner's lumbar disc injuries at L4 through S1 and the cervical strain are directly related to the on-the-job accident of Nov 7, 2010.

With regards to the issue of medical services (J, K), the Arbitrator finds as follows:

As noted above, Petitioner began treatment immediately following the accident and has treated continuously through the date of trial. Throughout the course of her treatment, she underwent diagnostic exams, physical therapy, ESI's and ultimately a 2-level fusion by Dr. Chang. Post surgery, she has been in a physical therapy program. On July 15, 2013, Dr. Chang ordered additional therapy. (PX 3) Petitioner testified that she wished to undergo the prescribed PT and the records show that PT has been beneficial. (PX 3)

Respondent made payments to several providers but failed to pay for some of the pre-op diagnostic exams. The bills listed below from Swedish American Medical Group and Radiology Consultants of Rockford arose from pre-op exams either at St. Anthony Hospital or at Swedish American Medical Group. (See PX 5 & 9) The bills were never paid and collection efforts commenced. The bill from Illinois Pathologist includes pre-op exams as well as tests performed on the date of surgery. This bill was also sent to collection. (PX 9C)

As for the bills from OSF St. Anthony, Petitioner was hospitalized from May 2, 2012 (date of surgery) through May 8, 2012. St. Anthony charged $125,782.55 for services during her hospital stay. (RX 9F, p2-8) Respondent paid $56,865.35 for charges associated with the surgery.

(id.) Another $4,149.46 was written off, leaving a balance of $64,767.34. (id, p8) Respondent partially paid for other diagnostic exams on 7/26/12 leaving a balance of $80.80. (id, p9) It did not pay for the MRI of 4/12/13($2,959). (id, p12) Finally, Respondent did not pay for post-op PT at St. Anthony from 9/4/12-9/25/12 ($3,084), 4/24/13-5/28/13 ($5,168) or 6/11/13-6/27/13 ($2,770). (PX 9F) The total balance at OSF St. Anthony is $78,829.14

At the time of trial, the following balances remained unpaid:

Swedish American (Pre-Op exam 4/10/12):	$480.50
Illinois Pathologist Services (Pre-Op 4/11/12& 5/2/12):	$246.00
Radiology Consultants of Rockford(Pre-Op 4/10/12):	$58.00
OSF St. Anthony:	$78,829.14
Total:	$80,062.14

The arbitrator finds that all treatment rendered to Petitioner was reasonable and necessary to cure her lumbar disc injuries as evidenced by the fact that both Dr. Chang and Dr. Zoellick were in accord with the prescribed treatment course. Therefore, Respondent shall pay Petitioner the above listed outstanding medical bills pursuant to the medical fee schedule. The Arbitrator further finds that Respondent shall authorize the physical therapy as prescribed by Dr. Chang on July 15, 2013.

With regards to the issue of TTD and TPD (L), the Arbitrator finds as follows:

Petitioner was off work following the accident from Nov 8, 2010 through April 10, 2011. She was paid TTD benefits for this period. Following Dr. Zoellick's February 2011 recommendations, Petitioner returned to work in a light duty capacity from April 11, 2011 through April 28, 2012. (PX 10, p41) During this period, she cleaned tables and would take food orders to customers. She worked anywhere from two to five hours per day, Monday through Saturday. In November 2011, Dr. Zoellick reiterated that Petitioner was still only capable of light duty work up to four hours per day. (RX 6) Despite Dr. Zoellick's recommendations, Petitioner was not paid any TPD benefits.

Petitioner was then placed on TTD from April 29, 2012 in anticipation of her surgery and as of the trial date, she had not returned to work. Margarita Ortega, the general manager, testified that Respondent offered Petitioner a light duty position working from 8 am to 10 am three days a week (Tues, Thur & Sat.) commencing on August 28, 2012. According to the Mrs. Ortega's testimony and the Termination Decision Summary, Respondent offered a light duty job when Culver's "received release information stating that Elvia was able to return to work the week that we contacted her." (RX 3, p2)

Petitioner testified that she did not return to work as offered by Mrs. Torres for two reasons: First, Petitioner understood that Mrs. Ortega would put her on the schedule but was unaware of a specific return to work date. Petitioner made a similar point to Dr. Zoellick during the October 9, 2012 evaluation. (RX 7, p2) To complicate matters, Respondent did not provide any advanced written notice asking Petitioner to return to work on a specific date. The only letter that was sent to Petitioner was a letter dated September 21, 2012, three weeks after Petitioner

was terminated for not showing up to work. (PX 2) Secondly, Petitioner testified that she did not return to work in August 2012 as she was not yet released to do so by her physicians. As such, Petitioner needed to consult with her doctors on the issue prior to returning to work. (RX 3, p2) The medical records corroborate Petitioner's testimony as there is **no mention in any records that she was capable of returning to work in any capacity in August of 2012.** It is unclear what "release information" Respondent relied on to offer the job as it did not produce the alleged release to return to work note. To the contrary, Petitioner introduced work status reports from Michelle Nice, NP whereby Petitioner was placed off work effective April 25, 2012 through August 2, 2012 and from August 13, 2012 through October 25, 2012. (PX 2)

Even if a job offer was properly made and Respondent produced the alleged return to work note, Respondent did not offer Petitioner a position that was within her physical capabilities. On October 9, 2012, during the first post-surgery evaluation with Dr. Zoellick, he indicated that Petitioner "could do sedentary type work only at this time". (RX 7, p7) Yet, Mrs. Torres testified that the job offered required Petitioner to be on her feet and that no sedentary work was available.

The above factors casts doubt on the legitimacy of Respondent's job offer and raises questions as to the motive behind the offer. As Petitioner did not return to work in August 2012, she was terminated from Culver's and all benefits were cut off on September 7, 2012. (RX 4) The Illinois Supreme Court reminds us that Respondent's "obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged-whether or not the discharge was for cause." (see *Interstate Scaffolding Inc. v. I.W.C.C.* Oct 20, 2008)

Respondent's obligation to pay TTD benefits continued beyond her termination date. After Dr. Zoellick placed Petitioner on sedentary work in October 2012, he re-examined her again in May 2013. At that time, Dr. Zoellick's stated that Petitioner remained incapable of performing her regular work and recommended an FCE to specify further restrictions. (RX 8)

The Arbitrator finds that the job offered by Respondent was not a bona-fide offer and that Petitioner is not yet capable of performing regular duty work. As such, Respondent shall pay Petitioner $21,396.46 in TTD benefits from 11/8/10-4/10/11 and from 4/29/12-7/22/13 (the date of trial) equaling 84.571 weeks at a statutory minimum TTD rate of $253 per week as Petitioner is married with no dependent children. Respondent is entitled to a credit of $11,894.52. As such, Petitioner is due $9,501.94 in TTD benefits.

The Arbitrator further finds the Respondent shall pay Petitioner $4,831.25 in TPD for the period of 4/11/11-4/28/12 equaling 54.714 weeks. During this period, Petitioner earned $10,010.46 or $182.96 per week. Her AWW was $315.41. Therefore, after the 2/3rd discount, Petitioner is entitled to $88.30 per week in TPD benefits.

Signature of Arbitrator

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

Gilberto Cisneros,

Petitioner,

vs.

Bath & Body Works, Inc.,

Respondent.

14IWCC0596

NO: 13 WC 15582

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 11, 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: JUL 21 2014

DLG/gaf
O: 7/17/14
45

David L. Gore

Stephen Mathis

Mario Basurto

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

14IWCC0596

CISNEROS, GILBERTO
Employee/Petitioner

Case# **13WC015582**

BATH & BODY WORKS INC
Employer/Respondent

On 9/11/2013, 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:

1315 DWORKIN & MACIARIELLO
DAVID VAN OVERLOOP
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

0208 GALLIANNI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST SUITE 1825
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)

14IWCC0596

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

GILBERTO CISNEROS
Employee/Petitioner

Case #13 WC 15582

v.

BATH & BODY WORKS, 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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on August 20, 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 April 20, 2013, 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's average weekly wage was $198.00.
- At the time of injury, the petitioner was 22 years of age, *single* with no children under 18.

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

9/10/13
Date

SEP 11 2013

FINDINGS OF FACTS:

On April 20, 2013, the petitioner, a sales associate, fell and injured his right arm. He was transported by emergency medical services to Alexian Brothers Medical Center for injuries to his right elbow, right pelvis and right ankle. X-rays of his pelvis, right ankle and right elbow were negative for fractures. The diagnosis was a closed fracture of the right radial head, a right ankle sprain and a pelvic contusion. A splint was applied and he was discharged. The petitioner saw Dr. Tom Karnezis of Illinois Orthopaedic and Hand Center on April 22nd, whose diagnosis was a right elbow occult fracture of the radial head and a right ankle sprain. The doctor applied a long arm splint and provided a right short splint, tubigrip stockinettes and a no-work status note. The petitioner reported continuous improvement with his right elbow and ankle through May 15th. On May 24th, the petitioner complained of increased right elbow pain. Dr. Karnezis administered a corticosteroid injection into the petitioner's elbow joint, the para-articular structure and the lateral epicondyle. Dr. Philip Kiley at NCH Medical Group saw the petitioner on May 25th and noted tenderness on palpation and abnormalities in the petitioner's elbows. A right elbow MRI on June 3rd indicated mild tendinosis or strain within the triceps tendon and common extensor tendon.

Dr. Steven Sclamberg of Orthopaedics of the North Shore saw the petitioner on June 13th and noted complaints of right elbow and shoulder pain. Dr. Sclamberg recommended the petitioner discontinue his use of the splint and start physical therapy. The petitioner received physical therapy at Athletico from July 5th through August 16th. At a follow-up with Dr. Sclamberg on July 15th, the petitioner reported continued pain and stiffness in his right shoulder and elbow. On August 15th, the petitioner reported

continued pain and stiffness in his shoulder but some improvement in his right elbow. The petitioner was released to work with restrictions of five pounds and no overhead lifting.

FINDING REGARDING 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 April 20, 2013, arising out of and in the course of his employment with the respondent. A security video captured the incident. The video shows the petitioner grasping a box with both hands, falling backward and to the right and pulling the box off the cart as he falls. He lands onto his buttock. It does not appear that the box was lifted before he started to fall. Also, it is clear that the petitioner was not meandering around a fixture and turning a box per his statement on May 10, 2013. Nor was the petitioner's fall unexplained as per his testimony but clearly the effect of idiopathic vertigo, unsteadiness, dizziness or other condition with similar side-effects. Even assuming the petitioner sustained an unexplained fall, he was not at a greater risk of injury because he was holding a box of merchandise. It is speculation to infer that the petitioner's risk of injury was greater while holding the box, or that he could have caught himself or prevented his fall if he was not holding the box. It is also noted that the petitioner tilts and uprights the box seemingly effortlessly. The petitioner's request for benefits is denied and the claim is dismissed.

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

Nancy Bator,

Petitioner,

14IWCC0597

vs.

NO: 05 WC 42478

Morton College,

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, temporary total disability, medical expenses, causal connection, permanent partial disability, Respondent's credits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 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.

14IWCC0597

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $47,000.00. 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: JUL 2 1 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/17/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BATOR, NANCY
Employee/Petitioner

Case# **05WC042478**

05WC042479
14IWCC0597

MORTON COLLEGE
Employer/Respondent

On 10/21/2013, 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 0.15% 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:

0347 MARSZALEK & MARSZALEK
STEVEN GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
PAUL W PASCHE
ONE N LASALLE 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

14IWCC0597

NANCY BATOR
Employee/Petitioner

v.

MORTON COLLEGE
Employer/Respondent

Case # **05** WC **42478**

Consolidated cases: **05WC42479**

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 **08-16-13**. 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 **03-21-05**, 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 **$29,342.56**; the average weekly wage was **$564.28**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **1** dependent children.

Respondent shall be given a credit of **$4,657.00** for TTD.

Respondent is entitled to a credit under Section 8(j) of the Act. SEE DECISION and ARB EX 2.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $376.19/week for 42 6/7ths weeks, commencing 03/29/05 through 07/11/05 and 01/16/06 through 07/31/06, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid. SEE ARB EX 2 and DECISION

Medical benefits

Respondent shall be given a credit of $58,563.21 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. SEE ARB EX 2 and DECISION

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $338.57/week for 90 weeks, because the injuries sustained caused the 45% loss of the right leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

10/19/13
Date

OCT 21 2013

FINDINGS OF FACT

Two consolidated matters were presented for trial. The first case is 05 WC 42479 and the date of accident is 9/3/03. On that case, the parties stipulated to accident, notice and average weekly wage. ARB EX 1. Petitioner, a 54 year old janitor, began working for Respondent in 1989. Petitioner worked 4 days per week, 10 hours per day. Her duties required her to carry over 20 pounds.

It is uncontested that on 9/3/03, Petitioner was injured at work when she fell into an elevator. The incident report at PX 1 documents that Petitioner was backing into an elevator with her custodial cart when she tripped backward. Petitioner reported that "the floor of the elevator was lower than the floor level on the second floor. As she was falling, she extended her right arm to ease the fall and caused trauma to her right wrist and hand when she hit the floor. Her right knee and ankle also suffered considerable trauma." PX 1. Petitioner testified that she noticed immediate pain in her right knee. Petitioner was taken by ambulance to MacNeal Hospital.

The MacNeal records from 9/3/03 indicate that Petitioner reported injuries to her right wrist and both knees. X-rays to the right wrist were negative. X-rays to the right knee were negative for fracture or other acute abnormality or joint effusion. The right knee x-ray revealed osteoarthritis. Specifically, it was noted that her "... degenerative disease of this knee joint has progressed when compared to radiographs of 2/9/94." PX 3. She was diagnosed with a right wrist sprain and a contusion to both knees. A knee immobilizer was given to Petitioner for the right knee as well as a splint for her right wrist. PX 3. Petitioner was discharged home and told to contact her doctor if her symptoms worsened. She was placed on restricted duty including "sitting work- minimum work involving standing or walking; until evaluated by a physician- no work involving the right hand; until evaluated by a physician." PX 3. Records submitted by Respondent at RX 6 from Loyola indicate complaints of bilateral knee pain and cracking in June 1988 and a diagnosis at that time of bilateral chondromalacia of the patella. RX 6.

Petitioner testified that she followed up with her primary care doctor, Dr. Gershberg, on 9/9/03. PX 4. On that day, Dr. Gershberg documented the accident and Petitioner's complaints of right knee pain, popping and weakness. Petitioner reported that she felt as if the knee would give out. Petitioner also reported that she tried working for 3 hours on 9/8/03 while wearing the knee brace but that she was unable to work due to pain. Dr. Gershberg noted right knee pain and diagnosed a right knee contusion/sprain with a questionable ligament tear and referred Petitioner to an orthopedic. She was taken off work until her consult visit. PX 4.

Petitioner was next seen by Dr. Joyce Tarbet on 9/10/03. Dr. Tarbet's report of the same date indicates an accurate history of accident and right knee pain. RX 8. Petitioner complained of anterior right knee pain. Petitioner is noted as having worked through 9/8/03. Upon initial exam and review of the Macneal x-rays, Dr. Tarbet noted that Petitioner had "pre-existing degenerative arthritis of her right knee, primarily affecting the medial and patellofemoral compartments. I believe the patient aggravated her arthritis and suffered a contusion to her right knee as a result of her work injury of September 3, 2003. Pt was recommended as well as discontinued use of the knee immobilizer. Petitioner was taken off work for two weeks and was to follow up at that time. RX 8. Petitioner was next evaluated on 9/24/03 when Dr. Tarbet noted Petitioner was attending PT at Athletico and noted significant improvement in her right knee pain. Petitioner continued to complain of stiffness and pain in the medial aspect of her right knee. Dr. Tarbet noted that Petitioner had not returned to pre-injury status. Tenderness and crepitus was noted on

exam. Dr. Tarbet wrote, "it is my impression that [Petitioner] significantly improved with physical therapy. She does have some pre-existing arthritis which was exacerbated with her injury of September 3rd. She also suffered a contusion to her knee at that time. I do recommend that she continue with the remaining two sessions of physical therapy and then be advanced to a home program. I do believe that the patient is fit to return to work as of Monday, September 29th with the restrictions of no stairs, no kneeling and frequent rest periods." Petitioner was to return for follow up in 2 weeks. RX 8.

As of her visit on 10/8/03, Petitioner continued to complain of localized pain and clicking to the medial aspect of the right knee. An MRI was ordered to evaluate for a medial meniscus tear. Following the MRI, Petitioner returned for her final visit with Dr. Tarbet on 10/23/03. Dr. Tarbet noted her review of the MRI showing intrasubstance signal change in the posterior horn of the medial meniscus without evidence of a frank tear. She further noted significant thinning of the articular cartilage, particularly involving the medial femoral condyle and medial facet of the patella. Dr. Tarbet wrote, "it is my impression that [Petitioner] has tricompartmental degenerative arthritis of her right knee." Dr. Tarbet recommended that Petitioner continue with a home exercise program. She noted, "I do not believe that further treatment is indicated at this time, however the patient is aware that she may require further evaluation and treatment in the future. I do believe that the patient is fit to return to work, without restrictions, as of October 24, 3003. Given the nature of her problem, however, she may require occasional rest periods and may have to ice her knee as needed. She will follow up as needed only." RX 8.

Dr. Tarbet gave a deposition on 7/10/12. She testified that she only treated Petitioner's right knee and never received any history of left knee problems. She further testified that Petitioner offered no history of right knee problems prior to 9/3/03. RX 8, p. 11. Dr. Tarbet testified that based on her reading of the 9/3/03 x-ray, Petitioner had pre-existing degenerative joint disease of the medial compartment that was unrelated to a contusion of the lateral knee on 9/3/03. RX 8, p. 17. She also noted several spurs on the x-ray and that the spurs developed over a period of time prior to 9/3/03. RX 8, p. 18. Dr. Tarbet opined that Petitioner sustained a temporary aggravation of her pre-existing right knee arthritis primarily affecting the medial and patellofemoral compartments in addition to a knee contusion. RX 8, p. 19. She testified that Petitioner could have aggravated the arthritis on the medial side of the knee even though she fell on the lateral side of her knee. RX 8, p. 20. Dr. Tarbet further testified that as of her last visit with Petitioner on 10/23/03, she was still symptomatic and was not pain free. She opined at that time that Petitioner may need future treatment "because patients who have degenerative arthritis who are symptomatic from them often require treatment in the future." RX 8, p. 33. She testified that the "ultimate treatment for degenerative arthritis of a knee joint is a knee replacement." RX 8, p. 34. Dr. Tarbet was asked, "At that point in October of 2003, was there any permanent biologic or anatomical change to her knee that was related back to the incident of September 2003, or were her findings at that point essentially related to her preexisting degenerative condition?" Dr. Tarbet responded, "her findings were related to her previous degenerative condition. There were no new findings on the MRI." RX 8, p. 36. Lastly, she clarified that she was referring to the findings on the MRI as related to the preexisting arthritis and that the future evaluation and treatment she mentioned as likely was related to Petitioner's pre-existing degenerative arthritis. RX 8, p. 36-37.

After Dr. Tarbet released Petitioner to full duty work on 10/23/03, Petitioner returned to full duty work the next day. Petitioner worked full duty for the next 17 months. Petitioner testified at trial that her knee

"still hurt" while she worked. Petitioner sought no additional treatment for her right knee after her return to work on 10/24/03.

Petitioner's second case at trial is case 05 WC 42478 with an accident date of 3/21/05. ARB EX 2. Accident and causal connection are at issue. ARB EX 2. Petitioner testified that on 3/21/05, she was at work performing her regular job duties as a custodian for Respondent. As such, she was changing towel rolls in a dispenser and reached upwards to turn the dispenser key with her right hand. While reaching upward, Petitioner felt a pain in her low back into her left leg. Petitioner reported the accident the next day on 3/22/05. The accident report indicates that she felt pain in her left calf muscle while reaching and that she could not walk without pain in the left calf. Petitioner was advised to see her physician should pain persist. PX 2. In 2001, Petitioner was seen at Macneal for complaints of low back pain and right hip pain and received physical therapy. RX 7.

Petitioner sought treatment from Dr. Chung at Braidwood Healthcare Center on 3/29/05. The records verify that Petitioner was reaching up at work when she felt a sharp pain in her lower back on 3/21/05. Petitioner complained that the pain worsened when she returned to work on 3/28/05. Petitioner reported pain in her lower back and left leg. PX 5. Petitioner followed up at Braidwood through June 3, 2005. PX 5. She continued to report discomfort and a favoring of her left side. She was diagnosed with a left lateral lumbar strain with radiculopathy and was taken off work while alternately returning to work under light duty restrictions. PX 5. Petitioner was also sent to physical therapy which she attended at Morris Hospital and ordered pain medication for right leg pain. As of 5/2/05, Petitioner reported right leg pain due to favoring of the left side. PX 5. Dr. Chung ordered PT to include the right leg as well. PX 5. He also ordered a Doppler study of the right lower extremity which was normal with no evidence of deep vein thrombosis. As of 5/18/05, the Morris PT records indicate that Petitioner reported a significant decline in the left lower extremity pain since starting therapy and was independent with a home exercise program of stretching and strengthening for her left lower extremity. Her current complaint was right lower extremity pain, "likely due to limping off her left lower extremity." PX 5, PX 6. Pt was continued for the right leg but it was noted that she had plateaued in PT for her left lower extremity and was discharged for the left leg on that day. PX 5, PX 6.

As of 5/21/05, Petitioner reported increased right leg pain with limping and swelling and was taken off work through 6/16/05. PX 5. On 6/3/05, Petitioner was referred to an orthopedic, Dr. Treacy. Petitioner was discharged from PT on the right leg as of 6/16/05 as her symptoms were not improving. PX 5. The PT diagnosis was right lower extremity pain, chondromalacia and medial epicondyle bursitis. PX 5, PX 6.

Petitioner treated at Rezin Orthopedics with Dr. Treacy and Dr. Pulluru from 6/9/05 through 8/17/06. At her initial visit with Dr. Treacy, he noted her history of accident in March 2005 with initial left leg and low back complaints. He noted that the low back and left leg complaints improved over time but that the favoring of the right side resulted in the development of the right sided pain. He noted pain in the anteromedial and posterior aspect of the right knee. He reviewed x-rays which he interpreted to show mild to moderate degenerative changes to the patellofemoral joint, early Fairbanks changes to the medial joint and no bone on bone deformity. His initial diagnosis was chondromalacia patella and pes bursitis, early chondromalacia of the medial femoral epicondyle. Dr. Treacy noted that the event aggravated her pre-existing condition and he ordered continued therapy, medication and a cortisone injection, which was

administered. Petitioner was to follow up on July 11th when he hoped "we can send her back to work." PX 7.

On 7/11/05, persistent symptoms were noted despite some improvement with the cortisone injection. Home exercises and anti-inflammatories were continued. An MRI was ordered due to consistent complaints as of 7/25/05, which demonstrated a medial meniscus tear and chrondromalacia. Arthroscopic surgery was recommended on 8/1/05. PX 7. Petitioner testified that she worked full duty between July 2005 and January 2006.

In the interim on 8/29/05, Petitioner was evaluated at Respondent's request by Dr. Tonino at Loyola. RX 6. Dr. Tonino noted Petitioner's 2003 right knee treatment. He also noted that she was seen at Loyola in 1988 for right knee complaints and was found to have bilateral chondromalacia patella with degenerative changes and bilateral complaints to both knees at that time at the age of 38. RX 6. He also reviewed a right knee MRI dated 7/26/05 which showed grade 4 changes of the patellofemoral compartment with a medial meniscus tear and degenerative changes of the medial compartment. RX 6. He reviewed the MRI from October 2003 showing tricompartmental degenerative changes. Dr. Tonino's impression was degenerative arthritis of both knees, right worse than left. He determined arthroscopic intervention would not help given the extensive nature of the arthritis in the right knee. In his opinion, Petitioner's bilateral knee condition was not related to her March 2005 accident given the history of knee complaints dating back to 1988 and the degenerative changes of her knee noted in 2003 by Dr. Tarbet. He determined that Petitioner needed no additional treatment for the left calf and that any future treatment would be related to the degenerative changes of both knees. He does not believe the March 2005 accident involved a knee injury given her complaints of left calf pain. He does not opine as to the impact of favoring the left side or to an altered gait. RX 6.

Dr. Tonino's deposition was taken on 8/2/10. He reiterated his report as above. He reiterated his opinion that Petitioner had pre-existing arthritis in both knees and that any need for further conservative treatment was not related to the accident of March 2005. RX 9, p. 19. On cross exam, he agreed Petitioner's right knee was worse than the left knee after September 2003 and when he examined her in 2005. He further agreed that in some cases, an altered gait from left leg symptoms can aggravate degenerative arthritis in the right knee. However, he did not give an opinion as to the specific role of altered gait in Petitioner's case. RX 9, p. 22, 27-28. He further agreed hypothetically that if further conservative care failed, Petitioner could require a knee replacement. RX 9, p. 23. He clarified his opinion that the calf injury to the left leg in March 2005 is not the type of injury that would aggravate what was a significantly degenerative condition that was identified back in 2003. RX 9, p. 27. The Arbitrator notes that the testimony regarding the relationship between a left calf injury and her right knee condition is different from the stricken testimony regarding the existence and effect of an altered gait. Altered gait was not addressed in Dr. Tonino's report and was not specifically applied to Petitioner's case on cross exam by Petitioner's attorney. Dr. Tonino's report and thus his allowed deposition testimony focused only on the relationship between a left calf injury and her right knee complaints.

Petitioner underwent an arthroscopy, partial medial meniscectomy and debridement of the right knee at St. Joseph Medical Center on 1/16/06 performed by Dr. Pankaj. The post op diagnosis was torn medial meniscus, grade 2 to 3 chondromalacia patella and medial femoral condyle, grade 3 medial tibial plateau and synovitis, right knee. Petitioner continued seeing Dr. Pulluru at Rezin thereafter. Dr. Pulluru referred

Petitioner to Dr. Wadowski for a total knee arthroplasty which was performed on June 1, 2006 at St. Joseph's. PX 7, PX 8.

Petitioner underwent physical therapy after her total knee surgery. She returned to work with restrictions in July 2006 and received a full duty return to work release on 8/17/06. Petitioner has not received any treatment on her right knee since her release.

The deposition of Dr. Runke was taken by Petitioner on 11/12/09. PX 11. He is board certified in Internal Medicine and specializes in occupational medicine. He was asked by Petitioner's counsel to examine Petitioner on 1/28/09. He also reviewed medical records from Morris, Macneal, Braidwood, Rezin, Dr. Chung and St. Joseph. PX 11, p. 6. Petitioner provided a history of an accident on 9/3/03 with immediate pain in the right knee. Petitioner advised that she was diagnosed with right knee arthritis in 1988 but had no complaints of pain or follow up for that diagnosis after that time and prior to 2003. PX 11, p. 8. She reported a marked worsening of her right knee condition after the 2003 accident. PX 11, p. 8. Dr. Runke stated that "In 2005, Ms. Bator noted that the pain in her right knee was worsening." He then notes Petitioner's report of the 3/22/05 accident when she felt pain immediately in her low back and right leg. PX 8, p. 11. Dr. Runke then notes Petitioner's continued treatment to the right knee through 2006. PX 8, p. 9. Examination revealed atrophy on the right leg. PX 11, p. 12-13.

Dr. Runke also examined Petitioner's lumbar spine with x-rays revealing degenerative joint disease at L2-L5 and levoscoliosis of the lumbar spine. He diagnosed lumbar spine strain associated with occupation injury of 3/22/05 and degenerative joint disease and disc disease of the lumbar spine exacerbated by lumbosacral spine strain injury on 3/22/05. PX 11, p. 19. Right knee x-rays showed status post right knee total arthroplasty intact and without evidence of resorption of bone. PX 11, p. 18. He diagnosed "internal derangement of the right knee; status postoperative intervention with a total knee replacement, associated with acute onset of pain and injury occurring 9/3/03." PX 11, p. 18.

Dr. Runke opined that Petitioner's right knee condition is causally related to the accident of 9/3/03 based on "the temporal onset of symptoms. The acute onset of symptoms and pain." He determined Petitioner's subjective complaints to be credible and supported by the objective findings. PX 11, p. 20. He also opined that her lumbar spine condition is related to her accident of 3/22/05 based on "the temporal onset of new and significant exacerbation of pain while performing a specific maneuver at work and leading to persistent symptoms including pain and such." PX 11, p. 21-22. On cross, Dr. Runke testified that he did not recall reviewing the records of Dr. Tarbet and does not know whether Petitioner received any treatment between October 2003 and April 2005. PX 11, p. 27.

Respondent sent Petitioner for a Section 12 exam by Dr. Kornblatt on 6/17/09. Dr. Kornblatt is a board certified orthopedic surgeon. Dr. Kornblatt reviewed Petitioner's treating records as well as the report of Dr. Runke. RX 10, p. 10. At his exam of Petitioner, Dr. Kornblatt took a history of work accidents on 9/3/03 and 3/22/05. He also noted that Petitioner had low back treatment in March and April 2005 and that no further treatment was referenced for her back after she started right knee treatment in June 2005. RX 10, p. 13. Dr. Kornblatt performed a physical exam of Petitioner's lumbar spine and found Petitioner to have multi-level lumbar degenerative disc disease not associated with trauma or activity level. He determined the condition was long standing and not caused or aggravated by the accident of 3/05. RX 10, p. 21. Rather, he opined that Petitioner sustained a soft tissue strain as a result of that accident. RX 10, p.

21. He further opined that she reached MMI 6 weeks after the accident, that she was able to continue working and that she sustained no permanent disability or impairment.

Petitioner testified that she currently notices pain in her right knee. She is unable to walk more than 20 to 30 minutes and has pain in her right knee every day with activity. Occasionally she uses a cane, which has not been prescribed by an physician for current use. She testified that she does not take any medication. Petitioner further testified that she is not claiming any current problems with her low back or left leg. Rather, her claim for PPD arises from her right knee only.

On cross-exam, Petitioner testified that she did not have any problems with her knees or legs prior to 2003. She testified that she went to Loyola on one occasion in 1988 complaining of knee cracking but does not recall a 1994 to Macneal for knee complaints. Petitioner also testified that she did not recall seeing Dr. Gershberg for low back pain and numbness in her right leg and knee in 2001.

Petitioner further credibly testified that she worked full duty after her release from Dr. Tarbet in October 2003 through March 29, 2005. During treatment for her right knee following the March 2005 accident, Petitioner was off work, worked light duty and worked full duty for periods of time prior to her first knee surgery in January 2006. After her arthroscopic surgery, Petitioner returned to light duty work in February 2006 and full time sedentary work until her knee replacement surgery in June 2006. She returned to full duty work in August 2006 and worked full duty until she retired in 2007.

John Potempa testified for Respondent as Petitioner's supervisor and the Director of Facility and Operations for Respondent. He testified that he honored all of Petitioner's restricted work duty requests. Specifically, he testified that Respondent was always able to accommodate Petitioner's work restrictions by offering sedentary phone work, administrative duties and paper work. Petitioner requested time off in 2005, 2006 and 2007 for sick, personal and vacation time only. RX 1, RX 2 and RX 3. The forms completed by Petitioner are entitled "Application for Leave" and none of the forms request time off for a work injury or treatment. He testified that any time off for a work injury would not go through his office but rather through Human Resources and the business office. Petitioner retired in June 2007 under a buy-out plan offering a percentage of her salary plus insurance. Petitioner was working full duty when she retired.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law pertain to both consolidated matters at trial.

With regard to the issue of (A) whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, the arbitrator concludes:

The parties stipulated that an accident occurred on September 3, 2003. The petitioner's testimony and contemporaneous medical treatment records established that the accident was an injury only to Petitioner's right knee.

With regard to Petitioner's second accident date of 3/21/05, the Arbitrator finds Petitioner sustained a work related accident on that day. Petitioner credibly testified that on 3/21/05, she was at work

performing her regular job duties as a custodian for Respondent. As such, she was changing towel rolls in a dispenser and reached upwards standing on her toes to turn the dispenser key with her right hand. While reaching upward, Petitioner felt a pain in her low back into her left leg. Petitioner reported the accident the next day on 3/22/05. The accident report indicates that she felt pain in her left calf muscle while reaching and that she could not walk without pain in the left calf. Petitioner was advised to see her physician should pain persist. PX 2. Petitioner did follow up with her physician and did seek treatment initially for complaints of low back pain and radiating pain in the left leg. In finding accident, the Arbitrator notes specifically that Petitioner testified she had to reach upward while on her toes to turn the dispenser key while performing her janitorial duties. Accordingly, the Arbitrator specifically finds that Petitioner's accident arose out of and in the scope of her employment as a janitor for Respondent. Petitioner was not facing a personal risk in changing the towel dispenser as posed by Respondent. Petitioner's testimony regarding accident is buttressed by the accident report and by the records of her initial treating physician, Dr. Chung.

With regard to the issue of (F) whether petitioner's current condition of ill-being is causally related to the injury, the arbitrator concludes:

Petitioner admitted at trial and in her proposed decision that she is not claiming any permanency for injuries other than for her right knee. However, Petitioner does seek a finding of causal connection between the accidents of 9/3/03 and 3/21/05 and her right knee and low back complaints. Specifically, Petitioner asserts that the 3/21/05 low back injury resulted in an altered gait further aggravating and accelerating her right knee condition that began on 9/3/03.

The Arbitrator initially notes that Petitioner had pre-existing degenerative condition of the right knee dating back to complaints made in 1988. The Arbitrator notes that there is no evidence of treatment for those complaints between 1988 and 2003, other than a reference to x-rays in 1994, and that Petitioner continued to work full duty for that long period of time. It is unrebutted that Petitioner sustained a right knee contusion and the development of right knee pain and complaints immediately after that accident for which she sought conservative treatment. The fact that Petitioner returned to work for 17 months without right knee treatment before her next accident is not lost on the Arbitrator. However, Petitioner credibly testified that she continued to work with pain in her right knee following the accident of 9/3/03. In addition, Dr. Tarbet released Petitioner to work in October 2003 with the caveat that she was still symptomatic and was not pain free. Dr. Tarbet opined at that time that Petitioner may need future treatment "because patients who have degenerative arthritis who are symptomatic from them often require treatment in the future." RX 8, p. 33. The Arbitrator finds that given the circumstances of Petitioner's release to work in October 2003, the fact that she worked for 17 months thereafter does not negate a finding of causal connection in these consolidated matters.

Furthermore, the treating records of Braidwood and Dr. Chung following the accident of 3/21/05 support a finding that Petitioner sustained injury to her low back and left leg in that incident. Petitioner received conservative treatment for those complaints and during said treatment complained of right knee and leg pain due to her altered gait as documented in the records of Dr. Chung, Morris Hospital and Dr. Treacy. After conservative care failed again to relieve her symptoms, Petitioner was sent for surgical treatment for what was now a torn medial meniscus and arthritis. Accordingly, the Arbitrator finds that Petitioner's pre-existing right knee arthritis was aggravated by the accident of 9/3/03 such that her previously asymptomatic right knee became symptomatic and that future treatment would be likely as stated by her

treating physician Dr. Tarbet. The Arbitrator further finds that Petitioner's right knee condition flared again as a result of the accident on 3/21/05 insofar as her low back and left leg complaints following that accident resulted in an altered gait aggravating the right knee and resulting in the need for the previously anticipated need for additional right knee care.

Finally, the Arbitrator finds Petitioner sustained a low back sprain and left leg calf complaints in the accident of 3/22/05 for which she received conservative care through May 18, 2005. Again, the Arbitrator notes that Petitioner made it clear at trial and in her proposed decision that she is not seeking permanency findings on those injuries and no permanency finding is made below on those injuries.

With regard to the arbitrator's decision on the issue of (J) were medical services that were provided to Petitioner reasonable and necessary, the arbitrator concludes:

Based on the Arbitrator's findings on the issue of causal connection in these consolidated matters, and Respondent's dispute as to the incurred medical expenses based on liability, the Arbitrator further finds Respondent is to pay Petitioner's unpaid medical expenses at issue. ARB EX 1 and ARB EX 2 each indicate unpaid bills in the total amount of $58,563.21 to the providers at St. Joseph and at Rezin Orthopedics. Petitioner agreed in both cases that should those bills be awarded, Respondent is entitled to an 8(j) credit in that amount as those bills were paid by the group carrier. ARB EX 1 and ARB EX 2. Accordingly, the Arbitrator further finds that Respondent shall receive the 8(j) credit as stipulated and that Respondent shall hold Petitioner harmless to the extent of that credit.

With regard to the arbitrator's decision on the issue of (K) temporary total disability and (N) credit, the arbitrator concludes:

In connection with the accident of 9/3/03, Petitioner asserted in her proposed decision that she was off work from September 9, 2003, through 9/28/03. TTD through 10/14/03 is listed on ARB EX 2. Respondent does not contest that period of time in its proposed decision. Accordingly, and based on the Arbitrator's findings on the issue of causal connection, the Arbitrator finds Petitioner was temporarily and totally disabled for a period of 2-5/7ths weeks commencing 9/9/03 through 9/28/03 pursuant to Section 8(b) of the Act. Respondent shall receive credit for amounts paid in TTD, full salary and for other benefits under Section 8(j) if paid, as stipulated by Petitioner on ARB EX 2.

In connection with the accident of 3/21/05, Petitioner asserts TTD commencing 3/29/05 through 7/11/05 and then again from 1/16/06 through 7/31/06 for a total of 42-6/7 weeks. These periods off work are supported by Petitioner's testimony, the records of her treating doctors at Braidwood Health and Rezin Orthopedics and by the period of time for which she was treated surgically. Based on the findings on the issue of causal connection, the Arbitrator awards TTD for these claimed periods totaling 42-6/7 weeks pursuant to Section 8(b) of the Act. Respondent shall receive credit for amounts paid in TTD, full salary and for other benefits under Section 8(j) if paid, as stipulated by Petitioner on ARB EX 1.

With regard to the issue of (L) the nature and extent of Petitioner's injury, the Arbitrator concludes:

Again, the Arbitrator notes that Petitioner is not requesting permanency with regard to her low back or left leg. To the extent that request is made, a finding of permanency as to those body parts is denied.

Petitioner sustained an aggravation injury to her right knee as a result of these two accidents. She failed conservative care and underwent arthroscopy followed by a total knee replacement. Petitioner made a good recovery from the last surgery in that she returned to work full duty until her retirement a year later. Her retirement was not due to her right knee condition. Petitioner testified that she currently notices pain in her right knee. She is unable to walk more than 20 to 30 minutes and has pain in her right knee every day with activity. Occasionally she uses a cane, which has not been prescribed by any physician for current use. She testified that she does not take any medication. Based on the foregoing and on the record as a whole, with regard to Petitioner's right knee, the Arbitrator finds Petitioner sustained 45% loss of use of the right leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nancy Bator,

Petitioner,

14IWCC0598

vs.

NO: 05 WC 42479

Morton College,

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, causal connection, permanent partial disability, Respondent's credits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 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.

14IWCC0598

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,000.00. 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: JUL 2 1 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gaf
O: 7/17/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BATOR, NANCY
Employee/Petitioner

Case# **05WC042479**

05WC042478

MORTON COLLEGE
Employer/Respondent

14IWCC0598

On 10/21/2013, 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 0.15% 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:

0347 MARSZALEK & MARSZALEK
STEVEN GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
PAUL W PASCHE
ONE N LASALLE 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

14IWCC0598

NANCY BATOR
Employee/Petitioner

v.

MORTON COLLEGE
Employer/Respondent

Case # 05 WC 42479

Consolidated cases:
05WC42478

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 **08-16-13**. 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 _____

14IWCC0598

FINDINGS

On **09/03/03**, 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 **$27,766.96**; the average weekly wage was **$533.98**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **1** dependent children.

Respondent is entitled to a credit under Section 8(j) of the Act. SEE DECISION AND ARB EX 1.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $355.96/week for 2 5/7ths weeks, commencing 09-09-03 through 09-28-03, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid. See ARB EX 1 and DECISION.

Permanent partial disability and medical expenses – see ARB DECISION ATTACHED.

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

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

Carolyn D Reedy

Signature of Arbitrator

10/19/13

Date

OCT 21 2013

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

Stephen Higa,

Petitioner,

14IWCC0599

vs.

NO: 09 WC 01470

State of Illinois, Department of Human Services,
Elgin Mental Health 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 medical expenses, causal connection, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 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.

DATED: JUL 2 1 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/17/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

HIGA, STEPHEN
Employee/Petitioner

Case# **09WC001470**

11WC015484

12WC011345

SOI DEPT OF HUMAN SERVICES ELGIN MENTAL HEALTH CENTER
Employer/Respondent

14IWCC0599

On 10/29/2013, 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 0.08% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

5145 ASSISTANT ATTORNEY GENERAL
KATHERINE ARISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 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

OCT 29 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
CORRECTED

14IWCC0599

STEPHEN HIGA
Employee/Petitioner

v.

Case # 09 WC 1470

Consolidated cases: 11 WC 15484 & 12 WC 11345

State of Illinois, Department of Human Services, Elgin Mental Health 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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, Illinois**, on **5/10/2013**. 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 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 14IWCC0599

On **12/18/08**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,797**; the average weekly wage was $**784.56**.

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

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

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

Respondent shall be given a credit of $**52,300.00** for TTD, $ for TPD, $ for maintenance, and $, for a total credit of $**52,300.00**.

Respondent is entitled to a credit of $**6,850.00**under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $523.04 per week for 100 weeks, commencing 12/19/08 through 11/18/10, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $316.06 to Elgin Barrington Neurosurgery and $9,600.70 to Sherman Hospital, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall further pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $6,850.25 to Sherman Hospital, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $6,850.25 for medical benefits that have been paid to Sherman Hospital, 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 benefits of $470.74/week for 25 weeks, because the cervical injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $470.74/week for 25 weeks, because the post traumatic stress disorder caused the 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

10/28/13
Date

OCT 29 2013

FINDINGS OF FACT:

Petitioner, a 47 year old married male with a history of mental and physical health issues, has been an employee of the Illinois Department of Human Services for approximately the last 27 years. Petitioner is a mental health technician at the Elgin Mental Health Center ("Elgin"). Petitioner testified that his job duties include providing treatment to mentally ill patients, admitting them into the unit, observing them, and caring for them.

On December 18, 2008 at approximately 2:00 a.m. Petitioner was working at Elgin. Petitioner testified he was assisting during the physical hold of an aggressive patient. The patient became resistant and repeatedly kicked Petitioner in his abdomen. After the incident, Petitioner reported to his employer that he felt "mid back severe pain." (RX 1) Petitioner testified that he felt a flush throughout his body, which he described as a rushing sensation everywhere.

Petitioner testified that after the incident he presented at Sherman Hospital's emergency room ("ER"). Records submitted show Petitioner presented complaining of mid back pain. Petitioner reported that he felt a pull in his mid back while restraining a patient at work. A thoracic spine x-ray was taken which showed mild dextroscolios. Also noted was mild spondylosis in the lower cervical spine. Petitioner was diagnosed with mid back strain and prescribed medications. (PX 2)

Later that day, Petitioner presented at Physician's Immediate Care where he was seen by Dr. Warren Wollin . Petitioner testified that he was sent there by Respondent. Records show Petitioner provided that he felt a pop in the middle of his back while restraining a combative patient. Petitioner denied any neck pain or lower back pain. He indicated that most of his pain was with rotation. After reviewing x-rays of Petitioner's back and conducting a physical exam, Dr. Wollin diagnosed thoracic strain and recommended Petitioner continue with his pain medication given to him from the ER, apply ice every 4-6 hours, restrict lifting to below 5 pounds, and follow up in a few days. (PX 4)

Petitioner testified that on December 19, 2008, he presented at the Sherman ER after feeling severe pain in his abdomen. Petitioner was diagnosed with acute appendicitis. Petitioner underwent an emergency appendectomy. After the surgery, Petitioner received conservative treatment for the appendectomy by taking prescription pain medication and undergoing intermittent CT scans. By February 4, 2009 Petitioner was feeling better and received no further treatment for his appendectomy. (PX 2 & 5)

On January 14, 2009, Petitioner was seen by Dr. Michael Shapiro, a psychiatrist. Petitioner informed Dr. Shapiro that he had gotten into a fight with a resident and ended up in the emergency room. Dr. Shapiro diagnosed Petitioner with post traumatic stress disorder and an increase in his mood symptoms. The records of Dr. Shapiro reflect that Petitioner had been treating with him prior to this accident and was diagnosed with clinical depression and bipolar disorder. (PX 3)

Petitioner testified that as a result of the December 18, 2008 incident, he also suffered from cervical pain. Petitioner had a history of cervical pain pre-dating the December 18, 2008 incident. (RX 8) Petitioner reported that he had experienced neck pain for nearly ten years prior to the incident and as early as March 2008, he was undergoing pain management with Dr. Barclay for his neck pain. (RX 6 & 8)

Petitioner returned to Dr. Shapiro on February 3 and February 25, 2009 with Petitioner informing the doctor that he had not been the same since the accident and he wished he could be dead. Petitioner reported nightmares about fighting, complained about "Jessica and ??? friend" living with them, "a fight at home..." and panic attacks. He informed Dr. Shapiro that he was in constant pain and that he is going to see Dr. Barclay. Petitioner informed Dr. Shapiro that he is dealing with the emotional pain from the incident. (PX 3)

On February 27, 2009, Petitioner was seen by Joanna Barclay of Sherman Hospital Pain Clinic. Dr. Barclay noted Petitioner had been last seen on September 2, 2008. At that time he was complaining of neck pain radiating down to the thoracic spine. The doctor noted Petitioner came back to the clinic with the same pain complaints. Petitioner reported that he had an altercation at work. Dr. Barclay noted that Petitioner had a cervical MRI in 2007 which showed a left C4-C5 disc protrusion and a bulging disc at C5-C6. Dr. Barclay ordered another cervical MRI and recommended physical therapy. (PX 2)

On March 19, 2009, Petitioner returned to Dr. Shapiro. Petitioner again reported having nightmares about fighting. He reported on the incident at work indicating he was afraid to go to sleep.

On March 25, 2009, Petitioner underwent a cervical MRI at Sherman Hospital. The impression was moderately advanced osteophytic changes of the cervical spine at C3-C7 levels and worsening of the left paracentral disc protrusion at C6-C7. (PX 2)

On April 7, 2009, Dr. Barclay noted Petitioner complaints of upper back pain were similar to the pain complaints he had when he first began treating at the clinic in February 2008. The doctor noted that the present pain complaints were greatly exacerbated after the altercation in December 2008. Dr. Barclay reported that the March 25, 2009 cervical MRI showed a bulging disc at C3-4, C4-5 disc osteophyte condition with left foraminal narrowing. The doctor felt there were similar findings in C5-6 and C6-7 level. Dr. Barclay indicated the C6-7 level seemed to be a newer finding as compared to the October 2007 MRI. The doctor reported that it appeared slightly worse and the disc protrusion favors the left side but Petitioner's reported pain was mostly to the right. Dr. Barclay recommended physical therapy and epidural steroid injections (PX 2)

Petitioner returned on April 17, 2009 to see Dr. Shapiro and informed him that he had been in constant pain since the accident. Petitioner also informed Dr. Shapiro that he had been having trouble sleeping and of having dreams of being trapped and trying to get away. He said he was fearful of work. (PX 3)

According to the medical records of Dr. Barclay, between June 18, 2009 and February 22, 2011, Petitioner underwent four epidural steroid injections to the C6-C7 level. In addition, he underwent a facet nerve block at the C3-C6 levels and a facet neurolysis with radiofrequency at the C3-C6 levels.

At the referral of Dr. Barclay, Petitioner saw Dr. Dennis Wen of Elgin Barrington Neurosurgery on October 1, 2009. Petitioner provided a history of neck pain with no known injury 2007. Petitioner reported the incident at work in December 2008, indicating that he developed worsening of his previous neck pain. After performing an examination and reviewing the previous diagnostic studies, Dr. Wen's impression was multilevel cervical disc/spurs with left root symptoms and likely left shoulder impingement syndrome. Dr. Wen recommended additional diagnostic studies in the form of a left shoulder x-ray and MRI. The doctor also recommended physical therapy and medication. (PX 8)

Petitioner had been seeing Dr. Shapiro through October 19, 2009. Dr. Shapiro's records reflect that Petitioner had been talking to him about the fact that he had been out of work for several months with back

problems. Dr. Shapiro's records reflect that Petitioner reported paranoia and nightmares. Dr. Shapiro's records of June 17, 2009 also reflect Petitioner had panic attacks since the last visit of June 12, 2009. Petitioner had talked to Dr. Shapiro about his fears of being attacked. At his October 19, 2009 session with Dr. Shapiro, Petitioner reported that he was being bombarded with stresses particularly with lawyers, the State, and his inability to handle his job. (PX 3) Petitioner testified that Dr. Shapiro retired after his October 19, 2009 visit. Thereafter, Petitioner continued his therapy sessions at Psychiatry Associates with Dr. Gundharj and therapist Steven Meisner. During the therapy sessions, Petitioner met with Dr. Gundharj about once a month to receive prescriptions for medications, including Cymbalta, Qam, Zprexa, and Neurontin. (PX 6 & 7)

On October 22, 2009 Petitioner started physical therapy for neck pain. Petitioner presented at physical therapy twice a week until February 8, 2010. By February 8, 2010 Petitioner continued to complain of neck pain. He did not meet any of his physical therapy goals. (PX 10 & 11)

Petitioner initially saw Dr. Meisner on November 21, 2009 at which time he informed him that he was suffering from PTSD since he was brutally attacked by a patient where he works. According to Dr. Meisner, Petitioner had PTSD symptoms related to an assault he suffered at the hands of a patient at his work place. Petitioner was reporting nightmares and flashbacks and avoidance of places related to the trauma (and extreme anxiety when exposed to it) and being triggered by seemingly unrelated stimuli (such as TV shows). (PX 7)

The records of Dr. Meisner reflect Petitioner was having interrupted sleep, nightmares, depressed moods, obsessional thinking, depression and anger. The notes of Dr. Meisner reflect that Petitioner reports that a majority of these symptoms were the result of being attacked at work. The records also reflect Petitioner being confused and angry at his employer due to changes the employer made. Petitioner complained of being constantly reminded of the attack throughout each day based on what he can no longer do because of the incident. At a January 2010 session, Dr. Meisner recorded that on a few occasions Petitioner said, "This isn't my fault. I didn't do anything wrong. I'd just like to be how I was before (the attack)." He stated that when he attempts to do certain activities, he experiences pain and then is reminded of the attack. (PX 7)

On June 12, 2010, Dr. Meisner wrote that Petitioner spoke in detail again about his traumatic experience from work. Petitioner was still reporting flashbacks, nightmares about his trauma with hypervilant and avoidance. (PX 7)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Bultler at Spine Consultants Park Ridge on September 15, 2010. Dr. Butler reviewed Petitioner's past treating medical records and physically examined Petitioner. Dr. Butler also conducted a clinical interview. Petitioner described his job at Elgin and the December 18, 2008 accident to Dr. Butler. Dr. Butler determined that Petitioner's diagnosis as it related to the 2008 incident was a thoracic strain. Dr. Butler also diagnosed multilevel degenerative disc disease in the cervical spine which he was a pre-existing condition. Dr. Butler reported that the September 2010 diagnosis was not related to the December 18, 2008, incident, but rather the cervical changes were long standing and Petitioner's self-reported complaints of pain at the time of his December 2008 injury were only related to a thoracic strain. Dr. Butler opined that Petitioner was capable of performing full duties as a mental health technician, that he did not require additional treatment for his thoracic strain, and that Petitioner reached maximum medical improvement for the thoracic strain by the time he saw Dr. Barclay in February 2009. Dr. Butler elaborated that Petitioner's reports of pain to Dr. Barclay were a result of his underlying degenerative condition for which he had been treating prior to December 2008 and that his condition was actually deteriorating up to and prior to the December 2008 incident. He felt that none of the cervical injections performed by the pain specialist were medically necessary or related to any of Petitioner's work place

exposures. The doctor opined that same were performed to treat Petitioner's underlying degenerative condition for which he was actively treating in the same calendar year. (RX 7)

At Respondent's request Petitioner met with Dr. David Hartman at Medical and Forensic Neuropsychology on October 14, 2010. Dr. Hartman conducted a full day psychological evaluation of Petitioner that included a clinical interview and multiple objective tests. At the conclusion of all of the interviews, Dr. Hartman concluded that Petitioner did not have PTSD and that there is no evidence that his bipolar or pre-claim of psychiatrist history was aggravated or caused by the 2008 work accident. Dr. Hartman reported that Petitioner's profile based on objective tests showed that he intentionally exaggerated his symptoms such that his results were unrealistic and malingered. The doctor opined that Petitioner showed feigned exaggerated cognitive dysfunction and symptoms for the potential of secondary gain, including financial benefits and litigation. The doctor indicated that in the Word Memory Test, Petitioner produced a score so low that it was improbable for someone to receive that score unless the individual knew the correct answer and then deliberately chose the wrong answer. Dr. Hartman stated that Petitioner scored so poorly on a simple digit recognition memory test that even individuals with severe brain injuries routinely answer almost all items correctly. His score was so low that even those with nervous system and psychologist impairments score better. His score was only typical for those individuals who were deliberately exaggerating. (RX 6)

Dr. Hartman reported that Petitioner's pattern on a test sensitive to PTSD symptoms was far greater than a pattern obtained by genuine PTSD patients that it far exceeded the cut off to demonstrate a malingered profile. The doctor indicated Petitioner's score indicated that he was willing to grossly feign symptoms if he believed that such symptoms would advance pendency of PTSD-related disability. He noted that on an objective personality test, Petitioner's profile was so exaggerated and extreme that it demonstrated a pattern considered to be self-serving in the interest of malingered work avoidance and secondary gain. (RX 6)

Dr. Hartman opined that Petitioner did not have PTSD, but rather had a pattern of repeatedly and grossly malingering his symptoms for the secondary gains of work avoidance and financial compensation. Dr. Hartman further found that Petitioner's credibility as a narrator of his symptoms is demonstrably flawed and it is more likely than not that he is attempting to mislead his treaters into colluding with his malingered goals. Dr. Hartman determined that if Petitioner had actual pain, discomfort, or cognitive inefficiencies, they are obscured and rendered speculative by the degree of exaggeration show in his examination. Furthermore, Dr. Hartman determined it is not possible to diagnose Petitioner with chronic pain disorder because his objectively malingered presentation prevents this diagnosis. Dr. Hartman further provided that individuals who malinger symptoms are unlikely to admit to a level of improvement that would permit a return to work. The doctor felt that the extreme degree of malingering shown by Petitioner indicated that he is unwilling to consider work return and will feign impairment to avoid having to re-enter the workplace. (RX 6)

In sum, Dr. Hartman diagnosed Petitioner with malingering and bipolar disorder. When posed as to whether Petitioner's current psychiatric condition was in any way related to the incident occurring on December 18, 2008, D. Hartman wrote, "No. Claimant symptoms are not credible and are objectively malingered. If the claimant actually suffered from a ruptured appendix and peritonitis secondary to his 2008 work injury, it is clinically reasonable to assume that he suffered some degree of acute psychological pain and distress related to this complication. At present, however, the claimant is distorting and malingering his psychological profile to such a degree that it is not possible to determine if he has any credible symptoms of any kind." Dr. Hartman opined that Petitioner's treatment plan should be limited to the type of psychiatric medication monitoring that he required prior to 2008 for long-standing bipolar disorder. He felt there was no credible loss of functional capacity with respect to Petitioner returning to work. (RX 6)

Petitioner continued treating with Dr. Meisner. In addition to the stressors noted earlier, the records indicate Petitioner reported that he was under significant financial stress. On June 4, 2010 Mr. Meisner noted Petitioner was more worried than usual about his finances because his old house needed repairs. On August 26, 2010 Mr. Meisner noted that Petitioner again stressed that his financial situation caused him to worry. On September 10, 2010 Mr. Meisner noted that Petitioner felt very concerned about his financial situation because his wife used money to bail his step-daughter out of jail and now felt he was unable to pay bills. On October 15, 2010 Mr. Meisner noted that Petitioner identified his marriage as a source of his stress. (PX 7)

On November 12, 2010 Petitioner met with Dr. Meisner and informed the doctor that his benefits had been cut following Dr. Hartman's report. Petitioner informed the doctor that he had a dream and as a result of same he stated, "I'm back." Petitioner reported that his symptoms had lessened and that he was willing and ready to return to work. Petitioner could not explain the sudden change. Dr. Meisner asked Petitioner if he was concerned that he was symptomatic for almost three years then suddenly, when his benefits were cut, he had a huge improvement and was able to return to work. The doctor wrote Petitioner smiled and said he didn't care about that, but just wanted to return to work. The doctor noted that Petitioner emphatically assured him that he had not been faking his symptoms. Dr. Meisner returned Petitioner to full duty work. (PX 7)

On November 18, 2010, Petitioner returned to work at Elgin without restrictions. Petitioner testified that upon returning to work he was very paranoid, hyper vigilant and afraid he would be attacked. He also indicated that he had "lots of pain in my cervical."

With respect to (C.) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Petitioner testified that at approximately 2:00 A.M. on December 18, 2008, he attempted to restrain an aggressive patient who had picked up a chair and was swinging it around. Petitioner testified he grabbed the patient by his feet while a security guard had the patient's upper body. Petitioner testified the patient was kicking and he received several blows to his abdomen.

Respondent placed into evidence as Respondent's Exhibit #1 a Worker's Compensation Employee's Notice of Injury Report. That document reflects Petitioner was assisting during a physical hold of an aggressive patient on December 18, 2008. The document indicates that Petitioner was holding the patient's legs when the patient got aggressive, resistive, and combative. This form was signed by Petitioner on December 18, 2008.

The Arbitrator finds that, based on Petitioner's unrebutted testimony and the Notice of Injury form submitted by Respondent, Petitioner sustained accidental injuries arising out of and in the course of his employment with the Respondent on December 18, 2008.

With respect to (F.) Petitioner's current condition of ill-being is not causally connected to his injury, the Arbitrator finds as follows:

Petitioner testified that following the altercation with the aggressive patient, he felt a sharp pain in his neck and a popping sensation in his back. He was treated immediately at Sherman Hospital where he was diagnosed with mid back pain. Later that day, at the Physician's Immediate Care Center, Petitioner was diagnosed with a thoracic strain.

Petitioner had a history of cervical pain pre-dating the December 18, 2008 incident. Petitioner reported that he had experienced neck pain for nearly ten years prior to the incident and as early as March 2008, he was undergoing pain management with Dr. Barclay for his neck pain. On February 27, 2009, Petitioner returned to Dr. Barclay who noted Petitioner had been last seen on September 2, 2008. At that time he was complaining of neck pain radiating down to the thoracic spine. The doctor noted Petitioner came back to the clinic with the same pain complaints. Petitioner reported that he had an altercation at work. Dr. Barclay noted that Petitioner had a cervical MRI in 2007 which showed a left C4-C5 disc protrusion and a bulging disc at C5-C6. Dr. Barclay ordered another cervical MRI. On March 25, 2009, Petitioner underwent the cervical MRI which showed moderately advanced osteophytic changes of the cervical spine at C3-C7 levels and worsening of the left paracentral disc protrusion at C6-C7. On April 7, 2009, Dr. Barclay noted Petitioner complaints of upper back pain were similar to the pain complaints he had when he first began treating at the clinic in February 2008. The doctor noted however that the present pain complaints were greatly exacerbated after the altercation in December 2008. Dr. Barclay reported that the March 25, 2009 cervical MRI showed a bulging disc at C3-4, C4-5 disc osteophyte condition with left foraminal narrowing. The doctor felt there were similar findings in C5-6 and C6-7 level. Dr. Barclay indicated the C6-7 level seemed to be a newer finding as compared to the October 2007 MRI. The doctor reported that it appeared slightly worse and the disc protrusion favors the left side. Petitioner underwent several cervical injections at the C6-C7 level. Petitioner also was diagnosed with a thoracic strain which received minimal treatment.

Respondent submitted the Section 12 examination of Dr. Butler who determined that there was no causal connection between Petitioner's employment and his post-accident complaints. Dr. Butler determined Petitioner suffered from a thoracic strain as a result of the December 2008 incident and that he was at maximum medical improvement for the thoracic strain by February 2009, was able to return to work at that time, and none of his treatment for his cervical injury was reasonably or necessary as it related to his December 2008 incident. Dr. Butler further diagnosed Petitioner with multilevel degenerative disc disease in the cervical spine, but noted that he was diagnosed with that injury pre-dating the December 2008 and that the incident on 2008 did not aggravate his pre-existing condition.

Based on the above, the Arbitrator finds that a causal relationship exists between Petitioner's cervical condition of ill-being and the accident sustained on December 18, 2008. The Arbitrator relies on the sequence of events and the records of Dr. Barclay who on April 7, 2009 noted Petitioner complaints of upper back pain were similar to the pain complaints he had when he first began treating at the clinic in February 2008. The doctor noted however that the present pain complaints were greatly exacerbated after the altercation in December 2008. Dr. Barclay also reported that the March 25, 2009 cervical MRI showed a bulging disc at C3-4, C4-5 disc osteophyte condition with left foraminal narrowing. The doctor felt there were similar findings in C5-6 and C6-7 level. Dr. Barclay indicated the C6-7 level seemed to be a newer finding as compared to the October 2007 MRI. The doctor reported that it appeared slightly worse and the disc protrusion favors the left side.

Petitioner underwent an appendectomy on December 19, 2008. The records of Sherman Hospital reflect Petitioner informed the doctor he was kicked in the abdomen the day before. The medical records of Dr. Wu reflect that on December 20, 2008, Petitioner gave a history of being well until about 2 days prior to admission when he was kicked in the abdomen by a patient at work. Petitioner started having some mild abdominal pain but more of like a back pain according to the records. The pain continued and when he arrived in the emergency room at Sherman Hospital, Petitioner was found to have an inflammation in the appendix area. He was then sent for laparoscopic appendectomy. Based on the sequence of events there is a reasonable presumption that the appendectomy was the result of the repeated blows Petitioner took to his abdomen. Respondent offered no rebuttal evidence on this issue.

Petitioner also claims that his post traumatic stress disorder is causally related to the accident in December 2008. On January 14, 2009, Petitioner was seen by Dr. Michael Shapiro, a psychiatrist. Petitioner informed Dr. Shapiro that he had gotten into a fight with a resident and ended up in the emergency room. Dr. Shapiro diagnosed Petitioner with post traumatic stress disorder and an increase in his mood symptoms. The records of Dr. Shapiro reflect that Petitioner had been treating with him prior to this accident and was diagnosed with clinical depression and bipolar disorder. Petitioner continued treating with Dr. Shapiro. Throughout treatment Petitioner reported having nightmares about fighting experienced trouble sleeping and of having dreams of being trapped and trying to get away; and paranoia. Petitioner had talked to Dr. Shapiro about his fears of being attacked.

Dr. Shapiro retired and Petitioner continued his therapy sessions at Psychiatry Associates with Dr. Gundharj and therapist Steven Meisner. Petitioner continued with similar complaints. According to Dr. Meisner, Petitioner had PTSD symptoms related to an assault he suffered at the hands of a patient at his work place. Petitioner was reporting nightmares and flashbacks and avoidance of places related to the trauma (and extreme anxiety when exposed to it) and being triggered by seemingly unrelated stimuli (such as TV shows). The records of Dr. Meisner reflect Petitioner was having interrupted sleep, nightmares, depressed moods, obsessional thinking, depression and anger. On June 12, 2010, Dr. Meisner wrote that Petitioner spoke in detail again about his traumatic experience from work. Petitioner was still reporting flashbacks, nightmares about his trauma with hypervilant and avoidance.

At Respondent's request Petitioner met with Dr. David Hartman at Medical and Forensic Neuropsychology on October 14, 2010 for psychological evaluation. Dr. Hartman opined that Petitioner did not have PTSD, but rather had a pattern of repeatedly and grossly malingering his symptoms for the secondary gains of work avoidance and financial compensation. Dr. Hartman further found that Petitioner's credibility as a narrator of his symptoms is demonstrably flawed and it was more likely than not that he is attempting to mislead his treaters into colluding with his malingered goals. Dr. Hartman determined that if Petitioner had actual pain, discomfort, or cognitive inefficiencies, they are obscured and rendered speculative by the degree of exaggeration shown in his examination. Furthermore, Dr. Hartman determined it is not possible to diagnose Petitioner with chronic pain disorder because his objectively malingered presentation prevents this diagnosis. Dr. Hartman diagnosed Petitioner with malingering and bipolar disorder. When posed as to whether Petitioner's current psychiatric condition was in any way related to the incident occurring on December 18, 2008, D. Hartman wrote, "No. Claimant symptoms are not credible and are objectively malingered. If the claimant actually suffered from a ruptured appendix and peritonitis secondary to his 2008 work injury, it is clinically reasonable to assume that he suffered some degree of acute psychological pain and distress related to this complication. At present, however, the claimant is distorting and malingering his psychological profile to such a degree that it is not possible to determine if he has any credible symptoms of any kind."

The Arbitrator is persuaded by the opinions of both Dr. Shapiro and Dr. Meiser. It is quite clear that Petitioner had been treating with Dr. Shapiro prior to this accident and was diagnosed with clinical depression and bipolar disorder. On January 14, 2009, Petitioner saw the doctor post accident. At that time, Dr. Shapiro diagnosed Petitioner with post traumatic stress disorder and an increase in his mood symptoms. Later, Petitioner came under the care of Dr. Meisner who felt Petitioner had PTSD symptoms related to an assault he suffered at the hands of a patient at his work place.

The Arbitrator has reviewed the report of Dr. Hartman. It is clear the doctor felt Petitioner was a malingerer and had bi-polar disorder. However, when posed as to whether Petitioner's current psychiatric condition was in any way related to the incident occurring on December 18, 2008, D. Hartman wrote, "No.

Claimant symptoms are not credible and are objectively malingered." He however went on to state, "If the claimant actually suffered from a ruptured appendix and peritonitis secondary to his 2008 work injury, it is clinically reasonable to assume that he suffered some degree of acute psychological pain and distress related to this complication..." The record is clear that Petitioner did in fact suffer a ruptured appendix and peritonitis secondary to his 2008 work injury.

Based on the above, the Arbitrator finds a casual relationship existed between Petitioner's PTSD condition of ill-being and the accident sustained.

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

Having adopting the findings and opinions of Petitioner's treating physician, Dr. Barclay, Petitioner's psychiatrists, Dr. Shapiro, Dr. Gandhiraj, and Dr. Meisner, the Arbitrator finds that all of the medical services rendered to Petitioner were reasonable and medically necessary to relieve Petitioner of the ill effects of his injuries sustained in this accident. With respect to the medical bills submitted into evidence the by Petitioner, those are as follows:

Elgin Barrington Neurosurgery	$ 316.06
Sherman Hospital	$4,045.00
Sherman Hospital	$5,555.70

The Arbitrator finds that Respondent is liable for payment of the aforementioned bills pursuant to the fee schedule of the Act.

Petitioner also placed into evidence a letter from Blue Cross Blue Shield reflecting payments they made to Sherman Hospital in the amount of $6,850.00. The Arbitrator finds that the payments made by Blue Cross were for services rendered Petitioner as a result of his accidental injuries of December 18, 2008. The Arbitrator awards these bills to Petitioner and also awards Respondent an 8(j) credit of $6,850.00. Respondent shall further hold Petitioner harmless from any claims by the providers of the services for which Respondent is receiving this credit.

Respondent placed into evidence as Respondent's Exhibit #2 a medical bills payment history for this injury. That document reflected $20,843.07 in medical bills were paid by Respondent. The Arbitrator has reviewed Respondent's Exhibit #2 and notes that none of those payments relate to the charges from the bill of Elgin Barrington Neurosurgery and the two bills from Sherman Hospital which Petitioner placed into evidence. Respondent is not, therefore, entitled to an 8(j) credit for these payments.

With respect to (L.) What is the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

The Arbitrator adopts his conclusion with respect to the finding that Petitioner's current conditions of ill-being are causally connected to the December 18, 2008 accident.

As a result of Petitioner's cervical injuries, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% pursuant to Section 8(d) 2.

As a result of Petitioner's post traumatic stress disorder, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% pursuant to Section 8(d) 2.

As a result of Petitioner's thoracic injuries, the Arbitrator finds that Petitioner did not sustain any permanent partial disability to his thoracic area as a result of this accident.

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

Stephen Higa,

Petitioner,

14IWCC0600

vs.

NO: 12 WC 11345

State of Illinois, Department of Human Services,
Elgin Mental Health Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

DATED: JUL 2 1 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/17/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

HIGA, STEPHEN
Employee/Petitioner

Case# **12WC011345**

11WC015484

09WC001470

14IWCC0600

SOI DEPT OF HUMAN SERVICES ELGIN MENTAL HEALTH CENTER
Employer/Respondent

On 10/29/2013, 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 0.08% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL ROLENC
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5145 ASSISTANT ATTORNEY GENERAL
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BUREAU OF RISK MANAGEMENT
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SPRINGFIELD, IL 62794-9208

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

OCT 29 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
CORRECTED

14IWCC0600

STEPHEN HIGA
Employee/Petitioner

v.

Case # 12 WC11345

Consolidated cases: 09 WC 1470 & 11 WC 15484

State of Illinois, Department of Human Services, Elgin Mental Health 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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, Illinois**, on **5/10/2013**. 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 current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other.

FINDINGS

On **3/09/12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$44,934.00**; the average weekly wage was **$864.12**

On the date of accident, Petitioner was **46** 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 $1 for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,380.20 to Sherman Hospital, as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit in the amount of $78.38 for payment tendered for services rendered.

Respondent shall pay Petitioner permanent partial disability benefits of $518.47/week for 5 weeks, because the injuries sustained caused the 1% 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

10/28/13
Date

ICArbDec p. 2

OCT 29 2013

FINDINGS OF FACT

Petitioner, a 47 year old married male with a history of mental and physical health issues, has been an employee of the Illinois Department of Human Services for approximately the last 27 years. Petitioner is a trained mental health technician at the Elgin Mental Health Center ("Elgin"). Petitioner testified that his job duties include providing treatment to mentally ill patients, admitting them into the unit, observing them, and caring for them.

On March 9, 2012 Petitioner was working at Elgin. He testified that on that day, he took the garbage out to the dumpster. Petitioner testified that the garbage was heavy and the dumpster was full. Petitioner testified he felt spasms in his thoracic.

Petitioner treated conservatively for the injury. On the day of the accident, he presented at Sherman Hospital. Petitioner reported to Dr. Mainiquis that he felt pain in between his shoulder blades without any radiation to his lower back or neck. Dr. Maniquis diagnosed Petitioner with a mild thoracic strain with muscle spasms mid back. Dr. Maniquis recommended Petitioner rest, ice his back, and engage in gentle range of motion exercises as well as take Ibuprofen and Flexeril. (PX 10)

On March 14, 2012 Petitioner presented to Dr. Barclay reporting pain in his neck area and groin. Dr. Barclay recommended Petitioner receive an epidural injection and cervical radiofrequency neurolysis procedure. Petitioner was further prescribed Flexeril. (PX 2)

On March 22, 2012, Dr. Barclay performed an L1-L2 epidural steroid injection. On March 29, 2012, Dr. Barclay performed a left C3-C4-C5-C6 facet neurolysis using radiofrequency. Dr. Barclay diagnosed Petitioner with cervical facet syndrome. (PX 2)

On May 22, 2012, Petitioner was again seen by Dr. Barclay. He informed her that he had persistent pain despite the epidural steroid injection. The pain had lessened at the cervical level but was persistent in the mid back level. The pain was also radiating mostly to his left side. (PX 2)

On May 23, 2012 Petitioner started physical therapy two times a week until June 15, 2012. At the time Petitioner was discharged from physical therapy in June 2012, he had reached all of his goals. (PX 10)

Petitioner followed up with Dr. Barclay on July 25, 2012 and informed her that most of his pain was in his lower back. Dr. Barclay recommended he come in for a left L1-L2 epidural steroid injection but noted Petitioner was unable to do so because he could not afford the co-pay. Dr. Barclay continued Petitioner on his Lyrica and Hydrocodone. (PX 2)

Petitioner returned to Dr. Barclay on October 30, 2012 and November 14, 2012. Examinations showed Petitioner had a full range of motion of the lumbar spine with minimal tenderness in the lumbar thoracic region. Dr. Barclay prescribed Petitioner Norco, Flexeril, and Lyrica. At the last visit on November 14, 2012, Dr. Barclay again recommended epidural steroid injections.

Petitioner testified he continues to experience pain in the back of his neck and his left leg. Petitioner testified he experiences pain when sitting. Petitioner lost no time from work for this injury, and to this day, works regular duty at Elgin.

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

Petitioner testified he felt pain in his thoracic area after throwing garbage into a dumpster at work on March 9, 2012. According to Dr. Barclay's office note of March 14, 2012, she reviewed an MRI from May 5, 2011 which revealed a left sided herniated disc at L1-L2 and a disc protrusion at L4-L5 and L5-S1. She also reviewed a March 25, 2009 cervical MRI which revealed a C3-C4 disc bulge, a C4-C5 disc osteophyte condition, a C5-C6 bulging disc osteophyte condition and a C6-C7 disc protrusion. A thoracic MRI from that same date showed a left sided paracentral disc protrusion at T7-T8.

The records reflect Petitioner received conservative treatment from Dr. Barclay consisting of an L1-L2 epidural steroid injection and a C3-C4 and C5-C6 facet neurolysis using radiofrequency. Petitioner also received physical therapy and pain medication.

Respondent offered no medical evidence in rebuttal.

The Arbitrator adopts the findings and opinions of Dr. Barclay.

Having adopted the findings and opinions of Dr. Barclay, the Arbitrator finds that Petitioner's current condition of ill-being is casually related to the accident of March 9, 2012. The Arbitrator further notes that this accident caused an aggravation of a pre-exiting condition to Petitioner's cervical, thoracic and lumbar areas.

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

Having offered no rebuttal evidence, the Arbitrator finds that all of the medical services rendered to Petitioner as a result of his injuries on March 9, 2012 were reasonable and necessary.

Petitioner placed into evidence two medical bills from Sherman Hospital, one in the amount of $917.70 and one in the amount of $2,462.50. These charges are for services rendered from May 23, 2012 through May 30, 2012 and from June 1, 2012 through June 15, 2012. Respondent offered no evidence to rebut the reasonableness or necessity of the services rendered in conjunction with these bills. As such, the Arbitrator finds Respondent is liable for these two medical bills. The Arbitrator awards the medical bills to Petitioner pursuant to the fee schedule of the Act.

Respondent placed into evidence as Respondent's Exhibit 2d, a medical bill payment history which reflects medical payments of $1,964.55. In reviewing that payment history, the Arbitrator notes that only $78.38 in payments correspond to any of the dates (June 15, 2012) Petitioner claims are still due and owing. Therefore, Respondent is entitled to a credit in the amount of $78.38 for payment tendered for services rendered. Said credit corresponds to the bills submitted by Petitioner.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

The injuries sustained by Petitioner as a result of this accident were essentially an aggravation of pre-existing condition. The pre-existing medical conditions were covered in the companion cases of 09 WC 1470 and 11 WC 15484.

Petitioner testified he presently has trouble sitting and has shooting pains radiating into his left leg. Petitioner testified he has pain from his neck to the back of his head. He testified that the pain is pretty much there all the time. The Arbitrator notes Petitioner was observed during the course of the trial. He appeared to move about freely and exhibited no outward signs of pain or discomfort.

Accordingly, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 1% pursuant to Section 8(d) 2 as a result of his March 9, 2012 accident.

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

Stephen Higa,

Petitioner,

14IWCC0601

vs.

NO: 11 WC 15484

State of Illinois, Department of Human Services,
Elgin Mental Health Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

DATED: JUL 2 1 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 7/17/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

HIGA, STEPHEN
Employee/Petitioner

Case# **11WC015484**

09WC001470
12WC011345

SOI DEPT OF HUMAN SERVICES ELGIN MENTAL HEALTH SERVICES
Employer/Respondent

14IWCC0601

On 10/29/2013, 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 0.08% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL ROLENC
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

5145 ASSISTANT ATTORNEY GENERAL
KATHERINE ARISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 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

OCT 29 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
CORRECTED

14IWCC0601

STEPHEN HIGA
Employee/Petitioner

v.

Case # 11 WC 15484

Consolidated cases: 09 WC 1470 & 12 WC 11345

State of Illinois, Department of Human Services, Elgin Mental Health 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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, Illinois**, on **5/10/2013**. 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 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

14IWCC0601

On **3/18/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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 **$43,079.00**; the average weekly wage was **$828.44**.

On the date of accident, Petitioner was **45** 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 **$14,488.68** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that based on the stipulation of the parties, Petitioner was temporarily disabled from March 21, 2011 through June 16, 2011, representing 12-4/7 weeks. The Arbitrator further finds that the parties stipulated that Petitioner received full salary for the above period.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,690.00 to Greater Elgin Pain Management, as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit of $285.00 for payments previously made.

Respondent shall further pay reasonable and necessary medical services of $14,488.68 to Sherman Hospital and East Dundee and Countryside, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $14,488.68 for medical benefits that have been paid to Sherman Hospital and East Dundee and Countryside, 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 benefits of $497.06/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.

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

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

Signature of Arbitrator

10/28/13
Date

ICArbDec p. 2

OCT 29 2013

FINDINGS OF FACT:

Petitioner, a 47 year old married male with a history of mental and physical health issues, has been an employee of the Illinois Department of Human Services for approximately the last 27 years. Petitioner testified that he is a trained mental health technician at the Elgin Mental Health Center ("Elgin"). Petitioner testified that his job duties include providing treatment to mentally ill patients, admitting them into the unit, observing them, and caring for them.

Petitioner testified that on March 18, 2011, he attempted to assist a patient off the floor when he experienced stabbing pain in his lower back. As a result of the incident, Petitioner presented at Sherman ER on March 23, 2011. Petitioner was complaining of increasing pain in his right lower back near his kidney which he had for 5 days. Petitioner advised that the pain commenced after lifting a patient at work. The records reflect Petitioner was anxious and shaking. He was given Valium and Dilaudid along with Toradol and Zofran. Petitioner was diagnosed with a lumbar strain. (PX 2)

Petitioner testified that he followed up with his primary care physician, Dr. Ignacio and then Physician's Immediate Care.

On April 12, 2011, Petitioner was seen by Dr. Joanna Barclay. Petitioner informed Dr. Barclay that he had a new injury on March 18, 2011 while picking up a patient. Petitioner provided that his neck pain was now worse (See 09 WC 1470) than before. He also complained of low back pain. Dr. Barclay diagnosed right lumbar radiculopathy. Dr. Barclay ordered a lumbar MRI and recommended a thoracic trigger point injection and an epidural steroid injection. (PX 2)

On May 5, 2011 Petitioner presented to Dr. Warren Wollin at Physicians Imedicate Care. Petitioner complained of intermittent pain down the right leg. Dr. Wollin reviewed the prescribed MRI indicating same showed a bulging disc at L1-L2, L4-5, L5-S1, with no nerve impingement, central canal, or foraminal stenosis. Dr. Wollin diagnosed Petitioner with a lumbar strain and right leg pain. Dr. Wollin recommended Petitioner continue with his prescription of Norco, physical therapy, and avoid prolonged sitting/standing and no lifting greater than 15 pounds. (RX 7a)

On June 8, 2011 Petitioner followed up with his pain specialist, Dr. Barclay at Sherman Pain Clinic. Petitioner complained that he had pain radiating from his left groin area down to the inner aspect of his thigh. Dr. Barclay diagnosed Petitioner with left lumbar radiculopathy Dr. Barclay recommended Petitioner undergo epidural steroid injections, take pain medication (Hydrocodone and Lyrica), and continue physical therapy. (PX 2)

On July 13, 2011, Petitioner saw Dr. Barclay who noted he was having radiculopathy on the left likely related to the left L1-L2 disc protrusion. Petitioner was also having groin pain due to his radiculopathy. Dr. Barclay again recommended an L1-L2 epidural steroid injection which Petitioner underwent on August 19, 2011 at Sherman Hospital. (PX 2)

On October 4, 2011, Petitioner returned to Dr. Barclay still complaining of pain radiating to the groin and interior thigh but noted there has been improvement. He was advised to continue with his medications. (PX 2)

On December 28, 2011, Petitioner returned to Dr. Barclay still complaining of low back pain and neck pain. Dr. Barclay recommended an L1-L2 epidural steroid injection and a left C3-C4-C5-C6 radiofrequency neurolysis. (PX 2)

Petitioner testified he was off work until June 17, 2011 at which time he returned to work. Petitioner testified he was doing a lighter-duty job when he returned to work. He eventually was returned to his regular work duty. Petitioner testified that as a result of his March 18, 2011 incident, he still suffers pain in his left leg, pain in the back of his neck, and in his head. He stated that he trouble sitting for a period time and that he still takes prescription medicine, Norco and Flexeril, for his pain.

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

The medical records reflect Petitioner sustained an injury to his lumbar area on March 18, 2011. He received medical treatment for this injury from Dr. Barclay whom he treated with in the past. In reviewing her medical records, there are newer findings at the L1-L2, L4-L5, and L5-S1 levels. These findings include a left far lateral disc protrusion at L1-L2, a central disc protrusion at L4-L5 and L5-S1. There is no medical evidence to suggest that Petitioner was diagnosed with these conditions prior to March 18, 2011. Respondent offered no rebuttal medical evidence on Petitioner's lumbar condition.

The Arbitrator relying on the sequence of events and the medical records submitted finds that Petitioner's lumbar condition of ill-being is causally related to the accident sustained on March 18, 2011.

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

Petitioner placed into evidence a medical bill in the amount of $3,690.00 from Greater Elgin Pain Management for services rendered. Respondent placed into evidence as Respondent's Exhibit 2(a) a medical bills payment history showing Respondent paid a total of $20,843.07 to various providers including Greater Elgin Pain Management. In reviewing the document it appears the payments made to Greater Elgin do not match up to the bills placed into evidence by Petitioner. There is one payment on this document for December 28, 2011 in the amount of $858.87. That date corresponds to a bill Petitioner placed into evidence but for only $285.00. As Petitioner is only claiming payment in the amount of $285.00 for that date of service, Respondent is entitled to a credit for only the claimed amount, or $285.00.

The Arbitrator finds that Respondent is liable for the medical bills of $3,690.00 from Greater Elgin Pain Management. The Arbitrator awards these bills pursuant to the fee schedule of the Act. Respondent is entitled to a credit of $285.00 for payments previously made.

Petitioner also placed into evidence a letter and itemization from Blue Cross Blue Shield reflecting payments they made to Sherman Hospital and East Dundee and Countryside totaling $14,488.68.

The Arbitrator finds those bills to be related to treatment Petitioner received for his injuries of March 18, 2011. The Arbitrator further finds Respondent is entitled to an 8(j) credit for the sum of $14,488.68. Respondent shall also hold Petitioner harmless from any claims by the providers of these services for which Respondent is receiving this credit.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

Petitioner sustained a low back injury on March 18, 2011 while attempting to assist a patient off the floor. Petitioner presented at Sherman ER where he was diagnosed with a lumbar strain. Thereafter, Petitioner began treating with Dr. Joanna Barclay who diagnosed right lumbar radiculopathy. On May 5, 2011 Petitioner presented to Dr. Warren Wollin at Physicians Imedicate Care. The doctor ordered a lumbar MRI which when completed showed a bulging disc at L1-L2, L4-5, L5-S1, with no nerve impingement, central canal, or foraminal stenosis. Dr. Wollin diagnosed Petitioner with a lumbar strain and right leg pain. Petitioner continued treating with Dr. Barclay who ultimately administered steroid injections to the L1-L2 level. Petitioner is currently working regular duty with no permanent restrictions.

Petitioner testified he still has pain in his back which radiates into his left leg and groin. He testified that it hurts when sitting. Petitioner testified that the pain is constant. The Arbitrator notes Petitioner was observed during the course of the trial. He appeared to move about freely and exhibited no outward signs of pain or discomfort.

The Arbitrator finds that as a result of Petitioner's lumbar injuries, he sustained permanent partial disability to the extent of 3% pursuant to Section 8(d)2 of the Act.

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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROGER MAY,

Petitioner,

vs.

NO: 07 WC 15818
14 IWCC 0602

GREENWOOD TOWNSHIP,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of temporary total disability (TTD) 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.

It is well established that the determination of the time for which a petitioner is temporarily totally disabled is a question of fact for the Commission to decide, and, unless that decision is against the manifest weight of the evidence, it will not be disturbed on review. *Lusietto v. Industrial Comm'n* (1988), 174 Ill. App. 3d 121, 528 N.E.2d 18. The period of temporary total disability encompasses the time from which the injury incapacitates the petitioner until such time as the petitioner has recovered as much as the character of the injury will permit, *i.e.*, until the condition has stabilized. *Rambert v. Industrial Comm'n* (1985), 133 Ill. App. 3d 895, 477 N.E.2d 1364. To show temporary total disability, the claimant must show not only that she did not work, but that she was also unable to work. *Rambert*, 133 Ill. App. 3d 895, 477 N.E.2d 1364.

The Commission finds that Roger May failed to prove that he is entitled to TTD from May 18, 2009 through July 19, 2009 and from August 12, 2009 through August 20, 2011. The evidence establishes that the Petitioner was able to perform his job duties as a Highway

Commissioner from the date of accident on April 15, 2006 through May 18, 2009, the date he voluntarily retired from his elected position. His testimony confirmed that no doctor ever informed him that he could not work as the Highway Commissioner or that he could not seek re-election due to his injury. T.59. & T.65. Further, no work restrictions were placed on the Petitioner at the time of his voluntary retirement on May 18, 2009. Dr. Matthew Ross, on July 17, 2008, indicated that Petitioner was fully capable of performing his job duties. T.59. & PX.8.

On July 20, 2009, Dr. Ross performed right cubital tunnel release on Petitioner. The Petitioner was taken off work by Dr. Ross and though he had already retired, he was correctly paid TTD from July 20, 2009 through August 12, 2009. Petitioner testified that he was released back to work with 10 pound restrictions. T.36.

The Commission notes that Petitioner did not offer into evidence any medical record outlining the parameters of the stated 10 pound restriction, or any medical record that indicated Petitioner had a 10 pound restriction following the cubital tunnel surgery and his discharge from care for that procedure. The only evidence regarding a 10 pound restriction is from Petitioner's testimony. Since there is no corroborative evidence, the Commission finds that the Petitioner's self-serving statement is not persuasive.

Petitioner offered no evidence that he presented his restriction (if any existed) to the Respondent or that the Respondent was unable to accommodate the restriction. Further, Mr. May offered no evidence that the restriction precluded him from performing his job duties as the Highway Commissioner. Additionally, Petitioner offered no evidence that he made any effort to seek employment and was denied employment because of his disability during the alleged period of temporary disability. The Petitioner offered no credible excuse for not looking for work within his alleged restriction during the period for which he seeks TTD. See *Lukasik v. Industrial Com. of Illinois*, 124 Ill. App. 3d 609, 465 N.E.2d 528, 1984 Ill. App. LEXIS 1871, 80 Ill. Dec. 416 (Ill. App. Ct. 1st Dist. 1984), which found no basis from the evidence to justify claimant's failure to seek any employment following his release for light work.

The Petitioner argues that he is entitled to TTD from May 18, 2009 through August 20, 2011 as his symptoms on August 20, 2011, the date he was taken off work by Dr. Lawrence Robbins, were the same as they were on May 18, 2009. His argument that this proves an inability to work during the entire period is not persuasive. The Petitioner provided the Commission with no guidance to support such an award. The Commission notes that the record is devoid of any doctor's note, as of May 18, 2009, or thereafter, that provided Petitioner with any work restrictions due to his work-related injury.

Based on the Petitioner's failure to look for work, his failure to provide documentation of any restriction of 10 pounds or otherwise, either to his employer or the Commission, his failure to inform Respondent of his alleged restriction and his failure to provide the Respondent an opportunity to accommodate his alleged restriction with light work, the Commission finds that Mr. May is not entitled to TTD from May 18, 2009 through July 19, 2009 and from August 12, 2009 through August 20, 2011.

With all of the above in mind, the Commission now considers the argument of the

Respondent relative to Petitioner's employment with May Sand and Gravel, Inc. Respondent has alleged that Petitioner was an active employee of May Sand and Gravel, Inc. It has suggested that the Commission reach this same conclusion based upon the location of the business and certain tax returns that were entered into the record. Additionally, Respondent has introduced a copy of an advertisement which listed Petitioner's name as a contact for the company. Both Petitioner and his wife, the majority owner and operator of the company, denied knowledge of the advertisement.

The Commission does not find the argument of the Respondent persuasive. Respondent's argument is based upon speculation and conjecture. Though the Commission is entitled to reach reasonable inferences, it cannot find that Petitioner was employed with May Sand and Gravel, Inc.

The Commission notes that the Respondent stipulated on the record that Mr. May is permanently and totally disabled as the result of his work-related accident. T.68. While the Commission may have a different view as to the extent of the disability, the Commission does not address this issue as the Commission is bound by the stipulation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 30, 2013, is modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $871.78 per week for a period of 112-4/7 weeks, from July 20, 2009 through August 11, 2009 and from August 21, 2011 through September 23, 2013, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $871.78 per week for life, commencing September 24, 2013, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15 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.

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: AUG 13 2014

MJB/tdm
052
O: 6/24/14

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAY, ROGER J
Employee/Petitioner

Case# **07WC015818**

GREENWOOD TOWNSHIP
Employer/Respondent

14IWCC0602

On 10/28/2013, 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 0.07% 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:

0247 HANNIGAN & BOTHA LTD
RICHARD D HANNIGAN
505 E HAWLEY ST SUITE 204
MUNDELEIN, IL 60060

2389 GILDEA & COGHLAN
EDWARD A COGHLAN
901 W BURLINGTON SUITE 500
WESTERN SPRINGS, IL 60558

14IWCC0602

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

Roger J. May
Employee/Petitioner

v.

Greenwood Township
Employer/Respondent

Case # **07** WC **15818**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Waukegan**, on **9/30/2013**. 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. [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 [ ] 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 **4/15/2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$67,999.88**; the average weekly wage was **$1,307.69**.

On the date of accident, Petitioner was **66** 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 **$96,145.97** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$96,145.97**.

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 $871.78/week for 228 weeks commencing 5/18/2009 through 9/29/2013, as provided in Section 8(b) of the Act.

Respondent shall pay petitioner permanent total disability benefits of $871.78/week for life, commencing 9/30/2013 as provided in Section 8(f) of the Act.

Commencing on the second July 15 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.

Respondent shall pay medical expenses in the amount of $5,431.01 as outlined in petitioner's exhibit 18 Respondent shall be allowed a credit for any of those bills paid prior to September 30, 2013.

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

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

Signature of Arbitrator

10/23/13
Date

OCT 28 2013

Roger J. May
Employee/Petitioner
v.
Greenwood Township
Employer/Respondent

Case # **07** WC **15818**

14IWCC0602

Findings of Fact and Law:

The parties have stipulated that the petitioner was injured on April 15, 2006. While descending a large snowplow on the outside ladder, the petitioner thought he had reached the bottom of the ladder and he released his hands from the ladder not knowing there was one more step. He free fell backwards onto the runner of the vehicle next to the snowplow. He struck his head on the back of the runner forcing his head and chin into his chest, cracking his teeth, fracturing the cervical spine, injuring the right arm and elbow. He was taken to Centegra were CT scan revealed a fracture of the facets at C6 (Px. 2). The petitioner has undergone extensive treatment from the date of the injury up through the date of hearing. The petitioner has worked light duty from the date of the accident through May 18, 2009. On July 17, 2008, there was a Section 12 evaluation with Dr. Matthew Ross. Among the many positive findings the doctor recommended a repeat EMG/NCV. The EMG/NCV was performed September 15, 2008 with numerous positive findings including a right ulnar neuropathy (Px. 8). On February 9, 2009, the petitioner announced to the Township board that he was not going to seek another term as a highway commissioner because of his work injury. In addition to the numerous treating physicians, the respondent tendered Dr. Ross as a treater. The petitioner saw him on June 24, 2009. Dr. Ross indicated that the petitioner would benefit from a right cubital tunnel release. That surgery was performed July 20, 2009. The petitioner was taken totally off work from thet date of surgery through August 12, 2009 when Dr. Ross gave him a 10 pound lifting restriction. The Respondent did not begin the payment of temporary total disability benefits until August 22, 2011. On September 3, 2009, Dr. Ross continued the petitioner on his restrictions and referred him back to the anesthesiologist for additional pain diagnostic work-up in an effort to locate and mask or ameliorate the neck pain.

Almost 2 years later the respondent had the petitioner evaluated by Dr. Robbins who is the pain doctor. Prior to that point in time he was referred to Dr. Dano. On March 8, 2010, his chief complaints to Dr. Dano were back pain, dizziness, ear congestion, eye pain, headaches, jaw clicking, jaw joint noises, jaw pain and limited mouth opening and muscle soreness, neck pain, ringing in the ears and shoulder pain. Dr. Dano indicated the petitioner suffered from jaw trauma due to the injury of April 15, 2006. On April 26, 2010 Dr. Dano recommended a mandible orthopedic repositioning device.

The respondent had the petitioner evaluated by Dr. Robbins on August 22, 2011. It should be noted that the petitioner's pain had not changed prior to being seen by Dr. Robbins. However, Dr. Robbins took him off of work on this date and never released him to return to work.

There is no dispute that the petitioner has been totally disabled from work as of August 22, 2011 when he saw Dr. Robbins. The dispute is whether the petitioner is entitled to temporary total disability benefits from May 18, 2009 through August 21, 2011.

Prior to May 18, 2009, the petitioner had been receiving epidural steroid injections in both the lumbar and cervical spine from Dr. Carobene. The petitioner obviously was not at maximum medical improvement on May 18, 2009. On June 24, 2009, Dr. Ross noted the ongoing epidural steroid injections for the cervical spine, the persistent pain in the right upper neck, head and sizzling or throbbing in the head, pain in the right upper back and scapula area, and numbness in the right hand. These are the same symptoms that Dr. Robbins noted on August 22, 2011 and what Dr. Robbins indicated precluded the petitioner from returning to any type of work. It is further noted that Dr. Ross took the petitioner totally off of work on July 20, 2009 when the petitioner had the right cubital tunnel release and did not release him to return to light duty work until August 12, 2009.

Dr. Robbins is currently treating the petitioner with trigger point injections which do, in fact, provide the petitioner with relief. On September 4, 2013, Dr. Robbins had the petitioner continued off work. This treatment is to alleviate the petitioner's occipital neuralgia.

Interstate Scaffolding v. Illinois Worker's Compensation Commission 236 Ill2d 132, 923 N.E.2d 266 (2010) indicates that a petitioner is entitled to temporary total disability benefits up until the point where he reaches maximum medical improvement. Based upon the treatment that the petitioner has had beginning May 18, 2009, it is the finding of the arbitrator that the petitioner had not reached maximum medical improvement and therefore it is the finding of the arbitrator that the petitioner is entitled to temporary and totally disabled from May 18, 2009 through the date of hearing of September 23, 2013.

It is the finding of the arbitrator that the petitioner's treatment has rendered by Dr. Robbins is necessary, reasonable and related to relieve the petitioner's condition of ill being.

It is the finding of the arbitrator that the petitioner has reached maximum medical improvement as of the date of September 30, 2013 and as of this date is permanently and totally disabled pursuant to Section 8(f) of the Act.

Respondent shall pay medical expenses in the amount of $5,431.01 as outlined in petitioner's exhibit 18. Respondent shall be allowed a credit for any of those bills paid prior to September 30, 2013.

Commencing on the second July 15 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.

Arbitrator Edward Lee

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ISACC ALLEN,

Petitioner,

14IWCC0603

vs.

NO: 10 WC 48689

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

With respect to the issue of nature and extent of Petitioner's injuries, the Commission finds the Arbitrator erred in finding Petitioner failed to prove entitlement to permanent partial disability benefits. Based upon a review of the record, the Commission finds Petitioner is entitled to an award of permanent partial disability benefits to the extent of 2% loss of use of the man-as-a-whole under Section 8(d)2 of the Act based upon his soft tissue injuries to his low back and neck. In so finding, the Commission relies on the following: Petitioner's credible testimony as to his continuing subjective pain complaints following his release to return to work by MercyWorks on January 1, 2011, including an inability to sit for long periods of time, pain, spasms and stiffness; Treating records documenting his significant pain complaints as of that release to return to work; Petitioner's continuing treatment thereafter with his own physician, Dr. Foster; Petitioner's unrebutted testimony that he was not symptomatic from any prior injuries on the date of his work injury; and, Dr. Foster's March 3, 2011 report wherein the doctor distinguished Petitioner's prior ailments and his pain related complaints from his work-related injury of December 8, 2010.

14IWCC0603

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 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 $859.62 per week for a period of 6.14 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 $669.64 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the Petitioner 2% loss of use of the man-as-a-whole.

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

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

The Respondent is exempt from bonding requirement for removal of this cause to the Circuit Court based upon Section 19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 22 2014
KWL/kmt
O-07/08/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0603

ALLEN, ISAAC
Employee/Petitioner

Case# 10WC048689

DEPT OF STREETS AND SANITATION
Employer/Respondent

On 12/2/2013, 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 0.10% 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:

0412 RIDGE & DOWNES
AMYLEE HAGAN SIMMONVICH
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

0113 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

Illinois WORKERS' COMPENSATION Commission

14IWCC0603

ARBITRATION DECISION

Isaac Allen
Employee/Petitioner

v.

Department of Streets & Sanitation
Employer/Respondent

Case # 10WC 048689

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 **Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **10/01/2013**. 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 **12/08/2010**, 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 $ **67,047.11**; the average weekly wage was $**1,289.43**

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** children under 18.

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

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

Respondent shall be given a credit of $**5,270.53** for TTD, $**0.00** for TPD, for a total credit of $**5,270.53**.

Respondent is entitled to a credit of $ 653.**00** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $859.62/week for 6 1/7 weeks, commencing 12/9/10 through 1/20/11, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $5,280.53 for temporary total disability benefits that have been paid.

Medical Benefits

Respondent shall pay for medical services in the amount of $968.67 as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $653.80 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.

Permanent Partial Disability: Person as a whole

The arbitrator does not award any permanent partial disability benefits.

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

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

Signature of Arbitrator

12-2-13
Date

DEC 2 - 2013

PROCEDURAL HISTORY

This matter was presented for a hearing before Arbitrator Ketki Steffen on October 1, 2013. Both parties were represented by counsel and entered into several stipulations that are contained as Arbitrator's Exhibit No. 1 ("AX1") for the trial record. The disputed issues are causal connection, Temporary Total Disability payments ("TTD"), medical payments for the physical therapy sessions at West Suburban Medical Center from September 29, 2011 through December 20, 2011 and nature and extent of the injuries.

SATEMENT OF FACTS

The petitioner, Isaac Allen, Jr. is 61 years old (58 years old at time of accident) and works as a truck driver for the City of Chicago. He drives a city truck with a small crew of two to three other employees and his duties involve rodent abatement throughout the city. He testified that on December 8, 2010, he was rear-ended while driving. No ambulance was dispatched to the scene but the Petitioner testified that he went to Mt. Sinai Hospital. He complained of lower back, left shoulder and left side neck pain. Hospital records show a CT scan of the cervical spine as being normal and x-rays of the lumbosacral spine as showing no fracture or subluxation. Petitioner was prescribed Tylenol and Cyclobenzaprine.

Petitioner also went to the Chicago Police Department and filled out an accident report (RX2). On cross examination Petitioner denied knowledge that the police officer has indicated in the report that there were no injuries to petitioner/driver.

Petitioner further testified that he had informed his supervisor of the accident (notice is undisputed) and was directed to go to a follow up medical checkup at Mercy Works on December 9, 2010. (PX1). He also returned to Mercy Works on December 14, 2010 and treated with them through January 11, 2011.

Records (PX1) show, at his initial appointment, Petitioner had the following subjective complains. He

complained of neck pain that radiated to his left shoulder. He also complained of left shoulder pain as being an eight on a one to ten scale. He described the pain as worse when raising his left arm above shoulder-level. He also complained of low back pain as a seven out of ten on a pain scale. He stated that this was radiating to the left calf and causing numbness.

PX1 records show that a physical examination by Dr. Homer Diadula revealed tenderness in the paracervical areas and the sternocleidomastoid muscles, left greater than right. There was also tenderness in the trapezius, with less tenderness in the acromioclavicular joint and bicipital groove. Range of motion of the lumbar spine was limited with tenderness in the lumbosacral spine, including the paralumbar areas. Dr. Diadula diagnosed petitioner with a strain to the neck, lower back, and left shoulder arising from his motor vehicle accident. He prescribed Tylenol, cyclobenzaprine, ice/heat packs, and a home exercise program. Mr. Allen was restricted from lifting more than 20 pounds, driving, and from repeated bending, twisting or bouncing.

PX1 records show that at the December 14, 2010 follow up appointment, Petitioner stated that his neck and left shoulder pain were decreased to 1 out of 10, but his lower back pain was 7 out of 10. He also complained of a grinding sensation in the left shoulder. Range of motions continued to be limited and some tenderness was noted. Dr. Diadula prescribed physical therapy at this time and all other recommendations from the prior visit were continued.

Mr. Allen began physical therapy on December 16, 2010. After attending three (3) visits, he followed-up with Dr. Diadula on December 28, 2010. At this time, Mr. Allen complained of neck, left shoulder, and low back pain of 6 out of 10 in all areas. Tenderness and limited ranges of motion continued to be observed on physical examination. Dr. Diadula recommended an MRI of the shoulder.

The MRI of the left shoulder obtained on January 5, 2011 showed mild hypertrophic changes of the acromioclavicular joint. Mr. Allen attended two more visits of physical therapy and followed-up with Dr. Diadula on January 11, 2011. Dr. Diabula notes on his visit that Petitioner continues to complain of neck, shoulder and lower back pain but that the CT spine of the neck from 12/09/10 is normal; lumbar spine x-ray of

12/8/10 shows no fracture/dislocation and the cervical spine and left shoulder have full range of motion with hardly any tenderness. Dr. Diabula's notes also show that the bilateral straight leg raising was negative and there was good tiptoe and heel-walk with hardly any tenderness. Based on these findings, Dr. Diabula discharged Petitioner for full work duties and prescribed Tylenol and warm soaks as needed.

Petitioner returned to work but was required by the Respondent to pass a physical before being allowed to return to work. Upon completion of said physical, petitioner was cleared to return to work by the City on January 21, 2011. He returned to his normal work duties without restrictions or accommodations and was paid Temporary Total Disability benefits up until this time.

Petitioner testified that he visited Dr. Foster on January 24, 2011. (PX3) Dr. Foster's notes indicate that petitioner continued to complain of ongoing pain in the cervical spine, lumbar spine, and left shoulder and this was likely from soft-tissue injury that would respond to analgesics, muscle relaxants, and physical therapy. Respondent did not authorize the additional physical therapy but Petitioner then attended nine (9) sessions through his group health insurance on 9/28/11, 10/25/11, 10/26/11, 11/7/11, 11/9/11, 11/29/11, 12/13/11, 12/15/11, and 12/20/11 at West Suburban Medical Center. Mr. Allen has not received any treatment for this injury since December, 2011 and continues to work his current job duties.

Subsequently, Respondent obtained a retrospective Utilization Review regarding the reasonableness and necessity of the nine (9) physical therapy visits at issue. On June 27, 2013, Coventry Workers' Comp Services issued a report indicating that Dr. Ann Nunez, M.D., determined that the medical necessity of the treatment has not been documented. (RX3). However, Dr. Foster appealed this decision and on August 1, 2013, Coventry Workers' Comp Services issued a Notification of Appeal Certification, wherein it certified that the documentation met the evidence-based guidelines for the requested services. (PX4).

Conclusion/Findings

Based on the evidence, statutes and case law, the Arbitration finds that the Petitioner's accident did occur and arise in the course of employment, that the Petitioner's condition of ill-being was causally related to this

injury and that the medical services provided were reasonable and necessary. Specifically with respect to the nine additional physical therapy session at West Suburban medical Center, Arbitrator finds that they were causally related to the accident and were reasonable and necessary. Arbitrator awards TTD benefits and finds that Respondent should pay for the additional medical care i.e. the nine additional therapy sessions. Arbitrator further finds, based on the Petitioner's testimony, his impeachment and his long history of other injuries and medical issues relating to the same body parts that the Petitioner has failed to meet his burden on the issue of Permanency. Arbitrator, in the absence of objective medical findings or testimony, declines to award a permanency benefit in this matter.

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

Petitioner's testimony, police reports and medical reports all clearly show that Petitioner was involved in a Motor Vehicle accident while working for the Respondent and during the scope of his employment. The evidence also supports that Petitioner notified his employer, sought medical attention for left shoulder, left neck and low back pain. The medical diagnosis and treatment were conservative, following a CT scan. An MRI of the left shoulder from January 5, 2011 showed mild hypertrophic changes in the acromioclavicular joint. Petitioner received pain medication and physical therapy and returned back to work without restrictions.

Therefore, based on Petitioner's testimony and supporting medical documentation, the Arbitrator finds that that there is a causal connection between the Petitioner's condition of ill-being and his work injury.

WITH RESPECT TO ISSUE, 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:

Although Respondent disputes all of the treatment, the initial treatment and follow up with Mercy Medical has been paid for by Respondent and there has been little evidence offered to show why or how emergency care and a follow-up with physician, after an accident during course of employment, are not reasonable or necessary. At real issue in this case is the follow up treatment with Dr. Foster on January 24, 2011 where Dr. Foster

recommends additional physical therapy. Respondent argues that this treatment is not reasonable and necessary and is unrelated to the accident. Respondent bases his argument upon the fact that Petitioner did not obtain this therapy for several months (eight months from January, 2011 to September, 2011) and had in fact returned to work full time, without restrictions. However, in finding that these sessions are medically necessary, reasonable, causally connected and therefore compensable, it is important to note that Petitioner explained that the delay is partly caused by Respondent's disagreement with paying for them. Also, Petitioner's returning back to full duty work is not a bar to medical treatment, specially pain management or physical therapy type of treatments. In this case, Petitioner's return to full time duties were accompanied by this subjective complains of continued pain. Additional physical therapy by a treating physician, who knows the Petitioner's history, is therefore appropriate. Lastly, the retrospective Utilization Review from Coventry Worker's Compensation Services also supports this conclusion that an evidence-based guidelines review found these sessions reasonable and necessary. (Although Respondent's brief fails to mention that the appeal was successful and in fact states that the treatment was rejected; the evidentiary record bears this out). Therefore, the Arbitrator finds that the physical therapy services rendered by West Suburban Medical Center were causally-related to the accident.

The Respondent therefore is liable for the following expenses:

DATE OF SERVICE	CPT CODE	UNITS	FEE SCHEDULE
9/28/2011	97001	1	$88.07
9/28/2011	97110	1	$44.03
10/25/2011	97110	2	$88.06
10/26/2011	97110	3	$132.09
11/7/2011	97110	2	$88.06
11/9/2011	97110	3	$132.09
11/29/2011	97110	3	$132.09
12/13/2011	97110	2	$88.06
12/15/2011	97110	2	$88.06
12/20/2011	97110	2	$88.06
		TOTAL	$968.67

Respondent is liable for this bill but is entitled to an 8(j) credit of $653.80 for medical bills it paid through its group medical plan. (RX1) Respondent is ordered to reimburse Petitioner $314.87 for the amount Petitioner has already paid towards this bill and Petitioner is be held harmless in regards to further payment on these bills.

WITH RESPECT TO ISSUE, WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

On the issue of TTD, Petitioner has testified, that he missed six weeks of work due to his accident. Petitioner has requested TTD payments through 1/20/11 because although he was medically released and returned to full duty on January 11, 2011, his employer required a medical release and physical exam which were not completed till January 20, 2011. (Respondent's briefs nor arguments counter or consider this fact) Therefore, Respondent's argument that Petitioner should not receive TTD after the January 11th release lacks merit. Petitioner cannot be faulted or denied TTD when it is the Respondent's internal requirement that holds off Petitioner's return to work. Therefore, TTD is appropriate for the full six weeks with the Respondent to receive full credit for this amount that is already paid (Stipulation between the parties, AX1)

Arbitration awards TTD benefits for six weeks from December 9, 2010 till January 21, 2011 at the average weekly benefit rate of $859.62, for a total amount of $5280.53. Respondent shall receive credit for full said amount already paid.

WITH RESPECT TO ISSUE, WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the evidence shows that Petitioner was involved in a Motor Vehicle accident while working for the Respondent and during the scope of his employment. His suffered injuries to his back, neck and shoulder which were treated conservatively. Subsequent physical therapy, although delayed, was reasonable and necessary and approved per recommendation of the treating physician.

However, with respect to the request for Permanent Partial Disability award, ("PPD") the Arbitrator finds that Petitioner is not entitled any permanency award based on the fact that Petitioner has failed to prove the

same. The record shows that the Petitioner had healed from his accident for his doctor to release him without restrictions. In fact, PX1 records show that at the December 14, 2010 follow up appointment with Mercy Works, Petitioner stated that his neck and left shoulder pain were decreased to 1 out of 10, but his lower back pain was 7 out of 10. Subsequently, Dr. Diabula also notes that although the Petitioner continues to complain of neck, shoulder and lower back pain, the CT spine of the neck from 12/09/10 is normal; lumbar spine x-ray of 12/8/10 shows no fracture/dislocation and the cervical spine and left shoulder have full range of motion with hardly any tenderness. Dr. Diabula's notes also show that the bilateral straight leg raising was negative and there was good tiptoe and heel-walk with hardly any tenderness. Based on these findings, Dr. Diabula fully discharged Petitioner for full work duties and prescribed Tylenol and warm soaks as needed.

Petitioner returned back to his original, full time work duties, without restrictions within a very brief time span. Although Petitioner testified that he uses ice packs and takes over the counter medication for his pain, he has not received or sought any further medical treatment for this accident since December, 2011. Petitioner's credibility regarding his continued pain and permanency is a contributing factor in the Arbitrator's assessment on this issue. Additionally, lack of medical corroboration for the subjective complains is also a factor. During trial, the Respondent questioned the Petitioner regarding prior accidents/injuries to his neck or back. The Petitioner initially denied any prior claims but was impeached with the introduction into evidence of three prior Illinois Worker's Compensation claims reflecting settlements involving neck and back injuries. (RX3) The Petitioner had also suffered stroke in 2008 which has left him with physical restrictions and medical issues, causally unrelated to this case. There is no medical evidence or testimony to clarify if Petitioner's current complaints arise out of this accident or his other medical issues or prior injuries. Lastly, the independent medical exams such as the CT scan and the X-rays of the lumbar were also normal, therefore weakening Petitioner's request for permanency. (PX1)

The burden of proof to prove permanency is on the Petitioner. Petitioner failed through his testimony to show that his injuries were permanent or that they were related to or worsened by this work accident. The

treating physician's records that he was healed from his accident and there is no medical opinion differentiating between his prior ailments and injuries and his current condition. In a case such as this, where Petitioner has three prior injuries to the same region was impeached and fails to show through his testimony or medical evidence that there is permanency due to this work accident, a permanency claim is unsupported. All of these factors, combined with the fact that the Petitioner has not needed prescription medications or medical care and has faithfully performed his full work duties for over eighteen months since the accident, leads to the Arbitrator's conclusion that a permanency award is not appropriate in this case.

ORDER OF THE ARBITRATOR

Petitioner's injuries were causally related and arose out of employment; Petitioner is entitled to medical treatment, physical therapy and to TTD for lost time but has failed to prove permanency.

Arbitrator, Ketki S. Steffen

December 3, 2013

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

ROBERT TAYLOR,

Petitioner,

14IWCC0604

vs.

NO: 08WC 56256

CITY OF SPRINGFIELD,

Respondent.

DECISION AND OPINION PURSUANT TO SECTION 19(h) and SECTION 8(a)

On February 10, 2011, Petitioner testified before Arbitrator Jeffery Tobin, claiming the December 1, 2008, workplace aggravation of his lumbar canal stenosis resulted in him experiencing continuing pain in his lower back and pain and numbness in his left leg, foot and heel, taking Tramadol daily, having his back stiffen with prolonged sitting and having a diminished ability to perform chores around the house. Based on these complaints, Arbitrator Tobin found Petitioner to have sustained a permanent partial disability that resulted in the 27.5% loss of the person as a whole and entered an award reflecting this. Respondent petitioned the Commission to review Arbitrator Tobin's decision, and the Commission unanimously found there to be evidence of Petitioner's permanent injuries not being as severe as Arbitrator Tobin believed them to be and, subsequently, reduced the permanent partial disability award by 5% to 22.5% loss of the person as a whole. No appeal was taken of the Commission's Decision and Opinion on Review. On March 24, 2013, Petitioner petitioned the Commission to revisit his claim under Section 19(h) and Section 8(a) of the Act, claiming that his physical condition has worsened since he testified before Arbitrator Tobin on February 10, 2011. A hearing pursuant to said petition was heard on July 25, 2013, and presided over by Commission Mario Basurto. A transcript of that proceeding was taken and documents admitted. The Commission finds, in reviewing the evidence, Petitioner seeks the PPD award to be increased to 27.5% loss of the person as a whole, reimbursement for medical expenses incurred and prospective medical treatment to be awarded in the form of pain management treatment administered through Dr. Salvacion. The Commission, after reviewing the evidence, finds there to be little support in the record to find in favor of Petitioner.

The Commission finds nothing supporting Petitioner's claim to merit an increase to his PPD award. Petitioner testified before Commissioner Basurto that his treating physician at the Springfield Clinic increased the number of Vicodin tablets he was to take daily from two to three rather than increase the potency of the tablets. It is noted, however, that the treatment records from the Springfield Clinic from October 25, 2011, indicate just the opposite. The pertinent record states, "He is taking 5/324 he tells me . . . I gave him 10/325, and we discussed how this is twice as strong as what he has at home." This clearly

refutes Petitioner's claim that he was instructed to take this medication on a more frequent basis. The Commission finds, if in fact, Petitioner took an increased number of doses rather than stronger doses, it may only indicate Petitioner was seeking a pain medication regimen that works best for him. As noted by Dr. Salvacion, Petitioner's pain medication specialist, a number of pain medications, including Lyrica, Gralise, and Baclofen, were prescribed, but they all either had unacceptable side effects or were ofquestionable benefit. Notably, nowhere in Dr. Salvacion's records does it indicate Petitioner was being treated for increased pain or a worsening physical condition.

Persuasive to the Commission is the above-referenced October 25, 2011, Springfield Clinic record noting that noted Petitioner complaining of "lower back pain since he stepped in a hole [four] days ago." The operation of the word "since," the Commission finds, implies that Petitioner was not symptomatic in his low back prior to his stepping into a hole, and also that Petitioner's treatment records prior to his presentment to Springfield Clinic on October 25, 2011, indicate he had not complained any low back pain over his five prior visits to the Springfield Clinic dating back to May 19, 2011. The Commission does, however, acknowledge these records reflected that Vicodin was among the medication Petitioner was noted to be among his then-current medication, but it finds the record indicating Petitioner complaining of lower back pain since stepping into a hole on October 21, 2011, to be more illustrative of the condition of his low back at that time.

Petitioner's treatment records do not reflect a change, let alone a worsening, of his physical condition attributable to his December 1, 2008, accident. This bolstered by Petitioner's testimony before Commissioner Basurto on July 25, 2013, as he answered the question, "[Y]our chronic pain has basically stayed the same since the arbitration, correct?," affirmatively.

As Petitioner failed to demonstrate a worsened physical condition stemming his December 1, 2008, accident, the Commission finds it unnecessary to disturb the PPD benefits awarded to Petitioner in its Decision and Opinion on Review from November 9, 2011.

Turning its attention to the medical expenses Petitioner incurred and the prospective medical services Petitioner seeks, the Commission finds Petitioner failed to prove either reasonable or necessary let alone both.

Petitioner incurred medical expenses treating with his pain medication specialist, Dr. Salvacion. The purpose of his treating with Dr. Salvacion, as he testified to before Commissioner Basurto, was to wean himself from his current pain medication regimen with the hope of being able to manage his pain without medication. This expressed motivation is absent from the records of either his then-treating physician, Dr. O'Brien, or Dr. Salvacion, with Dr. O'Brien's records only noting Petitioner requested the services of a pain management physician. Dr. Salvacion's records reflect no expressed motivation for or goal of reducing or eliminating Petitioner's use of pain medications, only the search for effective pain medication. Based upon Petitioner's medical records, the Commission is uncertain as to the necessity of Petitioner treating with Dr. Salvacion in an effort to eliminate his need for pain medication when there was no evidence Dr. O'Brien was incapable of or unwilling to do the same. This uncertainty precludes the Commission from holding Respondent liable for medical expenses incurred by Petitioner for his treatment with Dr. Salvacion.

The Commission also finds it is unable to award the prospective medical treatment Petitioner seeks as it is unconvinced Petitioner was partaking in any active pain management treatment as of July 25, 2013. Petitioner testified, at that time, he was prescribed Vicodin on a monthly basis by Dr. O'Brien and that he was seen by Dr. O'Brien every six months. Petitioner provided nothing to support this claim as he tendered only two records from his treatment with Dr. O'Brien into evidence, both from 2012, and only one that referenced pain medication. That record, written on May 10, 2012, indicated the

14IWCC0604

medications Petitioner was known to be on at that time were Lipitor, Cymbalta and Ritalin. The second record, written on August 24, 2012, indicated, again, that Petitioner was being prescribed Lipitor, Cymbalta and Ritalin. Petitioner apparently represents those two records to be the extent of his treatment with Dr. O'Brien and, as neither indicates Dr. O'Brien provided Petitioner a prescription for Vicodin on either of those two dates or anytime thereafter. The Commission concludes Petitioner misstated the extent he used or uses Vicodin based on the submitted evidence, and presumes Petitioner last took Vicodin or hydrocodone-acetaminophen, the equivalent of Vicodin, in April 2012, as he was last provided with a prescription for twenty tablets of hydrocodone-acetaminophen, on March 23, 2012, and no refills being authorized. Given this history, the Commission finds Petitioner does not need the services of Dr. Salvacion to wean him off any pain medication as he failed to demonstrate he was using any such medication. The Commission, therefore, declines to find Petitioner to be in need of any prospective medical treatment relatable back to his December 1, 2010, accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's request for additional PPD, reimbursement medical expenses and prospective medical treatment under Sections 19(h) and 8(a) of the Act is 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: JUL 22 2014
KWL/mav
O: 6/3/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ 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 Galowitch,

Petitioner,

14IWCC0605

vs.

NO: 12 WC 25208

Village of Fox Lake,

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 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).

This matter came before Arbitrator Edward Lee on April 10, 2013, pursuant to Section 19(b) of the Act. At that time, the contested issues were accident, incurred medical expenses and prospective medical care. On June 3, 2013, Arbitrator Lee caused an arbitration decision to be filed with the Illinois Workers' Compensation Commission, a decision in which Petitioner was found to have sustained a compensable injury and also held Respondent liable for both the medical expenses incurred by Petitioner as well as the prospective bilateral carpal tunnel release surgery that was recommended by Dr. Kuesis. Respondent took timely appeal of the arbitration decision, contesting the entirety of the arbitration decision.

The Commission, having reviewed the transcript of the April 10, 2013, proceedings as well as the exhibits tendered by both parties, finds it necessary to modify Arbitrator Lee's arbitration decision with respect to the amount of medical expenses Respondent is liable for. The Commission found medical charges are either unrelated or unrelatable to Petitioner's compensable injury. Specifically, the Commission finds Petitioner's January 23, 2012, visit to Dr. Wilcox resulted in a $505.00 charge. Of this amount, $211.00 was charged for the visit itself, a visit during which Petitioner's bilateral carpal tunnel condition was discussed. The remaining amount of $294.00 is attributed to lab work that performed. The

relationship between this lab work and Petitioner's compensable condition is not clear, either within the record itself or through testimony, and, as such, the responsibility for payment of the $294.00 falls upon Petitioner. Similarly, Petitioner is also found to be personally liable for the $141.00 in incurred charges that resulted from her January 26, 2012, visit to Dr. Wilcox. The Commission finds the only concerns addressed during that visit were Petitioner's abnormal weight gain and her irregular menstrual cycle. The Commission finds neither of these concerns is relatable to Petitioner's bilateral carpal tunnel symptoms.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall authorize the prospective medical care in the form of bilateral carpal tunnel release and be held responsible for all the reasonable and necessary medical expenses incurred from said surgeries.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all medical expenses incurred by Petitioner for treatment of her bilateral carpal tunnel condition from the date of accident, January 23, 2012, through the date of the arbitration hearing, April 10, 2013; Respondent is not liable for $294.00 of the $505.00 charged to Petitioner on account of the January 23, 2012, visit to Dr. Wilcox or for the $141.00 charged to Petitioner on account of her January 26, 2012, visit to Dr. Wilcox.

IT IS FURTHER ORDERED BY THE COMMISSION these awards 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.

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: JUL 22 2014
KWL/mav
O: 6/24/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0605

GALOWITCH, PATRICIA
Employee/Petitioner

Case# 12WC025208

VILLAGE OF FOX LAKE
Employer/Respondent

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:

0152 LINN CAMPE & RIZZO LTD
JOHN J RIZZO
215 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
STEPHEN FRIEDMAN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0605

PATRICIA GALOWITCH
Employee/Petitioner

v.

VILLAGE OF FOX LAKE
Employer/Respondent

Case # **12** WC **25208**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Rockford (Waukegan Venue)**, on **4/10/13**. 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 **Prospective Medical Care**

14IWCC0605

FINDINGS

On the date of accident, **1-23-12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$47,976.44**; the average weekly wage was **$921.47**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **2** dependent children.

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

Pursuant to stipulation sheet the parties did not request a decision with findings of fact and conclusions of law.

ORDER

Medical Benefits:

The Arbitrator awards prospective medical care pursuant to Section 8a and 8.2 of the Act as recommended by Dr. Kuesis on 12/27/13, i.e. bilateral carpal tunnel release.

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

5/31/13
Date

ICArbDec19(b)

JUN -3 2013

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☐ 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

Billy J. Bailey,

Petitioner,

14IWCC0606

vs.

NO: 08 WC 051234

Rockford Housing Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, TTD, PPD 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.

On January 31, 2013, Arbitrator Lee caused to be filed with the Illinois Workers' Compensation an arbitration decision in which all contested matters were decided in favor of Petitioner. Specifically, Arbitrator Lee found there to be a causal connection between Petitioner's August 2, 2007, accident and the medical care he received as well as between said accident and Petitioner's entitlement to TTD and PPD benefits. In addition to awarding these benefits to Petitioner, Arbitrator Lee also awarded Petitioner additional benefits under Section 16, Section 19(k) and Section 19(l) after concluding Respondent's actions merited the imposition of penalties and fines. After being afforded the opportunity to review the evidentiary record, the Commission is in agreement with the findings and conclusions made by Arbitrator Lee on all of the issues except for those that led him to impose penalties and attorney's fees.

The basis for the imposition of penalties and fees was Arbitrator Lee finding Respondent improperly relied on Dr. Hastings' amended medical opinion to deny Petitioner benefits under the Act. The aspects of the amended opinion Arbitrator Lee took issue with were Dr. Hastings'

suggestion, based on what he saw on surveillance footage, that Petitioner did not have a symptomatic medial meniscus tear and would be able to work without restrictions, opinions which ran opposite the opinions of Petitioner's then-treating physician, Dr. Whitehurst, who imposed work restrictions on Petitioner and recommended surgery to address Petitioner's symptomatic knee. Arbitrator Lee also believed that there were aspects of Petitioner's condition and care that he felt Dr. Hastings ignored. The Commission finds nothing so improper with Respondent's reliance on Dr. Hastings' amended medical opinion as to merit the imposition of penalties.

With respect to the conflicting opinions of Dr. Hastings and Dr. Whitehurst, the Commission recognizes that it is not necessarily unreasonable for physicians to have conflicting opinions, particularly if there is uncertainty that they have the same information. In the present case, the Commission is only certain that Dr. Hastings viewed the surveillance footage of Petitioner dancing while Dr. Whitehurst's records do not indicate that he saw this footage. This possibility would explain why the two physicians' opinions concerning Petitioner's condition diverge with respect to the symptomatic nature of Petitioner's knee and of his ability to with restrictions.

The Commission is unsure as to what Arbitrator Lee meant about Dr. Hastings' ignoring certain aspects of Petitioner's care. The Commission finds taking into consideration, as Arbitrator Lee states, "the waxing and waning of medial meniscal tears" places an unnecessary demand on Dr. Hastings to project beyond what was known to him. Dr. Hastings examined Petitioner pursuant to Section 12 on December 3, 2008, and found Petitioner to have pain symptoms in his left knee that were consistent with a medial meniscal tear. He subsequently recommended Petitioner restrict stair climbing. A little more than two months later, Dr. Hastings viewed surveillance footage of Petitioner dancing, performing "spinning maneuvers on his leg [that] suggest his MRI documented medial meniscus tear is not symptomatic." He then recanted the work activity restriction he suggested on December 3, 2008, and, instead, found Petitioner capable resuming his normal work activities in an unrestricted manner. The surveillance also appears to have changed Dr. Hastings' opinion concerning the need for physical therapy, another of the recommendations Dr. Hastings made following the December 3, 2008, examination. The Commission finds nothing inappropriate with Dr. Hastings having a changed opinion after viewing what is arguably objective evidence of the condition of Petitioner's left knee. Lastly, Arbitrator Lee found "Dr. Hastings completely ignored the fact that none of Petitioner's doctors said he should not dance." The Commission finds Dr. Whitehurst's office had, however, instructed Petitioner not to engage in repeated bending/stooping, pivoting or lifting. Petitioner was recorded, the Commission notes, engaged in several of the prohibited acts. Dr. Hastings saw this, and it was this that prompted him to reverse his opinion as to the condition of Petitioner's left knee. The Commission finds nothing untoward with this or with Respondent's reliance on Dr. Hastings' changed opinion in deciding deny Petitioner benefits. The Commission also finds Respondent's actions does not to rise to the level of being unreasonable or vexatious as to come into the orbit of Sections 16, 19(k) and 19(l).

The Commission, after reviewing the record in the present matter, modifies the Decision of the Arbitrator to vacate the awarding of penalties and fee as stated above but otherwise affirms and adopts all other aspects of the Decision of the Arbitrator.

14IWCC0606

IT IS THEREFORE ORDERED BY THE COMMISSION that the order that Respondent pay to Petitioner penalties and fees under §16, §19(k) and §19(l) is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $841.17 per week for a period of 21 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 $636.15 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 15% loss of use of the left leg

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner for the medical expenses set forth in Petitioner's Exhibit #1 under §8(a) and §8.2 of the Act.

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

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

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: JUL 22 2014
KWL/mav
O: 6/24/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
SECOND CORRECTED

14IWCC0606

BAILEY, BILLY J
Employee/Petitioner

Case# 08WC051234

ROCKFORD HOUSING AUTHORITY
Employer/Respondent

On 1/31/2013, 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:

0230 FITZ & TALLON LTD
PATRICK A TALLON
5338 MAIN ST
DOWNERS GROVE, IL 60517

2389 GILDEA & COGHLAN LTD
RUAN M REGAN
901 W BURLINGTON SUITE 500
WESTERN SPRINGS, IL 60558

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

2nd CORRECTED
ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0606

Billy J. Bailey
Employee/Petitioner

Case # **08** WC **51234**

v.

Consolidated cases: **N/A**

Rockford Housing 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 **Edward Lee**, Arbitrator of the Commission, in the city of **Rockford**, on **April 25, 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 2, 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 **$65,611.52**; the average weekly wage was **$1,261.76**.

On the date of accident, Petitioner was **62** 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

Respondent shall pay Petitioner temporary total disability benefits of $841.17/week for 21 weeks, commencing January 5, 2009 through May 31, 2009, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $6,729.36 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit #1 as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $8,647.42 under Section 8(j) of the Act 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 benefits of $636.15/week for 32.25 weeks, because the injuries sustained caused the 15% loss of the left leg, as provided in Section 8(e) of the Act.

Respondent shall pay to Petitioner penalties of **$2,187.04**, as provided in Section 16 of the Act; **$5,467.61**, as provided in Section 19(k) of the Act; and **$10,000.00**, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

1/24/13
Date

ICArbDec p. 2

JAN 31 2013

FINDINGS OF FACT

The Petitioner, BILLY J. BAILEY, was employed by the Respondent, ROCKFORD HOUSING AUTHORITY, as a lead foreman at the time of his undisputed work injury of August 2, 2007. The Petitioner had been working for Respondent for over 29 years at the time of this injury, having been hired by Respondent on July 2, 1978. (PX9)

In his capacity as lead foreman for Respondent in August, 2007, the Petitioner was in charge of the boilers, electrical, plumbing, sewer and snow removal in five high rises and three low rises operated by the Housing Authority. The parties agree that the Petitioner sustained an accidental injury arising out of and in the course of his employment with Respondent on August 2, 2007 when he slipped and fell while turning off the pumps in one of the buildings, thereby injuring his left knee. The Petitioner initially thought he was OK after this incident, so he simply "hobbled around and got the pumps shut off, and then went over and sat down." (Testimony p. 9) One of the supervisors, Chuck Doyle, had him fill out an accident report. This report, in evidence as part of Petitioner's Exhibit #9, was signed by the Petitioner and dated August 3, 2007, and names a witness to the event, Mike Colombi. The Petitioner continued working for Respondent after sustaining this work injury.

As the Petitioner continued working, however, he noticed his left leg was bothering him. The Petitioner therefore sought medical care for his left knee pain from his personal physician, Dr. O'Malley, on October 9, 2007. (The Petitioner had also been seen at Dr. O'Malley's office on September 6, 2007 for an unrelated problem. The Petitioner filled out a history page on 9/6/07 on which he indicated he was suffering from left knee pain for one month after injuring his left knee at work one month ago while shutting off some pumps. (PX5)) On October 9, 2007, after documenting the Petitioner's injury as well as the fact that the Petitioner walks about 10-15 flights of stairs a day and has noticed more difficulties with his knee as he does this, Dr. O'Malley recommended X-rays, which the Petitioner underwent on October 9, 2007. These revealed multi-compartmental degenerative joint disease most pronounced in the medial joint space compartment. (PX5) Dr. O'Malley also gave the Petitioner pain pills and recommended that he limit his physical activities at work.

The Petitioner explained that before his injury, when he inspected Respondent's buildings, he walked up and down 15-30 flights of stairs per day. After the injury, when the doctor recommended he limit his physical activities at

work, he performed the same basic job, however, he used the buildings' elevators rather than the stairs because when he climbed the stairs his left leg would swell, hurt and give out. He was, therefore, unable to inspect the stairwells as he had done before the injury.

With these modifications to his job duties, the Petitioner was able to continue working for Respondent following the August 2, 2007 work injury. In July, 2008, however, the Petitioner's job changed when he was moved to Respondent's buildings at Concord Commons. Working at this site required increased stair climbing in the performance of the Petitioner's job. The Petitioner tried to continue doing his job, however, the increased stair climbing resulted in increased knee pain. This increased knee pain led the Petitioner to return to see Dr. O'Malley in late September, 2008. Dr. O'Malley recommended an MRI of the left knee, which the Petitioner underwent on October 2, 2008. This test, which is documented as being performed due to the Petitioner's "chronic left knee pain", revealed a large tear involving the medial meniscus, as well osteoarthritis, chondromalacia and small joint effusion. (PX3) It was thereafter documented by Dr. O'Malley on October 9, 2008 that the Petitioner's left knee pain had been getting better and worse. Now, however, the pain was intense and it was hard to walk. (PX5)

Respondent then conducted an investigation of the Petitioner's workers' compensation claim in early October, 2008, providing its first report of the Petitioner's injury to AHRMA at this time. (PX12) According to Respondent's investigation report, in evidence as part of PX9 and PX12, after investigating the Petitioner's claim of injury, a letter was sent to AHRMA stating in relevant part: "...it looks as though the reason for delay in report of this occurrence does not lie with Mr. Bailey, but perhaps was an administrative mistake. Ms. Shirley agreed the employee advised her of the accident and forms were filled out at the time." (PX12) The investigator's reports/notes, furthermore, include the following information: Petitioner's job required him to inspect stairwells at five high rises. After the accident in August, 2007, his left knee got to bothering him as he performed these duties. This ultimately led him to see his doctor; his doctor recommended he limit stair climbing, which helped for awhile. Then, however, the Petitioner was transferred to Concord, which required more stair activity, which aggravated the Petitioner's knee. He therefore returned to the doctor, who recommended the MRI performed October 2, 2008. (PX9)

The Petitioner continued to work for Respondent during and after this investigation.

Respondent then sent the Petitioner to Dr. Michael Hastings for a Section 12 evaluation on December 3, 2008. In his report dated December 3, 2008 (PX3), Dr. Hastings' "Impression" included the following: The Petitioner "...has a medial meniscal tear to his left knee which was probably aggravated or caused by his work injury in August 2007." Dr. Hastings further stated that the Petitioner has developed quad weakness causing his leg to "quit", which, Dr. Hastings opined, is most likely due to his injury of August, 2007. Dr. Hastings therefore recommended both physical therapy and an arthroscopic procedure to evaluate and remove the torn medial meniscus. ***Dr. Hastings specifically stated in his report that the petitioner's subjective and objective findings correlate.*** As for restrictions, Dr. Hastings opined that the Petitioner could work, but should restrict stair climbing until he received definitive treatment to his left knee.

Dr. Hastings also opined that the Petitioner had degenerative arthritis of the left knee which was chronic and pre-existed the work injury of August, 2007. According to Dr. Hastings, the Petitioner's work injury did not alter the natural history of his pre-existing osteoarthritis, and therefore, treatment for this osteoarthritis, including a total knee arthroplasty, was not causally related to the Petitioner's work injury.

The Petitioner thereafter received a memo from Respondent dated December 22, 2008 advising that they reviewed the IME of Dr. Hastings, and based upon this IME the Petitioner has restrictions. According to Respondent, in light of these restrictions the Petitioner could not perform the essential duties of foreman for Respondent and he was, therefore, being placed on workers' compensation leave effective January 5, 2009. (PX10) The Petitioner stopped working for Respondent as of January 5, 2009, consistent with the Respondent's mandate as set forth in this memo.

Also in December, 2008, the Petitioner came under the care of Dr. Jon B. Whitehurst upon referral from David Finnegan, the P.A. for the Petitioner's physician, Dr. O'Malley. Dr. Whitehurst is the Chairman of Orthopedics at Rockford Memorial Hospital. (PX7) After diagnosing the Petitioner with a medial meniscus tear as well as osteoarthritis of the left knee, Dr. Whitehurst recommended physical therapy. He also performed a cortisone injection on December 29, 2008. (PX3)

The Petitioner began this recommended therapy on January 7, 2009, with the stated goal of increasing activity and avoiding surgery. A second physical therapy session took place on January 9, 2009 – it was noted at this time that the Petitioner's knee was better after the last session. Those were, however, the only two physical therapy sessions which

Respondent would authorize at this time. The Petitioner, therefore, began a home exercise program for improvement of his left knee. (PX3)

The Petitioner then returned to see Dr. Whitehurst on February 4, 2009. Dr. Whitehurst noted that the Petitioner was better since his last visit; in fact, a 25% improvement was documented. Dr. Whitehurst also noted, however, that workers' compensation had only approved two therapy visits, which the Doctor stated was insufficient as the Petitioner still had pain, instability and weakness in the left knee. Cautioning that the Petitioner was possibly reaching a plateau in progress regarding the medial meniscus tear, Dr. Whitehurst recommended that at this point, the Petitioner continue his home exercise program and use of Naprosyn. (PX3)

In the meantime, Respondent was conducting surveillance of the Petitioner in December, January and early February, 2009. Videos of the Petitioner taken on December 26, 2008, January 5, 2009, February 3, 2009 and February 13, 2009 show the Petitioner dancing. (RX6) The Petitioner explained that at the time these videos were taken he was taking pain medication to alleviate the pain in his left knee. Furthermore, not only had no doctor restricted the Petitioner from dancing at this time, but therapy was medically recommended, and the Petitioner was either in physical therapy or undertaking a home exercise program at the time most of these videos were taken. Moreover, while dealing with the emotional stress of the loss of his wife and son, both of whom had died – he had consumed alcoholic beverages at the time these videos were taken.

Dr. Hastings, Respondent's Section 12 evaluator, prepared a supplemental report dated February 23, 2009 following his review of Respondent's surveillance video. In this report, Dr. Hastings stated that the information on the videos "require(d)" him to "alter" his previous impressions. According to Dr. Hastings, "Mr. Bailey's dancing activities suggest he does not have a symptomatic medial meniscus tear." Dr. Hastings therefore opined that the Petitioner's activities suggested that the Petitioner should be able to climb stairs without restrictions, and as such, the Petitioner could return to work without restriction. Dr. Hastings further opined that the Petitioner was not in need of any further medical care, and that, per the videos, if the Petitioner needed treatment in the future, it would be due to his underlying arthritis and not his work injury. Dr. Hastings then concluded that the Petitioner should have been able to return to work as of December 27, 2008, and that he was at MMI as of December 27, 2008. (PX12, RX1)

The Respondent thereafter terminated benefits to the Petitioner as of March 1, 2009, and wanted the Petitioner to return to work full duty March 13, 2009. The parties agree TTD benefits were paid only for the period from January 5, 2009 through March 1, 2009.

The Petitioner's care with Dr. Whitehurst, however, continued after March 1, 2009, as did Dr. Whitehurst's work restrictions. Dr. Whitehurst saw the Petitioner on March 4, 2009, at which time Dr. Whitehurst recommended that the Petitioner undergo surgery. Dr. Whitehurst also recommended that the Petitioner continue his current restrictions and his home exercise program. (PX3)

The surgery recommended by Dr. Whitehurst was ultimately approved under OSF Healthcare and was performed by Dr. Whitehurst at Rockford Orthopedic Surgery Center on March 31, 2009. The history recorded in the records of ROSC is of a 64 year old male with a long history of knee pain refractory to multiple conservative efforts dating to a work injury in 2007. The procedures ultimately performed included a left knee arthroscopy with partial medial meniscectomy and a left knee chondroplasty with debridement. The post-operative diagnosis was left knee complex tear of the posterior horn of the medial meniscus; chondrosis, grade 3 to 4, of the femoral trochlea; and chondrosis, grade 2 to 3, of the patella. (PX3, 7)

The Petitioner received post-operative follow up care from Dr. Whitehurst. He also underwent post-operative physical therapy, per Dr. Whitehurst's prescription, beginning on April 16, 2009. (PX3) The Petitioner was ultimately released to return to work by Dr. Whitehurst as of June 1, 2009, following which he took a one week vacation, returning to work for Respondent June 9, 2009. (RX8)

When the Petitioner returned for his physical therapy session on June 10, 2009, after his return to work, the therapist noted that the Petitioner's knee was still sore when he went out to walk and was weak when he stood up from a chair or lifted an object. It was, therefore, recommended that he continue his home exercise program. (PX3) When the Petitioner then saw Brent Card, Dr. Whitehurst's PA-C, on June 15, 2009, while it was noted that the Petitioner was working with a restriction of no stairs and no lifting more than 10 lbs., it was further noted that the Petitioner had increased pain in his knee when he had to climb several flights of stairs after returning to work. It was then recommended that the Petitioner continue physical therapy, and that if the pain continued, the Petitioner should consider cortisone injections or Synvisc. The Petitioner was also to continue OTC analgesics PRN. (PX3)

The Petitioner thereafter returned for physical therapy, continuing with both formal physical therapy and his home exercise program through the end of June, 2009. The Petitioner was ultimately discharged from physical therapy as of July 2, 2009 with the instruction to continue his home exercise program. (PX3)

When the Petitioner returned thereafter to see Dr. Whitehurst on August 3, 2009, the doctor stated the Petitioner was presently working with the restriction of no stairs and no lifting more than 10 lbs. Dr. Whitehurst recommended the Petitioner continue with restrictions of no climbing; no repeated bending or stooping; and no continual walking, standing or stairs. Dr. Whitehurst also recommended that the Petitioner continue with his home exercise program and follow up in six months. (PX3)

The Petitioner returned for a final visit with Dr. Whitehurst on March 3, 2010. Noting that the Petitioner had not worked since December 31, 2009, Dr. Whitehurst stated that the Petitioner complained of pain in the anterior portion of the knee if he over uses it. (PX3)

As documented by Dr. Whitehurst, the Petitioner continued to work for Respondent through December 31, 2009. The Petitioner then took his retirement at age 65 after 32 years with Respondent. While the Petitioner has not had much medical care since he took his retirement, he testified he does try to perform the home exercise program he was given by his therapist on a daily basis. He also limits the use of his left leg as needed, and takes over the counter pain medication as needed – which the Petitioner explained is every day.

The Petitioner had no such problems with his left knee prior to his work injury of August 2, 2007. He also had no injuries to his left knee either before or after his work injury of August 2, 2007.

The medical bills for care related to the Petitioner's claim are in evidence as PX1. Some of these bills were paid by the Petitioner's health insurance, some were paid by the Petitioner as co-pays and have not been reimbursed, and some are outstanding.

Under cross-examination, the Petitioner was questioned about a notation in the medical records indicating that he began lifting weights prior to the August, 2007 work accident, and further that he continued lifting weights after the August, 2007 work injury. On re-direct, however, the Petitioner confirmed that this weight lifting solely involved his upper extremities. He does not do any weight work involving his legs.

The Petitioner was also questioned under cross-examination about a notation by the physical therapist indicating that while the Petitioner liked dancing, he hadn't been doing much as of June, 2009. The Petitioner then explained that he only dances when his leg "allows" him to do so. The Petitioner said that when he is on pain medication, and his leg allows him to move, he tries to move as much as he can.

The Petitioner saw Dr. Pietro Tonino for an evaluation at the request of his own attorney on August 23, 2010. Dr. Tonino prepared a report following this evaluation, which is in evidence as part of PX11. In this report, Dr. Tonino recorded the Petitioner's history of work injury August 2, 2007 with minimal treatment until the fall of 2008 as the Petitioner was able to avoid stair climbing. Dr. Tonino noted the Petitioner's job change to Concord Commons in 2008 which resulted in increased stair climbing and resulting increase pain; the MRI performed October 2, 2008 which showed a meniscal tear with chondromalacia of the medial femoral condyle; and the Petitioner's further medical care which included surgery in March of 2009. Dr. Tonino opined that it was his "...impression within a reasonable degree of medical and surgical certainty, that the patient's left knee condition is related to the injury sustained on the 2nd of August 2007." Dr. Tonino further testified that the gap in care was reasonable as the Petitioner was able to limit the use of his leg by avoiding stairs until 2008. Once his job changed, however, with increased stair climbing, his symptoms increased and led to consistent treatment and ultimately surgery. (PX11)

Dr. Tonino also reviewed Respondent's surveillance videos from December 2008, January 2009 and February 2009, and prepared a report of his opinions. Dr. Tonino stated that while these videos show the Petitioner dancing without physical restrictions, they do not affect the doctor's causation opinions. They simply show the Petitioner dancing with the previously diagnosed medial meniscus tear and chondromalacia as verified at the time of surgery. (PX11)

Dr. Tonino also testified by way of deposition on February 21, 2011. (PX11) He confirmed that the October, 2008 MRI showed a left meniscus tear and chondromalacia of the medial femoral condyle. (@13)

With regard to what, if any condition pre-existed the Petitioner's work injury, Dr. Tonino explained that while he thinks the Petitioner probably had some arthritis prior to the August, 2007 work injury, it was significant that the Petitioner had no complaints or medical care to the left knee before that work injury. (@14-15) Dr. Tonino explained that this condition – arthritis - can exist asymptomatically, and is subject to aggravation by trauma. (@ 15-16) As such, even if the Petitioner had some arthritic changes at the time of the accident, he wasn't symptomatic at that point. The

event described by the Petitioner as occurring at work in August, 2007, however, is capable of aggravating the Petitioner's underlying pre-existing degenerative condition. (@15-16) As for treatment for this condition, Dr. Tonino opined that while the Petitioner may need a total knee arthroplasty if his symptoms worsen, the Petitioner did not need that procedure at the time of his evaluation. (@19) The care the Petitioner had received as of the date of Dr. Tonino's evaluation was, according to Dr. Tonino, reasonable and necessary. He recommended that the Petitioner simply continue to do what he was doing, i.e. limit his activities. (@19)

Dr. Tonino again reiterated his causation opinion during his deposition testimony, i.e. that the Petitioner's condition of ill-being of his left leg was causally related to his work injury of August, 2007. (@21) Moreover, Dr. Tonino again stated that Respondent's surveillance videos which show the Petitioner dancing did not change his opinion. As Dr. Tonino explained, none of the Petitioner's doctors said he should not dance. As Dr. Tonino also explained, there was no question the Petitioner had a meniscus tear documented on the October, 2008 MRI - prior to the activity shown on the videos. (@22-23)

Dr. Tonino then went on to explain that meniscus tears act with intermittent symptoms, so they can be relatively asymptomatic or less symptomatic and then become more symptomatic, allowing someone with a meniscus tear to do something on a good day which they can't do on a bad day – which is consistent with the Petitioner's history of waxing and waning symptoms as documented in the treating doctors' records. (@22-23) Dr. Tonino testified that he has patients with meniscus tears who like to golf, and will put off surgery until after golf season; in other words, they golf with a meniscus tear. As Dr. Tonino then concluded: "...the fact of the matter is he (the Petitioner) was performing those activities with a meniscus tear." And – as Dr. Tonino stated, that is not unheard of. (@23-24)

Under cross-examination, Dr. Tonino agreed that the Petitioner's degenerative changes could be aggravated by some of the activities he saw on the videos. (@33) On re-direct, however, Dr. Tonino stated that had they *actually* been aggravated by these activities, there would have been some physical reaction to the aggravation on the video; there was not. (@39) Dr. Tonino also agreed under cross-examination that the Petitioner probably could have been doing some sort of work activity in December, January and February, 2009 – the Petitioner wasn't totally disabled at that time. (@35)

CONCLUSIONS OF LAW

With regard to "F", whether the Petitioner's current condition of ill-being is causally related to his work injury of August 2, 2007, the Arbitrator finds the following:

With regard to the threshold issue in the instant case, causal connection – specifically whether the Petitioner's condition of ill-being of his left knee/leg is causally related to his undisputed work injury of August 2, 2007 - the Arbitrator finds that based upon all of the credible evidence, there is a causal connection between the Petitioner's condition of ill-being and his work injury.

There is no dispute that the Petitioner sustained an accidental injury to his left knee arising out of and in the course of his employment with Respondent on August 2, 2007. (Arb. Exh. No. 1) Nor is there any dispute that the Petitioner continued working for Respondent after sustaining this work injury.

The Petitioner testified that as he continued working for Respondent following this incident, he noticed his left leg was bothering him. The Arbitrator notes that not only did the Petitioner specifically seek care for this left knee pain from his personal physician, Dr. O'Malley, on October 9, 2007, after trying to continue to perform his job duties – which included extensive stair climbing - for two months post-injury, but further that when the Petitioner had previously been seen at Dr. O'Malley's office on September 6, 2007 for an unrelated problem, the Petitioner filled out a form on which he stated he had left knee pain for one month after injuring his left knee at work one month ago while shutting off some pumps. (PX5)) On October 9, 2007, after documenting not only the Petitioner's history of injury but also his complaint of increasing left knee pain from climbing stairs in the performance of his job for Respondent, Dr. O'Malley recommended X-rays, which the Petitioner underwent on October 9, 2007 and which revealed multi-compartmental degenerative joint disease most pronounced in the medial joint space compartment. (PX5) Dr. O'Malley gave the Petitioner pain pills and recommended that he limit his physical activities at work.

The Petitioner credibly testified that he followed the doctor's recommendation; he continued performing his job for Respondent, but instead of climbing the buildings' staircases numerous times each day, he instead used the buildings' elevators in order to try to keep his left leg complaints under control. With these modifications to his job duties, the Petitioner was able to continue working for Respondent following the August 2, 2007 work injury.

Based upon all of the evidence presented, the Petitioner's job changed in July, 2008; he was moved to Respondent's buildings at Concord Commons. This job change, again based upon all of the evidence presented, resulted

in an increased requirement for stair climbing in the performance of the Petitioner's job, which in turn resulted in an increase in the Petitioner's left knee pain. This ultimately led the Petitioner to return to see Dr. O'Malley in late September, 2008, at which time Dr. O'Malley recommended an MRI of the left knee. This test, performed October 2, 2008, revealed a large tear involving the medial meniscus, as well osteoarthritis, chondromalacia and small joint effusion. (PX3) It was thereafter documented by Dr. O'Malley on October 9, 2008 that the Petitioner's left knee pain had been getting better and worse. Now, however, the pain was intense and it was hard to walk. (PX5)

The Arbitrator finds that this evidence explains the gap in the Petitioner's treatment. As the Petitioner credibly explained he was able to keep working following the August 2, 2007 accident as he was able to limit his stair climbing at that time. In the summer of 2008, however, his job changed. He once again had to climb stairs, which resulted in his injured left leg getting worse. That's when he sought additional care and underwent the October, 2008 MRI.

The Arbitrator notes that Respondent's subsequent investigation of the Petitioner's claim in October, 2008 resulted in confirmation that timely notice of the injury had been given by Petitioner, an accident report was timely prepared by Petitioner, a witness was timely named by Petitioner and this witness corroborated Petitioner's claim of injury. (PX9 & 12) The Petitioner, in spite of his left knee pain, continued to perform his job duties for Respondent.

Respondent then sent the Petitioner to Dr. Michael Hastings for a Section 12 evaluation on December 3, 2008. In his report of this evaluation dated December 3, 2008 (PX3), while Dr. Hastings opined that the Petitioner had degenerative arthritis of the left knee which was chronic and pre-existed the work injury of August, 2007, Dr. Hastings further opined that the Petitioner "...has a medial meniscal tear to his left knee which was probably aggravated or caused by his work injury in August 2007;" and also that the Petitioner had developed quad weakness causing his leg to "quit", which was most likely due to his injury of August, 2007. Dr. Hastings, in fact, specifically stated in his report of December 3, 2008 that the Petitioner's subjective and objective findings correlate. Dr. Hastings then recommended both physical therapy and an arthroscopic procedure to evaluate and remove the torn medial meniscus. Dr. Hastings also opined that the Petitioner could work, but should restrict stair climbing until he received definitive treatment to his left knee.

The Petitioner thereafter received a memo from Respondent dated December 22, 2008 which stated they had reviewed the IME of Dr. Hastings, and based upon the restrictions placed on the Petitioner by Dr. Hastings, Respondent

opined that the Petitioner could not perform the essential duties of foreman for Respondent. The Petitioner was, therefore, notified by Respondent that he was being placed on workers' compensation leave effective January 5, 2009. (PX10) The Petitioner followed Respondent's instructions and stopped working as of January 5, 2009. TTD benefits were initially paid in January and February 2009.

During this same time, i.e. December, January and February, 2009, Respondent was conducting surveillance of the Petitioner. Videos of the Petitioner were taken on December 26, 2008, January 5, 2009, February 3, 2009 and February 13, 2009 which show the Petitioner dancing. (RX6) Respondent sent these videos to Dr. Hastings, Respondent's Section 12 evaluator who then prepared a supplemental report dated February 23, 2009 in which he stated that because of the videos he altered his opinion and that "Mr. Bailey's dancing activities suggest he does not have a symptomatic medial meniscus tear." Dr. Hastings therefore now opined that the Petitioner should be able to climb stairs without restrictions, and as such, the Petitioner could return to work without restriction. Dr. Hastings further opined that the Petitioner was not in need of any further medical care, and that, per the videos, if the Petitioner needed treatment in the future, it would be due to his underlying arthritis and not his work injury. Dr. Hastings then concluded that the Petitioner should have been able to return to work as of December 27, 2008, and that he was at MMI as of December 27, 2008. (PX12, RX1) The Respondent thereafter terminated lost time benefits to the Petitioner as of March 1, 2009 following receipt of Dr. Hastings report, and wanted the Petitioner to return to work full duty March 13, 2009.

The Petitioner, however, had come under the care of Dr. Jon B. Whitehurst, the chairman of orthopedics at Rockford Memorial Hospital, in December, 2008, upon referral from his personal physician, Dr. O'Malley. (PX7) Dr. Whitehurst, after examining the Petitioner and reviewing the MRI, diagnosed a medial meniscus tear as well as osteoarthritis of the left knee, performed a cortisone injection and recommended physical therapy. (PX3)

The Petitioner underwent two therapy sessions - on January 7, 2009 and January 9, 2009 - with the stated goal of increasing activity and avoiding surgery, and with a notation as of January 9, 2009 that the Petitioner's knee was better after the first session. In spite of the fact that both Dr. Whitehurst and Dr. Hastings had, at this time, recommended physical therapy, with not medical recommendations to the contrary, those were the only two physical therapy sessions which Respondent would authorize. The Petitioner, therefore, began a home exercise program for improvement of his left knee. (PX3)

When Petitioner returned to see Dr. Whitehurst on February 4, 2009, the doctor documented a 25% improvement since his last examination. Dr. Whitehurst also, however, commented on the fact that workers' compensation had only approved two therapy visits, which the Doctor stated was insufficient as the Petitioner still had pain, instability and weakness in the left knee. The doctor noted his concern that the Petitioner was possibly reaching a plateau in progress regarding the medial meniscus tear. He continued the Petitioner's restrictions (PX3) Then, on March 4, 2009, in addition to continuing the Petitioner's restrictions, Dr. Whitehurst recommended the Petitioner undergo surgery. The Petitioner thereafter underwent the surgery recommended by Dr. Whitehurst on March 31, 2009, with post-operative findings including left knee complex tear of the posterior horn of the medial meniscus; chondrosis, grade 3 to 4, of the femoral trochlea; and chondrosis, grade 2 to 3, of the patella. (PX3, 7)

Based upon the foregoing, the Arbitrator finds that when the Petitioner's workers' compensation benefits were terminated by Respondent and Respondent requested that the Petitioner return to work full duty in March, 2009, the Petitioner not only remained under the care of his treating physician, Dr. Whitehurst, with an ongoing restriction from work, but furthermore, there was a recommendation for surgery. The Arbitrator notes that this recommendation from surgery came – not after evidence of any intervening occurrence increasing or impacting the Petitioner's credible complaints - but rather after Respondent refused to authorize necessary physical therapy which not only had initially resulted in improvement in the Petitioner's symptoms but which had been also recommended both by the treating physician and Respondent's own evaluating physician. The Arbitrator also specifically notes that this recommendation for surgery came after Petitioner's treating physician opined that the Petitioner's recovery from his unquestioned medial meniscus tear was reaching a plateau.

The Arbitrator further finds that the true question in this case is actually whether the evidence of the Petitioner's ability to dance as seen on the surveillance videotapes of late December 2008, January 2009 and February 2009 validates Dr. Hastings' altered opinions as expressed on February 23, 2009 as set forth *supra*, and Respondent's termination of all benefits to the Petitioner based upon those opinions. The Arbitrator finds it does not.

The Arbitrator finds the Petitioner's testimony regarding the waxing and waning nature of his left knee complaints was credible and fully supported by the testimony and opinions of Dr. Pietro Tonino, which the Arbitrator further finds to be credible.

As Dr. Tonino explained, none of the Petitioner's doctors said he should not dance. As Dr. Tonino also explained, there was no question the Petitioner had a meniscus tear documented on the October, 2008 MRI - prior to the activity shown on the videos. (@22-23) And, as Dr. Tonino then went on to explain, meniscus tears act with intermittent symptoms, so they can be relatively asymptomatic or less symptomatic and then become more symptomatic, allowing someone with a meniscus tear to do something on a good day which they can't do on a bad day – which is consistent with the Petitioner's history of waxing and waning symptoms as documented in the treating doctors' records. (@22-23) As Dr. Tonino then concluded: "...the fact of the matter is he (the Petitioner) was performing those activities with a meniscus tear." And – as Dr. Tonino stated, that is not unheard of. (@23-24)

The Arbitrator adopts Dr. Tonino's opinions and findings and rejects the altered findings of Dr. Hastings as expressed in his February 23, 2009 report.

The Arbitrator has reviewed the video of Petitioner dancing. As properly noted by Dr. Tonino, there is no evidence of any type of aggravation of the Petitioner's condition through any physical manifestation on the videos.

Moreover – even had there been any such evidence, it does not negate a finding of causation in the instant case. As the Supreme Court said in Sisbro v. Industrial Commission, 207 Ill. 2d 193 (2003), an accidental injury need not be the sole causative factor, nor even the primary causative factor, in order to obtain workers' compensation benefits, as long as it was a causative factor in the resulting condition of ill-being. Sisbro v. Industrial Commission, id. And, as the Appellate Court said in Fierke v. Industrial Commission, 309 Ill.App. 3d 1037 (2000), the fact that other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant to the causal connection between the employment and claimant's condition of ill-being.

Based upon the foregoing, the Arbitrator findings that there is a causal relationship between the Petitioner's work injury of August 2, 2007 and the entirety of his current condition of ill-being of his left knee, including not only the complex medial meniscus tear found at surgery, but also aggravation of the Petitioner's preexisting degenerative condition of osteoarthritis and chondromalacia/chondrosis as diagnosed both per the October 2, 2008 MRI (PX3) and post-operatively. (PX3, 7)

With regard to "J", whether the medical services that were provided to the Petitioner were reasonable and necessary, the Arbitrator finds the following:

The Petitioner's medical bills are in evidence as PX1. Respondent's sole objection to these bills was liability. Based upon Arbitrator's causation findings, which the Arbitrator incorporates herein by reference, the Arbitrator rejects Dr. Hastings' altered opinions as expressed on February 23, 2009, as well as Respondent's reliance upon those opinions, and awards all bills in PX1 pursuant to Section 8(a) & 8.2 of the Act. As part of this award, Respondent is ordered to reimburse the Petitioner for all of his out of pocket expenses as outlined in PX1 in the amount of $1,126.93. Respondent is given credit for amounts paid as per the parties' stipulations and as outlined in PX1, and is further ordered to hold the Petitioner harmless from any claims for reimbursement.

With regard to "K", whether temporary total disability benefits should be awarded to the Petitioner and for what period of time, and with regard to "N", credit due Respondent, the Arbitrator finds the following:

Based upon the evidence presented, the Arbitrator finds that the Petitioner's relevant period of lost time from work began January 5, 2009, when Respondent ordered the Petitioner off on workers' compensation leave, through June 1, 2009, when the Petitioner was released to return to work by his treating physician, Dr. Whitehurst. (RX8)

The dispute regarding the Petitioner's entitlement to TTD benefits for his lost time from work is based on Respondent's reliance upon Dr. Hastings' altered opinions as expressed in his February 23, 2009 report. The Arbitrator, as previously set forth herein, rejects Dr. Hastings' altered opinions as set forth in his February 23, 2009 report. The Arbitrator, also as previously set forth herein, finds credible the opinions and findings of the Petitioner's treating physician, Dr. Whitehurst, and the Petitioner's examining physician, Dr. Tonino, and adopts the findings and opinions of Drs. Whitehurst and Tonino.

The Arbitrator further notes that while Dr. Tonino agreed under cross-examination that the Petitioner probably could have been doing some sort of work activity in December, January and February, 2009 (PX11 @35), there was no allegation that the Petitioner was restricted from all work at that time. Rather, the Petitioner was placed on restricted work in December, 2008, by both Respondent's evaluating physician Hastings and Petitioner's treating physician Whitehurst. It was, in fact, Respondent who forced the Petitioner off work as of January 5, 2009 citing Dr. Hastings restrictions and stating that in light of those restrictions, the Petitioner could not perform the essential duties of foreman for Respondent and he was, therefore, being placed on workers' compensation leave effective January 5, 2009. (PX10)

Based upon the foregoing, as well as the Arbitrator's causation findings which are incorporated herein by reference, the Arbitrator finds that the Petitioner is entitled to TTD benefits for the period from January 5, 2009 through May 31, 2009, representing 21 weeks at $841.17/week. The parties agreed that Respondent paid $6,729.36 in TTD benefits representing the period from 1/5/09 through 3/1/09, for which Respondent is given credit.

With regard to "L", what is the Nature & Extent of the Petitioner's injury, the Arbitrator finds the following:

The Arbitrator first incorporates all of his causation findings herein. Based upon these causation findings, the Arbitrator finds the Petitioner is to be compensated for the entirety of the condition of ill-being of his left knee.

The Petitioner underwent surgical procedures in March, 2009, including a left knee arthroscopy with partial medial meniscectomy and a left knee chondroplasty with debridement. The post-operative diagnosis was left knee complex tear of the posterior horn of the medial meniscus; chondrosis, grade 3 to 4, of the femoral trochlea; and chondrosis, grade 2 to 3, of the patella. (PX3, 7)

The Petitioner credibly testified that at present he tries to perform the home exercise program he was given by his therapist on a daily basis. He limits the use of his left leg as needed, and takes over the counter pain medication as needed – which the Petitioner explained is every day. The Petitioner had no such problems with his left knee prior to his work injury of August 2, 2007. He also had no injuries to his left knee either before or after his work injury of August 2, 2007.

The Arbitrator finds that the Petitioner has lost 15% of the use of his left lower extremity, or 32.25 weeks at $636.15/week.

With regard to "L", whether penalties and fees should be imposed upon the respondent, the Arbitrator finds the following:

The Appellate Court provided an analysis of the penalty sections of the Act relevant to the instant case in Ford Motor Co. v. Industrial Commission, 140 Ill. App. 3d 401 (1986):

> The Act provides an income stream to an injured worker, who is typically left without income while he is disabled. (Avon Products, Inc. v. Industrial Com. (1980), 82 Ill. 2d 297, 45 Ill. Dec. 117, 412 NE2d 468.) The penalty sections attempt to prevent bad faith and unreasonable withholding of compensation benefits from employees. (Board of Education v. Industrial Com. (1982) 93 Ill. 2d 1, 66 Ill. Dec. 300, 442 NE2d 861.) If an employer acts in reliance upon qualified medical opinion, penalties are not usually imposed. (O'Neal Brothers Construction Co. v. Industrial Com. (1982), 93 Ill. 2d 30, 66 Ill. Dec. 334, 442 NE2d 895.) But the employer's withholding of compensation is unreasonable when the evidence that an employer has, or should reasonably have, in its possession discloses the absence of any substantial grounds for challenging liability. (Board of Education v. Industrial Com.) The test is whether the employer's reliance was objectively reasonable under the circumstances. (Consolidated Freightways, Inc. v. Industrial Com. (1985), 136 Ill. App. 3d 630, 483 NE2d 652.)

Respondent in the instant case relied on the ***altered*** opinion of Dr. Hastings for its denial of benefits to the Petitioner. The Arbitrator, as stated herein, rejects Respondent's causation arguments and rejects Dr. Hastings' altered opinions. The remaining question was whether Respondent's reliance upon this doctor's **altered** opinion for a denial of all benefits was objectively reasonably under the circumstances. The Arbitrator, once again, finds that it was not.

Dr. Hastings, in his February 23, 2009 report, stated that the information on the videos "require(d)" him to "alter" his previous impressions. According to Dr. Hastings, "Mr. Bailey's dancing activities ***suggest he does not have a symptomatic medial meniscus tear.***" (emphasis added) Dr. Hastings therefore opined that the Petitioner's activities "suggested" that the Petitioner should be able to climb stairs without restrictions, and as such, the Petitioner could return to work without restriction, and furthermore was not in need of any additional medical care. (PX12, RX1) Dr. Hastings made these findings in spite of the fact that the Petitioner's treating physician was, at approximately the same time, not only maintaining the Petitioner's restrictions but also recommending surgery for the Petitioner's purportedly "asymptomatic" medial meniscus tear as "suggested" by the Petitioner's dancing activities.

Dr. Hastings completely ignored the waxing and waning nature of medial meniscal tears – something credibly testified to by Dr. Pietro Tonino. Dr. Hastings completely ignored the fact that both he and Dr. Whitehurst had recommended the Petitioner undergo physical therapy – which treatment was then, for all intents and purposes, denied by Respondent – but which the Petitioner was trying to carry out on his own.. Dr. Hastings completely ignored the fact that none of the Petitioner's doctors said he should not dance. The Respondent unreasonably relied upon Dr. Hastings' opinions, which were in turn "suggested" by the videos.

Based upon the foregoing, the Arbitrator finds that the Petitioner is entitled to penalties pursuant to Sections 19(l) and 19(k) and fees pursuant to Section 16. As the vast majority of the Petitioner's medical bills were either written off or paid by group, the Arbitrator will award these penalties and fees solely on the unpaid TTD.

The Petitioner was entitled to 21 weeks of TTD benefits @ $841.17/week or $17,664.57
The Respondent paid 8 weeks of TTD benefits @ $841.17/week or $6,729.36
The difference is $10,935.21. 50% of $10,935.21 is $5,467.61.
The Petitioner is entitled to $5,467.61 in additional compensation pursuant to Section 19(k).

20% of $10,935.21 is $2,187.04. The Respondent is liable for $2,187.04 in attorney's fees pursuant to Section 16.

Respondent terminated benefits on March 1, 2009 and has paid no benefits to date. 3/2/09 through 4/25/12 represents 1150 days. 1150 days @ $30/day = $34,500. The maximum penalty pursuant to Section 19(l) therefore applies. The Petitioner is, therefore, entitled to $10,000 in additional compensation pursuant to Section 19(l).

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

Linette Bailey,

Petitioner,

vs.

NO: 12 WC 28453

14IWCC0607

HCR Manor,

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

Petitioner's counsel filed its Motion Instanter on July 8, 2014 to correct a typographical error contained within the Decision of the Arbitrator filed on September 16, 2013.

Pursuant to Section 19(f) of the Act:

> [T]he Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall

have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision.

The Commission hereby denies Petitioner's Motion as being untimely pursuant to Section 19(f) of the Act.

The Commission notes, however, that the issue of TTD was properly before the Commission on review. The Commission modifies the Decision of the Arbitrator and finds that the compensation due for the TTD period of September 5, 2012 through July 12, 2013 should read $25,062.40, not $2,403.61. The Commission further modifies the Decision and finds that the total TTD period, March 4, 2012 through March 21, 2012 and September 5, 2012 through July 12, 2013 represents 47 weeks, not 46-6/7 weeks. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $564.10 per week for a period of 47 weeks, commencing March 4, 2012 through March 21, 2012 and September 5, 2012 through July 12, 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 shall pay to the Petitioner the sum of $423.00 per week for a period of 8-5/7 weeks, commencing March 22, 2012 through May 21, 2012, and $211.50 per week for a period of 15 weeks, commencing May 22, 2012 through September 4, 2012 that being the period of temporary partial disability for work under §8(a), 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 partial compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $50,375.20 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

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

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

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.

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: JUL 2 2 2014
o070814
MJB/tdm
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

BAILEY, LINETTE
Employee/Petitioner

Case# **12WC028453**

HCR MANOR
Employer/Respondent

14IWCC0607

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:

2444 LAW OFFICE OF ROBERT JUSINO
440 W BOUGHTON RD
SUITE 204
BOLINGBROOK, IL 60490

2542 BRYCE DOWNEY & LENKOV LLC
EVA IMREM
200 N LASALLE ST SUITE 2700
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)

Linette Bailey
Employee/Petitioner
v.
HCR Manor
Employer/Respondent

Case # 12 WC 28453

14IWCC0607

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 **07-16-13**. 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **03-04-12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**44,004.10**; the average weekly wage was $**846.23**.

On the date of accident, Petitioner was **47** 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 $**1,208.96** for TTD, $**6,120.72** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $**7,329.68**.

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

ORDER

TTD:

Respondent shall pay Petitioner temporary total disability benefits of $564.10/week for 2.429 weeks, commencing 03-04-12 through 03-21-12, as provided in Section 8(b) of the Act. ($1,370.20)

Respondent shall pay Petitioner temporary partial disability benefits of $423/week (4hr/work day) for 8.714 weeks, commencing 03-22-12 through 05-21-12, as provided in Section 8(a) of the Act. ($3,686.02)

Respondent shall pay Petitioner temporary partial disability benefits of $211.50/week (6hr/work day) for 15 weeks, commencing 05-22-12 through 09-04-12, as provided in Section 8(a) of the Act. ($3,202.74)

Respondent shall pay Petitioner temporary total disability benefits of $564.10/week for 44.429 weeks, commencing 09-05-12 through, 07-12-13, as provided in Section 8(b) of the Act. ($2,403.61)

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $17,052.36 to Edward Hospital, $ 24,566.50 to Du Page Medical Group, $ 1,529.34 to Provena St. Joseph Medical Center and $877.00 to Joliet Radiology Service, as provided in Sections 8(a) and 8.2 of the Act. This amount total $ 44,025.20, but does not take into account fee schedule reductions, nor the amount the above providers have accepted under Blue Cross / Blue Shield. The total outstanding amount appears to be $ 50,375.20.

PENALTIES:

Respondent shall pay $ **30,518.88**, as provided in Section 19(k) of the Act (50% of the above award).

Respondent shall pay **$ 6,103.78,** in Section 16 penalties which is 20% of the total amount of the 19(k) award.

and $ **7,980.00**, as provided in Section 19(l) of the Act.($30.00 per day x 266 days since Oct. 10, 2012).

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

09-15-13
Date

SEP 16 2013

FINDINGS OF FACT

The Petitioner sustained an accidental injury to the right shoulder on March 4, 2012 while working full time for the Respondent, HCR Manor, as a licensed practical nurse, LPN.

The Respondent stipulated that it employed the Petitioner at their HCR Manor facilities in Wheaton, Illinois on that date and it did receive notice of the accidental injury, but disputes that the Petitioner's current condition of ill-being was causally connected to this injury. The parties stipulated that the Petitioner's previous year earnings were $44,004.10 and the calculated average weekly wage was $846.23. The parties also stipulated that at the time of the accident the Petitioner was 47 years old, married and with 2 dependants. Both parties stipulate to the Respondent receiving a credit of $6,120.72 for TPD and $1,280.96 for TTD payments made. The Petitioner claims to be entitled to unpaid TTD, TPD and Medical benefits.

The Petitioner, Mrs. Linette Bailey, testified that she was employed by HCR Manor for approximately one year prior to the injury.

The Petitioner wore a right arm sling at the hearing following instructions from her therapist to avoid re-injury in crowded public places.

The Petitioner testified that on March 4, 2012 she suffered a right shoulder injury at work while transferring a patient from a bed to a chair. She testified that she felt a loud pop on her shoulder and felt immediate pain. She reported the injury to her supervisor in writing.

On March 6, 2011, Petitioner she was sent to the Respondent's company clinic at Edward Corporate Health and went to human resources to sign an official injury report, given to her by Ms. Cam Lanning.

Later that day, Petitioner was seen at Edward Corporate Health by Dr. Kelly, who diagnosed of neck and shoulder strain, and placed her off work. (PX #1)

On March 8, 2013, Dr. Kelley ordered a cervical and right shoulder x-ray, and prescribed physical therapy and an MRI of the right shoulder if there was no improvement. (PX #1)

Between 03-09-12 and 04-04-12, the Petitioner underwent physical therapy at Edwards Corporate Health as instructed by Dr. Kelley. (PX #1)

The Petitioner testified that she continued attending her visits at Edwards Corporate Health and was seen by doctor, Dr. Link, who diagnosed of right shoulder impingement. (PX #1)

On March 21, 2013, Dr. Link returned Petitioner to light duty and limiting her work day to 4 hours. Petitioner began doing limited clerical office work. Dr. Link planned to refer his patient to an orthopedic surgeon if she her medical condition did not improve. (PX #1)

On April 2, 2013, Dr. Link referred the Petitioner to an orthopedist, Dr. Lombardi, to look for a rotator cuff tear because her condition did not improve. (PX #1)

On April 6, 2012, Dr. Lombardi added a medication regimen of Prednisone and Diclofenac. She also testified that he continued the TPD light duty restrictions and referred her to the pain clinic for the neck injury. Her diagnosis was as right rotator cuff tendonitis and cervical spine strain. (PX #2)

The Petitioner testified that she followed up with Dr. Lombardi on May 8, 2012, he continued the light duty restrictions and recommended physical therapy for the shoulder. (PX #2)

On June 15, 2012 she returned to the Spine Pain Clinic to review her MRI findings. The Petitioner testified that she understood from her doctor visit that she had a labral tear in the right shoulder and a herniated disc in the cervical spine. She further testified that her light duty was continued. The medical record for June 15, 2012 and shoulder MRI report of May 21, 2012 confirmed the Petitioner's testimony by documenting a definitive labral tear but did not find a rotator cuff tear. The cervical MRI report documented a disc bulge effacing the thecal sac. Dr. Paul recommended the shoulder injection and diagnosed her cervical condition as a C5-C6 disc herniation. Dr. Paul also requested PT approval. (PX #2)

On June 19, 2012, Dr. Lombardi injected her shoulder with cortisone. Dr. Lombardi wrote that the right shoulder MRI was not of good quality and that it showed tendonitis changes but no evidence of rotator cuff tear. However, Dr. Lombardi did not mention the definitive labral tear documented in the findings section of the MRI report.

The Petitioner testified that on July 17, 2012 she suffered a pain exacerbation episode at work while pushing and pulling a chart cart since she needed both hands to keep it steady. She returned to see Dr. Lombardi with a lot of pain. The medical record for that day confirmed the Petitioner's testimony. Dr. Lombardi found the Petitioner in worse condition with decrease range of motion and pain. Dr. Lombardi further adds no use of the right arm to the Petitioner's restrictions. (PX #2)

The Petitioner testified that she saw Dr. Lombardi on July 27, 2012 following her pain exacerbation and he returned her to work with her continued light duty and hourly restrictions. The medical record that day confirmed her testimony and further documented significant muscle spasm, pain in the superior shoulder and deltoid region. Dr. Lombardi commented that the physical therapy was approved. (PX #2 & #4)

On August 1, 2012, the Petitioner was examined pursuant to Section 12 of the Act by Dr. Klaud Miller who found no labral tear but agreed with the disc bulge at C5-C6. The IME posed a diagnosis of cervical spine sprain, scapular strain and a chronic non-physiologic pain syndrome. Dr. Miller stated that the Petitioner was at MMI and that any restrictions were due to the chronic non-physiologic pain syndrome. No future treatment would benefit the Petitioner. He opined that the shoulder MRI was normal and her condition to mainly be of non-physiologic nature with symptom magnification.

All workers' compensation benefits were terminated.

On September 4, 2012, Dr. Lombardi ordered an arthrogram MRI of her right shoulder and placed her off from work as there was no light duty. Dr. Lombardi ordered the arthrogram to better visualize the shoulder. (PX #2)

On November 28, 2012, Petitioner underwent the shoulder arthrogram MRI at Provena St Joseph after a long delay. However, this study was incomplete and had to be repeated on January 2, 2013. That MRI clearly demonstrate a superior labral tear extending from the posterior labrum to the anterior/superior labrum and biceps anchor. (PX #3)

On January 11, 2013, Dr. Lombardi opined that she clearly had a labral tear and due to failed conservative therapy and the MRI findings it was warranted to refer to an orthopedic surgeon specializing in the shoulder, Dr. Pulluru. Dr. Lombardi also placed the Petitioner off work. (PX #2)

On January 14, 2013, Dr. Pulluru prescribed surgery. (PX #2)

On March 21, 2013, Petitioner underwent surgery to repair her shoulder at Edward Hospital by Dr. Pulluru. The Petitioner further testified that the surgery was more complicated than expected because there was a complete rotator cuff tear in addition to the labral tear and she also had to undergo subacromial decompression. (PX #1a)

Petitioner's spouse had group health insurance and paid for the surgery. Dr. Pulluru ordered the patient to be off from work on TTD on 04-04-13, 05-16-13, 06-27-13 and 07-09-13. (PX #1a).

The Arbitrator notes that Petitioner's treating doctors were all within the chain of company physicians.

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 condition of ill being is casually related to the accidental injury in this claim. In support the Arbitrator finds as follow:

The Petitioner's accident history was consistent with her medical treatment records.

The Petitioner followed all of the employer instructions upon seeking medical care for her injury and treated with five medical physicians and several therapists under the sponsorship and direction of the employer. Mrs. Bailey never deviated from the instructions of these physicians who consistently made objective findings of her present condition being causally connected to the injury.

The first MRI study on May 21, 2012 was poor, but still showed a labral tear. Later, on Janaury 11, 2013, Dr Lombardi opined that the new MRI demonstrated that she clearly had a labral tear and due to failed conservative therapy and referred to an orthopedic surgeon shoulder specialist, Dr. Raghu Pulluru.

To her credit, the Petitioner continued to work, albeit in a limited capacity. As a result, her condition worsened. For instance, on June 26, 2012, the petitioner suffered pain exacerbation while working clerical duties at work for 6 hours per day and had to go to Edward Corporate Health because she is working with a sling but had to use her hand to write and answer the phone constantly, causing increased pain.

The trier of fact does not find it material if the injury was described by the Petitioner as a pop or a pulling sensation.

Mrs. Bailey testified that she was fired from her employment on February 23, 2013 due to her Family Leave of Absence having ended.

The Arbitrator does not find Dr. Klaud Miller's opinion to be credible as he missed the initial labral tear and was the only physican or medical treater of any kind to discern symptom magnification.

Instead, the Arbitrator adopts the causation opinions of the five medical physicians the petitioner treated with under the direction of the employer: Dr Kelley, Dr.Link, Dr. Paul, Dr. Lombardi and Dr. Pulluru. These providers acted together as a team in an occupational medicine environment and consistently made objective findings of the Petitioner's present condition being causally connected to the injury. Their treatment plans were credible since they were based on the patient's present condition and diagnosis of ill being. These uniform medical causation of ill-being opinions give the Petitioner the preponderance of the evidence necessary to overwhelmingly override the unfounded non-physiologic pain syndrome proposed by the IME, Dr. Miller.

Additionally, Dr. Pulluru has seen the patient several times and is the only surgeon that actually looked inside the Petitioner's shoulder, assessed the damage and repaired the Petitioner's condition. Dr. Pulluru has rendered a post surgical diagnosis of: 1. Right shoulder rotator cuff (subscapularis) tear; 2. Anterior capsular tear; 3. Superior labral tear; 4. Subacromial bursitis.

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 the services provided to the Petitioner were reasonable and necessary. In support of this finding the Arbitrator restates all the stated facts and causal relationship affirmations under item (F) above. The Respondent failed to offer any credible evidence contesting the reasonableness and medical necessity of the services rendered to the petitioner.

Furthermore: a.) the Petitioner followed all of the employer instructions upon seeking medical care for her injury and treated with 5 medical physicians and several therapist under the sponsorship and direction of the employer without deviation; b.) This group of physicians acted as an occupational medicine team and consistently made objective findings of her present condition being causally connected to the injury; c.) The MRI objective findings of progressive labral tear together with failed conservative treatment methods provide a strong indication of treatment and surgical necessity; d.) The treatment plans were credible since they started with the most conservative first, medications, therapy and rest, slowly ratcheting up to more aggressive treatments, like injections and surgery, when the patient's condition and exacerbations did not respond to treatment.

The Arbitrator finds that the billing record in evidence shows that the Respondent has not paid all appropriate charges for all reasonable and necessary medical services. The Petitioner submitted into evidence, in its Exhibit 5, unpaid bills from the employer chosen physicians and hospitals for reasonable and necessary services related to the Petitioner's injury suffered on March 4, 2012. However, the employer paid some treatments like the pre-surgical and post-IME Empower Physical Therapy treatments and should receive a credit for those bills and any others already paid.

The Respondent disputed the medical bills in part. The parties agreed that the Respondent partially paid $1,102.00 of the DuPage Medical Group balance of $25,668.50 and noted this partial payment on the Exhibit #5 cover sheet. The parties also agree that the Respondent paid the, post IME, Empower Physical Therapy charges of $8,550.00 in full and noticed this payment on the exhibit cover sheet. Lastly, the parties agree that there were $639.00 unrelated charges on the HMO billing of $ 6,989.00 and reduced these on the exhibit's cover sheet also. Therefore, the outstanding medical amount due after these reductions may be **$50,375.20**.

L. What temporary benefits are in dispute?

The Arbitrator finds the Petitioner to be entitled to receive TTD benefits of $546.10 per week for 2.429 weeks between 03-04-12 and 03-21-12 and again receive TTD benefits of $546.10 per week for 45 weeks between 09-05-12 to 07-12-13.

The arbitrator finds the Petitioner to be entitled to receive TPD benefits of $423/week (4hr/work day) for 8.714 weeks, commencing 03-22-12 through 05-21-12 and again receive TPD benefits of $211.5/week (6hr/work day) for 15.1 weeks, commencing 05-22-12 through 09-04-12.

The Petitioner has been unable to work due to her condition of ill being as evidenced by her physician's continued unbroken orders. Upon her injury on 03-04-12 the Edwards Corporate Health physicians, Dr Kelley and Dr. Link, placed the Petitioner off from work in TTD status until Dr. Link placed her on TPD status of 4 hours work per day.

On 05-21-12, Dr. Paul placed the Petitioner on TPD status of 6 hours per day.

On 09-04-12, due to the Petitioner's worsening condition and pain exacerbations at work, Dr. Lombardi placed Mrs. Bailey off from work. This off work status has been reiterated continuously pre-operative by Dr. Lombardi in 10-12-12 and 01-11-13 and post-operative by Dr. Pulluru in 04-04-13, 05-16-13, 06-27-13 and 07-09-13.

The Petitioner has therefore established entitlement to TTD benefits under the Illinois Worker's Compensation Act following our court's reasoning in City of Granite v. Industrial Commission, 279 Ill.App.3rd 1087 (1996).

The Respondent failed to offer any credible evidence contesting the established inability of the Petitioner to work. Respondent's reliance on Dr. Miller's report is unreasonable and vexatious.

M. Should penalties or fees be imposed upon Respondent?

The Petitioner has filed a petition for penalties under 820 ILCS 305/19(l) and 820 ILCS 305/19(k) and attorney fees under 820 ILCS 305/16 of the ILWCA. (PX #6)

Section 19(l) allows $30.00 per day penalty, not to exceed $10,000 for an employer's refusal, neglect and unreasonably delaying the payment of benefits without just cause. Section 19(k) allows for 50% penalty on the benefits due for an employer's vexatious and frivolous delay of payment. Section 16 allows for attorney fees on situations where the employer has been found to have unreasonable or vexatious in its payment of benefits. The Court in McMahan reasoned that the imposition of penalties under section 19(l) is mandatory while the Arbitrator or Commissioner has discretion on the imposition of penalties under 19(k) and section 16. McMahan v. Industrial Commission, 183 Ill.2d 499 (1998).

The Arbitrator finds that the Respondent acted unreasonably and vexatious in delaying, approving and not paying the ordered MRI arthrogram provided by Provena St. Joseph. Also found is that the Respondent acted unreasonable and vexatious for not paying for the Petitioner's physician ordered TTD, not paying for the necessary and reasonable medical treatment at DuPage Medical Group and Edward Hospital and not approving the should surgery after having 2 MRI objectively confirming the lesion. In support of this finding the arbitrator restates the facts and causal relationships stated above in items F, J, and L.

The employer relied solely on the unfounded opinion of its IME, Dr. Klaud Miller, not to pay for the above reasonable and medically necessary benefits. The arbitrator has found for all the above reasons the opinion of the IME not credible when compared to the clear and convincing medical evidence and opinions of physicians chosen by the employer that supported the reasonableness and medical necessity of the benefits.

The employer cannot rely solely on the IME determination on disability issues and should consider the employee's physician opinions in making disability determinations and the Commission has the authority to settle conflicting medical evidence. Grabs v. Safeway In., First District Appellate Court of Illinois, Third Division, Docket No. 1-08-3007, June 17, 2009.

Therefore for all the above reasons:

The Arbitrator awards section 19(l) penalties in the sum of $7,980.00.

The Arbitrator awards section 19(k) penalties in the sum of $ 30,518.88.

The Arbitrator awards section 16 attorney fees in the amount of $ 6,103.78.

N. Is Respondent due any credit?

Both parties stipulate to the Respondent receiving a credit of $1,208.96 for TTD payments made.

Both parties stipulate to the Respondent receiving a credit of $6,120.72 for TPD payments made.

Respondent claims an additional credit of $10,621.51 which is not supported by the record.

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 Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tonya Tenney,

Petitioner,

14IWCC0608

vs.

NO: 11 WC 38352

Cerro Gordo School District,

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, temporary total disability and permanent partial disability and being advised of the facts and law, modifies the Decision of the Arbitrator on the issue of permanent partial disability as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In a decision dated February 28, 2013, the Arbitrator found that Petitioner sustained an aggravation of her preexisting left wrist synovitis as a result of the April 1, 2011 lifting injury. Petitioner underwent left wrist dorsal synovitis surgery by Dr. Brustein on July 31, 2012. On September 28, 2012 Dr. Brustein testified that Petitioner should be able to resume her full duties at work and that permanent disability does not generally result from the type of surgery he performed. However, Petitioner testified that she does not believe surgery improved the condition of her left wrist because she still experiences pain with any activity. We note that although Petitioner denied prior symptoms similar to those she experienced as a result of the April 1, 2011 accident, the evidence shows that Petitioner's left hand and arm were not pain-free prior to the accident. Petitioner admitted that she concurrently suffers from constant symptoms of carpal tunnel syndrome that preexisted the accident by at least five years. A history of left wrist tendonitis and thoracic outlet problems is also indicated in the medical records. According to prior records offered into evidence by Respondent, Petitioner presented to Dr. Heimbrecht on August 5, 2009 with complaints of pain in the base of her left thumb and weakness in her left wrist; she explained that she worked as a cook and experienced pain and weakness holding trays and lifting at work. Petitioner described the pain as occurring deep inside the wrist joint. Furthermore, there is some evidence that Petitioner sustained a motor vehicle accident

subsequent to her left wrist surgery that may have caused an aggravation of her left wrist symptoms. Petitioner reported to Dr. Fulbright on July 17, 2012 that she sustained a motor vehicle accident in August of 2011. She complained of bilateral upper extremity numbness, worse on the left side, extending between the hands and elbows. After considering all of the evidence and for the foregoing reasons, we find that the Arbitrator's award of 15% of the left hand is an overvaluation of Petitioner's loss as a result of the April 1, 2011 accident and we modify the award to 10% of the left hand.

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $284.57 per week for a period of 14 and 1/7 weeks, commencing April 6, 2011 through May 25, 2011 and August 20, 2012 through October 9, 2012, 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 $284.57 per week for a period of 20.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 10% loss of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services directly to the providers as set forth in Petitioner's Exhibit 10, according to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act. The Respondent shall indemnify and hold the Petitioner harmless for any subrogation claim that may be made by Blue Cross/Blue Shield.

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: JUL 24 2014
RWW/plv
o-5/27/14
46

Ruth W. White

Daniel D. Donohoo

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0608

TENNEY, TONYA
Employee/Petitioner

Case# 11WC038352

CERRO GORDO SCHOOL DISTRICT
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:

2217 SHAY & ASSOCIATES
TIMOTHY M SHAY
1030 DURKIN DR
DECATUR, IL 62523

1337 KNELL & KELLY LLC
PATRICK JENNETTEN
504 FAYETTE ST
PEORIA, IL 61603

14IWCC0608

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

Tonya Tenney
Employee/Petitioner

v.

Cerro Gordo School District
Employer/Respondent

Case # 11 WC 38352

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 **Springfield**, 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 _____

14IWCC0608

FINDINGS

On **April 1, 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 $**10,244.68 (36 weeks)**; the average weekly wage was $**284.57**.

On the date of accident, Petitioner was **39** 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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $284.57/week for 14 1/7 weeks, commencing 4/6/2011 through 5/25/2011 and 8/20/2012 through 10/9/2012, as provided in Section 8(b) of the Act.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $284.57/week for 30.75 weeks, because the injuries sustained caused the 15% loss of the left hand, as provided in Section 8(e) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services directly to the providers as set forth in Petitioners Exhibit # 10, according to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act. The Respondent shall indemnify and hold the Petitioner harmless for any subrogation claim that may be made by Blue Cross/Blue Shield.

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 Malloy — Signature of Arbitrator

February 21, 2013 — Date

FEB 28 2013

ADDENDUM 14IWCC0608

In support of the Arbitrator's Decision relating to issues (C), Accident, (F), Causal Connection, and (L), Nature and Extent, the Arbitrator finds the following facts:

The Petitioner testified that she currently has an ongoing companion case for carpal tunnel repetitive trauma injury against the Petitioner. This decision does not address that case and is limited to the adjudication of the Petitioner's alleged single trauma wrist injury occurring on April 1, 2011.

The Petitioner testified that she is currently employed as an elementary school cook for the Cerro Gordo School District. She testified that she held this position on April 1, 2011. She testified that her position requires her to cook approximately 250-300 meals per day for kindergarten through fifth grade students, including both breakfast and lunch. A videotape of the Petitioner's job duties was entered into evidence as Petitioner's Exhibit # 11. The Petitioner testified that she participated in the videotape, and that it was prepared in May of 2011. The petitioner identified milk crates in the video as the type involved in her April 1, 2011 injury. The Petitioner testified that the milk crates are made from plastic, are approximately two feet square, and when full weigh, between twenty-five and thirty-five pounds. She testified that most of the milk crates are kept in a milk cooler, and the remaining crates are kept in a large walk-in refrigerator. She testified that when the milk cooler gets low, she moves milk from the walk-in refrigerator to the cooler as part of her job duties.

The Petitioner testified that on April 1, 2011, at approximately 1:00pm to 1:15pm on a Friday, she was transporting milk from the walk-in refrigerator to the milk cooler. She testified that she slid a stack of four crates across the floor because it was easier than carrying them all. She indicated that sliding a stack of four crates was her general practice for moving milk crates. She lifted and unloaded the first two crates with out incident. However, she testified that when she lifted the second to last crate, it stuck to the bottom crate, causing the Petitioner to unexpectedly lift fifty to sixty pounds instead of twenty-five to thirty. The Petitioner testified that she felt a pull in the outside of her left wrist. She testified that her left hand is her non-dominant hand.

The Petitioner testified that she had never sustained a similar injury in the past. She testified the pain in her wrist after attempting to lift the crates was completely different than her carpal tunnel symptoms. While her carpal tunnel symptoms include numbness and tingling in the hands, the sensation she felt after picking up the milk crate was a sharp pain. She testified that as the evening went on, the pain in her wrist worsened to the point she could not touch her fingers.

The Petitioner testified that her injury took place on a Friday, shortly before the end of her shift, and that she did not report the accident until the following Monday. She testified that over the weekend the pain did not decrease, and that on Monday morning she immediately recognized that she would not be able to complete her job. The Petitioner testified that she reported the accident to Tina Arsneau, the elementary school secretary. She indicated that she reported the accident to the secretary because she was unaware of whether the Respondent had a set of standards regarding who to report injuries to. She further testified that she also reported the accident to Carol Ann Jackson, the secretary for the school superintendent. The Petitioner testified that she filled out an incident report that day. The incident report was entered into evidence as Petitioner's Exhibit # 1. She testified that she filled out the report in the presence of Ms. Arsneau and the elementary school principal, who also signed the report. However, she testified that neither she nor the principal dated the report.

On April 6, 2011, the Petitioner presented to her family physician, Dr. Kurt Heimbrecht. Dr. Heimbrecht's records from Springfield Clinic were entered into evidence as Petitioner's Exhibit # 3. Dr.

Heimbrecht's office note indicates that the Petitioner informed him that she was injured when she was transferring crates and two of them stuck together. (Px. 3). She indicated that her wrist had been stiff since the accident. (Px. 3). Upon examination Dr. Heimbrecht noted decreased range of motion to the wrist. (Px. 3). He ordered an x-ray of the wrist, which came back negative. (Px. 3) He diagnosed the Petitioner with wrist joint pain and a probable wrist sprain. (Px. 3). Dr. Heimbrecht referred the Petitioner to Dr. David Brustein, a hand specialist and placed the Petitioner off work pending his assessment. (Px. 3).

The Petitioner testified that she presented herself to Dr. Brustein's office shortly after the April 6, 2011 referral by Dr. Heimbrecht, but the consultation was cancelled due to the non-approval by her workers' compensation carrier. Petitioner was unable to present to Dr. Brustein for a period of approximately one year because she did not receive approval for treatment from the Respondent. The Petitioner remained off work until the end of the school year, on May 25, 2012, however she returned to work the following fall.

She returned to Dr. Heimbrecht on January 27, 2012 and her wrist pain was discussed (Px. 3). The Petitioner testified that in the interim period between her first visit to Dr. Heimbrecht on April 6, 2011 and January 27, 2012, she treated conservatively at home with a non-prescribed splint. She testified that she was able to function if she wore the splint because it decreased motion to the wrist, and motion tended to cause more pain.

Dr. Heimbrecht ordered a MRI of the Petitioner's left wrist on January 27, 2012. (Px. 3). The MRI was taken on February 1, 2012. The MRI report was entered into evidence as Petitioner's Exhibit # 2. The MRI revealed an abnormal signal in the dorsal aspect of the lunate. It included a round possibly enhancing focus of abnormal signal. (Px. 2). The signal from the scapholunate ligament was very heterogeneous and there was a linear high signal in the central portion of the ligament. (Px. 2). The scapholunate interval was not widened. A small amount of fluid was seen in the radiocarpal joint. (Px. 2). The MRI indicated a partial tear of the scapholunate ligament. (Px. 2). Further, the MRI revealed a possibly enhancing abnormal signal in the dorsal surface of the lunate. It was unknown whether the abnormal signal was due to trauma, erosion, or a small benign bone lesion. (Px. 2). As a result, Dr. Heimbrecht again referred the Petitioner to Dr. Brustein. (Px. 2).

The Petitioner testified that she was finally able to see Dr. Brustein by billing her private health insurance. Dr. Brustein's records were entered into evidence as Petitioner's Exhibit # 5. Dr. Brustein testified via his evidence deposition, taken on September 28, 2012 and entered into evidence as Petitioner's Exhibit # 9. Dr. Brustein testified that he is a board certified orthopedic surgeon with a certificate for added qualifications for surgery of the hand. (Px. 9, p. 5).

The Petitioner first presented to Dr. Brustein on May 2, 2012. She presented with left wrist pain, described as aching, sharp pain, and throbbing. (Px. 5). The Petitioner told Dr. Brustein that the pain had started approximately one year prior and that she was injured lifting milk crates. (Px. 5). Upon examination of the left wrist, Dr. Brustein noted mild pain with extension, hyperextension, and hyperflextion. (Px. 5). He indicated that the pain was on the ulnar side. (Px. 5). After reviewing her February 2, 2012 MRI, Dr. Brustein diagnosed the Petitioner with ulnar sided wrist pain, likely related to triangular fibrocartilaginous complex (TFCC) or dorsal synovitis. (Px. 5). He recommended conservative care including a forearm based resting wrist orthosis and physical therapy. (Px. 5). He also indicated that a cortisone injection and/or wrist arthroscopy may be considered in the future. (Px. 5).

Dr. Brustein referred the Petitioner for physical therapy at Decatur Memorial Hospital two to three times per week for four weeks. (Px. 5). The Petitioner presented for therapy on May 7, 2012 and continued to receive physical therapy at Decatur Memorial Hospital until May 31, 2012. (Px. 6).

The Petitioner returned to Dr. Brustein on June 13, 2012. The Petitioner indicated that her left wrist was sore. (Px. 5). Dr. Brustein testified that continued pain indicated that the therapy hadn't helped that much. (Px. 9, pp. 10-11). Physical examination still revealed pain with radial and ulnar deviation, flexion and extension, and pronation and supination. (Px. 5). As a result of the examination, Dr. Brustein administered a cortisone injection to the Petitioner's left wrist. (Px. 5). Dr. Brustein testified that the purpose of the cortisone injection was both to decrease the inflammatory process within the joint, as well as for diagnosis. (Px. 9, p. 11). He testified that if the cortisone injection relieves or improves a patient's pain, it indicates that the pathology is within the joint. (Px. 9, p. 11).

Petitioner returned to Dr. Brustein on June 13, 2012. (Px. 5). She indicated that the injection had helped some, but that her wrist was still sore. (Px. 5). At this point, Dr. Brustein recommended and scheduled a left wrist arthroscopy with a possible triangular fibrocartilage complex repair. (Px. 5).

Dr. Brustein performed the left wrist arthroscopy on July 31, 2012. The operative report was entered into evidence as Petitioner's Exhibit # 7. Both the pre and post-operative diagnoses were left wrist pain with dorsal synovitis. (Px. 7). The arthroscopy revealed the TFCC was intact. (Px. 7). However, the Petitioner had quite a bit of dorsal synovitis. (Px. 7). Dr. Brustein testified that synovitis is an inflammatory condition. (Px. 9, p. 13). There were some changes, mostly on the dorsal aspect of the lunate toward the lunotriquetral ligament, although the lunotriquetral ligament itself was intact. (Px. 7). Dr. Brustein performed a dorsal synovectomy and debrided some dorsal arthritis and distal radial erosions. (Px. 7).

Dr. Brustein testified that in his opinion, and to a reasonable degree of medical certainty, it is reasonable to think that the Petitioner's reported mechanism of injury of picking up two stuck together milk crates had aggravated or exacerbated the Petitioner's pre-existing synovitis. (Px. 9, p. 14). He indicated that since the Petitioner had reported no prior complaints of wrist pain, it was reasonable based on history, physical, and the operative findings, that her pain and symptoms were aggravated or exacerbated by the accident. (Px. 9, p. 14).

The Petitioner testified that as an employee of the school district, she did not work summers, and therefore was not working on July 31, 2012, the date of her surgery. However, she testified that when school resumed on August 20, 2012, she remained off work per Dr. Brustein.

The Petitioner returned to Dr. Brustein on August, 18, August 27, September 10 of 2012 for follow up. (Px. 5). Dr. Brustein ordered another round of physical therapy with Decatur Memorial Hospital two to three times per week for four weeks. (Px. 5). These therapy records were admitted into evidence as Petitioner's Exhibit # 8. Dr. Brustein ordered the Petitioner on light duty, with no use of the left upper extremity on August 18 and 27, and no heavy lifting with the left upper extremity on September 10. (Px. 5).

The Petitioner's final visit to Dr. Brustein was on October 8, 2012 (Px. 5). At that point, she was released to full duty. (Px. 5). The Petitioner has subsequently returned to work. She testified that she has received no treatment for her left wrist since that date.

The Petitioner testified that as of the date of Arbitration, she continued to experience pain in her left wrist. She indicated that the pain was on the side of the wrist, where she initially felt pain after the

accident. The Petitioner testified that she generally does not have pain in her wrist if she has not been moving it, but that with activity she experiences sharp localized pain.

She testified that certain duties exacerbated her pain, including serving lunch and moving milk crates. She testified that she serves between 170 and 175 lunches per day during an hour and a half period. She testified that she also has to move large trays of food weighing approximately ten pounds. She testified that she is the only cook and that she does not have any assistance with her duties.

After a review of the totality of the evidence, the Arbitrator finds that on April 1, 2011, the Petitioner sustained an accident arising out of and in the course of her employment with the Respondent where she unexpectedly lifted two milk crates that were stuck together and felt a pull in her left wrist. Relying primarily on the medical records of Dr. Brustein and Dr. Heimbrecht and the operative report of July 31, 2012, collectively indicating that the Petitioner suffered an aggravation of her pre-existing synovitis, as well as Dr. Brustein's testimony that the accident as reported to him could have aggravated or exacerbated the Petitioner's pre-existing synovitis, the Arbitrator finds that the condition of ill-being to the Petitioner's left wrist is causally related to the April 1, 2011 accident.

With respect to nature and extent, the Arbitrator finds that the Petitioner has been released back to work full duty without restrictions. However, the Petitioner continues to suffer from sharp pain in her left wrist, even after a cortisone injection, arthroscopic surgery, and both pre and post-operative physical therapy. Therefore, the Arbitrator awards the Petitioner the sum of $284.57 per week for a period of 30.75 weeks, because the Petitioner sustained a 15% loss of the use of her left hand, pursuant to Section 8(e) of the Act.

In support of the Arbitrator's decision relating to issue (J), Medical Expenses, the Petitioner's outstanding medical bills, as set forth in Petitioner's Exhibit # 10, shall be paid by the Respondent directly to the providers pursuant to the Medical Fee Schedule set forth in Sections 8(a) and 8.2 of the Act. The Respondent will hold the Petitioner harmless for any subrogation claim asserted by Blue Cross/Blue Shield, the Petitioner's private medical insurance.

In support of issue (K), Temporary Total Disability, the Arbitrator finds the following facts:

On April 6, 2011, the Petitioner was restricted from working entirely by Dr. Heimbrecht until such time as she was seen by Dr. Brustein. (Px. 3). There is no indication that this restriction was lifted until the Petitioner presented to Dr. Brustein on May 2, 2012. However, the Petitioner testified that the school year ended on May 25, 2011, and that she would not have worked over the summer regardless of her injury.

Even though her work restriction from Dr. Heimbrecht was still in place, the Petitioner returned to work in the fall of 2011. She did not miss work because of her injury again until after her arthroscopic surgery of July 31, 2012. Again, the Petitioner testified that she was not working at the time of the surgery because school was not in session. However, the Petitioner testified that she did not return to work until she was released to full duty by Dr. Brustein on October 9, 2012. She further testified that the school year started on August 20, 2012. Dr. Brustein did return the Petitioner to light duty on August 18, 2012, with restrictions of no use of the left upper extremity, and adjusted the restriction on September 10, 2012 to no heavy lifting with the left upper extremity. (Px. 5). However, the Petitioner's description of her job duties, including lifting ten pound cooking trays and moving twenty-five to thirty pound milk crates does not fall within those restrictions.

Therefore, the Arbitrator awards the Petitioner temporary total disability benefits in the amount of $284.57 per week for 14 1/7 weeks commencing April 6, 2011 through May 25, 2011 and August 20, 2012 through October 9, 2012, as provided in Section 8(b) of the Act.

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ramona Davis,

Petitioner,

vs.

NOS: 09 WC 23736
09 WC 33358

Winnebago County States Attorney,

Respondent.

14IWCC0609

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 and causal connection and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner failed to prove she sustained repetitive trauma injuries arising out of her employment by Respondent and manifesting on November 11, 2008. Petitioner, a 44-year-old victims advocate, alleged that her job duties entailed frequent keyboard use and other activities using her hands in a repetitive manor that caused or aggravated her bilateral carpal tunnel syndrome.

Petitioner has worked for thirteen years as a victims advocate in the Juvenile Unit. She functions as a liaison between the victims of crime and the prosecution. Her work day usually begins with the receipt of the detention list and police reports for crimes recently perpetrated by juveniles. Using these documents she begins making contact with the named victims over the telephone, and follows this with a confirmation letter. The number of juveniles on the detention list usually varies between zero and ten individuals. She enters the identifying information from the detention list and police reports into the Juvenile Unit information system ("JSI") on her computer. She also generates letters and forms, such as medical release forms and restitution summary forms, to be provided to the victims for completion and return.

Petitioner testified that on some days she primarily sits at her computer and other days she is in court or in victim interviews for part or all of the day. Although she works in the

Juvenile unit, she is also assigned to work on homicide and murder cases; those trials are often several days or a week in duration. There are, however, weeks where she does not go to court at all due to the particular the cases, the prosecutors and the needs of the victims. Although Petitioner attends meetings and witness interviews, for legal reasons she does not take notes. Another job duty Petitioner described is contacting the victims as the cases progress to notify and remind them of court dates, or to notify them that a case is being dismissed. Petitioner may have up to twenty-five cases on her docket at any time. When a case closes she assists in documenting the release and return of evidence using the computer system. Petitioner was unable to estimate the number of hours she spends at her desk on a daily basis due to the variation of her days and weeks, but she agreed that in any given month approximately 50% of her time may be spent at her desk using her computer. Petitioner testified that her court appearances usually lasted for an hour or so at a time, rather than days or weeks. She agreed that when she is at her desk she is not always typing because she may be on the phone or looking through paperwork.

Petitioner offered into evidence a group exhibit consisting of examples of documents she manages or uses as part of her job. The items include redacted detention lists and police reports. Petitioner explained that she also received "brown files" from the juvenile detention center to review. If the Juvenile Unit decides to charge, the secretary generates the necessary documents and Petitioner makes contacts with the victims. Petitioner's group exhibit also contains examples of initial contact letters, disposition letters, court dockets, medical release forms, restitution summary forms, "brown file" petitions and evidence release forms.

On cross-examination, Petitioner agreed that she performed a variety of job duties. She agreed that many of the documents represented begin with forms stored on a hard drive; she edits information such as names, dates, charges, and name of prosecutor. The number of phone calls and the amount of typing she performs varies from day to day and her ability to type at a certain speed was not a requirement of her job. The Arbitrator asked Petitioner how many days she attends court in any given month. Petitioner estimated that on average she may spend eight days per month in court.

Petitioner began to notice symptoms of numbness and pain in both of her hands for approximately a year prior to the alleged manifestation date, November 11, 2008. She did not go to the doctor for a year and in that time her pain gradually became worse. When her symptoms would bother her at work she would take a break and massage her hands. On cross-examination, Petitioner agreed that she experienced symptoms at home as well as at work; for example her hand would go numb while cleaning the bathtub. Petitioner was examined by her primary care physician, Dr. Baxter, on November 11, 2008. She complained of bilateral hand numbness but Tinel's and Phalen's tests did not reproduce symptoms. Dr. Baxter suspected early carpal tunnel syndrome and recommended electrodiagnostic testing. A December 11, 2008 EMG test indicated severe bilateral carpal tunnel syndrome and mild left cubital tunnel syndrome. Petitioner did not recall when she notified her supervisor about her condition, but we note that notice was not at issue according to the Request for Hearing. Dr. Baxter referred Petitioner to Dr. Antonacci, an orthopedic surgeon, and she was examined on January 13, 2009. Petitioner complained of pain that was better during the day and worse at night. On Dr. Antonacci's recommendation, Petitioner wore splints and took over-the-counter anti-inflammatory medication for conservative treatment. On May 29, 2009, Dr. Antonacci recorded in his notes that Petitioner was "an office

worker who does a lot of repetitive motion such as typing and answering the phone." He noted that Petitioner's symptoms started a year earlier with work activities and that they eventually began to bother her at night. Dr. Antonacci recommended surgical correction and opined that "her condition is work-related secondary to repetitive motion and the types of activity that she performs at work."

At the request of Respondent, Petitioner was examined by Dr. Pomerance on August 13, 2009. Petitioner explained her job duties of sending letters, performing data entry, making phone calls and attending court. Dr. Pomerance also reviewed a job description classifying Petitioner's job as 40% sedentary, 30% standing and 30% walking and requiring the ability to lift, carry, push, and pull up to twenty-five pounds. Dr. Pomerance agreed with Dr. Antonacci's diagnosis of carpal tunnel syndrome, but he did not believe that Petitioner's job duties caused or aggravated Petitioner's condition.

Dr. Antonacci wrote a causal opinion letter dated October 21, 2009. He opined that Petitioner's condition was work-related due to repetitive motion of her hands. He reviewed Dr. Pomerance's August 13, 2009 report. Dr. Antonacci believes that keyboarding and computer use are still "controversial" factors and not clearly unrelated to the development of carpal tunnel syndrome in all cases. He disagreed that Petitioner did not perform any work activities involving "factors known to cause, aggravate or accelerate a diagnosis of carpal tunnel syndrome" because of her history of over ten years of keyboarding and repetitive motion of her hands.

Dr. Pomerance issued an addendum report dated February 7, 2010. He reviewed additional medical records and Dr. Antonacci's causal opinion letter dated October 21, 2009. Dr. Pomerance disagreed with Dr. Antonacci's opinion based on what he claimed was a lack of recent studies (within the last nine years) supporting a causal link between keyboarding and clerical duties and carpal tunnel syndrome.

Dr. Antonacci testified via deposition on February 17, 2010. Dr. Antonacci is a board-certified orthopedic surgeon. He practices general orthopedic surgery including the treatment of upper extremity conditions. Dr. Antonacci testified that on May 29, 2009 Petitioner described her job duties to him, explaining that she performed office work involving repetitive hand motion such as typing and answering the phone and that her symptoms became worse over time while working. Dr. Antonacci testified that he did not believe that Petitioner had any significant idiopathic risk factors for the development of carpal tunnel syndrome and he opined that her job duties were a contributing factor. On cross-examination, Dr. Antonacci testified that "any type of wrist flexion activity that's repetitive has been known in the past to be a causative factor for carpal tunnel" He did not recall the details of the Mayo Clinic study involving keyboarding, but he felt that the conclusions were not "written in stone." He does not believe that the medical literature regarding causal connection between keyboarding and carpal tunnel syndrome is yet definitive. Dr. Antonacci assumed that Petitioner did not actually type "all day." He still believed that her work could cause an aggravation because the most important fact in his opinion was her history of performing the same job duties. It was very significant to Dr. Antonacci that when Petitioner modified her job duties by limiting her typing to ten hours per week, her symptoms improved. However, Dr. Antonacci agreed that this information came directly from Dr. Pomerance's report; Dr. Antonacci did not impose any restrictions on Petitioner preoperatively.

We note that Petitioner never testified with respect to working modified duty and Dr. Pomerance's Section 12 report is the only indication of that occurrence. Dr. Antonacci agreed that someone of Petitioner's physical characteristics could develop carpal tunnel syndrome irrespective of work activities.

Dr. Pomerance testified via deposition on June 25, 2010. Dr. Pomerance is a board certified orthopedic surgeon whose practice is limited to the treatment of upper extremities, including hand surgery and microsurgery. Dr. Pomerance outlined risk factors for the development of carpal tunnel syndrome including age, sex and menopausal status, medical conditions such as hypothyroidism, diabetes and autoimmune diseases. He also explained that trauma can be a risk factor as in the case of penetrating injuries, wrist fractures and dislocations. Further risk factors are abnormal forearm musculature, nerve tumors, "persistent median artery," and obesity. Dr. Pomerance testified that he examined Petitioner on August 13, 2009; he reviewed medical records and took a history. He believed Petitioner's risk factors for the development of carpal tunnel syndrome were her age, gender and body mass index. On the date of examination, Petitioner reported that she was awaiting surgery and working modified duty, limiting her keyboarding to ten hours per week. She complained of persistent bilateral pain and numbness. She described her job duties as consisting of clerical and data entry tasks. Dr. Pomerance testified that numerous peer-reviewed studies have not supported a relationship between keyboarding and carpal tunnel syndrome and that "the basic tenet of typing and carpal tunnel syndrome has been shown to be incorrect." Dr. Pomerance disagreed with Dr. Antonacci's opinion that "repetitive flexion and extension of the wrist could cause or contribute to carpal tunnel." He explained that the literature supports a causal relation only to repetitive hyper flexion and hyperextension, where the wrist is subject to extremes of range of motion, at least sixty to seventy degrees, that causes pressure in the carpal canal approaching pathologic levels. He testified that the literature clearly supports his opinion that there is no relation between keyboarding and data entry and carpal tunnel syndrome. On cross-examination Dr. Pomerance agreed that there was no way to prove, however, that any particular idiopathic factors caused Petitioner's carpal tunnel syndrome.

Petitioner underwent carpal tunnel releases, on June 3, 2010 (right hand) and October 7, 2010 (left hand). Petitioner returned to work on November 19, 2010. There is no dispute with respect to the duration of time that Petitioner was medically authorized off of work in relation to the two surgeries. Petitioner testified that she used sick time benefits and that her bills were paid by her group health insurance. Petitioner testified that following her surgeries she experienced almost complete resolution of symptoms and returned to work in her regular capacity. She chooses to wear wrist braces occasionally when lifting and she practices some of the exercises she learned in physical therapy. She takes no medications and has not returned to Dr. Antonacci since she returned to work.

In a decision dated February 13, 2013, the Arbitrator found that Petitioner sustained compensable repetitive trauma injuries to her bilateral upper extremities manifesting on November 11, 2008. The Arbitrator relied on the causal connection opinion of Dr. Antonacci, Petitioner's doctor, over the opinion of Dr. Pomerance. The Arbitrator specifically found Dr. Pomerance's opinion not credible because Dr. Pomerance does not believe that keyboarding is ever causally related to carpal tunnel syndrome. The Arbitrator found that opinion contrary to

Appellate Court precedent and long held opinions of the Commission.

After considering all of the evidence, we reverse the Decision of the Arbitrator and find that Petitioner failed to prove that she sustained repetitive trauma injuries that caused or aggravated bilateral carpal tunnel syndrome. We believe there is insufficient proof that Petitioner's job duties caused repetitive injury. We find that Petitioner testified credibly with respect to her job duties and we note that her testimony was not rebutted. Nevertheless, we do not find that Petitioner proved by a preponderance of the evidence that she used her hands at work in a repetitive manner causing cumulative trauma. Petitioner testified that she is generally sitting at her computer 50% of the time; the job description in evidence states that Petitioner's job was only 40% sedentary. Petitioner's sedentary duties involve inputting data into the computer system, producing documents from forms and templates stored on her computer, reviewing files and making telephone calls. The letters she sends to witnesses are edited to reflect the correct names, dates and relevant information. Petitioner did not testify that she types any documents from start to finish, and there are no examples of documents that Petitioner produced that are of any significant length. Dr. Antonacci's causal connection opinion was based on his belief that Petitioner's ten to eleven year usage of computers caused or aggravated her carpal tunnel syndrome over time, although he assumed that Petitioner did not type "constantly." Dr. Antonacci also stated that he found it very significant that Petitioner claimed (per Dr. Pomerance's report) to have had relief when she limited her keyboarding to ten hours per week. However, Dr. Antonacci confirmed that he never put restrictions on Petitioner, and Petitioner did not testify that she ever worked light duty.

The Arbitrator did not find Dr. Pomerance's opinions with respect to causal connection to be credible and we agree. We do not believe it is true that a claimant could never successfully prove causal connection between certain clerical activities and carpal tunnel syndrome, as per the opinion of Dr. Pomerance, but we believe that the Petitioner in this case did in fact fail to prove such a causal nexus. The Arbitrator wrote that "the Commission has long held that keyboarding activities, when done frequently throughout the work day, can result in an injury to the bilateral hands causing carpal tunnel syndrome." More than mere "frequent" keyboarding must be shown; we further note the importance of factors such as sustained hand positioning, force exerted and the duration of continuous keyboarding. Petitioner's testimony was unclear as to how much time she spends typing and it was apparently difficult for Petitioner to answer the Arbitrator's questions on this issue due to the great amount of variation in her work days. She estimated that for eight days out of any given month she attended trials where she would be sitting and supporting the witnesses and families and not performing any typing or writing. Petitioner testified that on any given day, while she may have some computer work, she may also have meetings, docket calls or interviews to attend for portions of the day. She may be pulling and reviewing files or evidence, making phone calls, assisting prosecutors and evidence technicians, or she may be generating letters and forms and performing data entry work. Although Petitioner felt like there were days that she "typed constantly," it appears that her keyboarding was self-paced, intermittent and interspersed with other activities. With respect to job duties other than keyboarding, Petitioner did not testify about any lifting, gripping, exposure to vibration or force, or any awkward hand positioning. She did not describe any physical characteristics of her work environment or equipment. In conclusion, Petitioner failed to offer persuasive evidence that her job duties caused repetitive trauma resulting in carpal tunnel syndrome.

14IWCC0609

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated February 13, 2013 is hereby reversed for the reasons set forth above and Petitioner's claim is 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: JUL 24 2014
RWW/plv
o-5/22/14
46

Ruth W. White

Daniel D. Donohoo

Charles J. DeVriendt

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

Donald Ingram,

Petitioner,

14IWCC0610

vs.

NO: 08 WC 40372

Panduit Corporation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of prospective medical treatment, temporary total disability, maintenance, vocational rehabilitation, 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, a 49-year-old machinist, sought an award of prospective medical treatment consisting of a lumbar fusion. Petitioner sustained a neck and back injury on June 24, 2008 occurring in the course of and arising out of his employment by Respondent. The Arbitrator found that Petitioner reached maximum medical improvement on November 6, 2009 and declined to award the lumbar fusion recommended by Dr. Ghanayem, who examined Petitioner for a surgical consultation on July 14, 2011. Petitioner complained of back and neck pain for several years. Dr. Ghanayem did not opine with respect to causal connection or record any history of a work accident but he recommended an anterior fusion at the L5-S1 level. Although

the Arbitrator denied prospective medical treatment, the Arbitrator awarded Dr. Ghanayem's consultation bill totaling $230.00, finding that it was reasonable for Petitioner to seek a second opinion. We disagree on the basis that Dr. Ghanayem's examination occurred over one and a half years after the Arbitrator found that Petitioner reached maximum medical improvement for the injuries sustained on June 24, 2008 and was not reasonable and necessary treatment related to those injuries. Therefore, we vacate the Arbitrator's award of Dr. Ghanayem's bill and otherwise affirm and adopt the decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator dated September 23, 2013 is modified as stated above and otherwise 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 24 2014
RWW/plv
o-6/19/14
46

Ruth W. White

Daniel D. Donohoo

Charles J. DeVriendt

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

14IWCC0610

INGRAM, DONALD
Employee/Petitioner

Case# **08WC040372**

PANDUIT CORPORATION
Employer/Respondent

On 9/23/2013, 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:

0786 BRUSTIN & LUNDBLAND LTD
CHARLES E WEBSTER
10 N DEARBORN 7TH FL
CHICAGO, IL 60602

1408 HEYL ROYSTER VOELKER & ALLEN
DANA J HUGHES
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

14IWCC0610

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)

Donald Ingram
Employee/Petitioner

v.

Panduit Corporation
Employer/Respondent

Case # 08 WC 40372

Consolidated cases: D/N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **July 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. 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. XIs Petitioner entitled to any prospective medical care?
L. X What temporary benefits are in dispute?
☐ TPD ☐ Maintenance X TTD
M. X Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. X Other **Vocational Rehabilitation**

FINDINGS

On the date of accident, **June 24, 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 lumbar spine condition of ill-being ***is*** causally related to the accident. Petitioner's current claimed cervical spine condition is not causally related to the accident. See attached conclusions of law.

In the year preceding the injury, Petitioner earned **$60,881.60**; the average weekly wage was **$1,170.80**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$7,750.94** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$7,750.94**. [At the hearing, the parties agreed Petitioner was entitled to TPD benefits from 9/8/08 – 10/6/08 and that Respondent paid $2,141.70 in TPD.]

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 $780.53 per week from June 25, 2008 through September 7, 2008 (10 5/7 weeks) and from February 20, 2009 through November 6, 2009 (36 6/7 weeks), as provided in Section 8(b) of the Act. The two awarded periods total 47 4/7 weeks. For the reasons set forth in the attached conclusions of law, the Arbitrator relies on Dr. Templin in finding that Petitioner reached maximum medical improvement with respect to his causally related lumbar spine condition on November 6, 2009. Respondent is entitled to credit for the $7,750.94 in TTD it paid prior to hearing. Arb Exh 1.

Respondent shall pay $263.00 in medical expenses, subject to the fee schedule.

Respondent is not liable for penalties or fees.

Petitioner failed to establish entitlement to prospective care in the form of a lumbar fusion.

Petitioner failed to establish entitlement to vocational rehabilitation.

This case is ripe for a permanency finding but the Arbitrator makes no such finding based on Petitioner's election to proceed solely pursuant to Sections 19(b) and 8(a) of the Act. See attached conclusions of law.

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.

Molly E Mason
Signature of Arbitrator

9/23/13
Date

ICArbDec19(b)

SEP 23 2013

Donald Ingram v. Panduit Corporation
08 WC 40372

14IWCC0610

Arbitrator's Findings of Fact

Petitioner was born on May 27, 1959. T. 13. He testified he worked for Respondent for 31 years. T. 65. He started out as an assembler. He then worked in a tool and die/change-up position for 25 years. The last job he held was tool room machinist, more formally known as a "Cam Tech 6." T. 15.

Petitioner testified he sustained a lifting-related injury while working as a "Cam Tech 6" at Respondent's Romeoville facility on June 24, 2008. Accident is not in dispute. Arb Exh 1. T. 55.

On direct examination, Petitioner initially testified he was not experiencing any back pain when he arrived at work on June 24, 2008. T. 21. He then testified his back "wasn't doing too bad" before that date. T. 22.

Under cross-examination, Petitioner acknowledged injuring his back at work in 2001 and 2004. He lost time from work following both of these injuries and saw physicians, including a neurosurgeon. He admitted that low back surgery was recommended to him before June 24, 2008. He did not undergo surgery at that time. T. 81.

Neither party offered into evidence any medical records pre-dating June 24, 2008. Some history forms in evidence reflect that Petitioner dated the onset of his back problems to 2001. RX 1

Petitioner testified he was injured on June 24, 2008 while using a bar to lift one half of a two-part die known as "die 32." T. 21. On either the second or fourth lift, he felt an "electric shock" sensation and pain going through his fingers, back and body. T. 22. He testified he had never previously felt this kind of sensation before. T. 22. He reported the injury to his foreman, Marty Bigg, who told him, "you're going to the doctor." Petitioner then drove himself to Silver Cross Hospital. [No records from Silver Cross Hospital are in evidence.] Petitioner testified he felt "tight" and tense at the hospital. He was experiencing tingling in his fingers, neck and lower back. He felt as if someone had kicked him in his rear end. T. 24. He was examined and given Motrin for pain. At discharge, he was instructed to seek follow-up care. T. 23.

Petitioner followed up with Dr. Horodysky at the Hedges Clinic the following day, June 25, 2008. The doctor noted that Petitioner was "seen in the ER" and complained of neck pain, lower backache and tingling into the legs. He also noted a "longstanding history of spine problems." He indicated Petitioner "saw neurosurgery in the past."

On examination, Dr. Horodysky noted tenderness in the cervical and lumbar spinous processes and bilateral upper and lower paraspinal muscle tenderness. He prescribed physical

therapy, Ibuprofen and Flexeril. He took Petitioner off work and indicated Petitioner "may need to re-check with a neurosurgeon." PX 7. RX 2.

On July 1, 2008, Petitioner underwent cervical and lumbar spine MRI scans at Dr. Horodysky's recommendation. The cervical spine MRI, performed without contrast, showed a broad-based mild central disc bulge at C7-T1, a minimal right paramedian very broad-based disc bulge at C5-C6 and no significant spinal stenosis. The report concerning the lumbar spine MRI reflects that the radiologist compared the scan with a prior MRI of May 13, 2004. [No May 13, 2004 MRI report is in evidence.] The radiologist noted degeneration at L5-S1, with no significant change since the prior MRI, and no evidence of focal disc herniation or spinal stenosis. He indicated that a "previously noted focal disc, left paramedian L1-L2, is no longer visualized." PX 7.

Petitioner returned to Dr. Horodysky on July 8, 2008 for what the doctor described as an "unspecified backache." The doctor prescribed physical therapy and again indicated Petitioner might need a "re-check with a neurosurgeon." He continued to keep Petitioner off work. PX 7.

On July 11, 2008, Dr. Horodysky completed FMLA-related paperwork indicating Petitioner had been suffering from back pain since June 24, 2008 and was currently undergoing physical therapy and unable to work in any capacity. PX 7.

On August 18, 2008, Petitioner returned to Dr. Horodysky and indicated therapy was not helping. The doctor's note reflects that Petitioner "has had spine problems for a long time." He indicated that Petitioner complained of pain in his upper and lower back, numbness in his arms and right leg and intermittent numbness in his left leg. He referred Petitioner to Dr. Templin, a spine surgeon.

Petitioner testified that Dr. Horodysky referred him to Dr. Templin. T. 26. Dr. Templin is a spine surgeon associated with Hinsdale Orthopaedic Associates, S.C.

Dr. Templin's initial note of September 4, 2008 sets forth a history of a lifting-related work injury of June 24, 2008. Dr. Templin noted that Petitioner complained of 5/10 neck pain "radiating down his back, some low back pain and some bilateral arm pain at the shoulders and elbows." Dr. Templin also noted that Petitioner had undergone cervical and lumbar spine MRIs in July as well as therapy. He indicated that Petitioner described himself as "75% better thus far with physical therapy."

Dr. Templin described Petitioner's prior medical history as "basically non-contributory."

On examination, Dr. Templin noted that Petitioner was able to perform heel-to-toe and tandem gait without difficulty. He also noted a full, painless range of cervical and lumbar spine motion. He noted mild tenderness to palpation about the paraspinal musculature from the cervical spine into the upper thoracic spine. He described Spurling's testing as negative.

Dr. Templin obtained cervical spine X-rays. He interpreted the films as showing no evidence of instability on flexion/extension views and no significant arthritic changes. He noted no stenosis or impingement on review of the MRIs.

Dr. Templin assessed Petitioner as having a "cervical strain that he is recovering from now." He recommended additional therapy followed by work conditioning. He kept Petitioner on a 10-pound lifting restriction with no overhead activities and released Petitioner to work four hours per day, "to allow for PT activity," as of September 8, 2008. He instructed Petitioner to return to him in four weeks. PX 3.

Petitioner testified he returned to work for Respondent on September 8, 2008 and began performing light duty, consisting of grinding. He continued attending therapy.

On September 12, 2008, Petitioner filed an Application for Adjustment of Claim alleging a lifting-related injury of June 24, 2008. Arb Exh 2.

Petitioner returned to Dr. Templin on October 2, 2008, with the doctor again noting improvement but also noting persistent 4/10 pain "centered across the cervical thoracic junction, the lumbosacral junction and extending into the thoracic spine." He also noted a complaint of some paresthesias to the right foot.

Dr. Templin noted no abnormalities on examination. He directed Petitioner to begin work conditioning and indicated he planned to obtain a functional capacity evaluation prior to the next visit. PX 3.

Petitioner began a course of physical therapy at ATI on October 6, 2008. The records from ATI contain a history form dated October 6, 2008 reflecting that Petitioner sustained an injury of June 24, 2008 and that his "lower back has been a problem since 2004." PX 10.

Petitioner returned to Dr. Templin on November 6, 2008 and indicated he was making progress in work conditioning and continuing to perform light duty. The doctor noted that Petitioner was "functioning at a light to medium physical demand for a job that is medium." He indicated that low back pain was the "only thing holding [Petitioner] up," progress-wise. On lumbar spine examination, he noted some mild limitation of flexion and extension and minimal tenderness to palpation. He assessed Petitioner as having an "aggravation of his degenerative L5-S1 condition after his lifting injury which happened in June." He recommended that Petitioner continue work conditioning and then undergo a functional capacity evaluation, with the understanding Petitioner might be a candidate for a fusion if the evaluation showed he could not resume his former job. PX 3.

Petitioner underwent a functional capacity evaluation at ATI on November 24, 2008. The evaluator, Kathryn Hannam, MA, ATC, rated the evaluation as valid. She described Petitioner as pleasant and cooperative. She found Petitioner to be performing at a medium to heavy physical demand level, meaning he could occasionally lift 63 pounds and frequently lift

32 pounds. Based on the Dictionary of Occupational Titles, she rated Petitioner's tool machinist job as falling within the medium physical demand level. She indicated that Petitioner "may certainly attempt returning to work within these safe FCA guidelines (medium to heavy PDL, approx. 75 lbs. occasional lifting), pending M.D. recommendations." PX 4. RX 6.

Petitioner returned to Dr. Templin on November 28, 2008, with the doctor noting the following:

> "He has finished his work conditioning program and his functional capacity evaluation. Functional capacity evaluation showed a valid examination with a medium to high workload tolerance. He did excellently with his therapy and with his work conditioning. The patient is at this point feeling ready to go back to work. He does complain of some occasional lower back pain. It gets up to about a 4/10. It does radiate into his leg. He only takes occasional Flexeril or anti-inflammatory for pain. He complains of occasional paresthesias to the right lateral calf. Neck is feeling much better. Most of the pain is across the lower back. We know he has an L5-S1 degenerative disc condition on this region."

Dr. Templin noted only minimal pain on lumbar spine range of motion testing. He released Petitioner to full duty but limited him to daytime hours "to help facilitate with his therapeutic exercise and rehabilitation program." He directed Petitioner to return to him in six weeks.

Petitioner returned to Dr. Templin on January 9, 2009. The doctor noted Petitioner was "doing pretty well" with full duty but was still experiencing low back pain that increased with activity as well as some right leg pain. The doctor indicated that Petitioner "is able to tolerate work and is enjoying it but it makes it difficult for him to do his exercise due to the severity of the pain."

On examination, Dr. Templin noted mild tenderness with pain over the back, some reflex spasm over the lumbar paraspinal musculature, flexion to about 50 degrees and extension to about 10 degrees.

After reviewing the previous MRI again, Dr. Templin referred Petitioner to Dr. Abusharif for a trial of facet blocks and radiofrequency ablation of the L5-S1 level. He instructed Petitioner to return to him in about a month. He did not impose any work restrictions. PX 3.

Petitioner saw Dr. Abusharif on January 29, 2009. On that date, Petitioner completed a lengthy history form indicating he had seen about six doctors for back pain since 2001 and had injured his back at work on June 24, 2008. The doctor's chart also contains an insurance-

related form indicating that adjuster Julie Blanchard of Sentry Insurance approved a consultation and facet injections. PX 2.

Dr. Abusharif noted that Petitioner complained of pain in multiple body parts, including his back, neck, arms and legs, along with numbness and tingling. The doctor also noted that Petitioner attributed his complaints to a lifting-related work accident that had taken place a few months earlier. He noted "no history of significant medical diseases" in the past.

On examination, Dr. Abusharif noted mild tenderness in the midline thoracic area, moderate tenderness in the left and right lumbar paraspinal areas and pain with passive lumbar extension. He interpreted the lumbar spine MRI as showing disc dehydration at L5-S1, facet arthrosis at L4-L5 and L5-S1 and a disc bulge on the left at L1-L2.

Dr. Abusharif assessed facet syndrome and non-discogenic lumbar spine pain. He recommended and administered bilateral L5-S1 facet joint injections. He instructed Petitioner to return to him in two weeks and indicated Petitioner could resume full duty on February 2, 2009. He indicated that, if the injections improved Petitioner's pain by 50% or better, he would recommend a radiofrequency ablation for a long-term solution. PX 2.

Petitioner returned to Dr. Abusharif on February 11, 2009 and reported improvement of "more than 60%." The doctor noted that, at certain points in the day, Petitioner was experiencing very little to no pain. The doctor indicated he "considers this a successful diagnostic block." He recommended radiofrequency ablation of the medial branch block nerves at L5 and S1 bilaterally.

On February 11, 2009, Dr. Abusharif wrote out a slip indicating Petitioner remained under his care "for a chronic low back condition" and imposing a lifting limit of 25 pounds. He indicated Petitioner should be kept on light duty until further notice. PX 2. T. 36.

On February 19, 2009, Respondent issued a letter to Petitioner indicating his last scheduled workday would be February 19th secondary to a "reduction in workforce due to current economic conditions." The letter also indicates Petitioner was eligible for severance pay based on his years of service, with that pay continuing through August 6, 2009. RX 3.

Petitioner testified that Pat Sheen of Respondent terminated him on February 19, 2009. Petitioner indicated that Sheen told him he was being let go because Respondent was "cutting back." T. 34. The next day, Petitioner applied for a job at Respondent's Burr Ridge facility. Petitioner testified he was not offered this job. It was his belief he did not get the job because he was on light duty and the job involved running a brake press. Petitioner characterized the brake press job as "very, very heavy work." T. 35-36.

Petitioner offered into evidence a letter dated March 5, 2009 (PX 5) sent by his attorney to Julie Blanchard of Sentry Insurance. In the letter, Petitioner's counsel requested that Petitioner be placed on temporary total disability, referencing (and attaching) Dr. Abusharif's

light duty restriction of February 11, 2009. At the hearing, Respondent raised a hearsay objection to a portion of the letter but did not object to the letter as a transmittal of a light duty restriction. T. 188-190. The Arbitrator reserved ruling on the hearsay objection.

On March 11, 2009, Dr. Abusharif performed radiofrequency ablation of the medial branch nerves at L5 and S1 bilaterally. On March 30, 2009, Petitioner returned to Dr. Abusharif and reported 70-80% improvement of his back pain. The doctor noted marked improvement of Petitioner's lumbar spine range of motion. The doctor indicated, however, that, "with the back pain under better control, [Petitioner's] neck pain became more evident." On examination, he noted tenderness along the trapezius muscle on the left side of the neck and three trigger points. He injected each of these trigger points. He continued the 25-pound lifting restriction and instructed Petitioner to follow up with him in three months or sooner if needed. PX 2.

Petitioner testified that his back pain gradually began to return about a month after the radiofrequency ablation. T. 37.

On April 20, 2009, Petitioner returned to Dr. Templin. On that date, the doctor noted that Petitioner obtained some relief from the ablation but was still experiencing 3/10 pain in his neck and lower back. He also noted that Petitioner had been laid off.

On examination, Dr. Templin noted a full and painless range of cervical and lumbar spine motion. He also noted that palpation across the neck and lumbar spine revealed no significant pain. He released Petitioner to full duty but expressed agreement with Petitioner's plan of trying to find less strenuous work. He released Petitioner from care on a PRN basis. PX 3.

On August 10, 2009, Petitioner returned to Dr. Abusharif. The doctor's note of that date is not in evidence. In a narrative report dated July 12, 2011, the doctor indicated he imposed a 50-pound lifting restriction on August 10, 2009 because, at that point, Petitioner had a full range of motion and "tolerable pain levels." Abusharif Dep Exh 2.

On October 2, 2009, Petitioner's counsel sent a letter to Julie Blanchard of Sentry Insurance referencing "permanent" lifting restrictions and requesting vocational rehabilitation. PX 12. The Commission main frame reflects that Petitioner first filed a 19(b) petition on November 30, 2009. No hearings were held prior to the hearing of July 29, 2013.

Petitioner testified he began looking for work "as soon as [he] was unemployed." T. 37. He did not receive any job search assistance from Respondent. On his own initiative, he attended a 48-hour bartending course in late June 2009. PX 17. He testified he did not get any bartending jobs. He testified it would have been difficult for him to stand for eight hours while tending bar. T. 50.

On March 1, 2010, James Boyd, M.S., CRC, conducted a vocational evaluation of Petitioner at the request of Petitioner's counsel. In his report of the same date, Boyd noted that Petitioner complained of frequent headaches, a pinching sensation in his neck and

shoulders, tingling in his hands and "the feeling of a bruise in his back." Boyd noted the valid functional capacity evaluation and Dr. Templin's full duty release. He also noted that Petitioner received severance pay from Respondent following his termination, had recently completed a bartending course and was considering various employment options.

Boyd indicated that Petitioner "presented as a very personable and friendly" individual during the evaluation. He also indicated that Petitioner "had no difficulty tolerating a full day of testing." He noted that Petitioner scored in a high average range in math and exhibited attention to detail on clerical testing. He indicated that Petitioner's interest survey suggested a wage range of occupational interests.

Boyd noted that "it would appear that [Petitioner] remains physically/functionally capable of working as a machinist" but that Petitioner indicated Dr. Abusharif had limited him to lifting 30 pounds.

Boyd opined that Petitioner "would be more likely to remain in the machining industry and retain his wage earning capacity in this occupation" if he underwent training in CNC [computerized numerical controlled] machines. He also opined that Petitioner would greatly benefit from completing courses in keyboarding and computer operating systems. He found Petitioner to be an "excellent candidate for vocational rehabilitation services." PX 11.

Between July and November of 2010, Petitioner attended a CNC technology course and internship. T. 52. He obtained a certificate of completion on November 10, 2010. PX 16.

Petitioner offered into evidence Illinois Department of Employment Security [IDES] "extended benefits work search forms" documenting employment-related contacts he made between November 16, 2010 and December 14, 2010. PX 27. Petitioner testified he also looked for work through various staffing agencies. T. 53.

Petitioner testified he worked for Haldex Corporation in Itasca, Illinois, for three to four weeks in December 2010. Records subpoenaed from Haldex show that Petitioner was hired as a CNC machinist on December 13, 2010, at a rate of $12.00 per hour. A termination form reflects that Petitioner last worked for Haldex on December 29, 2010 and was terminated due to "illness." The form describes Petitioner as "eligible for re-hire." An E-mail from Petitioner dated January 3, 2011 reflects that Petitioner notified Haldex he was unable to tolerate the job due to back pain. He indicated his back had been "pinching out for some time now." He described the Haldex job as "maybe too demanding" for his back. He also indicated his back pain was "no fault of Haldex." He expressed an intention to return to his doctor. PX 18.

On January 14, 2011, Petitioner returned to Dr. Abusharif and complained of "primarily neck pain with radiation into" both arms as well as intermittent tingling in his hands and arms. The doctor noted that Petitioner was experiencing these symptoms "throughout his workday." On examination, the doctor noted a normal gait, intact heel, toe and tandem gait, tenderness in the left and right trapezius and painful cervical muscles with certain maneuvers. The note

contains no mention of any lumbar spine abnormalities. The doctor administered a cervical epidural steroid injection at C6-C7. He instructed Petitioner to return in two weeks for another possible injection. He administered two more injections at the same level on January 28 and February 18, 2011. PX 2.

Petitioner testified he began working for a company called Ideal Carbide Die in late January 2011. The job involved grinding but he was also required to lift an 80-pound sign plate device onto a table. He testified he experienced "stingers" while performing this lifting. He found it difficult to focus due to his pain. He testified he was terminated on March 18, 2011. He did not explain why he was terminated but he did indicate the job proved to be "too heavy" for him. T. 53. Payroll records in PX 19 reflect that Petitioner's last paycheck was dated March 18, 2011. The records in PX 19 do not reflect why Petitioner left Ideal Carbide Die's employment.

On March 18, 2011, Petitioner returned to Dr. Abusharif. The doctor noted some improvement secondary to the injections but indicated Petitioner "still has a steady baseline level of pain in the neck and left upper extremity." He indicated Petitioner had been laid off from work and might improve with rest. He also indicated Petitioner might ultimately require surgery. He suggested that Petitioner discuss this with Dr. Templin. He instructed Petitioner to return to him as needed. PX 2.

On July 14, 2011, Petitioner saw Dr. Ghanayem, a spine surgery affiliated with Loyola University Medical Center. Petitioner testified he saw Dr. Ghanayem at Dr. Abusharif's referral. T. 49.

Dr. Ghanayem indicated that Petitioner complained of neck and back pain of a "few years'" duration. He described Petitioner's medical history as otherwise unremarkable. He indicated Petitioner complained of numbness in his legs and left arm but had "no true radicular type symptoms."

Dr. Ghanayem described Petitioner's gait as normal. On cervical spine examination, he noted some tenderness in the mid-cervical region. On lumbar spine examination, he noted some tenderness at the lumbar base and a marked increase in symptoms with lumbar extension. He noted no neurological deficits. He interpreted the cervical spine MRI as showing cervical spondylosis "but no discrete single level that is responsible for his symptoms." The lumbar spine MRI, in contrast, showed "severe collapse of the L5-S1 disc space with modic changes and facet disease as well."

Dr. Ghanayem recommended non-surgical treatment with respect to the cervical spine. With respect to the lumbar spine, he recommended an anterior fusion at the L5-S1 level. He indicated Petitioner planned to give these recommendations some thought and get back to him.

Dr. Ghanayem's report contains no mention of any work accident and no causation-related opinions. PX 2.

On February 20, 2012, Petitioner returned to Dr. Abusharif and complained of persistent neck and back pain that increased with activity. Dr. Abusharif indicated he discussed the chronicity of symptoms with Petitioner and told Petitioner he would ultimately need surgery. He indicated Petitioner could undergo epidural injections on an "as needed" basis. PX 2.

Petitioner offered into evidence Dr. Abusharif's deposition of March 13, 2012. Dr. Abusharif testified he is fellowship-trained in pain management. PX 21 at 5. He testified that Petitioner provided him with a history of the June 24, 2008 work accident at the initial visit on January 29, 2009. PX 21 at 7-8. He testified that Petitioner's July 2008 MRI showed "mostly degenerative disc disease, significant narrowing at L5-S1, discogenic endplate changes and a left paramedian disc bulge at L1-L2." Dr. Abusharif did not view the L1-L2 disc bulge as correlating with Petitioner's symptoms, which "mostly" involved the L5-S1 level. PX 21 at 9-10.

Dr. Abusharif rendered several causation-related opinions at his deposition. The Arbitrator notes that Respondent's counsel voiced Ghere-based objections throughout the deposition, maintaining that Petitioner provided no written causation-related opinions to him in advance of the deposition. The Arbitrator sustains those objections.

Dr. Abusharif testified that he imposed a 50-pound lifting restriction on Petitioner on August 10, 2009 because he viewed Petitioner's degenerative endplate changes as "progressive" and wanted to minimize the mechanical stress to Petitioner's spine. PX 21 at 16-17. The 50-pound restriction related to the low back. PX 21 at 31. He viewed the 50-pound restriction as allowing Petitioner to do "most of what he needed to do," work-wise. PX 21 at 17. He opined that the 50-pound restriction was "absolutely permanent" and subject to reduction. PX 21 at 17. He has not since altered this restriction. PX 21 at 30-31. Because the radiofrequency ablation provided only 50% pain relief, he referred Petitioner to Dr. Ghanayem for a surgical consultation. PX 21 at 23. He has reviewed Dr. Ghanayem's note of July 14, 2011. He assumes Dr. Ghanayem reviewed the 2008 MRIs since he is unaware of any MRIs having been performed after 2008. PX 21 at 25. A fusion would involve removing the disc and endplate and fusing the vertebrae. PX 21 at 26. He would rely on Dr. Ghanayem with respect to the surgical recommendation. PX 21 at 34. If Petitioner does not undergo surgery, he will continue to experience low back pain and "typically more degeneration over time." Surgery would be in Petitioner's best interest. PX 21 at 31.

Under cross-examination, Dr. Abusharif testified he originally recommended Petitioner confer with Dr. Templin about the need for surgery but he ended up recommending a consultation with Dr. Ghanayem because patients usually want more than one opinion. PX 21 at 36. His records do not specifically mention a referral to Dr. Ghanayem. PX 21 at 37. He released Petitioner to full duty on January 29, 2009 and February 2, 2009. He did not impose any work restrictions before the March 11, 2009 ablation. PX 21 at 39. He is not aware of Petitioner having undergone a functional capacity evaluation. PX 21 at 39. Based on what

Petitioner told him, Petitioner would have been lifting 20 to 40 pounds throughout his workday before the accident. PX 21 at 40. Since August 2009, he has been treating only Petitioner's cervical spine. PX 21 at 42. He has not treated the lower back even though nerves typically regenerate a year or so after an ablation. PX 21 at 43. He would not offer a repeat ablation unless Petitioner's low back symptoms became very severe. PX 21 at 43. He is board eligible but not board certified. PX 21 at 45. He does not believe Petitioner worked anywhere after February 19, 2009. PX 21 at 46. Disc degeneration occurs in everyone but endplate changes are indicative of a level of degeneration that could cause "more significant high grade level of pain." PX 21 at 47-48. There is no indication that Petitioner has a herniated disc or nerve root impingement. PX 21 at 52.

On redirect, Dr. Abusharif testified that Dr. Templin contemplated surgery if the facet joints were ruled out as a source of Petitioner's pain. Petitioner's facet joints are not the sole cause of Petitioner's pain, based on the 50% relief afforded by the ablation. PX 21 at 55. The other cause is discogenic, i.e., related to the endplate changes. PX 21 at 55.

Dr. Kornblatt, a spine surgeon affiliated with the Illinois Bone & Joint Institute, conducted a record review on behalf of Respondent on May 17, 2012. In his report of the same date, Dr. Kornblatt indicated he reviewed records from Drs. Templin, Abusharif and Ghanayem, records from ATI and Dr. Abusharif's evidence deposition.

Dr. Kornblatt opined that the work accident of June 24, 2008 resulted in cervical and lumbar strains. He characterized Dr. Templin's treatment as appropriate. He opined that Petitioner reached maximum medical improvement by November 30, 2008. He characterized the subsequent treatment provided by Dr. Abusharif, i.e., the L5-S1 facet injections and radiofrequency ablation, as "directed to [Petitioner's] pre-existing facet degenerative joint disease and L5-S1 degenerative disc disease" and "unrelated to the work incident of June 24, 2008." He opined that the treatment Dr. Ghanayem recommended on July 14, 2011 would be referable to the underlying degenerative disc disease and unrelated to the work accident. He further opined that the work accident did not aggravate Petitioner's pre-existing degenerative disc disease. He indicated Petitioner might need further treatment due to this degenerative disc disease, "unrelated to the self-limiting cervical and lumbosacral strains which occurred on June 24, 2008." He found Petitioner capable of performing medium to heavy demand work as of November 24, 2011. Kornblatt Dep Exh 2.

Dr. Templin gave a deposition on behalf of Petitioner on August 3, 2012. Dr. Templin obtained board certification in orthopedic surgery in 2009. Templin Dep Exh 1. He testified he performed 200 spinal fusions per year during the two to three years before his deposition. PX 22 at 5. He has experienced in reading and interpreting MRI scans. PX 22 at 6. He found a causal relationship between the neck and back complaints Petitioner voiced at the initial visit and the June 24, 2008 work accident, based on the history Petitioner provided. PX 22 at 8. As of November 6, 2008, following therapy, Petitioner's low back was still bothering him but his neck was doing better. Petitioner related that his low back pain "was the only thing really hindering him at that time." PX 22 at 9. He briefly discussed an L5-S1 fusion with Petitioner on

that date. He told Petitioner a fusion would be an option if he continued having low back pain. PX 22 at 10. On November 28, 2008, he released Petitioner to full duty based on the functional capacity evaluation. PX 22 at 10. On January 9, 2009, Petitioner returned to him and complained of 7/10 low back pain that was made worse by activity. He referred Petitioner to Dr. Abusharif for facet blocks and potential radiofrequency ablation. Dr. Templin testified that the June 24, 2008 work accident brought about the need for this treatment. PX 22 at 12.

Dr. Templin testified that Petitioner had a pre-existing condition, i.e., L5-S1 degenerative disc disease and facet arthropathy. Dr. Templin opined that trauma can make this condition symptomatic. PX 22 at 14. He believes the lifting incident of June 24, 2008 made Petitioner's pre-existing condition symptomatic. PX 22 at 14. Both Dr. Ghanayem and he discussed fusion surgery with Petitioner. Dr. Ghanayem suggested an anterior approach. PX 22 at 15-16.

Dr. Templin testified that the treatment he rendered was reasonable and necessitated by the June 24, 2008 work accident. PX 22 at 16.

Under cross-examination, Dr. Templin testified he believes Petitioner was injured on June 24, 2008 when he lifted a tool. He does not know the weight of this tool. PX 22 at 18. It was his review of Petitioner's MRI that prompted him to diagnose degenerative disc disease. PX 22 at 20. Petitioner's cervical strain "potentially" resolved as of November 6, 2008. PX 22 at 21. He never recommended a discogram. A discogram is an optional pre-fusion study. PX 22 at 22. He does not know what activities Petitioner engaged in between April 20 and November 6, 2009. PX 22 at 24. On November 6, 2009, Petitioner told him he did not want to undergo a fusion. At that point, he was unconvinced that surgery would help Petitioner. PX 22 at 24. He told Petitioner this. PX 22 at 25. Surgery remains an option for Petitioner. PX 22 at 25. He has not seen Petitioner since November 2009 and has no idea what Petitioner's current condition is or whether Petitioner is working. PX 22 at 27.

On redirect, Dr. Templin testified it is more likely than not that the accident caused the onset of Petitioner's pain, given the temporal relationship Petitioner described. PX 22 at 28. His notes reflect that Petitioner complained of pain despite having a normal neurological examination. PX 22 at 29.

At his March 11, 2013 deposition, Dr. Kornblatt testified he underwent fellowship training in spine surgery and is a board certified orthopedic surgeon. RX 5 at 5. He devotes about 15% of his practice to independent medical evaluations. RX 5 at 5.

Dr. Kornblatt testified he believes Petitioner's diagnoses include lumbar degenerative disc disease, lumbar strain and cervical strain. He does not believe Petitioner has "facet syndrome." He is "not a big believer in that diagnosis" because it is difficult to determine that it is only the facet that is involved. RX 5 at 10. When patients have facet arthritis, they also have degenerative disc disease. RX 5 at 11.

Dr. Kornblatt testified that the treatment Petitioner underwent for his strains was "certainly reasonable and necessary." Petitioner did not warrant the facet injections, however. Those injections had "nothing to do with the work incident." RX 5 at 11.

Dr. Kornblatt testified he agrees with Dr. Templin's decision to release Petitioner to full duty as of November 28, 2008. RX 5 at 12. Based on his experience and record review, Petitioner would have reached maximum medical improvement from his strains within eight to twelve weeks of his work accident. RX 5 at 13. Surgery was "commented on" but never accepted by Petitioner or scheduled. RX 5 at 14. He views Dr. Ghanayem as discussing rather than recommending surgery. RX 5 at 14. A spinal fusion could be performed on Petitioner but he does not think it would help Petitioner. RX 5 at 15. If he were treating Petitioner, he would not recommend a fusion because Petitioner does not have disability and no significant objective findings on examination. Those factors "would portend a poor surgical result." RX 5 at 16. He agrees with Dr. Templin's statement that surgery would likely not help given Petitioner's widespread back pain. RX 5 at 16. If Petitioner had a fusion, the fusion "would have nothing to do with a strain that occurred at work years ago." RX 5 at 17.

Under cross-examination, Dr. Kornblatt testified he did not examine Petitioner and did not review the MRI films. RX 5 at 18. He only reviewed the MRI reports. RX 5 at 19. If he were trying to determine whether a patient needed surgery, he would examine the patient and review the patient's MRI films. RX 5 at 18-19. He charges $500 per hour to review records and $1,000 per hour for deposition time. RX 5 at 19. He spent four hours reviewing Petitioner's records and preparing his report. RX 5 at 20. Almost all of the record reviews he performs are for insurance carriers or employers. He has performed other record reviews for Respondent's counsel. RX 5 at 20. He performs lumbar fusion surgery about three or four times per month. RX 5 at 21. It would be "very uncommon" for a patient like Petitioner to undergo surgery. Probably less than one percent of patients like Petitioner, as Petitioner presents, would undergo a spinal fusion. RX 5 at 22. He does not think that Petitioner's degenerative disc disease is a problem. Petitioner is "functioning quite well." RX 5 at 22. A trauma consisting of one lifting episode would not cause someone with degenerative disc disease to be symptomatic for the rest of his life. RX 5 at 24. In Petitioner's case, the lifting episode caused a strain, which was self-limiting. RX 5 at 25. It did not cause his degenerative disc disease to become symptomatic. RX 5 at 25. He does not believe Petitioner is really symptomatic. RX 5 at 25. He would not call Dr. Ghanayem's report a recommendation for surgery. Dr. Ghanayem is simply "talking about surgery." RX 5 at 26. Petitioner tested out at lifting occasionally up to 50 pounds but now could perform any kind of work he likes. RX 5 at 26. If Petitioner's job required him to lift up to 60 pounds, Petitioner could have done that. RX 5 at 27. He would recommend "zero treatment" to Petitioner. He would simply suggest Petitioner exercise and live a full life. RX 5 at 27.

On redirect, Dr. Kornblatt testified he agrees with Dr. Templin's December 30, 2009 MRI interpretations. RX 5 at 28. The functional capacity evaluation actually indicated Petitioner could occasionally lift 63 pounds. RX 5 at 29.

Under re-cross, Dr. Kornblatt testified he does not know what the functional capacity evaluator meant by the term "occasionally" with respect to Petitioner's lifting capacity. RX 5 at 29.

At the hearing, Petitioner testified he continues to experience constant pain in his upper and lower back as well as tingling in his fingers and legs. T. 44-45, 51. He did not have these symptoms before June 24, 2008. T. 52. Sitting and walking aggravate his pain. He tries to do normal household chores and walk to stay in shape but the pain makes these activities unpleasant. Since June 24, 2008, he has not had one pain-free day. T. 45. He has not been looking for work because he has been depressed. His brother-in-law needed someone to make deliveries but did not hire him because the work involved lifting heavy lawn mowers. T. 47-48. He wants to undergo the surgery that Dr. Ghanayem recommended. T. 49. He "mostly" looked for work in bars because he thought he could handle tending bar. He did not receive any offers to work as a bartender. He would have trouble standing eight hours a day. He underwent four months of CNC training before Haldex hired him. Haldex had CNC machines. T. 52. He also looked for work through various staffing agencies. T. 53. One of these agencies, Midwest, found a job for him at ICD, Ideal Carbide Dye. The job proved to be too heavy for him. T. 53. He would like to undergo job retraining if it would make him productive but he would prefer to get healthy enough to do what he used to do. T. 53.

Under cross-examination, Petitioner acknowledged injuring his low back at work in 2001 and 2004. T. 54. He missed time from work due to these injuries. T. 55. He saw a neurosurgeon for back pain before the June 24, 2008 work accident. T. 55. He had various lifting devices available as of June 24, 2008. One of these devices was a "die bar." He used this bar to tip up a die so that the die could be hooked up to an overhead crane. However, the lower shoe of die he used as of the accident, die #32, "would not accept any hooks." He had to "manhandle" this die. Also, Respondent removed the hoisting straps because the straps could get cut by steel and break. Respondent did not want a strap to break, thus causing a heavy piece of metal to fall on a worker. T. 57. If he had to move a heavy part, he could get assistance from a co-worker such as an operator but "sometimes operators weren't available." T. 57-58. When he lifted dies, the dies would be a little above belt level. T. 59. Carts could be used to transport parts but the carts sometimes broke down. T. 60. Before June of 2008, Respondent purchased a mechanical "die mover" to move big tools but it took eight months for that die mover to get set up. The workers continued moving the big tools in the meantime. T. 60. Extra lifting devices were available when he resumed working in November 2008. T. 61. He never measured the pounds of force required to move various objects at Respondent. He did, however, conduct a force-related experiment at home. T. 61. Before June 24, 2008, doctors told him many times to "get an operation" but he tried therapy instead. T. 61, 81. When he discussed surgery with Dr. Ghanayem, the doctor told him he would never be 100%. That hurt him because he wanted to be able to resume an occupation he was very good at. T. 64. The therapists who oversaw his work conditioning believed he was going to be able to resume his job at Respondent. T. 68. Dr. Templin asked him if he felt ready to resume working and he said he would try it, which he did. However, he never returned to the point he was at before the accident. T. 68. Respondent did not accommodate Dr. Abusharif's 25-pound lifting

restriction. T. 70. When he told Dr. Templin in January of 2009 that he enjoyed being back at work he meant he enjoyed trying to be productive rather than sitting around at home. T. 72. Dr. Templin kept him at full duty. He does not believe that Respondent laid him off for economic reasons, although he acknowledges other tool and die workers lost their jobs in February of 2009. T. 73-74. He quit the job at Haldex due to back pain. He went to get more shots from Dr. Abusharif thereafter. T. 76. The subsequent job, at ICD, involved mostly grinding but he had to lift a heavy sign plate at times. T. 77. At ICD, he earned about $20.00 per hour. T. 78. The lifting he performed at ICD aggravated his neck and back and prompted him to return to Dr. Abusharif, who performed a series of neck injections. T. 77-78. The bartending school he attended advertised that you can earn up to $30.00 per hour tending bar. He never earned that much tending bar but you could possibly earn that in Hawaii. Between 2003 and 2006, he worked two jobs at a bar in addition to his job at Respondent. T. 81. Dr. Templin seemed to be in a bad mood at the November 2009 visit. He just said "you need an operation" without discussing other options. T. 81-82. He finds the idea of surgery terrifying. T. 82. He has undergone no low back care since August 2009. He will not take prescription medication because he was "suicidal at one time with prescriptions." T. 82.

On redirect, Petitioner testified that, between 2003 and 2006, he did two jobs, cleaning and bartending, at a bar, in addition to working at Respondent. T. 83. When he tried to lift the 80-pound plate at ICD, he got "stings." He experienced similar "stings" back in 2001 and 2004 but the sting he experienced on June 24, 2008 was "one of the worst." He now experiences them about twice weekly. T. 84. His home experiment showed he had to use 5 pounds of force to move a 20-pound weight. T. 90.

Under re-cross, Petitioner testified he told the therapists at ATI about his lifting requirements. T. 91.

On further redirect, Petitioner testified the therapists at ATI told him he tested out at 30 pounds and he told them that was not the weight he used to lift. T. 93.

[The Arbitrator addresses the testimony of Robert Doyle, Petitioner's former co-worker, and Tammy Duckworth, Respondent's witness, in the attached conclusions of law.]

[CONT'D]

Arbitrator's Credibility Assessment

The Arbitrator found credible Petitioner's testimony that the work accident of June 24, 2008 brought about a significant change in his ability to perform his machinist duties.

The Arbitrator also found Petitioner's termination-related testimony to be credible. While Respondent told Petitioner he was being terminated as part of a reduction in workforce, and while Petitioner acknowledged he was not the only worker to be terminated on February 19, 2009, the evidence shows the termination occurred while Petitioner was undergoing active treatment with Dr. Abusharif, as recommended by Dr. Templin (and authorized by the adjuster, Julie Blanchard), and only eight days after Dr. Abusharif recommended a radiofrequency ablation and imposed a 25-pound lifting restriction.

Where the Arbitrator had some problems with Petitioner, credibility-wise, was with his TTD claim (see Arb Exh 1) and his testimony concerning his post-termination work activities.

Did Petitioner establish causal connection?

The Arbitrator finds that Petitioner established a causal connection between his undisputed work accident and a cervical strain that essentially resolved by November 6, 2008. At his deposition, Dr. Templin testified that, as of November 6, 2008, Petitioner's low back pain "was the only thing hindering him." PX 22 at 9. Petitioner did undergo additional neck-related care in 2011 but that was only after two intervening periods of employment with other companies.

The Arbitrator also finds that Petitioner established a causal connection between the work accident and his current lumbar spine condition of ill-being. The Arbitrator assigns no weight to Dr. Kornblatt's opinion that the accident caused merely a self-limiting lumbar strain. The Arbitrator concludes that the work accident aggravated Petitioner's underlying degenerative lumbar spine condition and brought about the need for the treatment Dr. Templin prescribed and Dr. Abusharif provided in early 2009. That treatment, consisting of lumbar facet injections and radiofrequency ablation, relieved some but not all of Petitioner's lumbar complaints. At his deposition, Dr. Templin clearly linked the need for this treatment to the June 24, 2008 work accident. Dr. Templin discussed a lumbar fusion with Petitioner but did not believe that surgery would ease Petitioner's widespread back pain. [Dr. Ghanayem also discussed a fusion but did not comment on causation]. At the hearing, Petitioner testified he continues to experience low back pain that affects his ability to sit and walk for extended periods. While the Arbitrator declines to award a fusion, for the reasons set forth below, the Arbitrator views the June 24, 2008 accident as leaving Petitioner with a significantly disabling low back condition.

Petitioner acknowledged injuring his lower back at work on two occasions prior to June 24, 2008. Petitioner also acknowledged seeing physicians, including a neurosurgeon, for his low back pain prior to that date. Petitioner underwent a lumbar spine MRI in 2004 but the report concerning that MRI is not in evidence. Apart from Petitioner's testimony, the Arbitrator has very little information concerning the treatment that took place before June 24, 2008. Regardless, there is no dispute that Petitioner was able to resume his machinist duties for Respondent after the two prior injuries and continued performing those duties until June 24, 2008, with the accident of that date bringing about an abrupt change in his condition. The Arbitrator relies on the "chain of events," Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193 (2003) and the causation-related opinions expressed by Drs. Templin and Abusharif in finding that the accident rendered Petitioner's underlying lumbar degenerative disc condition disabling.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner claimed two intervals of temporary total disability: June 25, 2008 through September 8, 2008 and February 20, 2009 (the day after the termination) through July 29, 2013 (the date of hearing). Respondent stipulated Petitioner was temporarily totally disabled from June 25, 2008 through September 7, 2008. Arb Exh 1.

The Arbitrator finds that Petitioner was temporarily totally disabled from June 25, 2008 through September 7, 2008, a period of 10 5/7 weeks, based on Dr. Templin's records and Respondent's stipulation. On September 4, 2008, Dr. Templin released Petitioner to 4-hour days as of September 8, 2008. PX 3. Respondent is entitled to credit for the $7,750.94 in benefits it paid prior to trial. Arb Exh 1.

The Arbitrator further finds that Petitioner was temporarily totally disabled from February 20, 2009 through November 6, 2009, a period of 37 weeks. In so finding, the Arbitrator relies in part on Dr. Abusharif's records, which show that Petitioner's lumbar spine condition was not stable and that Petitioner was subject to a 25-pound lifting restriction, as of the February 19, 2009 termination. After being terminated, Petitioner went on to undergo the radiofrequency ablation that Dr. Abusharif recommended prior to the termination. Following the ablation, Petitioner reported only partial resolution of his lower back pain. The Arbitrator also relies on Dr. Templin's records, which reflect that he found Petitioner to be at maximum medical improvement as of November 6, 2009, the date on which he discussed surgery as an option but indicated he felt surgery would not help Petitioner.

Is Petitioner entitled to medical expenses?

Petitioner seeks an award of medical bills relating to treatment rendered by Dr. Abusharif in 2011 and Dr. Ghanayem's lumbar spine evaluation. Having previously found that the work accident resulted in a cervical strain that resolved as of November 6, 2008, the Arbitrator declines to award Dr. Abusharif's bill of $4,500.00. That bill relates to cervical

injections Dr. Abusharif administered after Petitioner's stints at Haldex and Ideal Die. The Arbitrator awards Dr. Ghanayem's bill of $263.00, subject to the fee schedule, because that bill relates to the lumbar spine and because the Arbitrator views it as reasonable for Petitioner to have sought a second surgical opinion.

Is Petitioner entitled to prospective care? Is Petitioner entitled to vocational rehabilitation?

Despite substantial pre-trial discussion, Petitioner insisted on simultaneously claiming four and a half years of temporary total disability benefits, prospective lumbar fusion and vocational rehabilitation. Arb Exh 1. The Arbitrator views these claims as inconsistent. There are some cases in which a claimant could pursue treatment and vocational rehabilitation at the same time but this case is not one of them. A lumbar fusion, by its nature, requires post-operative recovery and therapy.

The Arbitrator declines Petitioner's request for prospective care in the form of a lumbar fusion. When Petitioner last saw Dr. Templin, on November 6, 2009, the doctor indicated Petitioner could "consider surgical intervention for fusion of the L5-S1 disc versus continuing to work" within the restrictions of the functional capacity evaluation. Dr. Templin also indicated he was unconvinced surgery would be helpful given the "widespread" nature of Petitioner's back pain. PX 22 at 24. He noted that Petitioner declined surgery. Based on that, he found Petitioner to be at maximum medical improvement.

At his August 2012 deposition, Dr. Templin testified that surgery was an "option" for Petitioner, while simultaneously acknowledging he had not seen Petitioner in almost three years. At the July 29, 2013 hearing, Petitioner testified he still has low back pain and wants to undergo the surgery. T. 49. Under cross-examination, however, he acknowledged he is "terrified" about having the surgery. T. 82.

Given the significant passage of time since 2009, the opinions Dr. Templin expressed in November 2009 and Petitioner's equivocal testimony, the Arbitrator declines to award a prospective lumbar fusion.

The Arbitrator also declines to award vocational rehabilitation. Much was made at the hearing about the true demands of Petitioner's machinist job. Petitioner testified at length about this subject, as did Robert Doyle, a former co-worker who stopped working for Respondent in 1993 (T. 108), and Tammy Duckworth, Respondent's environmental safety manager, who testified that Petitioner had mechanical assists available but acknowledged workers did not always use such assists due to their desire to meet production needs. The Arbitrator has considered the testimony of these witnesses as well as the valid functional capacity evaluation and the testimony of Drs. Templin and Abusharif.

The Arbitrator elects to rely primarily on the valid functional capacity evaluation and Dr. Templin. Based on the Dictionary of Occupational Titles, the evaluator rated Petitioner's

machinist job as a medium physical demand level position, with occasional lifting of 50 pounds. She found Petitioner to be functioning at a medium to heavy demand level and indicated he could attempt to return to work at a medium to heavy occupation, with occasional lifting of 75 pounds, subject to his doctor's recommendations. While she did not reference a formal job description, she indicated Petitioner completed a physical functioning questionnaire before undergoing the evaluation. PX 4. Petitioner continued to experience low back complaints after he resumed full duty, and required more low back care in early 2009, per Dr. Templin's referral to Dr. Abusharif, but, thereafter, Dr. Templin did not impose new restrictions or prescribe another evaluation. Dr. Abusharif imposed a 50-pound lifting restriction in August of 2009 but this restriction did not stem from a repeat evaluation. Nor would this restriction have prevented Petitioner from resuming his machinist job, per the Dictionary of Occupational Titles. The Arbitrator assigns little weight to the testimony of Petitioner, Doyle and Duckworth concerning the force Petitioner had to exert at work because the testimony was based either on memory or experiments/attempted replications performed outside of Petitioner's actual work environment as it existed prior to the accident.

The Arbitrator views this case as ripe for a permanency determination. The Arbitrator declines to make a permanency award, as requested by Respondent, because Petitioner proceeded solely pursuant to Sections 19(b) and 8(a). This is not a case in which both parties agreed to have the Arbitrator address permanency if she felt that was warranted.

Is Respondent liable for penalties and fees?

Petitioner seeks penalties and fees on both post-termination temporary total disability and on the claimed medical bills. Although the Arbitrator has awarded a period of post-termination temporary total disability, she notes that Dr. Templin did not impose work restrictions during this period and that the period pre-dates the Supreme Court's decision in Interstate Scaffolding. The Arbitrator declines to award penalties and fees on the awarded unpaid temporary total disability. The Arbitrator also declines to award penalties and fees on the awarded bill from Dr. Ghanayem because Dr. Ghanayem did not link his evaluation and surgical recommendation to the undisputed work accident.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Jones,
Petitioner,

vs.

No: 12 WC 007237
(Consolidated with No: 07 WC 004399)

Southwest Airlines Co.,
Respondent.

14IWCC0611

DECISION AND OPINION ON REVIEW

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

The Commission notes that this case was consolidated for review hearing with No. 07 WC 004399, in which Petitioner sought Section 8(a) benefits for an August 30, 2005 injury. Arbitrator Dollison awarded Petitioner 27.5% loss of use of the left leg on March 15, 2011, and Petitioner filed a timely Petition for Review pursuant to Section 8(a) in that case. The Commission granted Petitioner's Section 8(a) Petition in a separate decision in No. 07 WC 004399.

In No. 12 WC 007237, the Commission finds persuasive the opinion of Respondent's Section 12 examiner, Dr. Troy, that Petitioner's 2012 accident caused at most a temporary aggravation of his ongoing arthritic condition. The Commission further adopts Arbitrator Flores' conclusion that Petitioner's current condition, including his need for total knee replacement, is not causally connected to his 2012 work accident, but to his 2005 work accident for which Petitioner seeks additional Section 8(a) benefits under No. 07 WC 004399. Petitioner's treating surgeon, Dr. DeFrino, recommended a total knee replacement following Petitioner's 2005 work injury, well before the 2012 accident occurred.

14IWCC0611

The Commission further notes that Arbitrator Flores' Decision contains the following boilerplate language: "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." As the Commission has determined that Petitioner has not met his burden of proof to establish the essential elements of his claim, the Commission declines to remand the case to the Arbitrator for further proceedings and removes the above referenced paragraph in the Arbitrator's May 29, 2013 Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in No. 12 WC 007237 filed May 29, 2013 is hereby affirmed and adopted, as modified.

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

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

DATED: JUL 25 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-05/21/14
drd/dak
68

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

JONES, KEVIN
Employee/Petitioner

Case# **12WC007237**

SOUTHWEST AIRLINES CO
Employer/Respondent

14IWCC0611

On 5/29/2013, 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 0.08% 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:

0391 THE HEALY LAW FIRM
KEVIN T VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
NATALIE J ROMO
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kevin Jones
Employee/Petitioner

v.

Southwest Airlines Co.
Employer/Respondent

Case # **12** WC **7237**

Consolidated cases: **N/A**

14IWCC0611

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 **September 24, 2012, October 22, 2012** and **October 29, 2012** and the case was later re-assigned for the purpose of issuance of a decision to the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**. After reviewing all of the evidence presented, the undersigned 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 _____

14IWCC0611

FINDINGS

On the date of accident, **January 2, 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 as explained *infra*.

In the year preceding the injury, Petitioner earned $**91,811.20**; the average weekly wage was $**1,765.60**.

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

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services. *See also* AX1, TR1, TR2 and TR3 regarding the parties' stipulations and the hearing Arbitrator's rulings regarding the issue of medical benefits.

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**. *See also* AX1 regarding the parties' stipulations for the period prior to March 27, 2012.

Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act. *See also* AX1, TR1, TR2 and TR3 regarding the parties' stipulations and the hearing Arbitrator's rulings regarding any 8(j) credit.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner failed to establish a causal connection between his claimed current left knee condition of ill being and his injury at work on January 2, 2012 and that there is insufficient evidence to support an award of penalties and fees. Thus, all requested benefits and compensation 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

May 28, 2013
Date

ICArbDec19(b) p.2

MAY 29 2013

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

Kevin Jones
Employee/Petitioner

v.

Southwest Airlines Co.
Employer/Respondent

Case # **12** WC **7237**

Consolidated cases: **N/A**

14IWCC0611

FINDINGS OF FACT

After extensive discussions between the parties and the Arbitrator that presided over the hearing in this case, the sole issues in dispute are causal connection, a period of temporary total disability benefits, and penalties and fees pursuant to Sections 16, 19(k), 19(l). *See* Arbitrator's Exhibit ("AX") 1; September 24, 2012 Arbitration Hearing Transcript ("T1 at page(s)"); October 22, 2012 Arbitration Hearing Transcript ("T2 at page(s)"); October 29, 2012 Arbitration Hearing Transcript ("T3 at page(s)").

Background

Petitioner testified that he has been employed with Respondent since July 1997. T1 at 27-28. As an aircraft mechanic, Petitioner diagnoses and repairs any aircraft problems to ensure they are ready for flights including overnight flights. T1 at 28. In his position, he uses hand tools (i.e., work wrenches, adjustable wrenches, pliers, and pullers), ladders, scissor lifts, trucks to get to immobilized aircraft, and certain computerized precision tools used to measure and diagnosed aircraft problems. T1 at 28-29. The tools weigh anywhere from 3 to 85 pounds. T1 at 29.

Petitioner filed a prior workers' compensation claim (No. 07 WC 4399) involving an injury to his left knee in which an Arbitrator awarded 27.5% loss of use of the left leg for an accident occurring on August 30, 2005. T1 at 5-7, 41; PX12. Petitioner testified that the case went to trial in that case to leave his medical rights open for a total knee replacement. T1 at 41-42.

In Petitioner's prior case, Dr. DeFrino treated him after a knee injury on August 30, 2005. T1 at 37-38; PX4. Petitioner fell from a broken ladder on this date. T1 at 49. Petitioner first saw Dr. DeFrino on September 23, 2005 at which time he diagnosed Petitioner with did and he ordered an MRI. T1 at 38. The interpreting radiologist noted the following: (1) a medial meniscus tear and associated meniscal degenerative change in the posterior horn and body; (2) subcortical edema and cystic degenerative change beneath the medial meniscal route at the posterior medial tibial plateau; and (3) moderate medial and patellofemoral compartments articular degenerative changes. *Id.*

Dr. DeFrino recommended arthroscopic surgery of the medial meniscus which Petitioner underwent on January 9, 2006; specifically, Petitioner underwent left knee arthroscopy and debridement of medial meniscal tear and chondroplasty patellofemoral joint and medial femoral condyle. T1 at 38; PX4. Petitioner then underwent physical therapy during which time he continued to have left knee problems. T1 at 39; PX4. On February 23, 2006, Dr. DeFrino administered a cortisone injection due to continued inflammation in the left knee. T1 at 39; PX4. Dr. DeFrino released Petitioner back to full duty work effective March 27, 2006. T1 at 39; PX4.

Petitioner testified that he continued to have knee problems after he returned to work and returned to Dr. DeFrino on May 4, 2006. T1 at 39-40. Petitioner testified that, at that time, his knee was locking and it was "about to give way." T1 at 40. Dr. DeFrino recommended a home exercise program. T1 at 40. Petitioner returned to Dr. DeFrino on August 24, 2006 complaining of left knee pain, but he indicated that Petitioner could continue to work in a full duty capacity and that Petitioner should return if he had any other me problems. T1 at 40. Approximately 4 1/2 months later, on January 11, 2007, Petitioner returned to Dr. DeFrino. T1 at 40-41. Dr. DeFrino indicated that Petitioner probably needed a total knee replacement. T1 at 41. Petitioner was also examined by Dr. Miller on September 29, 2010 and Dr. Cole with regard to his 2005 left knee injury. T1 at 42, 54-55. Petitioner testified that he continued working in a full duty capacity and did not pursue a total knee replacement at that time. T1 at 41.

On December 6, 2010, Dr. Miller submitted to a deposition[1] in Case No. 07 WC 4399. RX2. Dr. Miller performed a Section 12 examination of Petitioner related to his August 30, 2005 accident[2]. *Id.* At that time, Dr. Miller opined that Petitioner had a pre-existing condition of arthritis that was severe, but not so severe at that time to require a total knee replacement. *Id.* In any event, he testified that Petitioner's future need for a total knee replacement was unrelated to his August 30, 2005 accident at work, but rather "[j]ust a natural deterioration of his preexisting degenerative arthritis." *Id.*

Petitioner also filed a workers' compensation claim related to an injury to his left foot after which he returned to work on August 23, 2009. T1 at 5-6, 42-43. Petitioner testified that he continued to work for Respondent in a full duty capacity until the injury at issue in the above-captioned case on January 2, 2012. T1 at 42-43. Petitioner testified that he did not seek any treatment from Dr. DeFrino since August 23, 2009. T1 at 43.

Petitioner also testified that since his return to work after August of 2009 through January 2, 2012, he noticed that his left knee was in a weakened condition, he would have to sit down after a while "because I would fall if I would have problems with it, so I would give myself a break." T1 at 43. Petitioner testified that he knew Dr. DeFrino had recommended a total knee replacement but he did not know if he was ready to undergo that surgery at the time because of his age and he wanted to wait until he was a little older in order to do it because "they" only last so long. T1 at 43-44. Petitioner further testified that his pain did not reach a level such that he felt that he needed to undergo the total knee replacement at the time. T1 at 44.

The Arbitrator takes judicial notice of the Commission's records and the parties' extensive discussions in this record related to a Section 19(h) petition and hearing process occurring concurrently and proceeding before the Commission related to Petitioner's prior left knee claim in Case No. 07 WC 4399 in which it appears that Petitioner seeks approval of payment for the same total knee replacement surgery sought in this case, but as it purportedly relates to Petitioner's August 30, 2005 accident at work. *See also* T1-T3. The Arbitrator takes further notice of the Commission's records which reflect that Petitioner filed his 19(h) petition in Case No. 07 WC 4399 on May 25, 2012.

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[1] The Arbitrator notes that the caption for this deposition refers to a company other than Southwest Airlines as the Respondent in the case. RX2. The Commission's records, however, reflect that Southwest Airlines was the Respondent in Case No. 07 WC 4399 as well as in the above-captioned case.

[2] The Arbitrator notes that the Section 12 examination report was not submitted into evidence and that Petitioner objected to its admissibility at the time of the deposition. RX2. A copy of the deposition with the Arbitrator's rulings on any objections was not submitted into evidence, but remains with the Commission in its case file for Case No. 07 WC 4399.

Petitioner submitted the deposition[3] testimony of Dr. DeFrino taken on November 30, 2010 related, in part, to Petitioner's left knee injury in 2005. PX5. DeFrino testified that the medical treatment that he rendered to Petitioner as a result of Petitioner's 2005 left knee injury was reasonable and necessary, and that Petitioner's underlying arthritis was exacerbated by the twisting injury at work in 2005. *Id.* He further testified that Petitioner would likely require a knee replacement to solve his problems in the long run. *Id.*

January 2, 2012

On January 2, 2012, Petitioner injured his left knee while stepping out of the van transporting him from line maintenance to the hangar when he slipped, twisted his knee, fell back, and hit his tailbone in the hangar out of the van. T1 at 30, 49. The issue of accident is not in dispute. AX1. Petitioner testified he noticed that he could not walk and soreness in his left knee. T1 at 30-31. Petitioner testified that his manager took him to MacNeal. T1 at 31.

Medical Treatment

The medical records reflect that Petitioner went to MacNeal, provided a history of his prior left knee meniscus surgery, reported his slip and fall accident at work, underwent x-rays, and was diagnosed with a left knee and low back contusion. T1 at 31; PX1. The left knee x-ray showed degenerative changes with no acute fracture as interpreted by the emergency room physician. PX1. The emergency room physician ordered a knee immobilizer, prescribed pain medication, and discharged Petitioner the same day. *Id.* Petitioner was referred to the Clearing Clinic. T1 at 31; PX1.

On January 3, 2012, Petitioner went to the Clearing Clinic. T1 at 31-32; PX2. On examination, Petitioner had joint crepitus, no joint effusion (swelling), limited range of motion, extension to 90° with pain, almost normal flexion with pain, and tenderness to palpation medially. *Id.* Petitioner's underwent left knee x-rays showing moderate "generative" changes in the left knee. *Id.* Dr. Delis diagnosed Petitioner with a left knee sprain/strain - possible care and mild buttock/sacral contusion. *Id.* He restricted Petitioner to seated work only, prescribed pain medication, and use of a brace as needed. *Id.*

On January 9, 2012, Petitioner returned to the Clearing Clinic. T1 at 32; PX2. On examination, Petitioner had joint crepitus, joint effusion (swelling), limited range of motion, flexion to 90° with pain, and tenderness to palpation medially. *Id.* Dr. Sorokin restricted Petitioner to seated work only, prescribed pain medication, use of a brace/cane as needed, and ordered an MRI. *Id.* Petitioner testified that Respondent does not have light duty and was unable to provide light duty work for him. T1 at 32-33.

Petitioner underwent the recommended MRI on January 13, 2012, which the interpreting radiologist noted showed the following: (1) a complex tear of the body of the medial meniscus; (2) moderate tricompartmental osteoarthritis with at least one intra-articular loose body; (3) grade 1 strain of the lateral head of the gastrocnemius and vastus medialis obliquus muscles; and (4) mild proximal patellar tendinopathy. T1 at 33; PX2. On cross examination, Petitioner denied that he reported to the MRI physician or technician that he fell from a broken ladder as reflected in the MRI report. T1 at 48-49. The mechanism of injury in Petitioner's 2005 accident was falling from a broken ladder. T1 at 49.

[3] The Arbitrator notes that the caption for this deposition refers to two other cases previously filed by Petitioner in 06 WC 9323 and 07 WC 42758. PX5.

On January 16, 2012, Petitioner went to the Clearing Clinic at which time Dr. Sorokin reviewed his MRI results showing a complex medial meniscus tear, diagnosed Petitioner with a left knee sprain/strain - possible tear and a mild buttock/sacral contusion. T1 at 33-34; PX2. He prescribed a brace/cane to be used as needed, additional pain medication, and restricted Petitioner to sedentary work only. *Id.* Dr. Sorokin referred to Petitioner an orthopedic specialist. *Id.*

On January 23, 2012, Petitioner saw Dr. Dedhia. T1 at 34-35; PX3. After an examination, Dr. Dedhia noted that Petitioner certainly had a meniscus tear, but there also appeared to be degenerative change within the knee and that his recent fall flared chondromalacia as well as potentially precipitated a new tear of his meniscus. *Id.* Dr. Dedhia reviewed Petitioner's most recent x-rays and MRI, which he noted showed a complex degenerative tear of the medial meniscus and tricompartmental chondromalacia. *Id.* He prescribed a brace, Synvisc [i.e., viscosupplementation] injections, and physical therapy. *Id.* Petitioner testified that he was restricted to light duty work. *Id.*

Petitioner began physical therapy on January 31, 2012. PX3. He returned to Dr. Dedhia on February 27, 2012, at which time he noted that Petitioner seem to be improving with physical therapy, reiterated his recommendation for viscosupplementation injections, and noted that the definitive solution for Petitioner's knee condition was arthroplasty. T1 at 35; PX3 at 5, 8, 10. Petitioner was to return after his scheduled independent medical evaluation. *Id.*

Section 12 Examination – Dr. Troy

On February 29, 2012, Petitioner submitted to an independent medical evaluation with an orthopedic surgeon, Dr. Troy, at Respondent's request. T1 at 36. Dr. Troy examined Petitioner, reviewed various treating medical records provided to him, and rendered opinions regarding Petitioner's left knee condition and its relation, if any, to his injury at work on January 2, 2012. RX2 (Exh. 2). Dr. Troy submitted to a deposition[4] on July 31, 2012 at which time both parties had an opportunity to question him about his report and the opinions contained therein. RX2. Ultimately, Dr. Troy diagnosed Petitioner with profound arthritic changes in the left knee and a possible temporary aggravation of end-stage degenerative changes in the left knee. RX2 (Exh. 2).

Dr. Troy noted that Petitioner's reported lack of symptomatology since 2008 until his recent work injury seemed highly unlikely and it was most likely that Petitioner's knee pain never truly resolved. *Id.* He opined that Petitioner's injury caused a strain to his left knee "but it's not the reason he will require a total knee arthroplasty. [Petitioner's] pre-existing history of tricompartmental degenerative changes is the impetus for total knee replacement in the future. [Petitioner's] current symptoms appear to be a result of the natural progression of degenerative changes in his left knee." *Id.* Dr. Troy further noted that the medial meniscal tear noted by Dr. Dedhia was degenerative in nature and most likely present prior to his incident at work on January 2, 2012. *Id.* At his deposition, Dr. Troy added that approximately 90-100% of patients with end-stage arthritic changes will have meniscal pathology visible in their MRIs due to profound pre-existing arthritic changes in the knee. RX2.

Dr. Troy testified that there is a significant correlation between advancing arthritic changes and obesity, treating physicians had recommended total left knee arthroplasty to Petitioner going back to 2006, and that it takes years for an osteoarthritic condition as profound as Petitioner's to develop. *Id.* Dr. Troy opined that Petitioner's

[4] The Arbitrator notes that the caption on Dr. Troy's deposition transcript refers to case number 07 WC 4399. RX2. However, the subject of the deposition is Dr. Troy's February 29, 2012 report and the opinions that he rendered therein. Id.

January 2, 2012 work accident did cause a strain to Petitioner's knee and that he would have reached maximum medical improvement approximately six weeks thereafter, but that it did not aggravate or accelerate Petitioner's underlying osteoarthritic condition and that Petitioner's need for a total knee replacement was not related in any way to that work accident. RX2. Petitioner testified that after Dr. Troy's report, his workers' compensation claim was denied. T1 at 36.

Continued Medical Treatment

On June 7, 2012, Petitioner returned to Dr. Dedhia. T1 at 36-37; PX3. Dr. Dedhia maintained his diagnosis that Petitioner had degenerative joint disease in the left knee and a medial meniscus tear which he noted was exacerbated by his recent slip and fall. *Id.* He again recommended knee arthroplasty and maintained Petitioner's light duty work restrictions. *Id.*

On June 19, 2012, Petitioner saw Dr. Dedhia who again recommended a total knee replacement. T1 at 37; PX3. Petitioner indicated his desire to undergo the surgery. *Id.*

On July 2, 2012, Petitioner testified that he saw Dr. DeFrino who again recommended a total knee replacement. T1 at 37-38, 44. Petitioner testified that Dr. DeFrino referred him to Dr. Luke at Parkview Orthopedics. T1 at 44-45.

Petitioner saw Dr. Luke initially on July 9, 2012. T1 at 45-46; PX4. On examination, Dr. Luke noted that Petitioner was ambulating with the cane, had a limp favoring his left knee and lower extremity, crepitus in the left knee with a varus inclination, range of motion just shy of full extension through approximately 120°, stable varus and Valdis strain with dorsiflexion and plantar flexion appreciable, and provocation maneuvers and examination consistent with his known degenerative joint disease in the left knee. *Id.* Dr. Luke diagnosed Petitioner with degenerative joint disease in the left knee with bone-on-bone changes. *Id.* After discussing several treatment options, Dr. Luke noted Petitioner's agreement to proceed with a total knee replacement and he prescribed a knee immobilizer for postoperative use. *Id.*

On July 24, 2012, Petitioner underwent the recommended surgery with Dr. Luke. T1 at 46; PX4; PX7. Pre-and postoperatively, Dr. Luke diagnosed Petitioner with degenerative joint disease in the left knee and morbid obesity. *Id.* Petitioner remained at Christ Hospital until he was discharged on July 26, 2012. *Id.* Dr. Luke kept Petitioner off work. *Id.*

Petitioner returned to Dr. Luke postoperatively two weeks later on August 8, 2012, at which time his stitches were removed and Dr. Luke ordered physical therapy. T1 at 46-47; PX4. On August 29, 2012, Petitioner saw Dr. Luke who ordered continued physical therapy and pain medication. T1 at 47; PX4. On September 17, 2012, Dr. Luke ordered continued physical therapy, which Petitioner underwent, and he kept Petitioner off work. T1 at 47; PX4; PX6.

Pursuant to the parties' stipulation, Petitioner remained off work at Dr. Luke's orders through the last date of trial, October 29, 2012, and Petitioner had another appointment scheduled with Dr. Luke for November 17, 2012. TR3 at 8-10.

Petitioner testified that since his evaluation with Dr. Troy, Respondent has refused to pay any of his medical bills or temporary total disability benefits. T1 at 47-48. On cross-examination, Petitioner testified that he did get a salary beginning January 3, 2012, but he could not identify the source of that salary. T1 at 50-52.

Petitioner testified that he received his salary through February 29, 2012 until Dr. Troy's report was issued. T1 at 51-53. Petitioner did not understand whether his salary was paid as a result of his union or sick time benefits. T1 at 55-56.

Additional Information

Regarding his current left knee condition, Petitioner testified that his left knee is still weak because his total knee replacement is "still fresh." T1 at 48. Petitioner attends physical therapy two to three times per week and has had improvement as a result; he originally had a walker and now uses a cane. T1 at 48. Petitioner testified that he is getting stronger. T1 at 48.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits[5] (AX1, PX1-PX7, PX12-PX15, RX1-RX4, RX6, RX10) 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 the injury sustained on January 2, 2012 and finds the opinions rendered by Respondent's Section 12 examiner, Dr. Troy, to be persuasive given the totality of the record. In so finding, the Arbitrator notes the ample evidence in the record regarding the extent of Petitioner's degenerative left knee condition, his co-morbidity (i.e., obesity), and the findings made by Petitioner's own treating physicians which reinforce the opinions rendered by Dr. Troy.

At his deposition, Dr. Troy commented on Petitioner's reported lack of symptomatology since 2008 until his recent work injury and found that this was highly unlikely. Dr. Troy noted that it was most likely that Petitioner's knee pain never truly resolved. This opinion is persuasive given Petitioner's testimony at trial that he knew that he needed a total knee replacement years before January of 2012 and that, since his return to work after August of 2009 through January 2, 2012, he noticed that his left knee was in a weakened condition. Specifically, Petitioner testified that he would have to sit down after a while "because I would fall if I would have problems with it, so I would give myself a break." T1 at 43. Petitioner also testified that while Dr. DeFrino had recommended a total knee replacement, he was not ready to undergo that surgery at the time due to his age and he wanted to wait until he was a little older in order to do it because knee replacements only last so long.

Moreover, Dr. Troy reasonably opined that Petitioner's January 2, 2012 accident caused a strain to his left knee "but it's not the reason he will require a total knee arthroplasty. [Petitioner's] pre-existing history of tricompartmental degenerative changes is the impetus for total knee replacement in the future. [Petitioner's] current symptoms appear to be a result of the natural progression of degenerative changes in his left knee." RX2. The record is replete with evidence of the severity of Petitioner's pre-existing left knee condition as documented by his own physicians.

[5] Respondent's Exhibits 5 and 7-9 were rejected and will remain in the Commission's file as rejected exhibits.

At Petitioner's initial visit with Dr. Luke on July 9, 2012, he diagnosed Petitioner with degenerative joint disease in the left knee with *bone-on-bone* changes. (*emphasis added*). Shortly thereafter on the date of Petitioner's total knee replacement surgery on July 24, 2012, Dr. Luke diagnosed Petitioner with degenerative joint disease in the left knee and morbid obesity. Dr. DeFrino, who treated Petitioner related to his 2005 injury, testified that at his deposition in 2005 that Petitioner would need a total knee replacement in the future to resolve his ongoing knee problems. Thus, in light of the record as a whole, the Arbitrator finds Dr. Troy's opinion that Petitioner's January 2, 2012 accident at work did not aggravate or accelerate Petitioner's underlying osteoarthritic condition to be plausible and persuasive.

Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed current condition of ill-being regarding his left knee is not related to the injury sustained on January 2, 2012.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

As explained above, the Arbitrator finds that Petitioner's claimed current condition of ill being is not related to the injury sustained on January 2, 2012. Thus, Petitioner's claim for temporary total disability benefits commencing on March 27, 2012 through October 29, 2012 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, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's injuries subsequent to January 2, 2012 were causally connected to his accident at work as alleged. Respondent required Petitioner to submit to a Section 12 examination and cut off benefits thereafter. Moreover, Respondent has defended against Petitioner's claim in this case while Petitioner concurrently seeks the same remedy in a 19(h) petition before the Commission as it relates to a prior knee injury occurring in 2005. Under these circumstances, Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Jones,
Petitioner,

vs.

No: 07 WC 04399
(Consolidated with No: 12 WC 07237)

14IWCC0612

Southwest Airlines Co.,
Respondent.

DECISION AND OPINION PURSUANT TO SECTION 8(a)

This matter comes before the Commission on Petitioner's Section 8(a) Petition, filed on March 10, 2008. The underlying claim arises out of an acute trauma to Petitioner's left knee that occurred when he fell from a ladder on August 30, 2005. That case was tried before Arbitrator Dollison on January 13, 2011, with a Decision issued on March 15, 2011, awarding Petitioner 27.5% loss of use of the left leg. Neither party appealed the Arbitrator's Decision, and Petitioner filed this timely Petition for Review pursuant to Section 8(a) of the Act.

The Section 8(a) Petition was considered in consolidation with Petitioner's appeal from Arbitrator Flores' Section 19(b) Decision denying Petitioner's separate claim for re-injury to his left leg in No. 12 WC 007237. In that case, Petitioner alleged that he slipped and twisted his knee while exiting a van on January 2, 2012. Arbitrator Flores found that Petitioner had failed to prove a causal connection between his 2012 fall and the current condition of his left knee. The Arbitrator denied all benefits in her Section 19(b) Decision entered on May 29, 2013 in No. 12 WC 007237.

The parties proceeded to hearing in both cases before Commissioner Donohoo on October 29, 2012. After considering the entire record, including the transcripts of the original arbitration hearing and the October 29, 2012 review hearing and oral arguments presented on May 21, 2014, the Commission, in a separate opinion, affirms Arbitrator Flores' denial of benefits in No. 12 WC 007237. The Commission finds that Petitioner's total knee replacement surgery and related treatment is causally connected to his August 30, 2005 work injury, rather than to his January 2, 2012 accident or to his pre-existing degenerative condition. Pursuant to Petitioner's Section 8(a) Petition in 07 WC 004399, the Commission awards Petitioner all reasonable and necessary medical expenses related to his total knee replacement surgery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner has been employed by Respondent as an aircraft mechanic, refurbishing and repairing aircraft, since 1997. On August 30, 2005, he was standing on a ladder to replace light bulbs when the ladder collapsed, causing him to fall and injure his left knee.

2. Petitioner's treating surgeon, Dr. DeFrino, testified in his January 30, 2010 deposition (12 WC 007237, PX5, p. 5) that Petitioner had pre-existing left knee pain complaints for five years, but there was no evidence that he had received treatment or had missed work due to his complaints prior to his August 30, 2005 accident. Dr. DeFrino causally related Petitioner's meniscal tear and aggravated arthritis to his 2005 work accident and performed arthroscopic surgery to debride the tear on January 9, 2006.

3. Following surgery, Petitioner underwent physical therapy and received a cortisone injection to relieve ongoing inflammation. He returned to work full duty on March 27, 2006, but continued to experience locking and giving way complaints, and on January 11, 2007, Dr. DeFrino recommended a total knee replacement. Petitioner elected to defer surgery, due to his relatively young age and active lifestyle.

4. The parties tried the 2005 injury claim before Arbitrator Dollison on the sole issue of nature and extent, and the Arbitrator awarded Petitioner 27.5% loss of use of the left leg. Neither party appealed that Decision.

5. On January 2, 2012, Petitioner re-injured his left knee while stepping out of a maintenance van. He received emergency room treatment and conservative care from Clearing Clinic for a left knee sprain/strain. A January 13, 2012 MRI revealed a complex tear of the medial meniscus, moderate tri-compartmental osteoarthritis, a grade 1 muscle strain, and mild tendinopathy. Petitioner was referred to an orthopedic specialist, Dr. Dedhia, for further treatment.

6. On January 23, 2012, Dr. Dedhia diagnosed Petitioner with a complex degenerative tear of the medial meniscus and tri-compartmental chondromalacia. He prescribed a brace, visco-supplementation, and physical therapy. When those efforts failed to relieve Petitioner's knee complaints, Dr. Dedhia recommended a total knee replacement.

7. On February 19, 2012, Respondent obtained a Section 12 evaluation by Dr. Troy. Dr. Troy determined that Petitioner's knee pain had never truly resolved following his 2005 work injury. The doctor opined that Petitioner's 2012 accident caused only a temporary aggravation of his degenerative condition and that the torn meniscus resulted from Petitioner's ongoing arthritis. Following this report, Respondent denied Petitioner's 2012 claim.

8. Petitioner continued to seek treatment from Dr. Dedhia and returned to Dr. DeFrino on July 2, 2012. Both doctors persisted in their recommendation of arthroplasty, and Petitioner was referred to Dr. Luke for the surgery.

9. Petitioner underwent arthroplasty on July 24, 2012 and began rehabilitative physical therapy thereafter. At the Review Hearing on October 29, 2012, Petitioner testified that he remained off work, as Respondent offered no light duty, and continued to undergo physical therapy. He further testified that his medical bills were paid by his group health insurer, but he received no temporary total disability from Respondent.

12 WC 007237 Appeal. By separate decision, the Commission affirms Arbitrator Flores' denial of benefits for Petitioner's 2012 accident. The Commission finds persuasive Dr. Troy's finding that the 2012 accident caused at most a temporary aggravation of Petitioner's ongoing arthritic condition, and adopts Arbitrator Flores' conclusion that Petitioner's current condition, including his need for total knee replacement, was not causally connected to his 2012 work accident. The Commission notes that Dr. DeFrino had recommended arthroplasty following Petitioner's 2005 accident and before his 2012 fall from the van.

07 WC 004399 Section 8(a) Petition. The Commission finds that Petitioner's need for total knee replacement is causally connected to his 2005 work accident. In so finding, the Commission relies upon Dr. DeFrino's opinion that Petitioner's current complaints are related to his arthritis, which was aggravated by his 2005 work accident. The Commission notes that Dr. DeFrino recommended the total knee replacement prior to Petitioner's 2012 work accident.

The Commission, after considering the entire record, including the transcripts of the Section 19(b) hearing in 12 WC 007237 and the Review Hearing before Commissioner Donohoo on October 29, 2012, finds Petitioner has proved he is entitled to medical expenses pursuant to Section 8(a) of the Act for the reasons set forth above.

IT IS THEREFORE ORDERED BY THE COMMISSION Petitioner's Section 8(a) Petition is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses related to his total knee replacement surgery, pursuant to Sections 8(a) and 8.2 of the Act.

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.

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

14IWCC0612

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 25 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-05/21/14
drd/dak
68

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly Wilson,
Petitioner,

vs. NO: 10 WC 20771

14IWCC0613

State of Illinois,
Chester Mental Health Center,
Respondent.

DECISION AND OPINION ON REVIEW UNDER
SECTION 8(a) AND SECTION 19(h)

This cause comes before the Commission on Petitioner's Petition under Section 8(a) and Section 19(h) filed on May 11, 2012. The arbitration hearing was held on May 9, 2011, and Arbitrator Nalefski issued a decision on May 24, 2011, awarding Petitioner medical expenses of $100,613.25, 20% loss of use of the right arm for her shoulder injury and 5% loss of use of the person as a whole for her cervical spine injury. The Arbitrator expressly noted that Dr. Gornet anticipated that Petitioner would require additional cervical treatment, including surgery. No appeal was taken from that Decision.

The hearing on Petitioner's Section 8(a) and Section 19(h) Petition was held on October 29, 2012 before Commissioner Donohoo. The Commission, after having reviewed the entire record, hereby grants Petitioner's Section 8(a) and Section 19(h) Petition and finds that Petitioner proved that her current condition is causally related to her work accident of December 3, 2009, and that the medical treatment she received from the time of her arbitration hearing on May 9, 2011 to October 29, 2012 was reasonable and necessary.

Petitioner, a 55 year old LPN, was trimming the toenails of an uncooperative patient on December 3, 2009, when the patient jerked his leg, pulling her down and forward. She felt a pop in the back of her neck and pain radiating into her shoulders down to her fingers. Petitioner sought treatment with her primary care provider, who recommended injections, medications and physical therapy. A cervical MRI showed mild to moderate canal stenosis at C5-6 with midline protrusions and mild bilateral foraminal narrowing. [The shoulder injury is not relevant to this Section 8(a) and need not be discussed at this time.]

14IWCC0613

Following surgery for her shoulder injury, Petitioner began treating with Dr. Gornet for her cervical spine symptoms. Dr. Gornet recommended steroid injections and a new MRI, which confirmed a large disc herniation at C5-6, correlating with Petitioner's symptoms. The injections provided significant relief, and Petitioner returned to work full duty on a trial basis on September 20, 2010. However, Dr. Gornet noted that Petitioner was likely to require further treatment for her cervical injury, including surgery. Respondent did not request a Section 12 exam, and prior to hearing on May 9, 2011, the parties stipulated to all issues but nature and extent. Arbitrator Nalefski entered his Decision on May 24, 2011, awarding 20% of the right arm and 5% of the body as a whole for Petitioner's cervical complaints. Neither party appealed from that decision.

Subsequently, Petitioner continued to treat for her cervical injury. She sought treatment from Dr. LaDove on September 7, 2011 and from Dr. Gornet on January 3, 2012. Dr. Gornet ordered a new cervical MRI and CT myelogram and causally related her cervical condition at that time to her December 3, 2009 work injury. The January 16, 2012 MRI showed a large herniation at C6-7, and the myelogram provided findings identical to a scan done on September 9, 2010 at C5-6 and C6-7. Dr. Gornet recommended a two level disc replacement, but Respondent refused to authorize the surgery.

Respondent requested a Section 12 examination by Dr. Cantrell, who issued a report on March 26, 2012, finding that Petitioner's accident aggravated her pre-existing degenerative changes. He recommended a one level disc replacement at C5-6.

Petitioner filed this Section 8(a)/Section 19(h) Petition on May 11, 2012, seeking prospective medical care.

Respondent disputes liability for prospective treatment, based upon its post-hearing discovery of Petitioner's pre-existing cervical complaints. On July 19, 2012, Dr. Cantrell issued a supplemental report, changing his causation opinion based on his review of Petitioner's pre-accident medical records. Those records revealed that Petitioner had complained to her primary care physician of neck pain at 10/10 only two weeks before her accident. She was prescribed Vicodin, Robaxin, and Flexeril, and referred to a chiropractor for further treatment. In his supplemental report, Dr. Cantrell found Petitioner's current need for surgery unrelated to her work accident, but causally connected to her pre-existing cervical condition.

Petitioner maintains that she has suffered no intervening accidents since the 2011 arbitration hearing and had no significant pre-accident symptoms. She testified that she saw the chiropractor only one time before the accident and was working full duty at the time of her accident. She had undergone no MRIs and had received no recommendations for injections or surgery prior to this accident. Moreover, there was no evidence that she had treated for her cervical condition between November 20, 2009, when she saw her primary care doctor for 10/10 cervical complaints, and December 3, 2009, the date of this work accident. Petitioner also argues that Respondent is bound by its May 9, 2011 Request for Hearing stipulations to accident and causal connection.

14IWCC0613

The Commission finds that Petitioner's current cervical condition and need for treatment as recommended by Dr. Gornet is causally connected to her December 3, 2009 work accident. Respondent agreed to accident and causal connection prior to the Arbitration Hearing and Arbitrator Nalefski entered an order finding causal connection. No appeal was taken from that Decision, and Petitioner testified that she had suffered symptoms continually since the accident, with no intervening accidents or aggravations.

The Commission concludes that Petitioner has proved that her current need for treatment and recommendations for surgery and CT myelogram are causally related to her December 3, 2009 work accident. Petitioner's Section 8(a) Petition for additional treatment as recommended by Dr. Gornet is hereby granted.

Petitioner's Petition for Penalties and Fees for Respondent's refusal to authorize and pay for continued treatment for her cervical condition is denied. Respondent raised a legitimate liability issue with regard to Petitioner's pre-existing cervical condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under Section 8(a) is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Fees is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay the reasonable and necessary costs of the surgery and CT myelogram recommended by Dr. Gornet.

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.

As this claim is against the State of Illinois, no appeal may be taken from this Decision pursuant to Section 19(f)(1) of the Act.

DATED: JUL 25 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-06/24/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mike Westphal,
Petitioner,

vs.

13 WC 08727
(Consolidated with 09 WC 45481)

Grupo Antolin,
Respondent.

14IWCC0614

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 and nature and extent of the permanent disability, and being advised of the facts and law, reverses the June 3, 2013 decision of Arbitrator Edward Lee as stated below.

On January 5, 2012, Petitioner was employed by Respondent as a material handler, supplying parts to assembly line workers. As he attempted to lift parts from a skid, he found they were still belted down and felt low back pain and right leg numbness. He reported the accident immediately, and Respondent referred him to Physicians Immediate Care, where he was diagnosed with a low back injury and prescribed work restrictions and pain medications. His primary care physician, Dr. Robyn, diagnosed him with work related lumbar strain with radiculopathy. Petitioner worked light duty until released from care on May 30, 2012. Respondent paid for the related medical bills, and Petitioner suffered no lost time related to this claim.

14IWCC0614

Petitioner filed a prior claim for a low back injury on October 2, 2009. The 2009 claim, No. 09 WC 045481, was consolidated with the instant claim for trial on April 11, 2013 by Arbitrator Lee. The Arbitrator awarded Petitioner medical and temporary total disability benefits in the 2009 claim, but deferred an award for permanent partial disability until entering his decision in the 2012 injury case. In the instant case, the Arbitrator awarded Petitioner 4% loss of use of the person as a whole for both the 2009 and 2012 injuries. Respondent appealed both the 2009 and 2012 decisions, arguing in this 2012 claim that Petitioner failed to prove accident and permanent partial disability.

Arbitrator Lee based his finding that Petitioner suffered an accident in 2012 arising out of and in the course of his employment on Petitioner's credible testimony and the supporting medical records of Physicians Immediate Care and Petitioner's primary care physician. Petitioner did identify a specific incident, which he alleged caused his injury, and timely notified Respondent. His contemporaneous medical records document that incident. The Commission affirms the Arbitrator's finding that an accident that arose out of and in the course of Petitioner's employment occurred on January 5, 2012.

With regard to permanency, Respondent argues that Petitioner failed to provide the required AMA rating and that the Arbitrator failed to consider the factors outlined in Section 8.1(b) of the Act in making his determination of permanency. Because the Commission finds that Petitioner failed to prove that he suffered any permanent partial disability as a result of this injury, it need not address these issues.

Petitioner's 2012 complaints are precisely the same as those he expressed following his 2009 injury: low back pain with right leg pain and numbness. Petitioner received only minimal conservative treatment and returned to work full duty. Based upon the identity of complaints before and after Petitioner's 2012 accident, the Commission concludes that he suffered no additional permanent partial disability as a result of his 2012 accident. The Commission therefore reverses the Arbitrator's award of 4% loss of use of the person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of 4% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act 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.

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

14IWCC0614

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

DATED: JUL 25 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-06/19/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James C. Williams,
Petitioner,

vs.

NO. 11 WC 029736

14IWCC0615

Interstate Cleaning Corp.,
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 issue of penalties and fees, and being advised of the facts and law, supplements but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a janitorial supervisor assigned to work at K-Mart, injured his lower back on December 27, 2009, when he lifted a 125 pound garbage barrel and attempted to pour its contents into a plastic-lined grocery cart. Petitioner timely reported his accident and sought medical treatment, receiving injections, narcotic painkillers and muscle relaxers from the emergency room physician, then his primary care doctor. When his symptoms failed to resolve, he was referred to a pain management physician, Dr. Santiago, who administered a series of steroid injections and placed him on light duty. K-Mart accommodated Petitioner's restrictions, and he continued working light duty until May 10, 2011, when he was terminated for unrelated causes. Respondent advised Petitioner that no other light duty jobs were available, but failed to initiate temporary total disability payments.

14IWCC0615

Petitioner continued treating with pain management and filed an Application for Adjustment on August 4, 2011. Respondent refused to pay the accrued temporary total disability or to initiate benefits. On September 20, 2011, Petitioner filed a Section 19(b) Request and penalty petition. The Petition for Penalties is not contained in the Transcript or record. No hearing was held on either the Section 19(b) request or petition for penalties. However, on December 24, 2011, Respondent reinstated all benefits and paid Petitioner all temporary total disability that had accrued from the date of his termination through the date of payment.

In February 2012, Dr. Santiago referred Petitioner to a neurosurgeon, Dr. Nardone, who diagnosed a right-sided herniated disc at L5-S1 and severe stenosis at L4-5 and recommended surgery. Respondent initially refused to authorize the recommended surgery, but ultimately reversed its decision, and Petitioner underwent a two-level decompressive laminectomy and discectomy on February 7, 2013. The surgery relieved Petitioner's right leg pain, but his low back pain persisted. After Dr. Nardone released Petitioner from care on April 24, 2013, Petitioner continued his pain management treatment, receiving pain medications and work restrictions of 15 pounds lifting with no bending or twisting.

Petitioner filed a second penalties petition on May 10, 2013, seeking penalties and fees for Respondent's refusal to pay temporary total disability benefits from April 30, 2013 (after his release from care by Dr. Nardone on April 26, 2013) through the date of arbitration, July 11, 2013. Arbitrator Lindsey ordered Respondent to pay temporary total disability benefits for the requested period and awarded Petitioner penalties and fees, based upon Respondent's failure to justify its unilateral termination of temporary total disability benefits effective April 30, 2013. Although Dr. Nardone had released Petitioner from his care, the Arbitrator noted that Petitioner continued to treat with his pain management physician and remained on light duty restrictions. She awarded 10-2/7 weeks of temporary total disability, totaling $2,523.39, $2,160.00 in Section 19(l) penalties, $1,261.70 in Section 19(k) penalties, and $504.68 in Section 16 attorney fees.

On appeal, Petitioner argues that he was entitled to penalties and fees under his first petition, as well as to those awarded by Arbitrator Lindsay under his second petition. Arbitrator Lindsay declined to award penalties and fees under the first petition based upon "divergent case law" concerning the employer's duty to pay benefits to terminated employees. The Arbitrator noted that the Commission in *Matuszcak v. Wal-Mart*, 12 IWCC 1079, recently found that the *Interstate Scaffolding* decision does not give fired employees an unqualified right to temporary total disability benefits. Arbitrator Lindsay found that, since there was a legitimate issue as to whether Petitioner's right to benefits was affected by his termination, he was not entitled to penalties or fees for Respondent's delay in payment of those benefits.

The Commission does not need to consider the legitimacy of Petitioner's termination or the effect of Petitioner's termination on his right to benefits under the Act in this case under *Interstate Scaffolding* or *Matuszcak*. This is a simple case of *laches*. Petitioner's first penalty petition was filed in 2011, but no hearing was held. Respondent voluntarily reinstated benefits and paid all accrued temporary total disability benefits. The Commission finds that it is clear an agreement was reached between the parties before December 2011, when Respondent paid the accrued benefits. To allow Petitioner a second bite of the apple by assessing penalties and fees against Respondent two years after the penalty petition was filed without Petitioner proceeding to a timely hearing would constitute an unfair surprise to Respondent. The Commission notes that Petitioner's first penalty petition does not even appear in the record. As Petitioner elected not to proceed to hearing on his petition at the time it was filed and proceeded to reach an agreement with Respondent in

14IWCC0615

which Respondent reinstated benefits, the Commission finds that Petitioner waived his right to proceed to hearing on that petition two years later.

All else is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of $245.33/week for 112-6/7 week, commencing May 11, 2011 through July 11, 2013, pursuant to Section 8(b) of the Act. Respondent to be given a credit for $25,233.89 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner penalties of $1,261.70 as provided in Section 19(k) and $2,160.00 as provided in Section 19(l) of the Act, in addition to attorney fees of $504.68 as provided in Section 16 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is ordered to authorize and pay for the reasonable charges for the epidural steroid injection and series of lumbar medial branch blocks recommended by Dr. Santiago.

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 $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.

JUL 25 2014

DATED:

Daniel R. Donohoo

o-05/28/14
drd/dak
68

Ruth W. White

Charles J. DeVriendt

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

WILLIAMS, JAMES C
Employee/Petitioner

Case# **11WC029736**

INTERSTATE CLEANING CORPORATION
Employer/Respondent

14IWCC0615

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:

1551 STOKES LAW OFFICES
GARY JOE STOKES
200 N GILBERT
DANVILLE, IL 61832

1454 THOMAS & ASSOCIATES
ROBERT A HOFFMAN
300 S RIVERSIDE PLZ SUITE 2330
CHICAGO, IL 60606

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)

JAMES C. WILLIAMS
Employee/Petitioner

v.

INTERSTATE CLEANING CORPORATION
Employer/Respondent

Case # **11** WC **029736**

Consolidated cases: **N/A**

14IWCC0615

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 **Admissibility of RX 1**

FINDINGS **14IWCC0615**

On the date of accident, **12/27/09**, 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 $**13,167.96**; the average weekly wage was $**253.23**.

On the date of accident, Petitioner was **53** 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 $**25,233.89** for TTD, $**n/a** for TPD, $**n/a** for maintenance, and $**n/a** for other benefits, for a total credit of $**25,233.89**.

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

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $245.33 (applicable minimum)/week for 112 & 6/7ths weeks, commencing May 11th, 2011 through July 11, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $25,233.89 for temporary total disability benefits that have been paid.

Penalties
Respondent shall pay to Petitioner penalties of $**504.68**, as provided in Section 16 of the Act; $**1,261.70**, as provided in Section 19(k) of the Act; and $**2,160.00**, as provided in Section 19(l) of the Act.

Prospective Medical Care
Respondent is directed to authorize and pay for the reasonable charges for the prescribed epidural steroid injection and series of lumbar medial branch blocks.

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

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

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

Nancy Lindsay
Signature of Arbitrator

September 4, 2013
Date

SEP 9 - 2013

The issues in dispute are accident, causal connection, temporary total disability benefits, prospective medical care, penalties and attorney's fee, and the admissibility of RX 1. Petitioner was the sole witness at arbitration. At the time of arbitration Respondent's counsel requested leave to submit any response which was filed by Respondent in response to Petitioner's first penalties petition. None was received by the Arbitrator.

The Arbitrator finds:

On December 27, 2009 Petitioner was working for Respondent as a janitor. His duties included mopping, cleaning, and dumping of garbage. It was while he was doing the latter that he felt his back pop. More specifically, Petitioner testified that he was picking up a garbage can to dump it into a grocery cart when it took off and his back popped. Petitioner testified to pain going down his leg. Thereafter, the pain went away but then it returned. Petitioner testified that he had never experienced anything like that before but believed he had simply pulled a muscle. Petitioner further testified that over the weekend his symptoms worsened. Petitioner initially sought treatment at the Provena Emergency Room on January 5, 2010, reporting that nine days earlier he had picked up some trash bags at work and felt lower back pain. Emergency room records describe Petitioner's pain as "achy" and a "2/10." According to the ER record, coughing and sitting upright made his complaints worse. A pain drawing showed mid back to lower right-sided back pain and some right hip/upper leg complaints. The clinical impression was acute lower back pain and right sciatica. A lumbar spine x-ray was normal with no evidence for fracture or dislocation. There were some degenerative changes noted in addition to narrowing of the disc space at L5-S1. The discharge instructions are difficult to make out. Petitioner, however, was given pain medication. (PX 1)

Petitioner followed up at Family Practice Medical Center on January 11, 2010. Petitioner presented with a history of having lifted a heavy garbage can at work two days after Christmas and experiencing a pop followed by pain approximately one hour later. The medication given to Petitioner in the emergency room had proven ineffective and Petitioner reported difficulty sleeping. Petitioner denied any numbness or tingling in his extremities. On physical examination Petitioner exhibited limited range of motion due to pain and tenderness to the right upper buttock at the area of the sciatica nerve. Petitioner was prescribed Darvocet, Flexeril, and Etodolac and asked to return in two weeks. (PX 2)

Petitioner returned to the Family Practice Center on January 25, 2010 reporting ongoing pain complaints when bending and discomfort when lying down, standing, driving his car or walking. Petitioner described the pain as "8/10" and going from the center of his spine to his right hip and ankle and needing to be "propped up" with his right leg crossed over his left leg. Petitioner denied any relief with pain medications. Petitioner also mentioned "leg lag" and needing to lift his leg on occasion. Petitioner's physical examination was positive for limited range of motion of the back due to pain, tenderness to the right on palpation of the paravertebral muscles and lumbar area and Petitioner's straight leg raise was noted to be "negative/positive Right Left Bilateral." Petitioner was diagnosed with sciatica, an MRI was ordered and he was given a prescription for Vicodin.

Petitioner was to return in one week. (PX 2)

Petitioner was unable to proceed with the MRI due to metal in his left hip and left leg. A CT scan was performed on January 27, 2010. It revealed bulging disks at multiple levels but most pronounced at L4-5 and L5-S1., vacuum sign at L5-S1 with disk space narrowing and posterior spurring; degenerative changes in the

facet joints at L5-S1; some possible neural foraminal narrowing also related to spur formation, and some calcification in the aorta. (PX 3)

Petitioner returned to the Family Medical Center on February 1, 2010 with ongoing complaints of pain ("7/10") which could only be relieved with taking vicodin 5/5000 bid. Straight leg raising was negative bilaterally. Range of motion of Petitioner's back was painful but within normal limits. Petitioner's physical examination was otherwise unchanged from his last visit. Petitioner was referred to Dr. Santiago, a pain specialist, for evaluation and treatment. (PX 2)

Before Petitioner could get in to see Dr. Santiago he had to go back to the Family Medical Center due to ongoing pain and lack of medication. Petitioner's exam was unchanged and his medications were renewed. Petitioner's diagnosis was noted as "Bulging Disck [sic] lumbar disk, Low back Pain, and back pain secondary to lifting garbage can." (PX 2)

Petitioner presented to Dr. Santiago, a pain management and rehabilitation specialist with Christie Clinic, on March 3, 2010. The visit was noted to be a "workman's comp case." Dr. Santiago had previously treated Petitioner in October of 2008 for neck pain which had subsequently stabilized. Petitioner gave a history of having injured his back on December 12, 2009 when he had an incident at work dumping trash weighing approximately 120 lbs. during which time he felt a pop in his back with increasing back pain thereafter.

Petitioner reported "shooting pain" down his leg ever since. To date, Petitioner denied any relief from the many pain medications he had been given. Petitioner also reported falling one week earlier while going up stairs carrying a three year old child and losing his footing. Petitioner denied any change in his pain as a result of that fall. Petitioner also reported a few incidences of urinary urgency – usually two to three times a week. Petitioner described this as a "new problem." On physical examination Petitioner had limited range of motion to extension and rotation bilaterally, positive seated and supine straight leg raising on the right, positive lasegues tst on the right and negative crossed straight leg raising bilaterally. Strength was reportedly 5/5 bilaterally (lower extremities) and Petitioner was noted to be tender to palpation along the lumbar paraspinals. Dr. Santiago's impression was lumbar radiculitis and spondylosis. He recommended a lumbar epidural steroid injection and a urologic evaluation. Petitioner was switched from Flexeril to Robaxin to see if it affected his urinary retention while providing him with pain relief. Petitioner was switched to Vicodin 7.5/325 every 8 hours as needed and Tramadol 50 mg. twice a day as needed. Petitioner was to return in two months. (PX 4)

Petitioner underwent a lumbar epidural steroid injection on April 8, 2010. (PX 5)

By the time Petitioner returned to see Dr. Santiago on May 3, 2010 he had sprained his right ankle and was on crutches. Petitioner reported the epidural had helped tremendously as had the medication changes which allowed him to engage in activities of daily living with ease. Petitioner was sleeping 5-6 hours per night with no bowel or bladder incontinence. Petitioner denied any radiating pain but still reported pain with prolonged sitting, standing, and lifting. Petitioner's physical examination remained unchanged except for a negative straight leg raising test and lasegues test. Petitioner's medications were refilled and Petitioner was counseled regarding continuing with endurance exercises as tolerated and back protection techniques. (PX 4)

Dr. Santiago re-examined Petitioner on June 23, 2010 at which time Petitioner reported his ankle pain was better but his back pain was shooting down his right leg again and all the way to the toes. Petitioner's last epidural had lasted for three months. Petitioner had been on some work restrictions which had been helping. Petitioner's condition was otherwise unchanged although straight leg raising while seated and supine was again positive on the right side. The doctor modified Petitioner's diagnosis to that of severe lumbar spondylosis and

radiculitis. They discussed the importance of following his back restrictions for work including no lifting over ten pounds and no bending or twisting combinations. Another epidural steroid injection was ordered. Petitioner was to follow-up in three weeks with his wife's appointment. (PX 4)

Petitioner returned to Dr. Santiago on July 23, 2010 reporting no change in his pain complaints but satisfactory management thereof. Petitioner's physical examination and diagnosis were unchanged. Medications were refilled. Back restrictions were again discussed and unchanged. Petitioner was waiting for his epidural injection and was to return in two months. (PX 4)

Petitioner underwent a second lumbar epidural steroid injection on July 28, 2010. (PX 5)

When Petitioner returned to Dr. Santiago on September 23, 2010 he reported one hundred percent resolution of his leg pain but ongoing significant right low back pain. Petitioner's straight leg raising test and lasegues maneuver were negative. Petitioner's work restrictions remained unchanged and his medications were refilled with the doctor noting they were rotating to Percocet. (PX 4)

Petitioner presented to Dr. Santiago on November 23, 2010 with severe right leg pain once again and a concern that the medications were not helping that much. He also believed 24 of his medications might have been stolen and he has only been taking one/day to make them last. Petitioner's physical examination was unchanged except for a positive slump test findings. Petitioner's medications were refilled but he was told to keep them in a combination safe as he would discontinue prescribing them if any more were lost/stolen. Petitioner's work restrictions remained unchanged. A fourth injection was to be scheduled. (PX 4)

Petitioner underwent a third lumbar epidural steroid injection on December 21, 2010. (PX 5)

By the next visit of January 21, 2011 Petitioner was reporting to Dr. Santiago that his leg pain was no longer as severe and he was just experiencing slight numbness in his feet (but no pain). No other changes were noted and the treatment plan remained as before. (PX 4)

By the time of the March 18, 2011 visit with Dr. Santiago, Petitioner was still quite functional but starting to experience right leg pain once again. Petitioner's diagnosis, exam, and treatment plan remained unchanged. (PX 4)

Petitioner's last day of work with Respondent was on May 10, 2011.

Petitioner reported a decline in his overall function when re-examined by Dr. Santiago on May 18, 2011.

Petitioner reported increased back pain and shooting right leg pain made worse since going on a prolonged drive to attend his father's funeral in another state. Petitioner had been without medication for two days. Petitioner's treatment plan remained unchanged although he was scheduled for another lumbar injection. (PX 4)

Petitioner did not receive authorization for the recommended epidural injection and Dr. Santiago noted Petitioner's level of pain during their July 15, 2011 visit. Percocet was helping but Petitioner's overall function had declined. It had been seven months since Petitioner's last epidural injection. (PX 4)

Petitioner signed his Application for Adjustment of Claim on August 1, 2011. (AX 2)

When Dr. Santiago examined Petitioner on August 12, 2011, he noted Petitioner's pain was reportedly getting worse every month. Petitioner was walking with a worse limp these days and not sleeping well at night. Petitioner did not want to have his pain medications increased, preferring instead to undergo the epidural. Another request for an injection was going to be made. (PX 4)

On September 20, 2011 Petitioner's attorney filed a Motion for Penalties and Attorney's Fees with the Commission claiming entitlement to Section 19(k) and 19(l) penalties and Section 16 attorney's fees for non-payment of temporary total disability benefits, medical benefits, and permanent partial disability benefits. The essence of the petition appears to be focused on non-payment of temporary total disability benefits. (PX 13)

As of October 11, 2011 Petitioner was again requesting that Dr. Santiago provide him with Naproxen for his inflammation and Petitioner was noted to be walking with a worse limp and not sleeping well. (PX 4)

Dr. Santiago's deposition was taken on October 26, 2011. Dr. Santiago focuses his practice on pain management. He is a board certified physiatrist and working towards certification in pain management. Physiatry includes a lot of pain management but also addresses other problems which require rehabilitation. According to Dr. Santiago, Petitioner has been a patient of his since March 3, 2010. It is the doctor's understanding that Petitioner was working in December of 2009 dumping trash that weighed about 120 pounds when Petitioner felt a pop in his back and a pain shooting down his right leg. Thereafter, Petitioner sought emergency medical care and care from his primary care physician, nothing of which provided any relief. Dr. Santiago was also under the impression Petitioner had fallen approximately one week before their initial visit; however, Petitioner represented that the fall did not seem to affect his leg pain which was already present. Dr. Santiago was also under the impression that Petitioner had not suffered any low back pain prior to the December of 2009 accident. Dr. Santiago's initial diagnosis was that of lumbar radiculitis, meaning that the nerve coming off the spinal cord and going down Petitioner's leg was inflamed and swollen producing a sciatic-type pain. It was Dr. Santiago's opinion that Petitioner's lumbar radiculitis was brought on by the lifting episode with the trash. (PX 8, p. 13) to help reduce the inflammation Dr. Santiago recommended a lumbar epidural steroid injection to target the inflammation and swelling located directly around the offending nerve. He also prescribed Flexeril, a muscle relaxer, and Vicodin, for pain control.

According to Dr. Santiago Petitioner had a positive reaction to the epidural injection as his right leg pain resolved, thereby telling the doctor that the inflammation had resolved. Petitioner still experienced some ongoing back pain, however. Dr. Santiago further explained that while the epidural injection can cure some patients' symptoms once and for all it did not cure Petitioner's problem with radiating leg pain. However, the doctor also explained that in his experience the injections typically resolve the leg symptoms for a period of months after which the patient usually does something in their day-to-day activities (such as turning the wrong way) that once again aggravates the condition. (PX 8, p. 18) Dr. Santiago further testified that Petitioner's condition since he began treating him has been consistent with his initial presentation findings and problems. Petitioner has undergone three injections which have done very well for Petitioner for a period of time and then his symptoms have returned. Medications have also worked pretty well but there are times from just his day-to-day activities that Petitioner's pain worsens. According to Dr. Santiago, Petitioner's leg pain is pretty constant although some months are worse than others. Dr. Santiago has continued to recommend additional epidural injections but that have not been authorized.

Dr. Santiago testified that throughout the time he treated Petitioner he issued work restrictions as he was concerned Petitioner could worsen his underlying problem without them. At no time has the doctor lifted those restrictions.

Dr. Santiago also testified that Petitioner can undergo approximately three injections per year. Depending upon Petitioner's response to the next injection, further evaluation may be necessary, including a surgical evaluation. At the current time, Dr. Santiago felt Petitioner was doing very poorly as his leg pain continues to progressively worsens and simply increasing pain medication is not something either the doctor or Petitioner really desires to do. Dr. Santiago was of the opinion Petitioner's current symptoms were "causally related to the lifting injury he sustained in March of 2010." (PX 8, p. 23)

On cross-examination Dr. Santiago acknowledged that lumbar spondylosis is akin to spinal osteoarthritis, involves degenerative and sometimes hypertrophic changes in the bone and cartilage of one or more joints, and that it is something that can occur during middle or old age. Dr. Santiago admitted he had not reviewed an IME from Dr. Lawrence Li. The doctor also agreed that a sprain and a strain generally present with an acute severe onset of pain limited to the location of where the affected muscles and ligaments are and that rest usually alleviates the complaints of pain. Additionally, strains and sprains of the low back do not typically cause problems in the legs; although facet arthritis in the low back can refer pain down the back of the leg but it usually never goes below the knee. According to Dr. Santiago a sprain/strain can take anywhere from 2 to 6 weeks to completely resolve. Based upon Petitioner's symptoms, Dr. Santiago did not believe Petitioner was only suffering from a lumbar strain. That may have been a part of his pain complex but it was not the only problem. He also acknowledged that while a lumbar sprain/strain can resolve itself the condition of spondylosis could remain. However, Dr. Santiago did not believe that was what was going on with Petitioner either as he is also suffering from lumbar radiculitis which is stemming from his bulging discs which the doctor believes could have been aggravated in the lifting episode even if they were present before. The bulging of the disc would not be a form of inflammation but it could cause inflammation. In Dr. Santiago's opinion the lifting incident caused Petitioner's right leg inflammation. When asked if right after the incident Petitioner did not have the radiculitis, Dr. Santiago agreed that Petitioner may have had a lumbar sprain/strain that could have resolved itself. Dr. Santiago did not believe Petitioner had experienced an aggravation of his spondylosis. He had an aggravation of his bulging discs which, in turn, caused radiculitis.

On further cross-examination Dr. Santiago also testified that the incident involving Petitioner carrying a child and losing his footing on the steps did not aggravate Petitioner's bulging discs because it happened after Petitioner's original injury and Petitioner's symptoms really did not change after that fall. (PX 8, p. 33)

After the deposition Dr. Santiago next saw Petitioner on December 9, 2011 at which time Petitioner was reporting not only increased low back pain and shooting pain down his right leg but also shooting pain into his left thigh as well. Petitioner had "almost" fallen once and had been experiencing episodes where he felt "stuck" in place when trying to get out of his van. Petitioner described these episodes as being so painful he wanted to cry and lasting for about ten minutes. Dr. Santiago noted Petitioner was declining functionally despite medication management and he ordered a straight cane and a CT myelogram. (PX 4)

Petitioner's myelogram was performed on January 25, 2012. It revealed mild diffuse bulging discs at L2-3 but no focal disc herniation or spinal stenosis. The L3-4 disc space demonstrated diffuse bulging disc with mild spinal canal stenosis at L3-4. There was marked diffuse bulging at L4-5 with severe spinal canal stenosis and a mild degree of left paracentral asymmetric disc bulging with impression on the thecal sac. Far lateral disc bulging was seen on the right side at L4-5. Spondylotic changes with lateral recess narrowing were found at L5-S1 on the left side with mild spinal canal stenosis at l5-S1. When compared to the January 27, 2010 film there was no significant interval change. (PX 7)

Upon completion of the myelogram Petitioner returned to Dr. Santiago's office reporting ongoing pain complaints especially in his right leg. The doctor also noted Petitioner's medications were helping for awhile

but then the pain would return. Petitioner denied any new symptoms. The doctor's impression was severe lumbar spondylosis and right greater than left lumbar radiculopathy. Petitioner's medications were refilled and he was referred to a neurosurgeon for consultation. (PX 4)

Petitioner initially met with Dr. Nardone, a neurosurgeon, on March 19, 2012. Dr. Nardone noted a history of Petitioner having, two years earlier, lifted a 125 # garbage can and placing it in a cartwhen it moved, he stepped forward, and he felt a pull in his low back. On physical examination Petitioner's left lower extremity was positive for hip pain, Petitioner's right lower extremity was positive for low back pain and leg pain, and Petitioner's right ankle jerk was absent. Straight leg raising was positive bilaterally with the right leg being worse than the left. Dr. Nardone looked at the myelogram CT which he believed showed severe stenosis at L4-5 and a right-sided L5-S1 disc herniation. Dr. Nardone recommended a L4-5 decompressive laminectomy and right L5-S1 decompression with a microdiscectomy. Petitioner was willing to proceed with surgery as long as it was approved by workers' compensation. (PX 9)

Petitioner returned to see Dr. Santiago on April 6, 2012 describing significant pain involving his right leg shooting below the knee to his calf and left leg pain shooting the knee posteriorly. Dr. Nardone's recommendation for surgery was noted. Dr. Santiago's diagnosis and treatment recommendation remained unchanged. (PX 4)

Petitioner followed up with Dr. Santiago on June 6, 2012 reporting his surgery had been denied. Petitioner's complaints, examination, and treatment plan were unchanged. (PX 4)

When Petitioner returned to see Dr. Santiago he reported increasing episodes of tripping and a feeling like his toes were "catching" on the right foot. Petitioner's script for Percocet remained unchanged although Petitioner indicated he felt like he could take more due to his level of pain. Dr. Santiago noted Petitioner needed either an epidural to calm the inflammation or surgery for more permanent relief. He expected Petitioner to completely wean off the Percocet if surgery was done. (PX 4)

As of September 10, 2012 Petitioner was waiting for surgery. He explained to Dr. Santiago that he didn't believe the Percocet was working as well but he didn't want to increase the dosage, preferring instead to go with surgery. Petitioner continued to complain of pain shooting into his "mainly" right leg all the way down. He noted difficulty with walking. (PX 4)

Petitioner's surgery was postponed due to an unrelated facial infection. Petitioner was re-examined by Dr. Santiago on November 9, 2012 who noted Petitioner's pain complaints were increasing, especially with the cold weather, and the Percocet would only reduce his pain to a "6/10." Dr. Santiago increased Petitioner's Percocet. (PX 4) Petitioner returned to Dr. Santiago on December 7, 2012 reporting improvement in his pain with the increased dosage of Percocet. All else remained the same. (PX 4)

Dr. Santiago continued to monitor Petitioner's condition on January 7, 2013 and February 6, 2003 with no improvement in his condition. (PX 4)

Dr, Nardone performed surgery on February 7, 2013. Petitioner underwent a minimally invasive bilateral L4-5 and right L5-S1 microsurgical decompression with right-sided approach. (PX 11)

Petitioner followed up with Dr. Nardone post-surgery. As of April 24, 2013 Petitioner was doing very well and reported being very happy with the results. His incision was well-healed. "All recommendations" were given and he was released to return as needed. (PX 9)

On/about April 24, 2013, Evelyn Crawford, a senior claim representative for Respondent's workers' compensation carrier, telephoned Dr. Nardone's office and verbally requested information from the doctor's staff regarding Petitioner's return to work. (PX 12)

On April 26, 2003, Ms. Crawford received, via fax, a note from Dr. Nardone's office stating "This type of procedure a patient may RTW [return to work] 6 weeks post-op." (PX 12, Ex. A)

Petitioner continued to follow up with Dr. Santiago post-operatively. His last visit with Petitioner was on April 30, 2013. (PX 4)

The attorneys for both sides stipulated that on May 2, 2013 Ms. Crawford telephoned Dr. Nardone's office and verbally requested additional information from the doctor's staff regarding Petitioner's return to work. Ms. Crawford denies this occurred. (PX 12)

Ms. Crawford received, via fax, a Return to Work/School Form from Dr. Nardone's office dated May 2, 2013 stating Petitioner could return to full-time work on March 20, 2013. The note further stated, "Patient currently being treated by pain specialist Dr. Santiago and placed on 15# weight limit restriction." (PX 12, Ex. B)

On May 10, 2013 Petitioner's attorney filed a Motion for Penalties and Attorney's Fees with the Commission claiming entitlement to Section 19(k) and 19(l) penalties and Section 16 attorney's fees for non-payment of temporary total disability benefits, medical benefits, and permanent partial disability benefits. The essence of the petition appears to be focused on non-payment of temporary total disability benefits. (PX 13)

Dr. Santiago issued a letter to Petitioner's attorney on July 9, 2013, the purpose of which was to respond to certain questions posed to him by Petitioner's attorney. Dr. Santiago stated that Petitioner's leg pain had improved overall, dramatically but that Petitioner would experience occasional flare-ups with radiating right leg pain depending upon physical activity and, at times, he appears ready for another epidural injection. In the future, Dr. Santiago believed such injections might be necessary due to Petitioner's tendency to easily aggravate the nerve root. As of the date of the letter, Petitioner's leg pain had gone away. Dr. Santiago further stated that Petitioner's overall function was significantly diminished and his activities of daily living were poor in quality, primarily due to Petitioner's ongoing and unrelenting low back pain. To alleviate that pain Dr. Santiago recommended lumbar medial branch blocks to determine if Petitioner's pain complaints were stemming from his facet joints. Dr. Santiago believed there was a high likelihood that this was contributing a great deal to Petitioner's complaints of pain. Dr. Santiago further stated that while arthritis is an ongoing degenerative condition he believed Petitioner's injury in December of 2009 aggravated Petitioner's underlying condition. Dr. Santiago did not believe Petitioner was at maximum medical improvement, that he needed ongoing work restrictions of no lifting greater than 15 lbs, and no repetitive bending, twisting, or lifting, and that if Petitioner's pain was not better improved as proposed he would require ongoing pain medication through medication. (PX 14)

At arbitration Petitioner testified that he was employed by Respondent on December 27, 2009 but working at the K-Mart store in Danville as the working supervisor over the janitors. His job duties included sweeping, mopping, emptying trash, cleaning bathrooms, waxing, and scrubbing floors. Petitioner testified that on December 27, 2009 he went to the café to clean it and he went to dump the garbage can that had been filled with all kinds of stuff from the night before. Petitioner went to pick the can up to dump it into a lined grocery cart when the grocery cart took off and Petitioner tried to go ahead and dump it and his back popped. Petitioner estimated the weight of the can at 125-150 lbs. Petitioner further testified that when he felt the pop in his back

he "like to fell" and also felt pain going down his leg. According to Petitioner it went away and everything was fine for a couple of hours and then he got to where he could hardly straight up and walk and it eventually got worse. Petitioner explained that he did not immediately go to a doctor because he thought he had just pulled a muscle or something. Petitioner testified he had never experienced anything like that before and that his symptoms worsened over the following week.

Petitioner testified that he went to the hospital where he received a pain shot and was referred to another doctor. He then went to his family doctor, "Dr. Mary", the next week and she treated him for a strained muscle and gave him Hydrocodone and something else. After about two to three weeks Dr. Mary scheduled him for an MRI because he wasn't getting any better.

Petitioner denied experiencing any new symptoms after falling on the stairs the week before he saw Dr. Santiago. Petitioner testified that he had symptoms in his lower back and right leg when he initially presented to Dr. Santiago. The injections Dr. Santiago gave him helped but didn't last longer than six to eight weeks. Petitioner denied ever being pain free.

Petitioner testified he stopped working at K-Mart in May of 2011. He notified Respondent of the event and was informed Respondent had nothing for him within his restrictions.

Petitioner testified he did not receive any temporary total disability benefits until December 24, 2011. He further testified that Respondent never authorized the injections Dr. Santiago began recommending in May of 2011.

Petitioner testified his surgery took awhile to get approved. During the time he was waiting for approval his condition continued to deteriorate and Dr. Santiago continued monitoring his medications, prescriptions, and work restrictions. According to Petitioner Dr. Santiago has never released him to return to unrestricted work and he continues to have work restrictions.

Petitioner testified that the pain going down his right leg is gone unless he bends over "extreme" and he still has pain going down his hip to the back of his leg if he bends over a lot. The lower back pain is still present. Petitioner testified that Dr. Santiago has recommended additional epidural injections and lumbar medial branch blocks but they have not been authorized. Petitioner's temporary total disability benefits were terminated as of April 24, 2013 but he received benefits through April 30th.

At the time of arbitration Petitioner indicated he had no income and was unemployed. He is 57 years of age and has an 11th grade education. His employment experience has consisted of work as a janitor or a mechanic and none of them involved lifting less than fifteen pounds or no bending or twisting. Petitioner cannot operate a computer. Petitioner testified he has attempted to find employment and he identified his job search records from June and July of 2013. (PX 15) Petitioner has not had any help from Respondent or other professional vocational persons. He currently takes Oxycodone, Methocarbamol and Naproxen. He last saw Dr. Santiago on June 26, 2013 and he remains under the same restrictions.

Petitioner denied any new injuries to his lower back since December 27, 2009.

On cross-examination Petitioner acknowledged he did not contact Respondent after Dr. Nardone released him and he has had no contact with Respondent or its insurer regarding the epidurals and block. Petitioner believed Dr. Santiago may have contacted them about it as he advised Petitioner that "they" refused

to do anything for him. He further acknowledged that he has never requested assistance in a job search from Respondent or its insurer.[1]

The Arbitrator concludes:

1. **Accident.**

On December 27, 2009, Petitioner sustained an accident that arose out of and in the course of his employment by Respondent. The emergency room records and treating physician notes all corroborate Petitioner's testimony of the lifting episode as the origin of his back and right leg pain. Petitioner was ultimately diagnosed with a right-sided herniated disk at L5-S1 and severe stenosis at L4-L5 (PX 10, p. 11). Petitioner's treating physician, Dr. Ivan Santiago concluded that the incident described by Petitioner was the cause of his low back and right leg pain (PX8, p.13). Respondent presented no evidence to the contrary.

2. **Causal Connection**.

Petitioner's current low back condition is causally related to the accident and injury of December 27, 2009. Petitioner testified, credibly, that prior to December 27, 2009, he had never experienced lower back pain or right leg pain comparable to that suffered on and after December 27, 2009. There is no evidence of complaints of pain or evidence of treatment prior to the date of accident. There is no evidence of intervening injury or other cause since December 27, 2009.

Petitioner testified that since December 27, 2009 he has never enjoyed complete relief of pain though his symptoms of radiculopathy down the right leg have improved since his surgery on February 7, 2013 (PX11). Petitioner continues at this time under the care of Dr. Santiago, a pain management specialist, for his persisting low back pain. According to Dr. Santiago, the injury on December 27, 2009 aggravated pre-existing degenerative conditions in Petitioner's lower back and is responsible for Petitioner's current condition of ill-being (PX14). Despite the improvements realized post-operatively, Dr. Santiago states Petitioner's overall function remains significantly diminished (PX14). Respondent presented no evidence or opinions to the contrary.

3. **Prospective Medical Care.**

Dr. Santiago, Petitioner's pain management physician, has opined, within a reasonable degree of medical certainty, that Petitioner should have another lumbar epidural injection and a series of medial branch blocks for treatment of his persistent low back pain. Respondent presented no evidence or opinions to the contrary.

Respondent is directed to authorize and pay the reasonable charges for the prescribed epidural steroid injection and the series of lumbar medial branch blocks. *Plantation Manufacturing Co. v. Industrial Commission*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2nd Dist., 1997).

4. **Temporary Total Disability Benefits.**

[1] The attorneys stipulated, however, that Petitioner's attorney sent a letter requesting vocational assistance from Respondent.

The parties stipulated that Petitioner was temporarily totally disabled from May 21, 2011 through April 26, 2013 (Arb.X1). Petitioner testified, however, that his last day of employment was May 10, 2011. There is no evidence presented to the contrary. The parties cannot, by stipulation, bind the Commission (*Lusietto v. Industrial Commission*, 174 Ill.App.3d 121, 528 N.E.2d 18, (3rd Dist. 1988)).

Respondent contends that Petitioner was capable of returning to unrestricted work effective April 26, 2013. Petitioner contends that he remained temporarily totally disabled on April 26, 2013 and remains temporarily totally disabled through the date of arbitration.

Respondent's contention that Petitioner was capable of returning to unrestricted work on April 26th, 2013 is based upon a single document, Respondent's Exhibit #1. In light of the Arbitrator's ruling below sustaining Petitioner's objection to the admission of Respondent's Exhibit #1, there is no evidence that Petitioner was capable of returning to unrestricted work or that his condition has reached a state of maximum medical improvement. Dr. Santiago's opinions stand unrebutted. Petitioner has been temporary totally disabled from May 11, 2011 through the date of hearing, July 11, 2013.

5. Penalties and Attorney's Fees.

Petitioner has filed two penalty petitions for two separate periods of time (PX13). Petitioner's first penalty petition was filed on September 20, 2011 seeking penalties pursuant to Sections 19(l) and 19(k) and attorney fees pursuant to Section 16. Petitioner testified that Respondent failed to pay temporary total disability benefits from May 11, 2011 through December 24, 2011. Petitioner's second penalty petition was filed on May 10, 2013 and seeks penalties pursuant to Sections 19(l) and 19(k) and attorney fees pursuant to Section 16. Petitioner testified that Respondent failed to pay any temporary total disability benefits from April 30, 2013 through the date of arbitration, July 11, 2013.

Regarding Petition #1, Petitioner testified that after his work-related accident on December 27, 2009 he continued working light duty within Dr. Santiago's restrictions of five to ten pounds lifting, no bending and no twisting. On May 10, 2011, Petitioner was removed from the premises by a K-mart official and directed to remain off the premises for alleged wrongdoing. Petitioner called Respondent and advised them of the termination but was told they had no other jobs within his restrictions.

The Arbitrator declines to award penalties and attorney's fees on the first penalty petition in light of divergent case law on the issue. While *Interstate Scaffolding* recognized that employers are obligated to pay temporary total disability benefits to an employee who is injured in the course of his employment even when that employee is terminated for conduct unrelated to the injury. *Interstate Scaffolding, Inc. v. Workers Compensation Commission*, 236 Ill.2d 132, 923 N.E.2d 266 (Sup. Ct.2010), the Commission has noted that decision does not give fired employees an unqualified right to TTD. See *Matuszcak v. Wal-Mart*, 12-IWCC-1079. While Respondent terminated the benefits when Petitioner lost his job with K-Mart it reinstated them and made Petitioner whole on December 24. 2011. Respondent's liability for same has not been raised by it in this proceeding. Respondent only disputes liability for temporary total disability benefits since April 26, 2013. (See AX 1)

Regarding Petition #2, Respondent apparently relies on Respondent's Exhibit #1 to justify its failure to pay temporary total disability benefits from April 30, 2013 through our date of hearing, July 11, 2013. Respondent's Exhibit #1, however, is not admitted into evidence for reasons detailed below. Respondent has failed to justify its unilateral termination of temporary total disability benefits effective April 30, 2013 and Section 19(l) penalties are awarded for the 72 days elapsed from April 30, 2013

through July 11, 2013. Petitioner is awarded $2,160.00 in Section 19(l) penalties on Petition #2. Section 19(l) provides, in part, that a delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. The additional compensation authorized by section 19(l) is in the nature of a late fee (*McMahan v. Industrial Commission*, 183 Ill.2d 499, 702 NE2d 545 (Sup.Ct. 1998)), and the employer bears the burden of justifying the delay in paying the benefits (*Ford Motor Company v. Industrial Commission*, 140 Ill.App.3d 401, 488 N.E.2d 1296, (1st Dist. 1986)).

Imposition of Section 19(k) penalties and attorney fees pursuant to Section 16 is discretionary rather than mandatory and appropriate where the employer's conduct was not the result of simple inadvertence or neglect (*McMahan v. Industrial Commission*, 183 Ill.2d 499, 702 NE2d 545 (Sup.Ct. 1998)). Respondent's conduct in terminating Petitioner's temporary total disability benefits effective April 30, 2013 appears to have been premised solely upon an unsigned, hand-written statement on a fax cover sheet dated two days after Dr. Nardone's last examination. Respondent was surely aware of Dr. Santiago's ongoing treatment and ongoing restrictions. Any reliance on Respondent's Exhibit #1, even if it were admissible, would not be reasonable. Respondent had every right to have Petitioner examined pursuant to Section 12 of the Act but, for whatever reason, chose not to.

Petitioner is awarded unpaid temporary total disability benefits from May 1, 2013 through July 11, 2013 or 10 & 2/7ths weeks. At Petitioner's T.T.D. rate of $245.33, the total arrearage awarded is $2,523.39. Section 19(k) penalties of 50% of said award totals $1,261.70 and is awarded. Section 16 attorney fees of 20% of said award totals $504.68 and is awarded.

6. Admissibility of Evidence (RX 1)

Respondent offered into evidence Respondent's Exhibit #1 which appears to be an unsigned handwritten note on a fax cover sheet. The document is not signed by Dr. Nardone or anyone else so authorship is unknown. There is no evidence that the note was prepared in the ordinary course of the medical practice at Central Illinois Neurohealth Sciences. Indeed, the parties have stipulated that the fax note was generated after a verbal conversation between Respondent's insurance adjuster and one of Dr. Nardone's staff and was intended as a direct response to an oral request by Respondent's insurance adjuster.

Petitioner has objected to the introduction of Respondent's Exhibit #1. Petitioner's objection is sustained. *Ex parte* communications between Respondent or Respondent's agents and Petitioner's physician or his staff are contrary to public policy and an unjustifiable intrusion on the confidential relationship between a patient and his physician (*Petrillo v. Syntex Laboratories*, 148 Ill.App.3d 581, 499 N.E.2d 952 (1st Dist. 1986)).

The doctrine enunciated in *Petrillo* is applicable to workers compensation claims as well: "*Ex parte* communications between an injured worker's health care provider(s) and the employer or their legal representative(s) are prohibited by operation of the doctrine enunciated in *Petrillo v. Syntex Laboratories, Inc.* and the public policy against such communications described in *Best v. Taylor Machine Works . . .*", *Hydraulics, Inc. v. Industrial Commission*, 329 Ill.App.3d 166 at 171, 768 N.E.2d 760, (2nd Dist. 2002).

****

STATE OF ILLINOIS)
)
SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mike Westphal,
Petitioner,

vs.

09 WC 45481
(Consolidated with 13 WC 08727)

Grupo Antolin,
Respondent.

14IWCC0616

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, medical expenses, causal connection, temporary total disability, and nature and extent of the permanent disability, and being advised of the facts and law, modifies the June 3, 2013 decision of Arbitrator Edward Lee as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On October 2, 2009, Petitioner was employed by Respondent as a material handler, lifting and loading plastic tote bins weighing 25-29 pounds, typically two at a time, and plastic totes weighing 10-15 pounds to supply parts for assembly line workers. On that date, Petitioner noticed sharp pain in his lower back radiating down his leg, along with numbness. Petitioner sought treatment with his primary care physician, Dr. Robyn, on October 5, 2009 and was diagnosed with lumbar radiculopathy, taken off work, and prescribed pain medications. Dr. Robyn related Petitioner's complaints to his work activities, and Petitioner provided Respondent with written notice of the work accident on November 5, 2009. Petitioner remained off work through November 12, 2009 and returned to work full duty on November 13, 2009. He testified that he continued to have low back pain and left leg numbness and tingling and last saw Dr. Robyn on November 23, 2009. Respondent denied the claim and refused to pay benefits. Petitioner received non-occupational disability pay, and some of his medical bills were paid by his group insurance.

14IWCC0616

Respondent obtained a records review from Dr. Hennessy on April 2, 2011. The doctor reviewed Petitioner's medical records, as well as a DVD and written description of Petitioner's job duties supplied by Respondent, and concluded that there was no causal relationship between Petitioner's job duties and his low back complaints. Petitioner testified that the materials did not accurately reflect his work-related tasks and sought penalties and fees for Respondent's denial of benefits.

Arbitrator Lee found that Petitioner had suffered a work accident, gave timely notice, and suffered an injury causally connected to his work activities, based upon Dr. Robyn's causation opinion. The Arbitrator awarded Petitioner medical expenses and temporary total disability benefits, but granted Respondent Section 8(j) credit for payments made by its short term disability insurer. Arbitrator Lee denied Petitioner's petition for penalties and fees, finding that there were legitimate issues as to the date of accident and Petitioner's pre-existing condition. The Arbitrator deferred making a permanency award in the 2009 claim. The Commission finds that Petitioner suffered a 2% loss of use of the person as a whole as a result of his October 2, 2009 injury.

Petitioner filed a second Application for Adjustment, alleging that a subsequent injury to his low back occurred on January 5, 2012, when he attempted to lift parts that remained belted to a skid. Petitioner testified that he felt immediate low back pain and right leg numbness. He again sought treatment with Dr. Robyn and received minimal conservative care through May 30, 2012. The 2012 accident claim, No. 13 WC 008727, was consolidated for trial with Petitioner's 2009 claim. Arbitrator Lee deferred a permanency award on the 2009 claim and awarded 4% loss of use of the person as a whole for both the 2009 and 2012 claims. The Commission has entered a separate decision with regard to Petitioner's 2012 claim in No. 13 WC 008727.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $345.10 per week for a further period of 10 weeks, as provided under Section 8(d)(2) of the Act, because the injuries sustained caused the loss of use of 2% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of $383.45 per week for 5-4/7 weeks, commencing October 5, 2009 through November 12, 2009, pursuant to Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $1,474.85 for reasonable, necessary and related medical expenses, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $1,035.00 pursuant to Section 8(j) of the Act for non-occupational indemnity disability benefits paid.

14IWCC0616

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,100.00. 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: JUL 25 2014

Daniel R. Donohoo

Charles J. DeVriendt

o-06/19/14
drd/dak
68

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WESTPHAL, MIKE
Employee/Petitioner

Case# **09WC045481**

GRUPO ANTOLIN
Employer/Respondent

14IWCC0618

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:

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

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST PO BOX 1288
ROCKFORD, IL 61105

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

Mike Westphal
Employee/Petitioner

v.

Grupo Antolin
Employer/Respondent

Case # **09** WC **45481**

Consolidated cases: _____

14IWCC0616

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 **Rockford**, on **April 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 _____

FINDINGS 14IWCC0616

On **October 2, 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 **$29,908.32**; the average weekly wage was **$575.16**

On the date of accident, Petitioner was **34** years of age, ***single*** with **0** dependent children.

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

To date, **$0** has been paid for TTD and maintenance benefits.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $383.45/week for 5 4/7 weeks commencing October 5, 2009 through November 12, 2009 representing the period of temporary total disability for which compensation is payable.

Respondent shall pay Petitioner the sum of n/a for a further period of n/a weeks, as provided under Section 8(d)2 of the Act because the injuries sustained caused...the arbitrator to defer his findings on permanent partial disability to the companion decision in case number 13 WC 8727.

Respondent shall pay Petitioner $1,474.85 for reasonable, necessary and related medical expenses pursuant to Section 8(a) and 8.2 of the Act.

Respondent is entitled to a credit in the amount of $1,035.00 pursuant to Section 8(j) of the Act for non-occupational indemnity disability benefits paid.

Respondent shall pay additional compensation pursuant to Section 19(k): $00.

Respondent shall pay additional compensation pursuant to Section 19(k): $n/a .

Respondent shall pay additional compensation pursuant to Section 16: $n/a .

Respondent shall pay Petitioner compensation that has accrued from 10/02/09 through 4/11/13, 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

5/30/13
Date

JUN -3 2013

14IWCC0616

Findings of Fact

The Arbitrator notes this case was tried with companion case number 13 WC 8727, both cases involving injuries to Petitioner's low back.

Petitioner, a 34 year old auto part factory worker, testified that he had noticed soreness in his back in approximately September, 2009 after performing his job duties as a material handler for Respondent. He testified that as part of his job duties, he would lift and load plastic tote bins full of regulators weighing approximately 25 – 29 pounds, typically two at a time, and plastic totes full of bolsters weighing approximately 10 – 15 pounds. He would provide these totes of parts to workers on the assembly line who were building door panels that are installed in new Chrysler cars. On October 2, 2009, he noticed sharp pain in his lower back going down his leg, along with numbness. These symptoms were greater than the soreness he had been experiencing.

A few days later, on October 5, 2009, he was seen by Dr. Robyn and advised his doctor about his work injury. (PX 1) Dr. Robyn diagnosed lumbar radiculopathy, recommended Petitioner be off work and recommended medication. Diagnostic testing revealed moderate spondylosis at L5-S1 with facet arthrosis. On October 7, 2009, Petitioner handed his off-work slip to Ms. Erin Hartman, a Human Resources representative for Respondent. On October 13, 2009, Dr. Robyn noted Petitioner's lumbar radiculopathy is exacerbated by his work.

Respondent sent Petitioner a letter on October 14, 2009, following his work accident, acknowledging that they had received information from his doctor stating his injury may be work related and enclosed an accident report. (PX 7) Petitioner completed the accident report noting lower back and hip pain, mostly when loading and unloading parts, and especially when twisting

or bending was needed. Respondent acknowledged receipt of the filed Application for Adjustment of Claim, which Respondent received on November 5, 2009. (PX 7) Respondent's records contained in PX 7 were provided via subpoena issued by Petitioner's attorney.

Petitioner remained off work, pursuant to doctor's restrictions, through November 12, 2009 and returned to full duty on November 13, 2009. At that time, he noticed pain in his low back, approximately at the belt line, and left leg numbness and tingling. He last saw Dr. Robyn on November 23, 2009. He did not have any accidents outside of work. He did not receive workers' compensation pay and Respondent denied responsibility for medical bills. Petitioner did receive non-occupational disability pay and some of his bills were paid by group insurance. Following his return to work, he continued to take Vicodin and Prednisone, as necessary, as prescribed by his doctor.

On April 2, 2011, Dr. Hennessy provided a record review report to Respondent at their request. (RX 1) Dr. Hennessy noted in his report that he reviewed a DVD of job duties, which included placing various screws, window harnessing and wire harnessing into a frame. Respondent offered a copy of this DVD as Respondent's exhibit number 2, as evidence at arbitration.

Petitioner testified he reviewed the job DVD (RX 2) and testified that this was not an accurate depiction of the material handling job duties he performed in October, 2009. He agreed that even though the DVD was labeled "material handler." The job duties depicted were not for this job. These were the job duties involved in a separate job description known as "assembler." Respondent offered no evidence to rebut Petitioner's testimony. A review of the DVD did not reveal any depiction of lifting plastic totes full of parts. Dr. Hennessy noted no causal

relationship based upon his review of the written job description and DVD. (RX 1) Petitioner's treating physician, Dr. Robyn, did note a causal relationship to Petitioner's low back injury.

Petitioner's original Application for Adjustment of Claim noted a low back injury due to repetitive work, filed November 2, 2009, was subsequently amended to the accident date of October 2, 2009. Petitioner filed a Petition for Penalties and Fees for Respondent's failure to timely pay benefits. (PX 3)

Conclusions of Law

In support of the Arbitrator's findings relating to **(C) " Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; (E) "Was timely notice of the accident given to Respondent; (F) " Is Petitioner's current condition of ill-being causally related to the injury?",** the Arbitrator finds the following facts:

The Arbitrator finds Petitioner did sustain an accidental injury arising out of and in the course of his employment on October 2, 2009. The Arbitrator's conclusion is based upon the credible testimony of Petitioner and supporting medical records. The Arbitrator finds Respondent did receive appropriate notice of the accident within 45 days, which included Petitioner's testimony of his conversation with Ms. Hartman, Respondent's Human Resources representative, Ms. Hartman's letter to Petitioner dated October 14, 2009 and Respondent's receipt of the Application for Adjustment of Claim, all of which occurred within 45 days of the accident.

The Arbitrator finds Petitioner has established a causal connection between his low back injury and his work activities of October 2, 2009. This conclusion is based upon and supported by the records and opinion of the treating physician, Dr. Robyn, which the Arbitrator finds to be more persuasive than the record review opinion of Dr. Hennessy. The Arbitrator notes Dr. Hennessy specifically relied upon the DVD job depiction (RX 2) which was not an accurate

depiction of Petitioner's job. Moreover, it appears Dr. Hennessy was not provided a copy of Petitioner's accident report. (PX 7)

In support of the Arbitrator's findings relating to **(J) " Were the medical services that were provided to Petitioner reasonable and necessary?"; (K) "What temporary benefits are in dispute?"; (M) " Should penalties or fees be imposed upon Respondent?"**, the Arbitrator finds the following facts:

Based upon the Arbitrator's findings of accident, notice and causal connection, which are incorporated here and by reference, the Arbitrator finds Respondent is liable for the related medical expenses totaling $1,474.85 as noted in PX 1. The Arbitrator finds Respondent is entitled to a credit for bills paid by group medical insurance, pursuant to Section 8(j) of the Act and by receiving said credit, Respondent shall hold Petitioner harmless to the extent of said credit. Respondent shall pay Petitioner $140.83 pursuant to Section 8(a) and 8.2 of the Act for unpaid bills.

The Arbitrator finds Respondent shall pay Petitioner the sum of $383.45 per week from October 5, 2009 through November 12, 2009 for a period of 5 4/7 weeks, which is the period for which Petitioner was temporarily and totally disabled from work, pursuant to Section 8(b) of the Act. The Arbitrator notes Respondent is entitled to a credit pursuant to Section 8(j) for non-occupational disability benefits in the amount of $1,035.00, leaving a net due to Petitioner in the amount of $1,101.40.

The Arbitrator notes Petitioner filed a Petition for Penalties and Attorneys' Fees (PX 3). The Arbitrator finds there were legitimate issues as to the date of accident and whether or not the petitioner's condition pre-existed the accident and therefore, finds the respondent was not unreasonable nor vexatious and accordingly, denies penalties or attorney fees.

(L) " What is the nature and extent of the injury?" the Arbitrator finds the following facts:

The Arbitrator defers the award of permanent partial disability to the Arbitrator's decision in the companion case in the Arbitrator's decision, case number 13 WC 8727.

5/30/13

Date

The Honorable Edward Lee

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim Hanley,
Petitioner,

vs. NO: 07 WC 32840

14IWCC0617

Costco Wholesale,
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 entire record and the issues of accident, notice, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, corrects and provides additional findings to the May 2, 2013 Decision of the Arbitrator and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Correction

Petitioner appeals the May 2, 2013 Decision of Arbitrator Dollison finding Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent. The Commission notes that the Arbitrator's Order references a date of accident January 16, 2007 and the Findings state a date of accident February 1, 2007. Petitioner's initial Application for Adjustment of Claim alleged a date of accident "February, 2007". The Second Amended Application for Adjustment of Claim listed a date of accident January 16, 2007. The Commission corrects the Arbitrator's Findings to denote an accident date of January 16, 2007.

Accident

The Arbitrator found Petitioner failed to present credible evidence of an accidental injury arising out of and in the scope and course of his employment by Respondent on January 16, 2007. The Commission makes additional findings of fact in support of this finding.

Petitioner testified that he sustained an injury to his right hip at work by repeatedly hitting it against pallets of merchandise while shrink wrapping on a single day, January 16, 2007. Petitioner testified that about a week later, he told his supervisor, Bob Stansberry, that he had bumped his hip against pallets all day and developed a bruise. Petitioner testified that he did not ask Mr. Stansberry to file a report or tell anyone else at Costco and, in fact, Petitioner did not want Mr. Stansberry to report any incident. While Mr. Stansberry testified on cross-examination he could not be 100% sure that

Petitioner did not mention bumping his hip, he testified that he did not remember Petitioner bumping his hip anytime in January 2007 or reporting a work accident. Mr. Stansberry did remember Petitioner commenting that his hip was bothering him, but not in relation to any incident at work. Mr. Stansberry testified that he would have notified management and filled out appropriate paperwork had a subordinate given notice of a work injury.

Petitioner's father, Ken Hanley, testified that he viewed Petitioner's hip on or about January 18, 2007 or January 19, 2007. Mr. Hanley testified that his son showed him a bruise on his right hip about the size of a hand that was black and blue in color. Mr. Hanley testified that he told his son not to report the incident. Petitioner's ex-wife, Dawn Hanley, testified that she saw bruising on Petitioner's right hip around January 15, 2007 as Petitioner was stepping out of the shower. Ms. Hanley testified that the bruise was as big as her palm, dark in the middle and yellow around the edges. Petitioner presented to Dr. Cumba on January 23, 2007 with complaints of hip pain lasting for approximately three weeks with no known injury. There was no mention in the record, either on exam or by way of history, of any bruising. Petitioner followed with Dr. Cumba for right hip pain without injury or trauma on January 25, 2007 and January 29, 2007. Again, there was no mention of any bruising. Petitioner presented to the Morris Hospital Emergency Department on February 8, 2007 with severe low back pain radiating to the right hip for a month with no known injury, and no evidence of any bruising was noted.

Petitioner next treated with Dr. Komanduri on February 21, 2007 for severe right hip pain that had persisted for two months with no known injury or trauma. Petitioner was specifically asked if he sustained a work injury, to which he replied that he did not know when the injury occurred. There was no mention of any bruising in the medical record. Petitioner had four sessions of physical therapy in March 2007 before he was discharged for failure to attend. Petitioner completed a questionnaire on intake in which he noted that he did not know a date of injury, but he had experienced hip pain for two months prior. Petitioner began treating at Morris Hospital Pain Management Center in May, 2007. Again, he failed to report any inciting event that lead to the pain in the right hip and no obvious signs of trauma were noted. Petitioner presented to the Morris Hospital Emergency Department on May 23, 2007, again denying any injury that caused his right hip pain and no obvious signs of trauma were noted. Petitioner presented to the Hines VA Hospital Emergency Department on June 20, 2007 with right hip complaints for six months with no known trauma associated with onset and Petitioner specifically stated in the record that he was unable to attribute it to any injury. Petitioner had an orthopedic consultation on June 27, 2007 and again, Petitioner stated that the pain began gradually with no acute trauma or injury.

Petitioner testified that he did not tell any medical providers of the alleged pallet wrapping incident, or any trauma at all, in January, 2007 because he feared losing his job. Despite this, Petitioner testified that he did tell his supervisor, Bob Stansberry, about the injury to his right hip while wrapping pallets, but he did not expect his supervisor to report the incident to management. The Commission notes that it was only after MRI confirmed avascular necrosis and collapsed femoral head that Petitioner made any mention in the medical records of his work activities. Even after a total right hip replacement on September 17, 2007, Petitioner continued to maintain that the pain in his right hip occurred gradually with no acute trauma or injury. After surgery, Petitioner contacted his primary care physician's office on October 9, 2007 and asked if there was any documentation of a hip injury while wrapping pallets and, if not, could it be added. Dr. Hopkinson testified that Petitioner advised him that a work injury to the right hip occurred on February 1, 2007. Dr. Lieber also noted that Petitioner gave a history of accident on February 1, 2007. Neither physician, or any other medical provider, notes a date of accident of January 16, 2007.

14IWCC0617

The Commission finds Petitioner's testimony, as well as that of his father and ex-wife, is incredible. Petitioner, Mr. Hanley and Ms. Hanley all testified Petitioner had large dark bruising on his right hip, about the size of a hand. No medical provider close in time to the alleged accident noted any bruising nor did Petitioner give a history of trauma to his hip causing bruising in the contemporaneous medical records. Prior to July 2007, Petitioner repeatedly denied sustaining any trauma or injury to the right hip, either at work or elsewhere. Petitioner's testimony that he advised his boss but not his medical providers of a work injury because he feared losing his job is unbelievable. The Commission affirms the Arbitrator's finding that Petitioner failed to prove that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent on January 16, 2007.

Causation

The Commission finds that Petitioner also failed to prove that his current condition of ill-being was related to the alleged injury of January 16, 2007.

An MRI was obtained of Petitioner's right hip on August 3, 2007. The MRI revealed moderate sized right hip effusion and avascular necrosis of the right femoral head with collapse of the superior margin of the femoral head. Petitioner underwent a right total hip arthroplasty due to osteonecrosis with Dr. Nassos on September 17, 2007. The operative report noted that Petitioner had a history of right hip pain for nine months prior and that he denied any type of acute trauma or injury but rather experienced pain that had been progressively worsening.

Dr. Hopkinson provided testimony by way of deposition on July 1, 2010. Dr. Hopkinson is a board certified orthopedic surgeon and treated Petitioner at Hines VA. Dr. Lieber was deposed on September 2, 2010. Dr. Lieber is also a board certified orthopedic surgeon and provided a §12 examination. Both Dr. Hopkinson and Dr. Lieber testified that risk factors for avascular necrosis are intense alcohol use, cortical steroids, intravenous drug use, and a history of fracture in the area. However, the most common cause is idiopathic. Dr. Hopkinson also confirmed that repetitive trauma to the hip could also be associated with avascular necrosis (AVN). Dr. Hopkinson testified that avascular necrosis is the loss of blood supply to the bone and, in Petitioner's case, it was at an advanced stage and post collapse of the femoral head. Dr. Lieber confirmed that the medical records show a history of excessive and long standing alcohol abuse, as well as steroid treatment. Dr. Hopkinson testified that despite the use of cortical steroids and heavy alcohol consumption, it was possible that a work injury could have aggravated Petitioner's hip condition to the point where he developed AVN and required hip replacement surgery. Based on the history and mechanism of injury as explained by Petitioner, Dr. Lieber opined that the incident of hitting his hip repeatedly on one day was not severe enough to permanently aggravate the underlying AVN. Even if Petitioner had blunt trauma to the hip that caused bruising, that would not be enough to cause AVN, as he did not suffer a fracture. The injury must be severe enough to alter the blood supply to the femoral head. Dr. Lieber reiterated that the main cause of AVN is idiopathic, but other causes are alcoholism, steroid use, fracture, regular deep sea diving and intravenous drug use.

The Hines VA treatment note of August 3, 2007 comments that Petitioner continued to deny any acute trauma to the right hip, but he did give a history of several months of intense alcohol use while in the service, as well as a short course of oral steroids three years prior for asthma. Petitioner also mentioned that he did have a job where he would hit the side of his right hip repetitively with boards. Petitioner underwent a psychiatric consult at Hines VA on August 18, 2007. It was noted that

14IWCC0617

Petitioner had a long history of anxiety disorder and benzodiazepine dependence. Petitioner was noted to have received a DUI shortly before his admission to the hospital in August of 2007. On September 24, 2007, the Hines VA treatment note states that Petitioner again denied any acute trauma or injury to the right hip, but that he had a three day dose of oral steroids one year prior while also binge drinking. Petitioner presented to the Morris Hospital Emergency Department in January, 2008 after falling in a movie theater after binge drinking. His wife was noted in the record as stating that she feared for Petitioner's safety as he drank more than a six pack of alcohol a day. Petitioner was seen at the Hines VA the following day and the record noted Petitioner consumed alcohol in the amount of 5-12 beers a day, which troubled his wife. Petitioner was admitted to the Hines VA for substance abuse treatment. Petitioner was again treated at the Hines VA Emergency Department on August 30, 2008 after his wife found him blue and passed out after drinking approximately 12 pack beers. A November 10, 2009 Hines VA record notes that Petitioner had been drinking alcohol since the age of 12 and, from the age of 16 to 26, he drink 6 to 30 beers a day. Petitioner admitted to drinking more than 12 beers the day before the November 10, 2009 treatment note.

Based on the evidence contained in the record, the Commission finds the opinions of Dr. Lieber more credible than Dr. Hopkinson regarding the cause of Petitioner's right hip condition and need for treatment. The Commission adopts the opinions of Dr. Lieber. If the Commission made findings of accident and notice in this case, it would further find the alleged accident of January 16, 2007 was not a cause of Petitioner's right treatment and current condition of ill-being with regard to the right hip.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 2, 2013 is hereby corrected and otherwise affirmed and adopted with additional reasoning. Claim denied.

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

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

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: JUL 25 2014

Daniel R. Donohoo

o-05/22/14
drd/adc
68

Ruth W. White

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HANLEY, TIM
Employee/Petitioner

Case# **07WC032840**

COSTCO WHOLESALE
Employer/Respondent

14IWCC0617

On 5/2/2013, 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:

0190 LAW OFFICES OF PETER F FERRACUTI
THOMAS M STROW
110 E MAIN ST
OTTAWA, IL 61350

0210 GANAN & SHAPIRO PC
MICHELKLE LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

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

Tim Hanley
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # 07WC 32840

Consolidated cases:

14IWCC0617

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, Illinois**, on **January 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 _____

FINDINGS

On **2/1/2007**, 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 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 **$15,711.28**; the average weekly wage was **$302.14**.

On the date of accident, Petitioner was **25** years of age, ***single*** with **0** 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 **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$5,758.28** for other benefits, for a total credit of **$5,758.28**.

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

ORDER

Having found that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent on January 16, 2007, his claim for compensation is hereby denied.

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

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

Signature of Arbitrator

5/1/13
Date

MAY - 2 2013

STATEMENT OF FACTS

The first of three Applications for Adjustment of Claim were filed with the Illinois Workers' Compensation Commission by Petitioner on July 24, 2007. (RX 5) Petitioner alleged an accident date of "February, 2007." (Id.). The second Application for Adjustment of Claim was filed by Petitioner on September 4, 2007. (RX 6) Petitioner alleged an accident date of "January, 2007." (Id.) The third Application for Adjustment of Claim was filed by Petitioner on January 29, 2013. (ArbX 1). Petitioner alleged an accident date of "January 16. 2007." (Id.) The hearing commenced on January 31, 2013.

In January of 2007, Petitioner worked wrapping pallets of merchandise for Respondent. To wrap a pallet, the employee handled a roll of plastic wrap. The employee began by attaching the plastic to a bottom corner of the pallet. Holding the roll of plastic wrap in his hands and moving forward around the pallet, the employee wrapped the pallet from the bottom to the top. (RX 3) Petitioner testified while wrapping pallets on January 16, 2007 he repeatedly struck his right hip against the pallets. Petitioner explained that he went counter-clockwise around the pallets, wrapping the pallets in plastic, and because the pallets were so close his right hip would hit the pallet behind him as wrapped. Petitioner testified there were many people wrapping pallets at one time, and that he had done this work before, but had never been in a situation with the pallets being so close. Petitioner provided that he wrapped pallets all day for 7.5 hours. He indicated that his right hip hurt while he was pallet-wrapping, but he did not think it was serious at the time.

Petitioner testified that after January 16, 2007 he noticed a large bruise on his right hip and his hip became very painful. Petitioner acknowledged he did not report the alleged incident or mention the bruise to Respondent on January 16, 2007. Instead, Petitioner testified he mentioned the problems with his right hip and that the problems began when he was wrapping pallets to his supervisor, Bob Stansberry, one week later which would be January 23, 2007. Petitioner testified he reported the alleged January 16, 2007 incident to Stansberry because the two of them were friends and because he expected Stansberry not to make mention of the alleged incident to anyone else.

On January 23, 2007, Petitioner presented to his family physician, Dr. C.M. Cumba for treatment. Dr. Cumba documented the following history: "shooting pain [right] hip/knee leg. Started 3 weeks ago [and] getting worse daily. No known injury." (PX 6) Petitioner testified the history documented by Dr. Cumba was true and what he reported to Dr. Cumba on January 23, 2007. Petitioner testified he did not mention the events of January 16, 2007 to Dr. Cumba, as he was recently engaged and he did not want to lose his employment with Respondent for reporting a workers' compensation injury.

Petitioner contacted Dr. Cumba's office on January 25, 2007, reporting he was being returned to work, had to stand throughout the day and the pain medication "[was] doing absolutely nothing." When he returned to Dr. Cumba on January 29, 2007, Petitioner again reported pain to his right hip. He also complained of back, knee and ankle pain. Dr. Cumba now noted Petitioner was limping. Dr. Cumba wrote a note taking Petitioner off work. (PX 6)

On February 8, 2007, Petitioner sought treatment at Morris Hospital. The records state Petitioner reported "severe low back pain [and] radiculopathy pt. sts. [right] hip pain in joint area, radiates down [right] leg to knee. Pain for one month. No known injury." A lumbar CT demonstrated normal findings with no disc herniation. X-rays of Petitioner's pelvis and right hip demonstrated central early joint space narrowing and a very early tiny spur forming at the superior lateral margin of the humeral head. (PX 6)

An off work slip was completed by Dr. Cumba on February 13, 2007, keeping Petitioner off work until February 27, 2007. It indicated that Petitioner requires further evaluation by specialist for his severe back/hip pain and spasm. (PX 6)

At the recommendation of Dr. Cumba, Petitioner saw Dr. Mukund Komanduri on February 21, 2007. Petitioner reported having severe right hip pain for "roughly two months" and denied any specific trauma. Dr. Komanduri noted Petitioner worked in a factory wrapping pallets, but that Petitioner "[did not] recollect whether this was a work injury or when it occurred specifically." Dr. Komanduri diagnosed a right hip flexor strain and possible groin sprain, recommending physical therapy and rehabilitation. (PX 6 & 10) Petitioner testified that he did not tell Dr. Komanduri it was work-related for sure because he was getting married and wanted to get back to work.

Petitioner had a follow up appointment with Dr. Cumba on February 27, 2007. (PX 6) He was diagnosed with having right hip pain and kept off work for a month.

Petitioner began physical therapy at Morris Hospital on March 5, 2007. On the patient intake form, Petitioner indicated he did not know the date of injury. He reported he had been shrink wrapping pallets before the pain began. No mention of a specific injury was documented. He complained of constant throbbing pain in his right anterior hip. He reported that he has sharp pain with walking or movement. He was ambulating without assistive device and had a prominent antalgic gait pattern. After the evaluation, Petitioner completed 3 sessions of physical therapy before quitting. (PX 14)

On May 22, 2007, Petitioner was seen at Morris Hospital for a pain management consultation at the recommendation of Dr. Cumba. Petitioner reported the pain began about five months earlier with no inciting event. Petitioner described the pain as continuous and worse with bending and walking. Dr. Maria Estilo who performed the consultation diagnosed chronic right lateral inguinal, right lateral hip pain, of unclear etiology, possible right trochanteric bursitis. The treatment plan included diagnostic/therapeutic right trochanteric bursa injection and the recommendation for a MRI of the right hip joint to better identify the etiology of pain. (PX 14)

Petitioner had a follow up appointment with Dr. Komanduri on March 23, 2007. Dr. Komanduri indicated, "He has completed his therapy. He has minimal pain complaints and he is released back to work without restriction." (PX 10) Petitioner testified that he was not symptom free at this time and wanted to get back to work because he was getting married.

Petitioner also presented to the emergency room at Morris Hospital on May 23, 2007. Petitioner's chief complaint was decreased use of the right hip. It was noted that the "[c]omplaint occurred by no trauma by history" and the "[o]nset was 2 days ago." Petitioner received a trigger point injection and was discharged with a diagnosis of chronic right hip pain. A MRI was also recommended. Petitioner returned to the emergency room on May 31, 2007 with complaints of right lower back pain which was "...low enough to actually be hip or sciatic area." Petitioner reported the "[o]nset of symptoms reported as gradual. Onset was 5 months ago." Petitioner received pain medication and diagnosed with hip pain. (PX 14)

Petitioner returned to Dr. Cumba on May 31, 2007. The doctor's notes show that the "ER doctor was unable to give him the same shots as previous. He did have Morphine last night." The doctor noted that Petitioner wanted to return to work. Dr Cumba gave him activity restrictions of no heavy lifting, no climbing, not to engage in the use of machinery. (PX 6)

Petitioner returned to Dr. Cumba on June 4, 2007, still complaining of right hip pain and limping. Dr. Cumba told him that it is not possible to work with the type of job that he has and took him off work. (PX6).

Dr. Cumba again completed off work forms for Petitioner on June 15, 2007. He indicated Petitioner was not having any new or different pain. He told Petitioner to return to an orthopedic. He also referred him to a pain clinic and indicated that he can't work yet. (PX 6)

On June 20, 2007, Petitioner sought treatment at Hines VA Hospital's emergency room, complaining of right hip pain for six months. The note from the Hines VA on June 20, 2007 says that since the time Petitioner's pain started, it has progressed to a constant 9/10 sharp pain, made worse with bending at the waist and hip flexion. Also noted was "no known trauma associated with onset." When discharged, the diagnosis was "Rt. Femur AVN." The treatment plan included laboratory tests, a referral to the orthopedic clinic, and Petitioner was given narcotic medication for pain. (PX 18 at 2155 – 2157) X-rays were taken, revealing degenerative joint disease and avascular necrosis. (PX18 at 199)

The orthopedic consultation was performed by Dr. Brian Foster on June 27, 2007. Dr. Foster recorded a history that Petitioner's "[p]ain has been gradual [with] no acute trauma or injury to the area. Seemingly no event that caused pain to start per [patient.]" Dr. Foster suspected AVN of the right hip and recommended an MRI of the hip joints. (PX 18 at 2144- 2146) The MRI, obtained on August 3, 2007, demonstrated findings of moderate-sized right hip effusion, avascular necrosis of the right femoral head with collapse of the superior margin of the femoral head and a normal left hip. (PX 18 at 194 – 196)

Petitioner presented for an evaluation at Hines on August 3, 2007. Records show that his right hip pain started eight months prior. (PX18 at 2107). Also reported was that "pt did have a job during which he would hit the side of his R hip repetitively on boards? - some sort of repetitive micro-trauma." The recommendation at that time was hip replacement surgery. (PX18 at 2108).

Under the direction of Dr. William Hopkinson, Petitioner underwent a total right hip arthoplasty on September 17, 2007. His preoperative and postoperative diagnoses were osteonecrosis of the right hip. (PX 19, at 2265)

Post-operatively, Petitioner commenced a course physical therapy on October 8, 2007.

On October 9, 2007, Petitioner contacted Dr. Cumba's office regarding documentation in his medical chart regarding an injury to his right hip. Chart notes indicate, "He wants to know if [there is] any documentation in his records regarding hip injury while he was wrapping pallets [and] if not could it still be added to his record if you recall the conversation." (PX 6)

By January 18, 2008, Petitioner had completed 20 physical therapy sessions. A progress letter from January 18th indicated, "Patient is continuing with slow progress, his progress has been slowed by pain which continues unchanged. Patient is ambulating indoors without assistive device, but continues with gait deviations trendelenberg and slow pace as well as short stride." The recommendation was continued physical therapy for another 4 weeks. (PX 14)

On March 13, 2008, Petitioner had an orthopedic visit, complaining of groin pain and popping. (PX18 at 1681, 1731). X-rays were taken of the right hip/pelvis, showing good alignment of the prosthesis. (PX18 at 186-86).

On June 4, 2008, Dave Hunnewell of Costco authored a letter to Petitioner. The letter states that a job assessment review meeting was held. It appears from the letter that Petitioner participated in the assessment. The letter provides, "...It was determined by you me and the nurse case manager that you were able to perform the essential functions of your position as a Sorter, with the following modification: You will not be required to

squat or lift over 50 pounds. You will limited your kneeling and bending and report any difficulty you encounter when doing your job." (RX8). Petitioner testified that he did return to work in June 2008, and his job duties involved walking around in circles putting wood in bins. He testified that it was painful but he could do it.

Petitioner was seen in the orthopedic clinic at Hines on December 3, 2008, complaining of gripping/grinding pain in his right groin and popping of the hip. (PX18 at 1683). X-rays were taken of the pelvis and right hip. (PX18 at 178-79). No evidence of loosening or bone abnormality was found.

Petitioner testified that he was fired from Costco on March 27, 2009 for taking an extra break. He testified that he did attempt to work at another job, but he only lasted a half day because his hip could not take it.

Petitioner's pain complaints did not go away and x-rays were again taken of the right pelvis on May 13, 2009, showing no evidence of recent fracture or dislocation and with the hip joint replacement in satisfactory alignment. (PX18 at 176-77).

At Respondent's request Petitioner underwent a Section 12 examination with Dr. Lawrence Lieber on September 23, 2009. Petitioner presented with a history of a work related injury dated February 1, 2007 while striking his bilateral hips against pallets while shrink-wrapping. As part of his evaluation, Dr. Lieber reviewed the records from Dr. Cumba and Dr. Komanduri, as well as records from Morris Hopsital and Hines VA Hospital. Based on his examination of Petitioner and review of the medical records, Dr. Lieber assessed status post right hip replacement secondary to avasular necrosis, right femoral head. Dr. Lieber opined that "[P]etitioner's right hip replacement was not related to his work activities, but rather that of preexisting avascular necrosis, which deteriorated over time with no relationship to Petitioner's work injury or work activities." The doctor further opined that "[t]here is no evidence of any aggravation, acceleration or cause of the right femoral avascular necrosis that can be related to [p]etitioner's work activity as of February 2007 or prior to that." He did not think Petitioner needed any more treatment related to any work injury. He thought Petitioner would be restricted to no lifting greater than 50 to 60 pounds as well as a restriction on a "significant amount of climbing. (RX 14)

X-rays were taken of the hip on November 10, 2009. (PX18 at 174-75). The impression was stable appearance of right hip hemiarthroplasty. Dr. Balaram indicated that there did not appear to be an orthopedic etiology for his pain. (PX18 at 1531-32).

Petitioner was seen at the pain clinic on December 21, 2009. (PX18 at 1425). Injections were not recommended at the time. He was scheduled to have a CT scan of the lumbar/thoracic region and an EMG of right leg. (PX18 at 1428). Petitioner then went to the ER for pain medication. (PX18 at 1415). He did not want to have x-rays taken. (PX18 at 1419).

Petitioner had an initial consultation with GMC pain clinic on March 5, 2010. (PX18 at 1393). The notes indicate: "Hip pain limiting his ability to do much. Can walk but has pain with this. Also has pain with any ADL and when sleeping/rolling on his right side his pain is excruciating."

An x-ray was done of the pelvis on June 29, 2010 because of Petitioner's pain. (PX18 at 158). The results were unremarkable, showing a total right hip prosthesis with good alignment.

Petitioner went to the ER on October 27, 2010, complaining of 10/10 hip pain. (PX18 at 287). Petitioner was admitted for pain management. He was given an iliopsoas tendon sheath injection. X-rays were also taken, showing no change in appearance compared to the prior x-ray. (PX18 at 156-58). Petitioner was discharged on October 29th. (PX18 at 286). On October 29, it was discovered that Petitioner had an ASR

acetabular component which had been withdrawn from the market by its manufacturer for concerns about early loosening. (PX18 at 1042). At the time, two possible etiologies for his pain were either loose hardware or iliopsoas tendonitis. (PX18 at 1039).

On November 1, 2010, Dr. Craig Mcasey called Petitioner to inform him that there had been a recall on his hip implant, a DePuy ASR Hip System. It was recommended that he receive cobalt and chromium ion level testing per manufacturer protocol. (PX18 at 1038).

On November 13, 2010, his lab results showed that his chromium level was elevated. (PX18 at 1035).

Petitioner underwent a second hip replacement on February 28, 2011. (PX18 at 511-14). He was discharged from the hospital on March 4 and referred for 12 home physical therapy visits. (PX18 at 887).

X-rays were taken of the right hip/pelvis on April 13, 2011, which were normal. (PX18 at 152-54).

Dr. Amit Dayal wrote a letter on July 28, 2011 to the Department of Human Services. (PX16) It states:

> "Mr. Timothy Hanley is a patient at Hines Veterans Hospital. He is currently disabled secondary to a severe hip injury which has required multiple surgeries. He suffers from an orthopaedic and neurologic deficit which renders him disabled. He has limitations in his ability to ambulate, carry more than 10 pounds and stand/sit. He suffers from a chronic pain syndrome that can really limit his ability on a daily basis. . . ."

X-rays were taken of the right hip on November 17, 2011. (PX18 at 150). The total right hip prosthesis appeared in good and stable position.

On December 15, 2011, Dr. William Hopkinson authored a letter stating:

> "...Mr. Hanley is a patient currently under the care of Hines VA Hospital for ongoing care relative to not only medical issues, but also mental health issues. Mr. Hanley was last seen at the Hines VA Clinic on November 17, 2011...He was noted to still be using a cane for ambulation and was on permanent disability for hip issues and bipolar disorder. Based on the above evaluation and his ongoing mental health issues, to include anxiety, bipolar disorder and substance abuse, I do not believe that Mr. Hanley is able to work in any capacity other than the possibility of doing sedentary duty in which he is being supervised at all times. It is my medical opinion that Mr. Hanley will more likely than not need additional hip revision surgery in the future due to his age. . . . As far as his hip is concerned, I feel that Timothy is at maximum medical improvement, i.e. he is permanently disabled from all but sedentary part-time activities in which he would have constant supervision." (PX8).

At the request of his attorney, Petitioner's vocational needs and potential was assessed by Kari Stafseth, a certified rehabilitation counselor of Vocamotive on January 10, 2012. Ms. Stafseth, also testified on Petitioner's behalf via evidence deposition on October 11, 2012. (PX5). Ms. Stafseth 's testimony was based upon a report she authored on January 27, 2012. (PX4). Ms. Stafseth met with Petitioner on January 10, 2012 to go over his personal and employment history and reviewed his medical records. (PX5 at 7). After reviewing all of the information related to Petitioner's case, Ms. Stafseth opined that she thought Petitioner did not have access to a meaningful stable labor market. (PX5 at 20). When asked about the factors she considered in making this determination, she replied:

"Well, review of the medical records, with looking at what Dr. Dayal and Dr. Hopkinson said, they indicated that he could function at a sedentary level; however, Dr. Hopkinson only indicated part-time basis which that's going to limit the labor market that he would have access to right there only being able to work part-time, as well as the need for constant supervision. He would almost have to have a baby-sitter at the job with him looking at everything that he's doing. With review of his education, he didn't have the skills that would be necessary of sedentary employment. Sedentary positions typically require computer literacy. He also indicated some difficulties while going through school with his limitations with regards to reading. With sedentary employment this also involves some type of reviewing records, reviewing correspondence, putting correspondence together." (PX5 at 21).

When asked to disregard Petitioner's mental health and focus only on his physical limitations, Ms. Stafseth indicated that her opinion was Petitioner still would not have access to a gainful stable labor market. She explained the reasons:

"The need for the constant supervision while on the sedentary job, the limitation to part-time employment only, as well as his need to alternate sitting and standing. . . . As well as his lack of transferability of skills, he doesn't have any type of computer skills that would be needed with this type of employment, he doesn't have any experience within any type of clerical-based, office-based employment which generally would be of benefit when looking for that type of work. He also ambulates with use of a cane. It could be perceived as him having a disability when going into an employer and it could affect the job placement aspect of voc rehab." (PX5 at 22-23).

Ms. Stafseth testified that she did not recommend any formal vocational services to be provided. She stated, "It's my opinion that even if we were to put together an aggressive job search, it's my opinion that it would not yield any type of positive outcome and it would be quite costly." (PX5 at 23). Ms. Stafseth testified that she did not do vocational testing on Mr. Hanley, but that the Respondent never offered to approve such testing. (PX5 at 34).

Petitioner initially testified on direct examination he looked for gainful employment and his job search was memorialized in Petitioner's Exhibit No. 3. On cross-examination, Petitioner admitted the first employer to which he applied, Ken's Hobbies, was his father's hobby shop. Petitioner further indicated he was unsure whether he completed the form or if someone else did it for him. Petitioner testified that he does not know if the log is a complete list and that he called more people than on the log.

Dr. Lieber testified via deposition on September 10, 2010. Dr. Lieber, a board-certified orthopedic surgeon with M & M Orthopedics, evaluated Petitioner on September 23, 2009. Dr. Lieber testified Petitioner reported while working on Feburary 1, 2007 he struck his bilateral hips against the pallets during the shrink-wrapping process, causing pain. (RX 13, at 8) The doctor testified that as part of his evaluation of Petitioner, he reviewed the records from Dr. Cumba and Dr. Komanduri. Additionally he reviewed the records from Morris Hopsital and Hines VA Hospital. (RX 13, at 9-10) Based on his examination of Petitioner and review of the medical records, Dr. Lieber opined there was no causal connection between Petitioner's condition of avascular necrosis/the need for the total hip arthroplasty and his work activities/alleged work accident. Dr. Lieber opined Petitioner's history of alcohol abuse and steroid use to treat poison ivy would be a cause for Petitioner's developing the condition of avascular necrosis. (RX 13 at 12) The doctor did not believe Petitioner suffered a permanent aggravation of his condition from an objective standpoint. The doctor also provided that based on "...[Petitioner's] history and in his opinion caused him to have pain, and certainly from that standpoint, there was a symptomatic aggravation of the condition that caused him to be painful." (RX 13 at 23) He also found Petitioner to be credible. (RX13 at 23) Dr. Lieber further added, "I'm not – I'm not denying that he didn't have

complaints associated with his work and/or may have had blunt trauma to his hips. I just – as you just heard from me, the etiology of avascular necrosis did not occur here. He didn't break his hip." (RX 13 at 28) The doctor partially based his opinion on the assumption that if the injury caused the pain, then the surgery should have cured the pain – and Petitioner's ongoing complaints therefore were inconsistent with it being a work injury. (RX13 at 28-29)

The deposition of Dr. William Hopkinson was taken on July 1, 2010. Dr. Hopkinson is a board-certified orthopedic surgeon. Dr. Hopkinson diagnosed avasulcar necrosis, which is the loss of blood supply to the bone. Petitioner had an advanced stage of the condition, as the head of the joint had collapsed, leaving the only treatment option to perform a total hip replacement. (PX 9 at 9 & 11) The collapse develops anywhere from 6 to 12 months following the onset of the loss of blood supply to the bone. Dr. Hopkinson admitted it was possible Petitioner had the condition in his right hip before his employment with Respondent began or even for several months before he first noted symptoms to Dr. Cumba on January 23, 2007. (PX 9 at 28-29) Dr. Hopkinson noted Petitioner provided a history of intense alcohol intake while he was in the military service, a short course of oral steroids three years earlier and a job during which he would hit the side of his right hip repetitively on boards. (PX 9, at 10) Petitioner's attorney presented Dr. Hopkinson with a hypothetical set of facts, asking him to assume that on January 1, 2007 Petitioner was wrapping closely placed pallets of merchandise standing about 4 to 5 feet high for an eight hour shift and repeatedly hit his right hip against the pallets, that his family members and other noticed bruising within days of the alleged work accident and he sought treatment within less than a month of the alleged accident. Based on the set of facts presented to him by Petitioner's attorney, Dr. Hopkinson opined the alleged work injury could have aggravated Petitioner's pre-existing condition. (PX 9 at 16-17) Dr. Hopkinson opined repetitive trauma to the hip can be associated with avascular necrosis. (PX 9, at 18) Dr. Hopkinson acknowledged the most common case of avascular necrosis is idiopathic, meaning the cause is unknown. (PX 9, at 21) Additional risk facts included the use of cortical steroids and heavy drinking. (PX 9, at 22) He testified that despite Mr. Hanley's alcohol use, the work injury could have aggravated his condition to the point where he needed a hip replacement. (PX9 at 36) Dr. Hopkinson also took issue with Dr. Lieber's opinion that Petitioner's total hip replacement was due to preexisting avascular necrosis. (PX9 at 19). Before the time of his deposition, Dr. Hopkinson admitted he never reviewed the records from Dr. Cumba and Dr. Komanduri. (PX 9, at 28) He noted that neither Dr. Cumba on January 23, 2007, nor Dr. Komanduri on February 21, 2007 noted bruising or a history of bruising. (PX 9, at 38-39)

Petitioner's father, Ken Hanley, testified at the hearing on Petitioner's behalf. Ken Hanley testified he saw and viewed a bruise on Petitioner's hip on either January 18th or 19th of 2007. Ken Hanley described the bruise as "very dark" and about the size of the palm of his hand. Ken Henley testified he advised Petitioner not to report the alleged accident to Respondent, as it was his impression from comments made around town that employees are fired for reporting work injuries to Respondent. Ken Hanley admitted he understood there were financial implications for Petitioner as a result of the hearing and he would pretty much do anything to help his son. He also provided he would never lie under oath for him.

Dawn Hanley, Petitioner's ex-wife also testified. Dawn Hanley testified she noticed a bruise on Petitioner's hip as he was getting out of the shower. On direct-examination, Dawn Hanley testified she noted the bruise just after the holiday season, meaning after Christmas or the New Year. On cross-examination, Dawn Hanley clarified she observed the bruise closer to January 15, 2007 than the first part of the month of January. Dawn Hanley testified the bruise was very dark, yellow around the edges and about the size of her fist. She testified the bruise was present for several weeks. Petitioner pays child support to Dawn Hanley for their daughter.

Bob Stansberry testified on Respondent's behalf. Mr. Stansberry testified that he never saw Petitioner bumping his hip in 2007; nor does he remember Petitioner reporting that he sustained an injury at work. Mr. Stansberry provided Petitioner did tell him that his right hip was bothering him. Mr. Stansberry couldn't

remember if Petitioner said it was work related. He also provided it was possible Petitioner told him that he hurt his right hip by hitting pallets. Mr. Stansberry testified he had attended Petitioner's wedding and was still presently employed by Respondent. He did not fill out an incident report for Petitioner at any time.

David Hunnewell, the general manger, also testified for Respondent. Mr. Hunnewell testified he did not become aware of Petitioner's allegation he sustained a work-related injury until sometime in July of 2007. When Respondent became aware of Petitioner's allegation, Mr. Hunnewell testified, the Form 45 Accident Report was completed and forwarded to the State/Respondent's workers' compensation TPA and an investigation was launched. The Form 45 Accident Report was dated July 20, 2007. (RX 12) The investigation report indicated the report was begun on July 20, 2007 and was signed off by Mr. Hunnewell on November 20, 2007. (RX 15) Mr. Hunnewell testified that the accident form was filled out by Steve Rain and that he merely signed off on it. He testified that he did not do the investigation and had no direct knowledge about the accident.

Mr. Hunnewell testified he is familiar with pallet wrapping. He testified to training on lifting techniques and safety, which takes approximately 30 minutes. An employee puts the clear plastic underneath the pallet, and then works around the pallet, walking forward so they can see where they are going. He testified that it does not matter whether an employee goes clockwise or counterclockwise around the pallet. When questioned about the job video, offered as Respondent's Exhibit 3, Mr. Hunnewell indicated the video was not filmed in January 2007 and that the video was not a video of the job being done on January 16, 2007. Mr. Hunnewell testified that he did not watch Petitioner wrapping the pallets on that day. He could not say what the spacing of the pallets was on January 16, 2007, and he testified that it was possible that the pallets were closer together than they were in the job video. Mr. Hunnewell testified that it is possible to bump one's hip if the pallets are close to one another. He testified that they want the workers to wrap pallets safely and efficiently.

Todd Shields, who is now the assistant warehouse manager, but was Petitioner's department manager in 2007, also testified for Respondent. Mr. Shields testified he was not aware of Petitioner reporting a work injury until July of 2007. Mr. Shields also testified employees are trained before they are assigned to pallet wrapping, and the job video accurately depicted how an employee is trained to wrap pallets and how pallets are actually wrapped on the warehouse floor. Mr. Shields did not recall working directly with Petitioner on January 16, 2007 and admitted he did not observe Petitioner throughout his entire shift. Mr. Shields testified that he did not know how far apart the pallets were on January 16, 2007 and it is possible the pallets were closer together than they were in the job video.

When Petitioner was taken off work by Dr. Cumba, he completed a "Request for Leave of Absence of Notification Regarding Family and Medical Leave Act (FMLA) and Other Similar State Leave Laws" form. On the first application, signed by Petitioner on January 29, 2007 and approved by Mr. Hunnewell on February 14, 2007, Petitioner indicated the leave of absence was for a "personal medical leave." (RX 9) On the second application, signed by Petitioner on February 23, 2007 and approved by Mr. Hunnewell on March 1, 20117, Petitioner did not indicate a reason for the leave of absence. (RX 10) On the third application, signed by Petitioner on May 29, 2007 and approved by Marti Sanford on June 4, 2007, Petitioner indicate the leave was for "personal medical leave." (RX 11) All three forms gave Petitioner the option of indicating the leave was for a workers' compensation injury.

Petitioner testified at trial that his hip still is not back to 100%. Every day he has nonstop pain in hip, including throbbing and shooting pain. He testified that is hard for him to sleep and he takes pain medication. He testified that he did not have these problems with his hip prior to January 2007. He testified that his hobbies before the accident included riding four-wheelers, surfing, playing guitar, and playing baseball, and he has not done any of these hobbies since the accident in 2007.

In support of the Arbitrator's Decision relating to ,C, whether an accident occurred arising out of and in the course and scope of Petitioner's employment by Respondent, the Arbitrator finds the following:

It is Petitioner's burden to prove by a preponderance of the credible evidence all elements of his claim, including whether the accident arose out of and in the course and scope of his employment. *See*, Hannibal v. Industrial Commission, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977). The key is that the evidence supporting a finding of a compensable accident must be credible. In this case, Petitioner failed to present credible evidence of an accidental injury arising out of and in the course and scope of his employment by Respondent on January 16, 2007.

Petitioner testified when wrapping pallets on January 16, 2007 he repeatedly struck his right hip due to the pallets being spaced especially close together. The Arbitrator notes Petitioner only alleged the pallets were spaced "closely" together, but never specifically described how closely the pallets were spaced. In the job video, Respondent's Exhibit No. 3, the pallets were spaced in such a manner so that the employee did not repeatedly make contact with the pallets while wrapping the merchandise. The Arbitrator is not convinced Petitioner would repeatedly strike his right hip while wrapping the pallets for an entire work day.

Petitioner's trial testimony of an accident occurring on January 16, 2007 is not supported by the other evidence. Statements and declarations made to a treating physician as to ones physical condition and the cause of the condition are admitted into evidence as an exception to the hearsay rule as it is presumed a person will not falsify a statement to a physician from whom he expects to receive medical treatment. Shell Oil Co. v. Industrial Commission, 2 Ill.Dec. 590, 119 N.E.2d 224 (1954). Petitioner's testimony can be found not credible when it is uncorroborated by other relevant testimony and is in conflict with the medical histories he provided to his treating physicians. *See*, United States Steel Corporation v. Industrial Commission, 8 Ill.2d 407, 134 N.E.2d 307 (1956); Banks v. Industrial Commission, 134 Ill.App.3d 312, 480 N.E.2d 139 (4th Dist. 1985); and McRae v. Industrial Commission, 285 Ill.App.3d 448, 674 N.E.2d 512 (5th Dist. 1996).

When seeking medical treatment for the first time on January 23, 2007, Petitioner told his family physician, Dr. Cumba, the symptoms began three weeks earlier and resulted from "no known injury." The history is problematic for Petitioner in two ways. First, if the symptoms began three weeks before the appointment, then the symptoms began around the first of January and pre-dated the alleged accident date of January 16, 2007. Second, Petitioner denied sustaining trauma to the right hip. Petitioner did not deny he provided such a history to Dr. Cumba. Instead, Petitioner contended he provided the history as he did not intend to report a work related injury to Respondent because he feared being fired. The Arbitrator does not find Petitioner's explanation persuasive. The one person to whom Petitioner could report the injury without repercussion was his treating physician. Petitioner chose to seek treatment with Dr. Cumba, and he had a long-standing doctor-patient relationship with Dr. Cumba. The fact Petitioner denied trauma and did not report the work injury to Dr. Cumba is persuasive.

The history documented by Dr. Cumba on January 23, 2007 was not the only medical history to contradict Petitioner's testimony at trial. Petitioner again denied sustaining an injury of any kind to the physicians at Morris Hospital on February 8, 2007. The history noted the pain had been present for one month (again placing the onset in early January of 2007) and was the result of no known injury. Dr. Komanduri noted in his chart for February 21, 2007 that Petitioner denied any specific trauma and could not recall a work injury or when it occurred. When he was first seen for the condition of his hip at Hines VA hospital on June 20, 2007, Petitioner again reported there was "no known trauma associated with the onset" of his symptoms. During the orthopedic consultation with Dr. Foster at Hines, Petitioner once again indicated there was no event that caused his symptoms to start. It was not until he underwent the MRI on August 3, 2007 Petitioner reported a work related cause for his condition to any medical provider.

Ken Hanley, Petitioner's father, and Dawn Hanley, Petitioner's ex-wife, both testified they observed a bruise on Petitioner's right hip in January of 2007. Petitioner also testified his hip was bruised after the alleged events of January 16, 2007. The Arbitrator does not find the testimony of any witness about bruising credible. Each witness testified to the presence of bruises beginning around the 16th of January with Dawn Hanley testifying the bruising remained for a least 1-1/2 weeks. Dr. Cumba, though, examined Petitioner on January 23, 2007, but Dr. Cubma makes absolutely no mention of bruising when examining Petitioner on January 23, 2007. If there was bruising to Petitioner's right hip after January 16, 2007, the Arbitrator would not only expect Petitioner to have made mention of it to Dr. Cumba when seeking medical care , but also for Dr. Cumba to have documented findings of bruising in his records. The fact Dr. Cumba makes no mention of bruising at the time of the January 23, 2007 appointment suggests there was no bruising to Petitioner's right hip.

Finally, the Arbitrator notes Petitioner appeared unable to decide upon an actual date of accident until January 29, 2013 when he filed an amended Application for Adjustment of Claim. This occurred five years after the alleged accident and just two days before the hearing. Before then, Petitioner only filed two Applications with a vague date of injury. On the first Application, filed in July of 2007, Petitioner alleged an accident date of "February, 2007." On the second Application, filed in September of 2007, Petitioner only alleged an accident date of "January, 2007." During the deposition of Dr. Hopkinson, Petitioner's expert, Petitioner's attorney continuously referred to an accident date of January 1, 2007 and even provided Dr. Hopkinson with a hypothetical set of facts in which she asked him to assume an accident date of January 1, 2007.

Overall, the Arbitrator finds Petitioner's testimony and allegation of a work injury occurring on January 17, 2007 not credible. As Petitioner repeatedly denied sustaining a work injury or any trauma to the right hip to medical providers until he learned he would require significant surgical intervention, the Arbitrator finds Petitioner did not sustain an injury arising out of and in the course of his employment by Respondent.

In support of the Arbitrator's Decision relating to, E, whether Petitioner provided proper notice of the alleged injury to Respondent, the Arbitrator finds the following:

Having found Petitioner's testimony as to accident not credible, the Arbitrator can then find Petitioner's testimony as to other issues not credible. *See*, Parro v. Industrial Commission, 167 Ill.2d 385, 657 N.E.2d 882 (1995); DeAngelo v. Aramark Management Services, 08 IWCC 0367, 04 WC 5850.

While testifying he did not inform Drs. Cumba and Komanduri of a work injury when seeking medical treatment for fear he would be fired, Petitioner claimed he reported the work injury to his supervisor, Bob Stansberry. Petitioner claimed he mentioned the injury to Mr. Stansberry as they were friends and he expected Mr. Stansberry to not mention the injury to anyone else. The Arbitrator notes Mr. Stansberry did not recall Petitioner reporting a work injury to him. If Petitioner truly feared he would be fired for reporting a work injury, it makes no sense why he would report the injury to Stansberry on or about January 23, 2007, but not mention the alleged injury to Dr. Cumba out of fear he would be fired. Petitioner's testimony itself is contradictory and cannot be reconciled. Petitioner is simply not credible and his testimony he reported a work injury to Mr. Stansberry is not credible.

Furthermore, when completing the three requests for leave of absence in January, February and March of 2007, Petitioner had three opportunities to report a work injury to Respondent. He did not do so. Instead, on the requests he submitted in January and March Petitioner indicated the requested leave was for personal, medical reasons and never checked the workers' compensation boxes. Petitioner's own actions suggested he failed to give notice of the work injury to Respondent and Respondent only learned of an alleged work injury after Petitioner filed an Application for Adjustment of Claim in July of 2007.

Based on the foregoing, the Arbitrator finds Petitioner failed to give Respondent notice of a work injury within 45 days of an alleged accident as required by Section 6(c) of the Act.

Having found Petitioner failed to prove accident and notice, the Arbitrator need not address the remaining issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTONIO GALE,

Petitioner,

vs.

NO: 12 WC 28485

IDOT,

14IWCC0618

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 Section 19(l) penalties and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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 finds that Respondent had a good faith argument against causation because Petitioner's time cards didn't reflect very much "mowing (hand)" (code 442) activity and, instead, seemed to indicate that he did most of his work with a machine. It was on the basis of this objective evidence that Respondent's Section 12 examiner, Dr. Vender, opined that Petitioner's "limited exposure would not contribute to the development of flexor stenosing tenosynovitis." It wasn't until Petitioner credibly testified at hearing that the codes on his time cards didn't reflect his actual work duties that Respondent realized that the opinion they received from Dr. Vender was based on inaccurate information. On review, Respondent has accepted the Arbitrator's finding regarding causation based on this new information. Therefore, the award for Section 19(l) penalties is hereby vacated.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $933.96 per week for a period of 39-1/7 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 $3,784.92 for medical expenses under §8(a) of the Act pursuant to the medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective care in the form of the left fifth finger trigger release surgery recommended by Dr. Nam.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of penalties under §19(l) of the Act are hereby 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.

DATED: JUL 28 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 6/19/14
49

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

GALE, ANTONIO
Employee/Petitioner

Case# **12WC028485**

IDOT
Employer/Respondent

14IWCC0618

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:

0140 CORTI ALEKSY & CASTANEDA
JOHN SERKLAND
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

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

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST SUITE 13-178
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 24 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0618

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)

ANTONIO GALE
Employee/Petitioner

v.

IDOT
Employer/Respondent

Case # **12** WC **28485**

Consolidated cases: **D/N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **June 26, 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, **July 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*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**72,849.00**; the average weekly wage was $**1,400.94**.

On the date of accident, Petitioner was **59** 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 $.

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 $933.96/week for 39 1/7 weeks, commencing 09/26/12 through 06/26/13, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $3,784.92, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner Section 19(l) penalties in the amount of $7,590.00. The Arbitrator declines to award Section 19(k) penalties and Section 16 attorney fees, as requested by Petitioner.

Respondent shall authorize and pay for prospective care in the form of the left fifth finger trigger release surgery recommended by Ellis Nam, M.D.

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.

Molly E Mosa
Signature of Arbitrator

7/24/13
Date

ICArbDec19(b)

JUL 24 2013

Antonio Gale v. Illinois Department of Transportation
12 WC 28485

Arbitrator's Findings of Fact

Petitioner, who was almost 60 years old as of the hearing, testified he has worked for Respondent for fifteen years. He is a member of Local 700. He is currently a "lead worker." He is in charge of a crew of workers who, from early spring through late autumn, remove shrubs and weeds from highways in a large designated area. He works 40 hours per week. In his spare time, he performs various functions at his church.

Petitioner testified that, even though he has supervisory duties, he actively participates in shrub and weed removal. Starting in the early spring and running through approximately November, he spends about 60 to 80% of each workday using "loppers" and gas-operated weed whackers. He pulls weeds by hand only when weeding near flowers. He works behind a tractor, addressing the areas that the tractor cannot reach due to its large wheels. When one tractor is in use, he and his crew cover about 3 acres per day.

Petitioner testified that a weed whacker weighs between 6 and 8 pounds. It vibrates when in use and is suspended from a strap that is worn over the shoulder. It is operated via a trigger. He has to depress the trigger in order to keep the power on. He typically uses one hand to depress the trigger and the other hand to "steer." He alternates his hands while doing this.

Petitioner's Application for Adjustment of Claim, filed on August 17, 2012, alleges bilateral hand injuries and a manifestation date of July 17, 2012. PX 1.

Petitioner testified he experienced bilateral hand pain as well as numbness and locking of his fingers before July 17, 2012. He continued working despite these symptoms. He did this because he loves his job and managed to "brainwash" himself into ignoring his discomfort.

Petitioner testified that, on July 17, 2012, he "couldn't take it anymore" and reported his hand symptoms to his supervisor, Jack Neven. Nevins completed paperwork. At Neven's direction, Petitioner also called an 800 number to make a report. Petitioner went to WorkRight Occupational Health [hereafter "WorkRight"] the same day. Petitioner testified he went to WorkRight because a poster at his job indicates this is Respondent's designated facility.

The WorkRight note of July 17, 2012 reflects that Petitioner complained to Dr. Ramsey of experiencing pain in his right hand and "locking" of his left little finger while operating a weed cutter. Petitioner also complained of tingling in the fingers of his right hand, especially the index, middle and ring fingers. Dr. Ramsey noted a past history of right hand trigger finger surgery. On right wrist examination, Dr. Ramsey noted pain with full flexion and extension and decreased grip strength. On left wrist examination, he noted swelling of the palm, tenderness

to palpation of the volar aspect of the MP joint of the small finger, discomfort with small finger flexion and extension, some locking at the MP joint of the small finger and good grip strength.

Dr. Ramsey obtained X-rays of the right hand and left small finger. He noted no fractures or gross bony abnormalities on review of the films. He fitted Petitioner's right wrist with a splint and told Petitioner to wear this splint while working. He prescribed Daypro and home exercises. He released Petitioner to full duty. PX 3.

Respondent offered into evidence as a group of documents, including an Employer's First Report of Injury completed by Petitioner on July 17, 2012. In the report, Petitioner indicated he was experiencing pain in his left small finger and numbness in his right hand secondary to using a gas-operated "weed whip" to remove weeds along a highway. RX 4. Also in RX 4 is an Employee's Notice of Injury completed by Petitioner on July 17, 2012, indicating he injured both hands while removing weeds. Petitioner indicated that Mark Zeman and Tony Shugailo witnessed his injury. Also in RX 4 is a Supervisor's Report of Injury completed by Jack Neven on July 17, 2012. Neven indicated that Petitioner experienced locking in his left small finger and right hand numbness while "weed whacking" on the Stevenson at about 9:30 AM on July 17, 2012. Neven also indicated that "weed whacking" is an activity Petitioner performs in the course and scope of his employment. Also in RX 4 are "workers' compensation witness reports" signed by Mark Zeman and Tony Shugailo on July 17, 2012. Both of these statements reflect that Petitioner complained of problems with his left hand after he finished "weed whacking" on July 17, 2012.

Petitioner returned to WorkRight on July 23, 2012 and saw Dr. Patel. Petitioner complained of persistent pain in his right hand. He described this pain as shooting up his arm. He also complained of pain and locking in his left small finger. Dr. Patel's examination findings were very similar to those made by Dr. Ramsey. He diagnosed a right hand strain, a left small finger sprain and trigger finger of the left small finger. He directed Petitioner to continue wearing the splint and attending therapy. He released Petitioner to full duty. PX 3.

On July 27, 2012, Petitioner returned to WorkRight and again saw Dr. Ramsey. Petitioner reported persistent symptoms and indicated his right hand now felt numb "all the time." Dr. Ramsey's examination findings were essentially unchanged. He prescribed physical therapy and Daypro. He released Petitioner to full duty but warned him to be "cautious when weed whacking and lifting heavy objects." PX 3.

Petitioner began a course of therapy at WorkRight on August 1, 2012. The therapist noted that Petitioner associated his symptoms with operating a weed cutter. On examination, the therapist noted tenderness to palpation of the left small finger and the base of the right thumb. He also noted locking of the left small finger and reduced grip strength. PX 3.

Petitioner saw Dr. Ramsey again on August 3, 2012, with the doctor noting the same complaints and making the same findings. The doctor again released Petitioner to regular duty. PX 3.

On August 7, 2012, Petitioner informed his therapist that his condition was unchanged and that his left small finger felt the same as his right finger had felt prior to undergoing a trigger release. Petitioner continued attending therapy thereafter, with the therapist noting little progress. PX 3.

Petitioner returned to Dr. Ramsey on August 17, 2012 and reported some improvement in his right hand. He described his left hand as unchanged. On this occasion, Dr. Ramsey described Petitioner's right grip strength as good and his left grip strength as sub-optimal. He instructed Petitioner to continue therapy, home exercises and Daypro. He again released Petitioner to full duty with use of the splint. PX 3.

On August 17, 2012, Petitioner filed an Application for Adjustment of Claim alleging he injured both hands on July 17, 2012. PX 1.

On August 28, 2012, Petitioner went back to Dr. Ramsey and indicated he had run out of medication and needed approval in order to undergo additional therapy. On examination, the doctor noted good grip strength in both hands, tenderness over the MP joint of the left small finger and minimal locking of that finger. He recommended an injection for the left small finger. Petitioner declined to undergo this form of treatment. The doctor refilled the Daypro prescription. He again released Petitioner to full duty, with the same warning to be "cautious when weed whacking and lifting heavy objects." PX 3.

When Petitioner next saw Dr. Ramsey, on September 11, 2012, he complained of his hands shaking. He also complained of right thumb numbness and pain and locking in his left little finger. The doctor noted Petitioner was awaiting approval of additional therapy visits. He again released Petitioner to full duty. PX 3.

On September 18, 2012, Dr. Ramsey noted that Petitioner was still awaiting approval of additional therapy. Petitioner complained of locking in his left small finger and, recently, in his right thumb. The doctor was unable to detect clicking or locking on right thumb examination. He prescribed Daypro and instructed Petitioner to resume therapy as soon as he obtained approval. He again released Petitioner to full duty. PX 3.

Petitioner returned to Dr. Ramsey on September 25, 2012, earlier than scheduled "due to pain." Petitioner complained of aching in his left arm and locking in his left small finger and right thumb. On examination, the doctor noted minimal swelling of the right thumb, no noticeable locking of the right thumb, swelling and locking of the left small finger at the MP joint and "sub-optimal" left hand grip. Dr. Ramsey recommended a hand surgery consultation. He imposed restrictions of no shoveling, no lifting with the right hand and no weed whacking. PX 3.

Petitioner testified his supervisor forwarded Dr. Ramsey's restrictions to workers' compensation, at which point Petitioner was taken off work.

Petitioner returned to Dr. Ramsey on October 2, 2012 and indicated he had heard nothing about the recommended therapy. Petitioner also reported having been "sent home by his supervisor due to his inability to do his work." The doctor prescribed Daypro and again instructed Petitioner to resume therapy as soon as he obtained approval. He kept Petitioner off work and referred him to Dr. Sagerman for a possible injection to the left small finger. PX 3. There is no evidence indicating that Petitioner ever saw Dr. Sagerman.

On October 16, 2012, Dr. Ramsey again instructed Petitioner to remain off work. He completed a form stating: "needs to see orthopedist; needs therapy." PX 3. Petitioner testified he was unaware that Dr. Ramsey wanted him to see a hand surgeon. He did not return to Dr. Ramsey after October 16, 2012.

At Respondent's request, Petitioner saw Dr. Vender, a hand surgeon, for a Section 12 examination on December 3, 2012. In his report of December 4, 2012, Dr. Vender noted that Petitioner's past history was significant for a right thumb injury, consisting of a distal phalanx fracture and laceration, in February of 2008 and a right small trigger finger release in May of 2009. He noted that Petitioner complained of pain and numbness in his right thumb metacarpal-phalangeal joint and triggering of the left small finger.

On examination, Dr. Vender noted that the right thumb A-1 pulley area was very tender to palpation. He also noted a mild nail deformity in the right thumb, mild decreased flexion of the right thumb and decreased extension of the right thumb. Right wrist motion was 65/60 compared with 60/60 on the left. On left small finger examination, Dr. Vender noted tenderness of the small A-1 pulley area and active locking with range of motion.

Dr. Vender obtained X-rays of both hands and the right thumb. He described the hand X-rays as within normal limits. The right thumb X-ray showed "what appears to be residuals of a previous distal radius fracture" and "deformity of the thumb metacarpal head, consistent with degenerative change." He diagnosed flexor stenosing tenosynovitis of the right thumb and left small finger. He did not believe that Petitioner showed evidence of carpal tunnel syndrome.

Dr. Vender addressed the etiology of Petitioner's symptoms as follows:

> "Mr. Gale has a previous history of an injury to the right thumb. It is not clear how soon after this injury his flexor stenosing tenosynovitis of the thumb occurred. Injuries to the thumb can lead to flexor stenosing tenosynovitis. Mr. Gale describes his work activities as a lead working foreman for the Illinois Department of Transportation. He describes a significant portion of his activities as working along expressways, either pulling weeds or utilizing a weed whacker. If Mr. Gale's job activities truly involve forceful grasping in the way of either persistent pulling of weeds or handling equipment, this could contribute to the development of flexor stenosing tenosynovitis."

Dr. Vender indicated Petitioner "has not reached maximum medical improvement." He indicated Petitioner could benefit from injections but described surgery as the "definitive treatment." He found Petitioner capable of working but recommended he avoid activities involving repeated forceful gripping, including heavy lifting, gripping or grasping. RX 1.

Petitioner testified he felt comfortable with Dr. Vender. The doctor thoroughly checked his hands.

On December 27, 2012, Petitioner saw Dr. Nam, an orthopedic surgeon. Records in evidence reflect Petitioner previously saw Dr. Nam for triggering of his right small finger, with the doctor performing a trigger release on May 19, 2009 and releasing Petitioner to full duty on August 12, 2009. PX 5.

In his note of December 27, 2012, Dr. Nam described the prior surgery and full duty release. He indicated that, for several months prior to early July 2012, Petitioner spent much of his time at work operating a "weed whacker" and pulling weeds. He noted that, in early July 2012, Petitioner "started developing left hand fifth finger triggering and locking as well as right thumb swelling and triggering and locking." He noted that Petitioner denied any specific trauma. He also noted that Petitioner had undergone physical therapy "without any benefit."

On left small finger examination, Dr. Nam noted tenderness along the A1 pulley reproducing Petitioner's pain and triggering. On right thumb examination, Dr. Nam noted some soft tissue swelling along the MCP joint with some fullness and tenderness. He indicated that most of Petitioner's pain seemed to be along the A1 pulley of the right thumb "with some reproduction of triggering along the IP joint."

Dr. Nam diagnosed "trigger finger" of the left small finger and right thumb. He injected cortisone into Petitioner's left small finger along the A1 pulley and instructed Petitioner to stay off work and return to him in one week. PX 5.

Petitioner next saw Dr. Nam on January 3, 2013. On that date, the doctor obtained bilateral hand X-rays and injected cortisone into Petitioner's right thumb. He instructed Petitioner to remain off work. PX 5.

At the next visit, on January 10, 2013, Petitioner told Dr. Nam he was mainly having problems with his left small finger. The doctor again noted triggering of that finger on examination. Based on the duration of symptoms, the doctor recommended a surgical release. He instructed Petitioner to stay off work. PX 5.

On January 16, 2013, Dr. Nam's nurse sent a facsimile to Debra Michaud, R.N., a medical case manager for the State of Illinois, seeking approval of a left small finger trigger release which was, at that point, scheduled for February 2, 2013. PX 5.

Petitioner returned to Dr. Nam on February 11, March 11, April 8, May 6 and June 3, 2013. At all of those visits, the doctor noted that Petitioner was awaiting approval of the recommended surgery and was still experiencing triggering and locking of his left small finger. The doctor kept Petitioner off work during this period, pending approval of the surgery. PX 5.

On May 10, 2013, Petitioner filed petitions pursuant to Sections 19(b) and 8(a), along with a petition for penalties and fees. PX 2.

On May 9, 2013, Respondent's counsel sent Dr. Vender a letter and coded timecard reports covering Petitioner's work activities from May 2012 through September 2012. Respondent's counsel informed Dr. Vender that Petitioner reported performing four hours of work coded "442," or mowing by hand, in May of 2012, thirty-six hours of mowing by hand in June of 2012, four hours of mowing by hand in July of 2012, thirty-two hours of hand mowing in August 2012 and no hours of hand mowing in September 2012. She asked the doctor to clarify "whether the amount of hand mowing or any other job duties are sufficient to contribute to the development of flexor stenosing tenosynovitis." She also asked the doctor to specify which job activities other than hand mowing could contribute to the development of this condition. On June 4, 2013, Dr. Vender responded as follows to Respondent's counsel's inquiry:

> "As I discussed in my December 4, 2012 report, Mr. Gale reported performing forceful activities involving his hands. The information provided indicates that Mr. Gale performed only very limited activities that may be considered forceful, such as hand mowing. The limited exposure would not contribute to the development of flexor stenosing tenosynovitis."

RX 2.

On June 13, 2013, Respondent filed responses to Petitioner's 19(b) petition and petition for penalties and fees. In its 19(b) response, Respondent agreed that it employed Petitioner on the alleged date of accident and that Petitioner underwent treatment with a provider of Respondent's selection. Respondent moved to strike the 19(b) petition, alleging, inter alia, that Petitioner failed to provide his medical bills and failed to state when and under what circumstances his injury occurred. Respondent indicated it was awaiting further information from Dr. Vender on the issue of causal connection. RX 3.

In addition to the exhibits previously summarized, Petitioner offered into evidence fee schedule analyses of the bills from WorkRight and Dr. Nam. PX 4, 6. Respondent did not stipulate to the analyses but did not raise any objection to the reasonableness or necessity of the underlying treatment.

Petitioner testified his hand symptoms have not really changed. When he wakes up, he experiences severe, "arthritis type" locking of his fingers. As he begins to move around, the locking sensation improves. He wants to undergo the surgery that has been recommended. He

did not injure his left hand before July 17, 2012. He has not re-injured either hand since July 17, 2012.

Petitioner testifies he "codes" his work activities on time cards. The codes are listed in PX 7. Petitioner emphasized that machine mowing is accompanied by weed whacking. When a tractor goes out, a weed whacker goes out as well. He used the machine mowing code even though he does not perform mowing. He did this because the timekeeper who handled payroll wanted to avoid excess paperwork. It is possible to put more than one code on a time card but, as a practical matter, he did not do this. It was only when his entire crew spent the day weed whacking that he used a different code, denoting shrub removal.

Petitioner testified that when he worked in temperate weather following his 2004 promotion, he spent 60 to 80% of his time weed whacking. He characterized this activity as his "health club."

Under cross-examination, Petitioner testified that a lead worker is not a foreman in that his activities are not confined to supervision. As a lead worker, he works, leading by example. In the winter, he and his crew perform snow and ice removal, barricade cleaning and graffiti removal. He does not perform any weed whacking in the winter but he sometimes uses gas-operated and hand saws to cut down trees. He begins weed whacking as early as March, if the weather allows. In the summer, he oversees smaller crews composed of three or four men. He assigns one of these men to operate the mower. The mower is out in front of everyone. He cannot mow because, as the lead worker, he needs to be able to observe what the other men are doing. The timekeeper is not on his crew. He completes the time cards each day and gives them to the timekeeper. The timekeeper enters the codes and hours in the computer. It is those entries that generate paychecks.

Petitioner testified his right thumb locks and his right index, middle and ring fingers are numb. His right small finger is okay. His left small finger locks and his left index, middle and ring fingers are numb. His left thumb is okay.

Petitioner testified he does not perform seeding or sodding. He used to use a jackhammer to perform road repairs but has not performed this activity for two or three years, barring an emergency.

On redirect, Petitioner testified he uses the code "440" to denote weed whacking. He does not use the code "441" because that code refers to platform maintenance, an activity he does not perform. He uses the code "442" if everyone on his crew spends the day weed whacking. The code "443" refers to operation of a mowing machine. PX 7. He testified there would be a "union issue" if he hopped on a gas-operated mowing machine and operated it. He can only operate a mowing machine if a machine operator gets sick and the machine has to be moved on an emergency basis. This did not happen during the last two years. When it was not winter, he spent more time weed whacking than doing anything else.

Michael LaBree testified on behalf of Respondent. LaBree testified he has worked as an information analyst in Respondent's maintenance bureau for ten years. Prior to that, he worked as a "yard tech" for Respondent. As an information analyst, he analyzes activities performed by work crews. The computer program he uses is a 1986 Doss system that uses "MMI" codes to define various work functions and types of time off. The system generates time cards. It is the "yard techs" and "lead lead workers" who designate codes. In terms of seniority, a "lead lead worker" is below a "yard tech" and above a "lead worker." Various codes have been added over time, as work activities have evolved. The "yard techs" review time cards prepared by others. When asked whether there was "room for error" in using the codes, LaBree answered "yes." The time cards "justify pay." The State of Illinois maintains the time cards in the ordinary course of business.

LaBree testified that the documents in RX 2 include a print-out of codes and some of Petitioner's timecard reports. The timecard reports shows Petitioner's job title ["highway maintenance lead worker"], the date, the coded work activity Petitioner performed on that date and the hours Petitioner spent performing that activity. [RX 2 contains reports for May through September 2012. In May of 2012, the reports reflect four hours of work coded "442" and twenty-two hours of work coded "443." In June of 2012, the reports reflect thirty-six hours of work coded "442" and seventy hours of work coded "443." The records covering the period July 2, 2012 through the alleged manifestation date, July 17, 2012, reflect eight hours of work coded "442" and thirty-six hours of work coded "443."]

Under cross-examination, LaBree testified he has no formal training in accounting. He does not account for the equipment used by the work crews. Documents entitled "work accomplishment records" reflect usage of machines such as tractors and tools such as weed whackers. A weed whacker has a specific equipment code. A person who completes time cards can use as many forms as necessary. No data is 100% accurate. All of the training he underwent took place at Respondent. The system he uses was designed specifically for the needs of the maintenance department.

CONT'D

Arbitrator's Credibility Assessment

Petitioner came across as a hard-working, honest individual. The fact that Respondent employs him in a "lead" or supervisory capacity enhances his credibility.

While Petitioner had some difficulty recalling the code numbers that correlated with certain work activities, he made it clear that the mowing machine never went out alone. Machine mowing was always accompanied by weed whacking and it was he who performed the latter. The Arbitrator finds credible Petitioner's testimony that he drove the mower only in the event of an emergency and that, between early spring and late fall, he spent much of his time "weed whacking" and manually pulling weeds.

Respondent's witness, Michael LaBree, was also credible but his testimony centered primarily on the codes assigned to various maintenance department work activities. LaBree is an information analyst who neither worked with, nor supervised, Petitioner. He readily acknowledged that the coding was subject to error. His testimony did not contribute to the Arbitrator's understanding of Petitioner's actual duties.

Did Petitioner sustain a work accident arising out of and in the course of his employment?

The Arbitrator finds that Petitioner met his burden of proof on the issue of accident. Based on Petitioner's credible testimony that he focused primarily on "weed whacking," continued working despite increasing symptoms and reported hand problems on July 17, 2012 because he "couldn't take it anymore," the Arbitrator views this claim as involving repetitive rather than specific trauma.

In defending this claim, Respondent elected to focus primarily on the timecard reports. What matters to the Arbitrator, however, is what Petitioner actually did, work-wise, rather than what codes he used. Respondent's supervisor, Jack Neven, indicated in his report of July 17, 2012 that Petitioner's injury stemmed from "weed whacking" and that "weed whacking" was an activity within the course and scope of Petitioner's employment. RX 4. Petitioner credibly explained that union regulations prevented him from driving a mower. He could only operate a mower in the event of an emergency. He also explained that generally only one weed whacker was available and that it was he who tended to operate this device. The device vibrated and could only be operated if the switch was depressed. Petitioner alternated hands while using the device. He used one hand to depress the switch and the other to "steer" the device. Petitioner further explained that, when completing timecards, he generally avoided using multiple codes, in an effort to adhere to Respondent's timekeeper's request to keep things simple.

The Arbitrator further finds that Petitioner established a causal connection between his repetitive work duties and his bilateral hand condition of ill-being. In so finding, the Arbitrator relies not only on Petitioner's credible testimony but also on the consistent histories set forth in his treatment records and Dr. Vender's initial report. In particular, the Arbitrator notes that Dr. Ramsey, a physician affiliated with a clinic of Respondent's selection, cautioned Petitioner against weed whacking and eventually took Petitioner off work pending approval of therapy. PX 3.

In his first report, Dr. Vender opined that the kind of work activities Petitioner described, i.e., operating a weed whacker and manually pulling weeds, were sufficiently forceful to contribute to the development of flexor stenosing tenosynovitis. RX 1. The Arbitrator assigns no weight to the opinions Dr. Vender expressed in his second report (RX 2) because those opinions are premised solely on coded timecard reports, some of which post-date July 17, 2012. As stated above, the Arbitrator opts to rely on Petitioner's testimony rather than the reports in determining the actual nature of Petitioner's duties. No one who actually worked alongside Petitioner refuted his account of those duties. In fact, the supervisor's and witness reports in evidence (RX 4) confirm that Petitioner related his hand complaints to operating a weed whacker or weed "whip."

Based on the weight of the credible evidence, the Arbitrator finds that Petitioner established both repetitive trauma and causal connection.

Is Petitioner entitled to temporary total disability benefits?

The Arbitrator finds that Petitioner was temporarily totally disabled from September 26, 2012, the day after Dr. Ramsey of WorkRight imposed restrictions and recommended Petitioner see a hand surgeon, through June 26, 2013, the date of hearing. The Request for Hearing form reflects that this period is equivalent to 30 3/7 weeks but it is in fact equivalent to 274 days, or 39 1/7 weeks.

In making this finding, the Arbitrator relies on Dr. Ramsey's note of September 25, 2012 and the following: 1) the fact that Dr. Ramsey is a physician affiliated with a clinic of Respondent's selection; 2) Petitioner's credible testimony that he presented Dr. Ramsey's restrictions to Respondent; 3) Dr. Ramsey's subsequent note of October 2, 2012, reflecting that Petitioner was sent home by his supervisor since there was no work he could perform; 4) the fact Dr. Ramsey instructed Petitioner to stay off work on October 2 and 16, 2012; 5) Dr. Vender's finding of December 3, 2012 that Petitioner was not at maximum medical improvement and required restrictions; and 6) Dr. Nam's subsequent notes, keeping Petitioner off work pending surgery.

Is Petitioner entitled to medical expenses?

Petitioner claims fee schedule charges associated with the care rendered by WorkRight Occupational and Chicago Orthopaedics/Dr. Nam. Those charges total $3,784.92 ($2,576.69 for WorkRight plus $1,208.23 for Dr. Nam.

Having found in Petitioner's favor on the issues of accident and causation, and noting that Respondent did not offer any alternative fee schedule analysis or raise any objection as to reasonableness or necessity, the Arbitrator awards Petitioner fee schedule charges totaling $3,784.92.

Is Petitioner entitled to prospective care?

Petitioner testified he continues to experience "locking" of his left small finger, for which Dr. Nam has recommended surgery. Having found in Petitioner's favor on the issues of accident and causation, and noting that Respondent's examiner, Dr. Vender, described surgery as the "definitive treatment" for Petitioner's condition, i.e., flexor stenosing tenosynovitis (RX 1), the Arbitrator awards prospective care in the form of the left small finger trigger finger release recommended by Dr. Nam.

Is Respondent liable for penalties and fees?

Petitioner seeks an award of penalties and fees on both unpaid temporary total disability benefits and unpaid fee schedule charges. Petitioner maintains that Respondent acted unreasonably in denying this claim, given Dr. Ramsey's findings and recommendations and the causation-related opinions Dr. Vender voiced in his initial report. Petitioner further maintains that Respondent acted unfairly in soliciting "new" opinions from Dr. Vender based on the coded timecard reports and "flip-flopped" immediately prior to trial by taking the issue of notice out of dispute.

Respondent argues that it acted in good faith in supplying Petitioner's timecard reports to Dr. Vender and asking the doctor to revisit the issue of causation based on the work activity codes set forth in those reports. Respondent also argues that it would be inappropriate for the Arbitrator to award penalties and fees, given the State's current financial crisis. RX 3.

The Arbitrator notes that the burden of proof shifts to the employer when penalties and fees are at stake. Once a demand for payment is made, it is up to the employer to show that it acted in an objectively reasonable manner, under all of the existing circumstances, in denying, or delaying the payment of, benefits. Crockett v. Industrial Commission, 218 Ill.App.3d 116, 121 (1st Dist. 1991).

The Arbitrator finds that Respondent failed to meet its burden of proof in this case. The coded timecards are but one small piece of a large puzzle. Respondent had the means of

determining whether the codes set forth in the timecards accurately described Petitioner's duties. Respondent's own exhibit (RX 4) shows that Petitioner attributed his symptoms to weed whacking and that Petitioner's supervisor, Jack Neven, described weed whacking as an activity "within the course and scope of" Petitioner's employment. Respondent did not call Neven or any of Petitioner's team members to refute Petitioner's claim that he primarily performed weed whacking and did not drive the mower, barring an emergency. Dr. Ramsey, a physician of Respondent's selection, instructed Petitioner to avoid the very activity that Respondent claims Petitioner did very little of.

The Arbitrator is mindful of the State's financial situation. The Arbitrator is also aware that Section 19(k) penalties and fees are discretionary in nature while Section 19(l) penalties are akin to non-discretionary "late fees." McMahan v. Industrial Commission, 183 Ill.2d 499, 515-6 (1998). The Arbitrator awards Section 19(l) penalties at the rate of $30.00 per day and in the amount of $7,590.00 based on the 253-day delay in payment between Petitioner's last visit to WorkRight on October 16, 2012 and the hearing of June 26, 2013. The Arbitrator cannot divine any reason why Respondent would not have paid WorkRight's charges. WorkRight is a facility of Respondent's selection. WorkRight's itemized bill identifies Respondent as the "account" for which it provided treatment. PX 3. Dr. Ramsey of WorkRight recommended care and instructed Petitioner to avoid weed whacking. Respondent's examiner took no issue with the treatment WorkRight rendered and Respondent raised no objection as to reasonableness or necessity. An award of Section 19(l) penalties is mandated.

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

Anita Ingold,

Petitioner,

vs.

Nos. 07 WC040038
07 WC010554

American Airlines,

14IWCC0619

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to an order of remand from the Appellate Court, Second District, Workers' Compensation Division. In accordance with the order of the Appellate Court entered on March 11, 2013 affirming the Commission's determination that the Petitioner's injuries were causally related to her employment, that the Petitioner was entitled to TTD benefits and that the award of medical was reasonable the Commission now considers the specific issues of what medical bills the Commission awarded the Petitioner and what credits the Respondent was entitled to receive.

Petitioner was a 42 year flight attendant who was married with 2 dependent children. She had been employed as a flight attendant since 1984. Petitioner's medical history was complicated by a diagnosis of reflex sympathetic dystrophy (hereinafter RSD) which was first made in 1994 following a fracture to her right ankle. In the intervening years Petitioner experienced intermittent flare ups of the RSD related to various precipitating events i.e. herpes zoster, wasp sting and a dog bite.

Petitioner first filed a workers' compensation claim for an injury suffered January 8, 2006 while working for the Respondent which resulted in an award of temporary total disability (TTD) benefits from January 12, 2006 through January 26, 2006. Claimant experienced pain, burning and swelling from the injury to her ankles which caused her miss a short period from work.

On March 1, 2007 Petitioner was working a flight returning from Manchester, England. A passenger bumped into her while she pushed a meal service cart causing her legs to get twisted under the 175- lb. cart. Petitioner testified that she experienced "extreme pain" and that she did not work the rest of the flight. She testified that she fell in the middle of the aisle and that "the cart just kept rolling over the top of my legs," and that both legs were under the cart.

When the injury occurred Petitioner elevated her legs and applied ice as she had been instructed previously by her neurologist, Dr. Herman Dick, M.D. Dr. Dick had previously treated Petitioner for flare ups of her RSD. On her return to Chicago she immediately went to her primary care physician, Dr. Phoebe Panaopio, M.D. who made a referral to Dr. Keller, an orthopedist. Petitioner also subsequently followed up with Dr. Dick.

Petitioner eventually came under the care of Dr. Ji Li, a pain specialist who has managed her medications, administered injections and provided a spinal cord stimulator to assist in pain management. She has not returned to work since the accident. She presently receives Medicare and Social Security Disability. At the time of trial Petitioner was being treated by Dr.Li.

At trial the Petitioner introduced into evidence Petitioner's Exhibit 20, a list of medical bills incurred by the Petitioner totaling $225,549.49. The Arbitrator awarded the full amount. Subsequently, the Respondent filed an appeal to the Commission raising among other issues not relevant to this remand, the amount of the medical expense awarded at arbitration.

The Commission on August 30, 2010 modified the Arbitrator's award of medical in case number 07 WC 010554 and reduced the award from $225,549.49 to the sum of $100,768.10. This modification reflected the exclusion of bills arising from unrelated medical conditions including, chest pain, gastric issues and recurrent cellulitis. The Commission found that there was no physician who conclusively stated that the Petitioner's condition of cellulitis was caused by her RSD and therefore ruled it noncompensable. The modification also excludes medical bills from Dr. Dick's treatment of Petitioner extending from October 16, 2006 through September 25,2008 for a peroneal nerve palsy or "drop foot" that was not related to the Petitioner's condition of RSD. The Commission affirmed and adopted the other findings of the Arbitrator.

The Respondent filed a complaint in the Circuit Court on September 27, 2010. The Circuit Court affirmed the Commission's award. The Respondent then filed an appeal to the Appellate Court which affirmed the trial courts findings with respect to liability, temporary total disability and medical bills awarded but remanded the case to the Commission for clarification on what credits the Respondent was entitled to receive.

Exhibit # 20 reflects certain payments for which Respondent seeks a credit pursuant to Section 8 (j) of the Act. Respondent claims a Section 8 (j) credit in the amount of $3,923.00 for payments made to Stephen Doughty M.D. for Infectious Disease Consultations concerning Petitioner's intermittent cellulitis. The Commission however, determined that based on a preponderance of the evidence presented at trial by Petitioner that there was no physician who

testified that the cellulitis was related to Petitioner's condition of RSD and was, therefore not compensable. For that reason and because the medical care rendered was not covered under the Act, Respondent is denied credit under Section 8 (j) 2 of the Act.

Similarly, the Respondent seeks 8 (j) credit for payments made to McLean County Neurology for care rendered from October 18, 2006 through September 25, 2008. The Commission found on appeal that Dr. Dicks' care during this period was for a diagnosis of right peroneal nerve palsy or "drop foot". The testimony elicited from Dr. Dick failed to establish the requisite relationship to the Petitioner's RSD and for that reason the payments totaling $5,650.54 are also denied under Section 8 (j) 1 of the Act.

At the Arbitration the parties stipulated that the "Respondent has credit for any bills that was clearly marked as paid by workers' compensation." The Petitioner stipulated that certain medical bills had already been paid and that the Respondent was entitled to a credit. This stipulation preceded the Commission's concerning the non-compensability of certain medical bills. The Respondent urged the Commission to modify the ruling of the Arbitrator that all bills submitted per Exhibit 20 were related to Petitioner's injury.

Taking into account the stipulation entered into at hearing together with the Commission's subsequent ruling on medical bills that were found to be unrelated the Respondent is hereby entitled to a credit of $93,331.65.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall have a credit of $94,331.65 for amounts paid to or on behalf of Petitioner on account of said work-related accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay to Petitioner the sum of $7,437.35 for medical expenses under Section 8 (a) of the Act related to case number 07 WC 010554.

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $7,500.00.

14IWCC0619

The party commencing this matter for review in the Circuit Court shall file Notice of Intent to File for Review in the Circuit Court.

DATED: JUL 2 8 2014
SJM/msb
o-07/10/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

Juliet Iloanusi,

Petitioner,

vs. NO. 11WC44064
14IWCC0620

Jackson Park Hospital,

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 and Opinion on Review dated July 28, 2014 has 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 July 28, 2014 is hereby vacated and recalled pursuant to Section 19(f) for 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: SEP 12 2014
SM/sj
44

Stephen J. Mathis

11WC44064
14IWCC0620

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Juliet Iloanusi,

Petitioner,

vs.

NO. 11 WC 44064
14IWCC0620

Jackson Park Hospital,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

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

Both parties seek review of the decision. Petitioner claims error on the denial of prospective medical and penalties and fees. Respondent claims error on the rulings concerning causal connection, medical expenses and the temporary total disability range.

The Petitioner is a registered nurse working on the psychiatric unit at Respondent, Jackson Park Hospital. On July 21, 2011 the Petitioner claims injury occurred when she and other staff were attempting to restrain a schizophrenic, mentally ill patient who was threatening another patient. They were attempting to medicate the patient by injection when the patient kicked the Petitioner in the chest and threw her backwards to the floor causing injury to her lower back and right arm and hand.

Prior to the accident Petitioner had no pain or symptoms to her right hand, arm or low back. She went to the Emergency Department following the injury with sharp pain in her low back and aching in her right hand. The pain in her right hand was in her palm, thumb and extending up to her wrist.

She was referred by the corporate health clinic at Jackson Park to Dr. Artelio Watson. Dr. Watson ordered an EMG of her right hand and performed an epidural injection in the Petitioner's lower back. In November, 2011 Dr. Rhode gave her an injection into the carpal tunnel of her right hand and treated her lower back before referring Petitioner to Dr. Rinella in March, 2012.

Dr. Rinella ordered an MRI on her lower back and referred her to Dr. Abusharif for pain management. Dr. Abusharif treated her lower back with injections and ordered physical therapy. Petitioner receives injections every 3 months and they supply relief for about 2 months.

At trial Petitioner testified that she had pain in her right calf and that as of two weeks prior to hearing it has been radiating upwards through the thigh and into the right buttock. The pain is worse when she stands. If she tries to bend down she has a sharp pain in her lower back. At hearing the Petitioner denied another accident since the work injury that caused the pain to now radiate up from her calf. She saw Dr. Rinella and he recommended another MRI for the lower back. Dr. Rinella also recommended X-rays to be done while Petitioner bending forward and backward to determine if movement destabilizes the lower back. Petitioner has pain if she stands more than one or two hours. The pain will then radiate from her back to her right leg. She takes Hydrocodone and Tramadol every 6 hours. Petitioner has never been offered light duty by Jackson Park Hospital.

It is not disputed that the carpal tunnel injury sustained by the Petitioner was the direct result of the July 21, 2011 work accident. It is undisputed that having failed conservative treatment that the carpal tunnel release surgery performed on May 19, 2012 was reasonable and necessary to treat Petitioner's symptoms. It is not disputed that post-operative physical therapy was entirely reasonable and necessary to rehabilitate Petitioner's hand. It is undisputed that the symptoms of de Quervain's syndrome declared themselves during the time that the Petitioner was in therapy following her carpal tunnel surgery. It was noted by Petitioner's treating

physician Dr. Rhode that the de Quervain syndrome was a complication of the necessary physical therapy following the carpal tunnel release.

Dr. Richard Lim M.D., Respondent's Section 12 Examiner performed a medical evaluation on September 28, 2012 (RX3) at which time he diagnosed De Quervain's tenosynovitis. In his report he states: "This does not appear to be a direct result of her injury however (it) may have developed as a result of the therapy being done for her carpal tunnel syndrome." In a preceding paragraph in his report Dr. Lim prefaces his opinions as being "Based upon a reasonable degree of Orthopedic certainty..."

Petitioner underwent surgery for carpal tunnel syndrome and complained of increasing pain with physical therapy. Dr. Rhode diagnosed Petitioner with De Quervain's tenosyovitis. Dr. Rhode did additional surgery to relieve the De Quervain's syndrome on May 14, 2013. The Petitioners pain has improved but remains in the thumb of her right hand. She is right hand dominant. She has had injections in her right thumb subsequent to the surgery.

The case law does not require that Petitioner show a direct relationship between a new injury that occurs in the course of treatment for a work related injury. In *International Harvester Co. v. Industrial Commission 46 Ill2d 49* the Supreme Court cited to *Republic Steel Corp. v. Industrial Commission 26 Ill.2d 32,45* holding:

> "To come within the statute the employee must prove that some act or phase of the employment was a causative factor in the ensuing injury. He need not prove it was the sole causative factor nor even that it was the principal causative factor but only that it was *a* causative factor in the resulting injury."

But for, the directly related carpal tunnel injury and the surgery and the therapy related thereto the de Quervain syndrome would probably not have developed.

The Lim report of February15, 2013 makes the following statement:

> "At this point, the patient should be able to return back to her work as a nurse. She would benefit from being placed into a right wrist splint with thumb extension. She may have difficulties restraining patients if necessary but certainly she should be able to return to work with limited use of her upper extremity."

The Commission finds that the recommendations of Dr. Lim concerning the use of a right wrist splint with thumb extension is not reasonable. Nurses perform multiple functions daily related to patient care that would be impossible wearing a splint on the dominant arm e.g. giving an injection, starting an IV line and restraining an agitated patient to name only a few.

Petitioner is complaining that what is bringing her to trial is her inability to work due to her right hand and her low back. Petitioner wants to return to full-duty at Respondent hospital when she gets better.

The Arbitrator denied prospective medical treatment having found that no prospective medical was prescribed. The August 9, 2013 note by Dr. Anthony Rinella, Illinois Spine & Scoliosis Center, however, recommends Petitioner receive an upright X-Ray of the Lumbar Spine, AP and Lateral views to determine whether there is instability with movement. The decision of the Arbitrator is hereby modified to order payment for this evaluation. In addition, as Petitioner points out in her brief, Dr. Rhode ordered a course of physical therapy on July 31, 2013. The decision of the Arbitrator is hereby modified to authorize the radiology studies and the physical therapy recommended by Drs. Rinella and Rhode and to pay for same.

The Commission hereby denies the Petitioner's claim for penalties and attorney's fees pursuant to Sections 16, 19 (k) and 19 (l) of the Act there being no showing that the conduct of the Respondent was unreasonable and vexatious.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $757.21 per week for a period of 109 6/7th weeks, commencing July 22, 2011 through August 28, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for medical services incurred from July 21, 2011 to August 28, 2013, as provided in Sections 8(a) and 8.2 of the Act. Respondent is to pay any unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule or the negotiated rate and shall provide documentation with regard to said fee schedule or negotiated rate calculations to Petitioner. Respondent is to reimburse Petitioner directly for and out-of-pocket medical payments.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay to Petitioner the costs to perform an upright x-ray of the lumbar spine, AP and lateral views to determine whether there is instability with movement as recommended by Dr. Anthony Rinella on August 9, 2013. Respondent shall also authorize and pay for the cost of the physical therapy recommended by Dr. Rhode for Petitioner's right hand.

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

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

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

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

DATED: SEP 12 2014
SJM/msb
o-6/05/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

ILOANUSI, JULIET
Employee/Petitioner

Case# **11WC044064**

JACKSON PARK HOSPITAL
Employer/Respondent

14IWCC0620

On 11/15/2013, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

4027 ODELSON & STERK
MATTHEW J DALEY
3318 W 95TH ST
EVERGREEN PARK, IL 60805

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)

Juliet Iloanusi
Employee/Petitioner

v.

Jackson Park Hospital
Employer/Respondent

Case #**11** WC **44064**

14IWCC0620

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **August 28, 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: **prospective medical treatment**

FINDINGS

On the date of accident, **July 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 **$40,889.29**; the average weekly wage was **$1135.80**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of **$53,870.06** for TTD, **$0** for TPD, **$0** for maintenance, **$0** for other benefits, and **$4,770.36** for advanced permanent partial disability benefits for a total credit of **$58,640.42**.

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

ORDER

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

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

Respondent shall be given a credit of **$53,870.06** for TTD, **$0** for TPD, **$0** for maintenance, **$0** for other benefits, and **$4,770.36** for advanced permanent partial disability benefits for a total credit of **$58,640.42**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$757.21**/week for **109 6/7^{ths}** weeks, commencing **July 22, 2011** through **August 28, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **July 22, 2011** through **August 28, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$53,870.06** for temporary total disability benefits that have been paid and **$4,770.36** for advanced permanent partial disability benefits that have been paid.

Respondent shall pay for medical services incurred from **July 21, 2011** to **August 28, 2013** only, as provided in Section 8(a) of the Act. Respondent is to pay any unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule or the negotiated rate and shall provide documentation with regard to said fee schedule or negotiated rate calculations to Petitioner. Respondent is to reimburse Petitioner directly for any out-of-pocket medical payments.

Petitioner's claim for penalties and attorneys fees is denied, because Respondent's disputes are reasonable.

Petitioner's claim for prospective medical treatment is denied, because no medical treatment has been prescribed.

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

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

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

Signature of Arbitrator

November 14, 2013
Date

NOV 15 2013

ICArbDec19(b)

FACTS

Petitioner is a registered nurse. At the time of her injury she was working in the mental health unit of Respondent hospital. Her duties included making hourly rounds, administering medications, and ensuring patients' safety. Rounds would take about 30 minutes. The time between rounds were used to complete paperwork. Three times per shift she would take medication in a cart to the patients. Petitioner testified that the cart felt like it weighed about 20 pounds and was difficult to push, even with both hands

Petitioner testified that she worked 12 hour shifts three days per week. Petitioner testified that overtime was offered five days a week and that she could say yes or no to the offer of overtime. Petitioner testified that if someone did not come in after her shift to replace her, then she was required to stay beyond her shift, which would occur three times per week. Petitioner testified that there were state inspections twice a year, requiring her to work an extra and mandatory 12 hour shift.

Petitioner testified that she was injured on July 21, 2011 when an agitated paranoid schizophrenic patient was threatening to kill another patient. A coworker put the agitated patient on the floor to restrain her. Petitioner was holding onto both legs of the patient. Another nurse was attempting to inject a sedative. The agitated patient flipped a leg and kicked Petitioner in the chest. Petitioner then fell backwards landing on her back and her

outstretched right hand. Petitioner testified that she experienced immediate low back pain and right hand pain. Petitioner testified that she had no prior low back pain or right hand pain.

Petitioner went to the hospital emergency room and received treatment at Health Benefits Pain Management. Medical treatment included two lumbar epidural steroid injections, a lumbar spine MRI, and EMG testing. The EMG revealed right hand carpal tunnel syndrome. Petitioner's symptoms persisted.

Petitioner then sought treatment with Dr. Blair Rhode of Orland Park Orthopedics. She received a wrist injection and was ordered off of duty. Dr. Rhode diagnosed right hand carpal tunnel syndrome and provided a cortisone injection into the right carpal tunnel. Dr. Rhode referred Petitioner to Dr. Anthony Rinella for her low back pain.

Dr. Rhode performed an endoscopic right carpal tunnel release. Thereafter, Petitioner began postsurgical physical therapy. Dr. Rhode noted that Petitioner had a small nodule over the lateral aspect of her wrist, which Petitioner stated was subsequent to therapy. Dr. Rhode recommended conservative treatment, however Petitioner's symptoms persisted. Dr. Rhode ultimately diagnosed de Quervain's syndrome and provided an injection. Thereafter, Dr. Rhode recommended a surgical de Quervain's release. Dr. Rhode noted that the symptoms were secondary to an injury while at work.

Dr. Rinella examined Petitioner. He noted that a prior lumbar spine MRI of October 11, 2011 was of very poor quality. Dr. Rinella ordered a new lumbar spine MRI, a lumbar spine CT, and a cervical spine MRI. The lumbar spine MRI was unremarkable. The CT scan showed prominent sclerosis involving the iliac portion into a lesser degree the inferior sacral portion of the spine. The cervical spine MRI showed disc protrusions at C3 – C4 and C4 – C5 resulting in mild central stenosis as well as hypointense structure posterior to C4 which likely represented focal thickening and/or ossification of the posterior longitudinal ligament resulting in additional mild central stenosis posterior to the C4 central body. Dr. Rinella referred Petitioner to Dr. Faris Abusharif for low back pain management.

Dr. Abushariff examined Petitioner. He ordered physical therapy and administered epidural low back injections. The injections alleviated the pain, but the symptoms returned. After initiating physical therapy, Petitioner developed the painful bump on the back of her wrist and was diagnosed with the de Quervain's syndrome. Dr. Abushariff recommended a back brace. Petitioner was eventually discharged from physical therapy.

Dr. Richard Lim examined Petitioner on three occasions at Respondent's request. In his first report, Dr. Lim opined that Dr. Lim opined Petitioner sustained a work-related lumbar strain and right-sided carpal tunnel. In his second report, Dr. Lim opined that Petitioner was overreacting to pain symptoms, that the lumbar strain should have been resolved, and that the de Quervains syndrome was not a direct result of her injury but may

have developed as a result of carpal tunnel syndrome therapy. In his third report, Dr. Lim opined that Petitioner's de Quervains syndrome was not a direct result of her injury and that she should be able to return to work with limited use of the right upper extremity.

Petitioner testified that she continues to have symptoms related to her de Quervain's and low back injuries. Petitioner testified that she is unable to work due to her pain. Petitioner testified that she is capable of standing for 1 to 2 hours without pain. Petitioner testified that there is severe aching and pain in the webbing between her right thumb and right forefinger. She has never returned to work. She claims continuing temporary total disability benefits. Respondent claims that liability for temporary total disability benefits should paid be through March 2, 2013 and not thereafter.

Michelle Pope testified for Respondent. She testified that she is Respondent's recruitment manager and that she is responsible for the hiring of staff except physicians. She testified that overtime is not mandatory, that employees must get pre-approval to work overtime, that employees are not penalized for refusing overtime, and that nurses are not required to work overtime for state inspections.

CAUSATION

The parties are in agreement that Petitioner's low back injury and right carpal tunnel syndrome injury are related the incident of July 21, 2011.

What is in dispute is whether or not Petitioner's de Quervains tenosynovitis are related the incident of July 21, 2011. The Arbitrator finds that it is. This finding is based upon Petitioner's testimony, the corroborating medical records, the sequence of events following the original injuries, and the consistent medical opinions. The Arbitrator notes that Dr. Lim opined that Petitioner's injury but may have developed as a result of carpal tunnel syndrome therapy and that Petitioner should be able to return to work with limited use of the right upper extremity.

Respondent further disputes Petitioner's claim that her low back injury prevents her returning to work. The Arbitrator finds that this dispute is well taken. Petitioner testified that she is capable of standing for 1 to 2 hours without pain. The Arbitrator notes that Dr. Lim opined that Petitioner was overreacting to pain symptoms.

EARNINGS

Petitioner testified that overtime was offered five days a week and that she could say yes or no to the offer of overtime. Petitioner testified that if someone did not come in after her shift to replace her, then she was

required to stay beyond her shift, which would occur three times per week. Petitioner testified that there were state inspections twice a year, requiring her to work an extra and mandatory 12 hour shift.

Michelle Pope testified that that overtime is not mandatory, that employees must get pre-approval to work overtime, that employees are not penalized for refusing overtime, and that nurses are not required to work overtime for state inspections.

Michelle Pope was extremely credible. She essentially contradicted Petitioner's testimony on the issue of earnings. Petitioner's testimony regarding overtime was not credible.

Therefore, Petitioner's claimed average weekly wage is denied, and Respondent's claimed average weekly wage is granted.

MEDICAL

Petitioner claims numerous unpaid medical bills (AX1). Petitioner does not allege what amount, if any, has been paid. Petitioner has submitted reams of medical bills (PX8). Petitioner's proposed findings allege that the total medical claim is $110,354.30. Respondent claims that it is not liable for certain bills incurred subsequent to February 27, 2013 because, Respondent claims, those bills are not related, not reasonable, and not necessary (AX1). Respondent has submitted a computerized printout of certain medical and other payments (RX6).

The Arbitrator finds that the medical bills incurred thus far are reasonable, necessary, and related. The Arbitrator bases this finding on the treating medical records and upon the medical opinions of the treating physicians. Therefore, the claimed medical bills are awarded.

TEMPORARY TOTAL DISABILITY

Petitioner's physicians have kept her off of work. Dr. Lim has opined that Petitioner should be able to return to work with limited use of the right upper extremity. Petitioner has not been offered work with limited use of the right upper extremity. Therefore she is entitled to the claimed temporary total disability benefits.

PENALTIES AND ATTORNEYS FEES

Respondent has relied on the reasonable opinions of Dr. Lim. Furthermore, Respondent has relied on the credible testimony of Michelle Pope.

Therefore, Petitioner's claims for penalties and attorneys fees are denied.

PROSPECTIVE MEDICAL TREATMENT

Petitioner claims to be entitled to additional unspecified medical treatment for her right hand and her low back. However, Petitioner does not allege that there is a prescription for any specific prospective treatment.

Therefore, Petitioner's claim for unspecified prospective medical treatment is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ken Barilow

Petitioner,

vs.

No. 02 WC 064744

14IWCC0621

American Airlines

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for review having been filed by Respondent and notice given to all parties, the Commission, after considering the issue of the nature and extent of the Petitioner's disability and being advised in the facts and law, affirms with modifications the decision of the Arbitrator as stated below.

Issues concerning the accident and causal connection up though November 19, 2005 were previously adjudicated at the 19 (b) hearing. Following that hearing the Respondent appealed to the Circuit Court. No benefits were paid during that time. The current review arises from Arbitrator Kane's decision following hearing on April 30, 2013.

The Respondent raises multiple issues on review; among them an assertion that the casual connection between the work injury and Petitioner's condition of ill-being concluded on one of several dates i.e. June 26, 2008, when the Petitioner was driving through a construction area and "twisted" his back, on September 27, 2008 when Petitioner fell and fractured his tibia or alternatively as of Section 12 examiner, Dr. Butler's exam of July 15,2009 when Petitioner was deemed to have reached MMI and ready to return to full duty employment per Dr. Butler.

14IWCC0621

The medical records reflect while the Petitioner did report the driving "event" to Dr. Holtan on June 26, 2008 there was no additional treatment, testing or therapy prescribed and Dr. Holtan noted that Petitioner was continuing his ongoing course of physical therapy. In his direct examination the Petitioner denied that he suffered any injury to his back since the work injury. There was no discernible change in Petitioner's medical condition following the event while driving. The finding by the Arbitrator that the incident was not significant to Petitioner's condition following his work injury is further borne out by the fact that there was no medical testimony that linked the incident to any change in Petitioner's back condition. Based upon the foregoing, the finding by the Arbitrator that the driving incident was not significant to Petitioner's low back injury, treatment or recovery is supported by a preponderance of the evidence.

On September 27, 2008 the Petitioner fell on some stairs while leaving his home when he became dizzy from Vicodin which he had been prescribed for his back. He was diagnosed and treated for a tibial fracture and remained on crutches for a number of months. He did not, however, sustain a back injury in the fall according to Dr. Holton, whose testimony the Arbitrator found credible.

Finally, the Respondent offers July 15, 2009,(the date of their Section 12 examiner Dr. Butler's last evaluation of Petitioner) as a date when the causal connection concluded. Dr. Butler opined at that time that the Petitioner reached MMI. Dr. Butler however, is inconsistent in his testimony that, on the one hand, the Petitioner is a "medical disaster" and yet opines that the Petitioner could return to his regular duties as an airline mechanic which includes lifting up to 100 lbs. The Arbitrator highlighted in his opinion that this testimony was not persuasive. In addition, Dr. Butler's comment that the Petitioner's physical deconditioning is unrelated to his work injury seems disingenuous.

In summary, the position taken by the Respondent that there were events and medical conditions that in their totality were sufficient to break the causal connection between the Petitioner's work injury and his current condition of ill-being concerning his back are based on conjecture rather than credible medical opinion are rejected and the Arbitrator's award affirmed.

The analysis applied above is also dispositive of the argument advanced by Respondent that the award of TTD benefits of 225 weeks extending from November 19, 2005 through March 12, 2010 was erroneous due to a lack of causal connection. Therefore, for the reasons stated above the Arbitrators award of TTD benefits of $798.87 per for 225 weeks from November 19, 2005 through March 12, 2010 is affirmed pursuant to Section 8(b) of the Act because the injuries sustained caused the disabled condition of

the Petitioner. The Respondent shall receive a credit for the TTD paid during that period in the amount of $108,199.82

. The Arbitrator awarded medical benefits in the amount of $7,160.39. The Respondent disputes the award based upon certain line items included in the medical bills being related to the Petitioner's fall in his home and not related to the work accident. Respondent specifically cites to a charge of $294.00 on March 26, 2009 from OSF Medical Center that pertains to treatment for Petitioner's knee. Petitioner acknowledges the OSF charge should be excluded from the award as well as a December 12, 2012 charge from Rockford Radiology Associates in the amount of $2.33 and a charge by Forest City Diagnostics in the amount of $5.29.**The corrected award should be modified** to $5,627.69 in unpaid medical expenses and $1,231.08 of unreimbursed medical for a **total of $6,858.77.**

The Respondent asserts error arguing that all of the Petitioner's diagnostics have been reported as normal and that he has a multitude of subjective complaints unsupported by objective findings. The evidence however also shows that the Petitioner has undergone a very prolonged course of conservative medical treatment which has included many courses of physical therapy, work hardening and medication. There has never been any suggestion in the records that there was any symptom magnification or inconsistency in the symptoms reported. The records from physical therapy support that the Petitioner has been faithful in his attendance and consistently hard working despite pain.

The Arbitrator found the Petitioner credible in his testimony. The Arbitrator similarly remarked that Dr. Holtan was a credible witness. Dr. Holtan testified that the Petitioner is now 52 years old. He is restricted in his activities of daily living. For example he has difficulty with light housekeeping, driving longer than 15 minutes because of his pain, he ambulates with the assistance of a cane, he takes as many as 5 Vocodin per day to manage his pain and also takes SSRI's as part of his pain management regime. He suffers from sleep interruption due to his pain. He has suffered a loss of trade.

.

The Arbitrator found that the Petitioner is partially incapacitated in his usual and customary employment and has sustained a loss of 40% loss of the use of the person as a whole. In light of the persistence, pervasiveness and severity of the Petitioner's symptoms despite repeated courses of physical therapy and despite the best efforts of the Petitioner to improve his situation the testimony of Dr. Holtan is that the Petitioner has regressed. Dr. Butler also recognized a decline in Petitioner's medical condition. The

Arbitrator's award of 40% of the person as a whole should be affirmed as it is supported by the medical records as well as the testimony of Dr. Holtan.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on May 17, 2013 is hereby affirmed and modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total benefits of $798.87 per week for 225 weeks from November 19, 2005 through March 12, 2010 provided in Section 8 (b) of the Act because the injuries sustained caused the disabling condition of the Petitioner. Respondent shall pay Petitioner permanent partial disability benefits under Section 8 (d) 2 of the Act in the amount of $534.16 per week for 200 weeks for a 40% loss of the man as a whole. Respondent shall be given a credit of $108,199.82 for TTD, $0 for TPD and $0 for maintenance for a total credit of $108,188.82

IT IS FURTHER ORDERED BY THE COMMISSION the decision of the Arbitrator is modified from an award of $7,160.39 in medical expenses and that Respondent shall pay to the Petitioner the sum of $6,585.77 in unpaid and unreimbursed medical expenses.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay to the Petitioner interest under Section 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.

IT IS FURTHER ORDERED BY THE COMMISSION that bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at $6,700.00. 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 the Circuit Court.

JUL 28 2014

DATED:
SJM/msb
o-05/08/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF HENRY)

☐ 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

Joseph Fox

Petitioner,

vs.

NO. 10 WC 035842

SOI-Dixon Correctional Center,

14IWCC0622

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issue(s) of causal connection, medical expenses, temporary total disability, nature and extent, and the award 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.

The Petitioner filed an Application for Adjustment of Claim indicating that he had suffered an injury to his lower back and person as a whole while working as a Correctional Officer at Dixon Correction Center on September 12,2010. He filed an Application for Adjustment of Claim on September 15, 2010. The Petitioner has worked as a Correctional Officer for Respondent since September 2010. He was 25 years of age.

The accident was not disputed. The Petitioner experienced a pinch and extreme pain on the left side of his back while placing a property box on a shelf. The box was 3 feet long and weighed 10 to 30 lbs. Petitioner testified that he squatted to his knees to pick up the box and then stood up and twisted to the left to put the box on a shelf.

The Petitioner testified that he was a weightlifter and that prior to the work accident he

had a weightlifting incident where he felt discomfort in his hips and left knee while "deadlifting" a 100 lb. weighted bar from the ground. This episode required chiropractic care and treatment with Petitioner's primary care physician. These records were not submitted as exhibits at trial.

On the date of the work related accident Petitioner was seen at the emergency room and was referred to his primary care physician. His primary care physician, Dr. Lucansik referred him to occupational health. The Petitioner came under the care of Dr. Robert Koogler at St. Margaret's Hospital. The Petitioner first saw him on September 15, 2010. Dr. Koogler diagnosed the Petitioner with improving left lumbar strain and recommended ibuprofen and rest.

On September 20, 2010 the Petitioner followed up again with Dr. Koogler. Dr. Koogler's note indicated that Petitioner was feeling a lot better and had stayed active throughout the weekend with no aggravation of symptoms. Dr. Koogler noted that the Petitioner was in no pain and could return to work full duty, was at maximum medical improvement and with instructions to follow good ergonomic lifting techniques.

On October 28, 2010 the Petitioner returned once again to Dr. Koogler and filled out a Patient Questionaire. In response to the question "when did injury occur?" the Petitioner responded "07/2010". He further indicated that he had an injury that preceded his work-related injury.

Respondent agrees that the Petitioner suffered a work related injury on September 12 ,2010. The pivotal issue on this appeal is whether the Petitioner reached maximum medical improvement on September 20, 2010.

At trial the Petitioner denied having low back problems prior to his work injury. The medical records of the Petitioner contradict this testimony. The Petitioner did not submit the records of the primary care and chiropractic care that he received following his July weight-lifting incident. It appears from the record that it is more likely than not the Petitioner's current back condition is related to a pre-accident weightlifting injury where he lifted over 100 lbs. rather than the work related incident when he lifted a 10-20 lb. box.

There was no expert testimony offered from any of the Petitioner's treating physicians that states that the Petitioner's current condition of ill-being or any back complaints after September 22, 2010 are causally connected to the work accident of September 12, 2010.

The Commission hereby finds that the Petitioner reached maximum medical improvement on September 20, 2010. The Petitioner failed to meet his burden of proof in establishing causal connection to any of the Petitioner's medical treatment or disability after September 20, 2010. The Commission finds that the Petitioner is not entitled to any award of temporary total disability or award of medical expenses beyond September 20, 2010 for the reason that there is no causal connection to the work related accident beyond September 20, 2010 when Dr. Koogler released Petitioner back to full duty work. Specifically, the Commission reverses the Arbitration award of temporary total disability from June 22, 2011 through October 1, 2011in the amount of $8,311.25. The Commission finds that there is no causal relationship to any medical expenses incurred after September 20, 2010. The Commission, for the foregoing

14IWCC0622

reasons reduces the permanent partial disability award made by the Arbitrator of 25% of the person as a whole to 7.5% based upon the medical evidence that the Petitioner sustained a lumbar strain that resolved by September 20,2010.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $0.00 per week for a period of 0 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 $519.45 per week for a period of 37.5 weeks for the reason that the injuries sustained caused 7.5% loss of the person as a whole pursuant to Section 8 (d) (2) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $0 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

JUL 28 2014

DATED:
SJM/msb
o-05-28-14

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

FOX, JOSEPH
Employee/Petitioner

Case# **10WC035842**

ST OF IL DIXON CORRECTIONAL CENTER
Employer/Respondent

14IWCC0622

On 7/18/2012, 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:

2028 JAMES M RIDGE & ASSOC PC
ANDREW BELL
415 N E JEFFERSON AVE
PEORIA, IL 61603

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

0988 ASSISTANT ATTORNEY GENERAL
BRETT D KOLDITZ
500 S SECOND ST
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
201 E MADISON ST SUITE 3C
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 18 2012

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)

COUNTY OF HENRY)

14IWCC0622

☐ 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 (CORRECTED)

JOSEPH FOX
Employee/Petitioner

v.

STATE OF ILLINOIS
DIXON CORRECTIONAL CENTER
Employer/Respondent

Case: **10 WC 35842**

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 Peter Akemann, Arbitrator of the Commission, in the city of Kewanee, on 03/08/2012. 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 THE ARBITRATOR

14IWCC0622

On 09/12/2010, 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 which arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the Petitioner's work related accident of 09/12/2010.

In the year preceding the injury, Petitioner earned $45,019.00; the average weekly wage was $ 865.75.

On the date of accident, Petitioner was 25 years of age, married with no dependent children.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $ 9,482.33 for TTD, $ N/A for TPD, $ N/A for maintenance, and $ N/A for other benefits, for a total credit of $ 9,482.33.

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

ORDERS OF THE ARBITRATOR

Respondent shall pay Petitioner temporary total disability benefits of $ 577.17 per week for 14.4 weeks, commencing 06/22/2011 through and including 10/01/2011, as provided in Section 8(b) of the Act. The Respondent shall receive a credit for any of the awarded sum that it has paid for.

Respondent shall satisfy all reasonable and related unpaid medical bills in accordance with the Workers' Compensation Act's Fee Schedule and/or PPO contractual rate between Respondent and the provider. Respondent may make payments directly to the medical providers and Respondent is entitled to a credit for any bills satisfied by Petitioner's group medical plan.

Respondent shall pay Petitioner permanent partial disability benefits of $519.45 per week for 125 weeks, because the injuries sustained caused the 25% 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 Peter Akemann

June 19, 2012

JUL 18 2012

In support of the Arbitrator's findings under (F) CAUSAL CONNECTION, the Arbitrator finds the following facts:

The parties are in agreement that on September 12, 2010, the Petitioner was placing property boxes into storage. He picked up a three foot long property box which weighed 10-20 pounds, and twisted to the left to place it on a low shelf. The Petitioner testified that he felt sudden pain in his low back and down his left thigh. He immediately approached his command staff, filled out an accident report, and was sent home.

On the day of the accident, Petitioner presented to Perry Memorial Hospital Emergency Room. The note from that date states that it was a recent injury and that it occurred lifting a box at work. (Pet. Ex. 1) The clinical impression was acute low back pain and muscle spasms were noted. He was given pain medications and instructed to follow up with his family doctor. He spoke to his family doctor and was told to go to occupational health.

Petitioner met with Dr. Koogler at occupational health on 9/15/10. Dr. Koogler recorded a history of "left low back pain. The onset was three days ago on 9/12/10 when he picked up a box weighing only 20-30 pounds. At the time he felt a sharp spasm type pain in his left low back. The pain scale on the first day was up to 9 to 10/10 and he went to the Perry Memorial emergency room for evaluation...He was treated with Norco and Norflex. Now three days later the pain scale at rest is down to 4/10 and with activity can go up to 7/10." (Res. Ex. 1)

In the past medical history, Dr. Koogler records a weightlifting incident about 4 or 5 months before the accident. (Res. Ex. 1) The note states that Petitioner saw a chiropractor for a couple of weeks and was better. When asked about this incident, Petitioner stated that he did not have the same type of pain after weightlifting as he did after lifting the box. Moreover, Petitioner said that the pain from the weightlifting was mostly in both of his hips and not his low back as with the incident at work. On objective exam, Dr. Koogler noted tenderness to the L4 to S1 area in the left parspinous region. He noted minimal left sacroiliac joint discomfort. Straight leg raising on the left produced a pulling pain to the upper posterior thigh. Forward flexion to 45 degrees increased pain. (Res. Ex. 1) The Petitioner was diagnosed with a left lumbar strain.

The Petitioner returned to Dr. Koogler on 9/20/10 stating that he was ready to return to work. In October 2010, at the request of Dr. Koogler Petitioner began physical therapy. (Res. Ex. 1) He only attended two visits as it was too painful.

On November 4, 2010, Petitioner presented again to Dr. Koogler and complained of pain in the left SI area, buttocks, and posterior thigh since the lifting injury of 9/12/10. (Pet. Ex. 3) On November 26, 2010, Petitioner underwent an MRI which showed disc desiccation and bulging at L4-L5 and L5-S1 with the most likely etiology for patient's complaint being the L5-S1 disc bulge which is left paramedian in position. (Pet. Ex. 3)

Petitioner returned to Dr. Koogler on November 30, 2010. Dr. Koogler recorded that the Petitioner continued to have pain in the low back and left thigh. Dr. Koogler also stated "the original injury was associated with picking up a box weighing only 20-30 pounds." (Res. Ex. 1) On objective exam, straight leg raise test on the left elicited pain in the low back and left thigh. The Petitioner was referred to a spine surgeon.

The Petitioner met with Dr. Shin, an orthopedic surgeon, who referred Petitioner to Dr. Orteza, a pain management specialist. Dr. Orteza saw Petitioner on 1/7/11 and recorded a history of severe left low back pain with radiation to the left posterior hip and posterior thigh to the knee joint area for four months. (Pet. Ex. 4) He goes on to state that the patient hurt himself while picking up a box and in the process of turning he suddenly felt pain in his left low back which became constant and radiated down the left leg. Dr. Orteza recommended epidural steroid injections. The Petitioner underwent two injections, one on 1/20/11 and again on 2/3/11. On 2/23/11, the Petitioner returned to Dr. Orteza complaining that that the injections provided only temporary relief. (Pet. Ex. 4)

Dr. Shin referred Petitioner to Dr. Dinh, a neurosurgeon. At the time, a request was made for a visit with Dr. Dinh and Dr. Shin's office indicated that it was a workers' compensation injury. (Pet. Ex. 4)

The Petitioner filled out the patient intake form for Dr. Dinh's office and indicated that this is a work injury to his lower back. (Pet. Ex. 4) He first saw Dr. Dinh on 4/27/11. Dr. Dinh recorded a history of Petitioner lifting a 10 pound box on September 15, 2010[sic], and developing immediate back pain to the point of dropping down to the floor. Dr. Dinh ordered a CT with myelogram to determine the involvement of the nerve root.

The CT with myelogram showed left posterolateral L5-S1 disc protrusion of moderate size with apparent truncation of the left S1 nerve root, moderate bilateral L4-L5 lateral recess encroachment, and L5-S1 foraminal encroachment. (Pet. Ex. 4)

Dr. Dinh performed a left L4-L5 hemilaminotomy and foraminotomy, and a left L5-S1 hemilaminectomy, foraminotomy, and discectomy on 6/23/11. (Pet. Ex. 4)

On 7/27/11, the Petitioner followed up for his first postoperative visit. He had developed a superficial infection near the incision. (Pet. Ex. 4) At that point, he had already finished formal physical therapy and was working on home exercises. He still complained of tightness in his hamstrings.

Petitioner returned to Dr. Dinh on 8/31/11 and stated that he continued to have back pain. Dr. Dinh progressed the treatment to work conditioning.

On 10/12/11, Petitioner had his final visit with Dr. Dinh. Dr. Dinh noted Petitioner's score was 60/100 on the Oswestry Disability Index. (Pet. Ex. 4) Dr. Dinh allowed him to return to work for 60 days light duty and then slowly progressing to full duty.

ANALYSIS

The Arbitrator notes that the Petitioner sought immediate medical treatment the day of the accident. He provided consistent histories to each provider and described the accident as the cause of his problem. Moreover, the Petitioner credibly testified that he did not have any of the low back pain with radiculopathy prior to the accident of 9/12/10.

The Arbitrator notes that while the Respondent argues that no opinion of causal connection exists, the Arbitrator concludes it can certainly be inferred by the statements of the Petitioner's treating physicians such as that of Dr. Koogler, who stated the original injury was associated with picking up a box weighing only 20-30 pounds.

The Arbitrator further notes that although Respondent placed causation in dispute, they did not present any medical evidence showing that Petitioner's condition of ill-being was not causally related to the stipulated accident of 9/12/10.

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the Petitioner's work related accident of 09/12/2010.

In support of the Arbitrator's findings under (K) DISABILITY PAYMENTS; the Arbitrator finds the following facts:

The Arbitrator notes that the Petitioner's treating physicians" have keep the Petitioner off work from 06/22/2011 thru 10/01/2011. Having found for the Petitioner under causal connection, this period of disability is awarded.

Respondent shall pay Petitioner temporary total disability benefits of $ 577.17 per week for 14.4 weeks, commencing 06/22/2011 through and including 10/01/2011, as provided in Section 8(b) of the Act. The Respondent shall receive a credit for any of the awarded sum that it has paid for.

In support of the Arbitrator's findings under (J) MEDICAL PAYMENT: the Arbitrator finds the following facts:

The Arbitrator notes that the parties have stipulated that if the accident is found compensable, the Respondent agrees to pay for the medical treatment.

The Arbitrator orders Respondent to satisfy all reasonable and related unpaid medical bills in accordance with the Workers' Compensation Act's Fee Schedule and/or PPO contractual rate between Respondent and the provider. Respondent may make payments directly to the medical providers and Respondent is entitled to a credit for any bills satisfied by Petitioner's group medical plan.

In support of the Arbitrator's findings under (L) NATURE AND EXTENT; the Arbitrator finds the following facts:

The Petitioner is now 26 years old and continues to have flare-ups of back pain. He cannot sit comfortably for longer than 30 minutes. His condition is affected by his job as he has pain and difficulty with walking for long periods of time. The Petitioner, at his young age, has to adjust how he lifts things and is cautious of lifting anything over 35 lbs. Officer Fox is unable to lift the amount of weights that he was lifting prior to the injury. He has soreness and stiffness when bending and squatting

Respondent shall pay Petitioner permanent partial disability benefits of $519.45 per week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole, as provided in 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 SANGAMON)	☐ 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

Ronald Heath,

Petitioner,

vs. NO: 08 WC 54469

Lincoln Central School District 27,

14IWCC0623

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of causal connection, the necessity of medical treatment, prospective medical care, TTD 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 Petitioner filed an Application for Adjustment of Claim alleging that he injured his left upper and left lower extremities as well as his body as a whole on September 16, 2008 when he stepped on a broom and fell down concrete steps landing on his back. The Petitioner has an 8th grade education and works as a custodian.

The Arbitrator found that Petitioner's left shoulder, left knee and back conditions were not causally related to the September 16, 2008 undisputed work accident. The Arbitrator reasoned that the medical records showed Petitioner had pre-existing left shoulder, left knee and lower back conditions. In 2006, Petitioner was suspected of having a torn left rotator cuff. Additionally, in November of 2007, a lumbar spine MRI showed that Petitioner had significant back problems. The Arbitrator found it most significant that Petitioner did not complain of left shoulder, left knee or back problems when he went to the emergency room on the day of the accident.

The medical records also show that on September 26, 2008, Petitioner treated with Nurse Draper and only complained of pain in his left foot and one of his shoulders. The Arbitrator concluded that it was more likely that Petitioner complained of right shoulder pain on

September 26, 2008 based on Nurse Draper's reference to the shoulder having been x-rayed when only Petitioner's right shoulder had been x-rayed at the emergency room. The Arbitrator also noted that Petitioner first complained of left shoulder and left knee pain on October 25, 2008, over one month after the accident. The subsequent MRIs showed substantial injuries to those body parts, making it "all the more unusual" that Petitioner waited one month to seek treatment for his left shoulder and knee. With respect to Petitioner's lower back condition, the Arbitrator noted that on September 26, 2008, Petitioner related his lower back complaints to a motor vehicle accident that had occurred in August of 2007. Lastly, the Arbitrator found that Petitioner's right shoulder and left foot conditions were causally related to the undisputed accident until October 25, 2008, at which time they resolved. The Commission disagrees that the right shoulder symptoms had resolved.

Petitioner asks the Commission to find that his left knee, left shoulder, left foot, lower back and right shoulder conditions are all causally related to the undisputed accident. Petitioner asks the Commission to rely on Dr. Carroll's causal connection opinions and his own credible testimony. In addition, Petitioner argues that Dr. Senica's opinions are speculative as she could not say whether Petitioner's injuries were caused by the car accident, the fall at the grocery store or the work accident.

The Commission hereby affirms the Arbitrator's well-reasoned decision with the exception of the Arbitrator's finding that the right shoulder injury was resolved, as the medical records fully support it. Petitioner's testimony was not credible and was contradicted by the medical records. On September 26, 2008, Petitioner attributed his lower back symptoms to a motor vehicle accident that happened about one year before. Petitioner complained of right shoulder pain on the day of the accident and complained of left foot pain about 10 days afterward. On October 25, 2008, Petitioner treated with Dr. Carroll who noted that Petitioner was involved in an accident and complained of left ankle, left knee and left shoulder pain. Subsequently, Petitioner underwent left knee and left shoulder MRIs. On December 1, 2008, Petitioner signed the application for benefits and a few days later, he began reporting to his providers that he tore his left rotator cuff and left meniscus when he fell down some stairs at work on September 26, 2008. Dr. Carroll's opinions are not credible or persuasive as he is not a specialist. Also, during his depositions, he could not recall the information found in Petitioner's pre-accident treatment records.

The parties disputed the issues of causal connection, unpaid medical bills, TTD, prospective medical care and the nature and extent of Petitioner's injuries. At the Arbitration hearing, the parties also stipulated that Respondent would receive credit under Section 8 (j) for the related bills paid by the group insurance. Petitioner argues that he is permanently and totally disabled under the "odd lot" category and does not address the issue of prospective medical care.

The Arbitrator found that the Petitioner's left shoulder, left knee and back conditions were not causally related to the undisputed accident and that Petitioner's right shoulder and left foot injuries had resolved by October 25, 2008. The Arbitrator noted that the Respondent already paid Petitioner's medical expenses between the date of the accident and October 25, 2008, and Petitioner did not miss time from work for treatment related to the right shoulder and left foot.

The Arbitrator found that Petitioner's injury caused the loss of use of 5% of the left foot based on his diagnosis of a left foot strain and aggravation of a pre-existing arthritic condition. With respect to the right shoulder, the Arbitrator found that Petitioner suffered a contusion/sprain due to the work accident. The Arbitrator was under the misapprehension that the Petitioner had received prior settlement award for 75% of the use of the right shoulder for which the Respondent was entitled to a credit. The Arbitrator found that "The credit that the Respondent is entitled to does not allow Petitioner any additional permanency for this injury pursuant to Section 8 (a) (17)."

The Arbitrator did not award medical expenses or TTD benefits as Respondent had already paid Petitioner's medical expenses between the date of accident and October 25, 2008, and Petitioner did not miss time from work for treatment related to the right shoulder or left foot. The Commission hereby affirms the Arbitrator's denial of TTD benefits

The Commission affirms the Arbitrator's PPD award for the left foot condition. With respect to the right shoulder Respondent's Exhibit Four shows that Petitioner received a settlement award for 75 weeks of the right arm **(not 75% of the right arm).** The Arbitrator declined to award PPD for the right shoulder apparently because he would have had to award under section 8(d)(2) and Respondent would not have been able to obtain credit for the prior right shoulder settlement award under section 8(e)(10). The Respondent is not entitled to credit for the prior right arm settlement award because shoulder injuries are no longer part of the arm based on *Will County Forest Preserve v. IWCC.*

The Commission hereby awards the Petitioner permanent partial disability under Section 8 (d) (2) of the Act and finds that the Petitioner's injury to his right shoulder caused the 1% loss of the use of the man as a whole based upon the persistent, intermittent nature of the Petitioner's right shoulder complaints and increased reliance upon the right shoulder due to his left shoulder injuries.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $0 per week for a period of 0 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 $400.90 per week for a period of 8.35 weeks, as provided in §8 (e) of the Act, for the reason that the injuries sustained caused the loss of use of 5% of the left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner the sum of $400.90 per week for a period of 5 weeks as provided in Section 8 (e) of the Act, for the reason that the injuries sustained to the right shoulder caused the loss of use of 1% of the man as whole.

14IWCC0623

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $0 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.

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.

JUL 28 2014

DATED:
SM/msb
o-5/28/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HEATH, RONALD
Employee/Petitioner

Case# **08WC054469**

14IWCC0623

LINCOLN CENTRAL SCHOOL DISTRICT 27
Employer/Respondent

On 3/11/2013, 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:

1816 NESSLER, FREDERIC V LAW OFFICE
MATTHEW V KENNEDY
536 N BURNS LN SUITE 1
SPRINGFIELD, IL 62702

2904 HENNESSY & ROACH PC
STEPHEN J KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

14IWCC0623

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ronald Heath
Employee/Petitioner

v.

Lincoln Central School District 27
Employer/Respondent

Case # 08 WC 054469

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 **D. 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. [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 **September 16, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**34,744.32**; the average weekly wage was $**668.16**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**4,000.00** for other benefits, for a total credit of $**4,000.00**.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $400.90 per week for 8.35 weeks because of the injuries sustained caused the 5% loss of use of the left foot, as provided in Section 8(e) of the Act.

Respondent has a credit of $4,000.00 towards the award of PPD.

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. Dyer McCarty
Signature of Arbitrator

March 6, 2013
Date

MAR 11 2013

The Arbitrator hereby makes further findings on the disputed issue of causal connection (F):

Prior to the accident, Petitioner was seen by Dr. Wahab on October 22, 2004 complaining of low back pain since October 2001. When Petitioner was seen by Dr. Wahab on January 3, 3006, Petitioner stated his left knee popped and was stiff, and he was unable to walk the week before. On May 6, 2006, Petitioner had an x-ray of the left foot due to pain on weight-bearing in the lateral fifth metatarsal region. This x-ray revealed mild to moderate osteoarthritis. On September 18, 2006, Petitioner was seen by Dr. Wahab and provided a history of slipping on a wet floor while grocery shopping on September 15, 2006, and since then, having pain in his back, left foot, left knee, left hip and right thumb. Dr. Wahab noted the x-ray of the left shoulder revealed large spurs off the acromion process and at the ACV joint off the inferior aspect of the clavicle associated with impingement syndrome. Dr. Wahab also noted an x-ray of the right shoulder which showed degenerative changes at the ACV joint with narrowing and inferior spurring. Dr. Wahab also noted an x-ray of the lumbar spine which revealed degenerative changes and an x-ray of the left knee which revealed a large osteophyte at the quadriceps tendon insertion of the patella and suggestion of suprapatellar effusion. On September 28, 2006, Dr. Wahab suspected a left rotator cuff tear and noted that Petitioner needed an MRI of the left shoulder. On October 24, 2006, Dr. Wahab provided an injection into Petitioner's left shoulder. According to Dr. Wahab's August 2, 2007 record, Petitioner was involved in a motor vehicle accident on August 1, 2007 and, as a result, had pain in his left shoulder and neck. Dr. Wahab diagnosed left bicipital tendonitis. An exam revealed full range of motion and normal strength. Respondent's Group Exhibit #1.

Petitioner testified he stepped on a broom that was left on the floor on September 16, 2008 while working as the head custodian at one of the schools in Respondent's school district before the school opened. Petitioner testified he felt a pop in his left foot and fell backwards down sixteen to eighteen steps. Petitioner testified that, after the fall down the stairs, he hopped on his right foot to phone the principal and was told to go to the hospital. Petitioner testified everything hurt and he was frightened about his right shoulder for which he previously had surgery for.

At the emergency room after the fall down the stairs on September 16, 2008, Petitioner had an x-ray of the right shoulder which revealed osteoarthritis in the ACV and glenohumeral joints. Petitioner was diagnosed with a contusion/sprain of the right shoulder and received a pain injection. Petitioner was prescribed Ibuprofen 800 milligrams and Tramadol. Petitioner was told to wear a sling and apply ice. Petitioner's Exhibit C.2.

Petitioner followed up with a nurse at Dr. Carroll's office, Sharon Draper, on September 26, 2008. According to the office visit note, Petitioner was complaining of pain in his left foot, but was hurting more in his shoulder. Petitioner's Exhibit B.3. According to Sharon Draper's testimony, she was not sure which shoulder Petitioner was complaining of. Respondent's Exhibit # 3. However, there is reference in the September 26, 2008 office visit note that Petitioner had x-rays of "the shoulder". Petitioner's Exhibit B.3. It was noted that Petitioner only had an x-ray of his right shoulder at the emergency room on September 16, 2008. Petitioner's Exhibit C.2. Also according to the September 26, 2008 office note, Petitioner was concerned about his low back and the diminishing sensation of urination, defecation, and impotence problems that he felt started after a low back injury sustained in an auto accident one year prior. Also according to the office note, Petitioner stated when he went to bed at night and reclined, his back locked up and he could not move for four to six hours, but was able to sleep, but if he had to get up at night to urinate, his girlfriend had to pull him out of bed. On September 26, 2008, x-rays of the left foot were ordered. Petitioner followed up at Dr. Carroll's office on October 25, 2008. At that time, Petitioner complained of pain in his left ankle, left knee, and left shoulder. Petitioner was provided with a Corticosteroid injection into the left shoulder. According to the office visit note, the left knee exam was relatively unremarkable. At that time, an MRI of the left knee and an MRI of the left foot was to be obtained. The left knee had two tears of the medial meniscus, while the left shoulder revealed a

full thickness tear of the supraspinatus tendon, a partial tear of the infraspinatus tendon, synovitis of the bicep tendon and a possible torn labrum. Petitioner's Exhibits B.3, C 2.

Petitioner testified he went on to have surgery to the left shoulder on June 29, 2010 and left knee surgery on March 18, 2011. Petitioner testified he did not return back to work after the left shoulder surgery performed on June 29, 2010. Petitioner also testified as to a stent put in his hip due to low back and hip pain. Petitioner also testified that, presently, he is unable to work. Petitioner testified he can only walk a few feet before he becomes fatigued and he is constantly shaking due to pain in his neck down to his back and hips. Petitioner testified that, at times, he almost passes out due to back pain. Petitioner testifies that he urinates 150 to 200 times a day.

Petitioner had a prior claim for his right arm, that being, 93 WC 38127 wherein he was awarded 75% loss of use of the right arm. Respondent's Exhibit # 4. Petitioner had a prior claim for his low back, that being, 90 WC 17827. Respondent's Exhibit # 5.

Dr. Carroll testified on March 31, 2010 and November 28, 2012. During the March 31, 2010 deposition, Dr. Carroll testified that Petitioner phoned his office on October 24, 2008 complaining of left knee and left shoulder pain. X-rays of those body parts were ordered at that time. Petitioner's Exhibit A, pages 24-25. Dr. Carroll also testified on direct examination on March 31, 2010 that Petitioner's "real problem" was his left shoulder. Petitioner's Exhibit # A, page 13. Also on direct examination on March 31, 2010, Dr. Carroll testified that the fall down the stairs caused a tear in the left rotator cuff. Dr. Carroll also testified on March 31, 2010, that it was hard for him to say whether the pains in Petitioner's right shoulder, knee, and hip are related to the fall down the stairs. Petitioner's Exhibit A, pages 15-18. On direct examination, Dr. Carroll testified that Petitioner had low back pain prior to September 16, 2008. Dr. Carroll also testified he ordered an MRI of the lumbar spine on November 6, 2007. Also on direct examination, Dr. Carroll testified that Petitioner's "left knee is not a big issue, I don't think". Petitioner's Exhibit A, pages 28-29.

Dr. Carroll was asked why, with substantial injuries involving the left shoulder, the Petitioner did not mention it when seen in the emergency room on the accident date and to his nurse practitioner ten days later. He said "I don't really know…relatively traumatic injury. You roll down a flight of steps, everything hurts.,.It was hard to know where to focus our attention first. As things got better, left shoulder was the part that wasn't getting better." (PX A at 25,26)

Petitioner was examined at the request of Respondent by Dr. Senica, who is board certified in orthopedic surgery, on March 9, 2009. Dr. Senica testified that if Petitioner injured his left shoulder as a result of the fall down the stairs, she would expect him to have complaints of pain in the left shoulder when he was examined at the emergency room shortly after the fall. Dr. Senica also testified that Petitioner denied having any problems with his left shoulder prior to the fall down the stairs on September 16, 2008 when she asked him. Dr. Senica also testified that, when she saw Petitioner, he had minor complaints regarding the right shoulder and Petitioner did not feel he needed further treatment for the left knee or the left foot. Respondent's Exhibit # 2, pages 6-13. Also on direct examination, Dr. Senica testified that it is possible that Petitioner's rotator cuff tear on the left side may have been pre-existing. Dr. Senica testified it was less likely that the rotator cuff tear on the left side was a result of the fall down the stairs while working for Respondent based on Petitioner's lack of complaints immediately after the fall down the stairs. In regards to the left knee, Dr. Senica testified the fall down the stairs could have temporarily aggravated Petitioner's left knee condition, but by the time of her evaluation, the left knee did not appear to be a "major issue". Likewise, Dr. Senica testified that Petitioner may have temporarily aggravated his back condition as a result of the fall down the stairs, but it should have gone back to the baseline of his pre-existing back condition. Respondent's Exhibit # 2, pages 18-22.

Dr. Seneca testified that the Petitioner's denial of any prior left shoulder injuries raised a credibility issue. (RX 2 at 19) Dr. Carroll was also unaware of the fact that the Petitioner received treatment for the left shoulder in September 2006. (PX A at 29) The Arbitrator agrees with Dr. Seneca. The Petitioner was seen on several occasions following his fall in the grocery store. His doctor at the time suspected a rotator cuff injury and suggested an MRI. The Petitioner certainly should have had some recollection of this problem when seen by doctors following his accident at work.

Based on the medical evidence, a finding is made that Petitioner's condition of ill-being regarding the left shoulder, left knee, and back are not causally connected to the accident of September 16, 2008. It is clear that Petitioner had pre-existing conditions regarding his left shoulder, left knee and low back. Prior to this accident, Petitioner was suspected to have a torn left rotator cuff and with having a large osteophyte at the quadriceps insertion of the patella and there was a suggestion of suprapatellar effusion in the left knee in 2006. Also, an MRI of the lumbar spine was done in November, 2007 indicating Petitioner having significant back problems at that time. Most noteworthy is the fact that Petitioner did not complain of problems with his left shoulder, left knee, or back when he was seen at the emergency room on September 16, 2008. When Petitioner followed up with Dr. Carroll's nurse, Sharon Draper, on September 26, 2008, twelve days after the fall down the stairs, his complaints were limited to the left foot and one of his shoulders. It is not clear which shoulder Petitioner was complaining of on September 26, 2008, however, based on the reference in the office note to a shoulder being x-rayed, the inference is that Petitioner was still complaining of his right shoulder on September 26, 2008 as this is the shoulder that was x-rayed on the day of the accident. The first indication of Petitioner having problems with his left shoulder and left knee after the work accident was when Petitioner phoned Dr. Carroll's office on October 24, 2008, or over a month after the accident, complaining of left shoulder and left knee problems and x-rays of those body parts being ordered. The subsequent MRI's revealed substantial injuries to those body parts, making it all the more unusual that they weren't mentioned to the first two providers. Petitioner did complain of his back on September 26, 2008, however, Petitioner related those complaints to the motor vehicle accident in August 2007. Also, based on the medical evidence, Petitioner's right shoulder and left foot injuries resolved by the October 25, 2008 visit with Dr. Carroll.

The Arbitrator hereby makes further findings on the disputed issue of medical services (J):

The medical bills are contained in Petitioner's Exhibit D. According to this exhibit, the charges for medical expense incurred between the date of accident and October 25, 2008 have been paid. All other medical expenses are not causally connected to the accident. Accordingly, Petitioner is not entitled to medical expenses.

The Arbitrator hereby makes further finding on the disputed issues of TTD (K):

Petitioner did not begin missing time from work until the left shoulder surgery on June 28, 2010. As a finding is made that Petitioner's left shoulder condition at that time was not causally connected to the accident, no TTD benefits are awarded.

The Arbitrator hereby makes further findings on the disputed issue of the nature and extent of the injury (L):

Based on the medical documentation, Petitioner suffered a contusion/sprain of the right shoulder as a result of the accident. However, as Petitioner has already received a settlement of 75% loss of use of the right arm, or 176.25 weeks of PPD, in case 93 WC 38127, the credit that Respondent is entitled to does not allow Petitioner any additional permanency for this injury pursuant to Section 8(a)(17).

Based on Petitioner's testimony and medical documentation, Petitioner suffered a strain or aggravation of a pre-existing arthritic condition in his left foot as a result of the accident. Accordingly, Petitioner is awarded 5% loss of use of the left foot. It is noted that Respondent has a credit of $4,000.00 that can be applied to this award of permanency.

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

Luis Montejano,

Petitioner,

vs.

NO. 11 WC 13279

ELG Metals Corp,

14IWCC0624

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(s) of TTD, PPD and 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.

Petitioner filed an Amended Application for Benefits on April 13, 2011, which alleges that he sustained an injury to his back and the person as a whole on November 4, 2010 while power washing underneath a forklift.

The parties disputed causal connection. Respondent disputed liability for all bills. The parties stipulated (if bills were awarded), to the amounts owed under the medical fee schedule, with the exception of the 4-24-2012 charge by Dr. Rinella.

The Arbitrator found that the Petitioner did sustain an accident and that there was causal relationship. The Arbitrator further found that Petitioner has received all reasonable and necessary medical services and that Respondent has not paid all appropriate charges for reasonable and necessary medical treatment. TTD benefits of $340.00/week for 88 5/7th weeks

commencing November 4, 2010 through August 21, 2013 were awarded. Respondent shall receive a credit of $2,000.04 for TTD benefits that have already been paid. The Arbitrator ruled that Respondent shall pay the bills for the reasonable and necessary medical services submitted into evidence. Respondent shall pay Petitioner permanent partial disability benefits of $306.00/week for 125 weeks because the injuries sustained caused the 25% loss of the person as a whole, as provided in Section 8 (a) and 8.2 (d) of the Act. Respondent shall be given a credit of $5,000.00 for the permanent partial disability advance payment that has been paid.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 6, 2013 is hereby affirmed and adopted with clarification that all medical bills are subject to the medical fee schedule pursuant to Section 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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $61,500.00. 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: JUL 2 8 2014
SJM/msb
o-07/10/2014
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MONTEJANO, LUIS
Employee/Petitioner

Case# **11WC013279**

14IWCC0624

ELG METALS INC
Employer/Respondent

On 11/6/2013, 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 0.08% 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:

4678 PARENTE & NOREM PC
PARAG P BHOSALE
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

0560 WIEDNER & MCAULIFFE LTD
JASON T STELLMACH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC0624

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

Luis Montejano
Employee/Petitioner

v.

ELG Metals, Inc.
Employer/Respondent

Case # **11** WC **13279**

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 **August 21, 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 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 as explained *infra*.

In the year preceding the injury, Petitioner earned **$26,520.00**; the average weekly wage was **$510.00**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of **$2,000.04** for TTD, **$0** for TPD, **$0** for maintenance, and **$5,000.00 (PPD advance)** for other benefits, for a total credit of **$7,000.04**. *See* AX1.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $340.00/week for 88 & 5/7th weeks, commencing August 22, 2011 through May 3, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 4, 2010 through August 21, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $2,000.04 for temporary total disability benefits that have been paid.

Medical Benefits

As explained in the Arbitration Decision Addendum, Respondent shall pay the bills for the reasonable and necessary medical services reflected in the bills submitted into evidence as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $306.00/week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall be given a credit of $5,000.00 for the permanent partial disability benefits advance payment that has been paid. *See* AX1.

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 4, 2013
Date

NOV - 6 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Luis Montejano
Employee/Petitioner

v.

ELG Metals, Inc.
Employer/Respondent

Case # **11** WC **13279**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing are causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he began working for Respondent in February of 2010 as a maintenance worker/mechanic. He performed maintenance tasks in and around Respondent's building and mechanic work including fixing machines such as bulldozers, bobcats, and cranes. Petitioner was injured on November 4, 2010 in an undisputed accident while power-washing a forklift. He testified that he was bending forward and squatting to do so and, when he finished, he felt his back pop when he stood up. Petitioner testified that he did not experience pain in that moment, but started experiencing it 24-48 hours later when he began noticing pain in his back and a shooting pain down his left leg.

Medical Treatment

Petitioner testified that he was directed to Occspecialists by his employer. The medical records reflect that Petitioner saw Dr. Heller on January 14, 2011 and reported a consistent mechanism of injury. PX8. Dr. Heller noted Petitioner's December 22, 2010 lumbar MRI showing a small L5-S1 disk herniation on the left, which she noted was consistent with his symptoms. PX8. She diagnosed Petitioner with left S1 radiculitis without neural deficit due to consistent disk herniation at L5-S1 on the left. *Id.* Dr. Heller noted that Petitioner was working light duty at the time and reported 25% improvement with physical therapy and oral medications. *Id.* She recommended a left S1 epidural injection. *Id.*

First Independent Medical Evaluation Report – Dr. Singh

On February 28, 2011, Petitioner attended a Section 12 examination at Respondent's request with Dr. Singh of Midwest Orthopedics at Rush. RX2. After taking a history from Petitioner, examining him, and reviewing various treating medical records, Dr. Singh diagnosed Petitioner with a left L5-S1 herniated disc and indicated that he would benefit from a series of L5-S1 transforaminal lumbar epidural injections. *Id.*

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. Joint exhibits are denominated "JX."

Continued Medical Treatment

Petitioner returned to Dr. Heller on March 18, 2011 at which time she maintained her diagnosis and reiterated her recommendation for an epidural injection. *Id.* Petitioner underwent the recommended injection at Rush Oak Park Hospital on March 24, 2011. PX10. Petitioner testified that it only provided him with relief for one day and then his low back pain and radiating left leg symptoms returned.

On April 1, 2011, Petitioner returned to Dr. Heller who noted that his condition had not improved much despite a Medrol Dosepak, Flexeril, physical therapy, and undergoing the recommended epidural steroid injection. PX8. She recommended that Petitioner resume physical therapy. *Id.* By April 15, 2011, Petitioner's condition had not much improved and Dr. Heller recommended a second epidural steroid injection. *Id.* When Petitioner returned on May 6, 2011, Dr. Heller noted that Petitioner's condition had not much improved despite the additional physical therapy and two injections. *Id.* She referred him out to a neurosurgeon for further consultation. *Id.*

Petitioner saw Dr. Cerullo, a neurosurgeon, on May 18, 2011. *Id.* Petitioner provided a history and Dr. Cerullo examined him noting Petitioner's marked limitation of range of motion of the back in both flexion and extension, a subtle left foot plantar flexion weakness of which Petitioner was unaware, and a positive straight leg raise on the left to 30 degrees. *Id.* Dr. Cerullo noted that conservative measures had failed and referred Petitioner to Dr. Onibokun to discuss a microdiscectomy at L5-S1. *Id.* Petitioner testified that he decided to see his own physician, Dr. Rinella.

On June 9, 2011, Petitioner saw Dr. Rinella for an initial visit. PX1. He diagnosed Petitioner with an L5-S1 disc herniation and left L5 radiculopathy. *Id.* He ordered a new lumbar spine MRI given that Petitioner's last MRI was six months old, but indicated that Petitioner would benefit from an L5-S1 laminotomy with microdiscectomy. *Id.* Petitioner underwent the recommended MRI without contrast on June 21, 2011, which the interpreting radiologist noted was normal. *Id.* Petitioner returned to Dr. Rinella on July 12, 2011 who apparently reviewed the MRI and found a left sided L5-S1 disc herniation. *Id.* In contrast to his earlier recommendation, Dr. Rinella now recommended a laminectomy. *Id.*

On August 22, 2011, Petitioner underwent the originally recommended laminotomy with microdiscectomy at L5-S1. PX7. Petitioner testified that nothing changed with regard to his low back pain and shooting pain into his left leg as a result of the surgery. He also testified that he never went back to work after the surgery and that he was performing light duty work for Respondent before that time.

Second Independent Medical Evaluation Report – Dr. Singh

On September 7, 2011, Petitioner returned to Dr. Singh for a second independent medical evaluation. RX3. Petitioner complained of low back pain radiating to his entire left leg and rated his low back pain as 8/10. *Id.* He reported that his pain caused him severe discomfort which was constant in nature, worsened with activity and with rest and coughing. *Id.* Dr. Singh indicated that Petitioner's left-sided L5-S1 disc herniation may have resolved prior to the August 2011 surgery given that the June 21, 2011 MRI revealed no evidence of disc herniation at the L5-S1 level as interpreted by the radiologist. *Id.* Dr. Singh opined that it was possible that the disc herniation naturally resorbed, which was not an unlikely phenomenon. *Id.* That said, Dr. Singh reserved his opinions on causality, future treatment and maximum medical improvement until he had an opportunity to personally review the MRI films. *Id.*

Dr. Singh did review the June 21, 2011 MRI films, which he memorialized in a September 27, 2011 addendum report. RX4. He noted normal lumbar lordosis and no evidence of a disc herniation. *Id.* Accordingly, Dr. Singh concurred with the interpretation by the radiologist and concluded that Petitioner sustained a left L5-S1 disc herniation as a direct result of the November 4, 2010 incident, which naturally resolved. *Id.* Dr. Singh further determined that Petitioner was at maximum medical improvement on June 21, 2011, the time of the normal MRI. *Id.* Dr. Singh agreed, however, that Petitioner required some work restrictions, but explained those were due to the August of 2011 surgery, and not the resolved disc herniation nor the November 4, 2010 incident. *Id.*

Continued Medical Treatment

Petitioner saw Dr. Rinella post-operatively on September 9, 2011 at which time he noted that he would continue to keep Petitioner off work. PX1. On October 19, 2011, Petitioner underwent a lumbar spine MRI, which the interpreting radiologist noted showed a left paracentral disc herniation with possible nerve root compromise on the left. PX6. On October 21, 2011, Dr. Rinella ordered physical therapy. PX1. Petitioner underwent physical therapy at ATI from November 2, 2011 through March 16, 2012. PX2.

Petitioner returned to Dr. Rinella on January 12, 2012, and was referred to Dr. Abusharif for additional epidural injections. PX1. On January 18, 2012, Dr. Abusharif administered a lumbar transforaminal epidural steroid injection at L5-S1. PX9. He administered a second injection on February 2, 2012. *Id.* He did not recommend any further injections given that they provided Petitioner little-to-no relief and recommended that Petitioner see a surgeon to discuss possible surgical intervention. *Id.*

On April 12, 2012, Petitioner underwent another lumbar spine MRI, which the interpreting radiologist noted showed the following: (1) straightening of the normal lumbar lordotic curvature indicating paraspinal muscle spasm; (2) early degenerative changes in the lumbar spine with disc disease at L5-S1; (3) laminectomy[2] defects at L5-S1 with a 5mm broad based left paracentral disc protrusion abutting the left traversing S1 nerve root with enhancing soft tissue on the left side of the central canal engulfing the left traversing S1 nerve root likely to represent epidural fibrosis; and (4) a less prominent disc bulge than previously seen as compared to the October 19, 2011 MRI. PX6. Dr. Rinella saw Petitioner on the same date and recommended a transforaminal lumbar interbody fusion surgery at L5-S1. PX1.

On April 24, 2012, Petitioner underwent a second surgery with Dr. Rinella at Silver Cross Hospital. PX13. Pre- and postoperatively, Dr. Rinella diagnosed Petitioner with status-post L5-S1 disc herniation, a recurrent disc herniation at L5-S1, and discogenic pain. *Id.* He performed the following procedures: (1) L5-S1 posterior spinal instrumentation (Globus); (2) L5-S1 posterior spinal fusion; (3) transforaminal lumbar interbody fusion at L5-S1 on the left; (4) placement of PEEK interbody cage at L5-S1; and (5) local spinal autograft and spinal allograft (OsteoSponge and cancellus chips). *Id.*

In a letter addressed to Petitioner's counsel dated June 15, 2012, Dr. Rinella opined that Petitioner's lumbar back pain and associated left leg symptoms were directly related to his injury at work on November 4, 2010. PX1. He also opined that the laminectomy surgery was necessary as a result of that injury. *Id.* Dr. Rinella also reviewed Dr. Singh's independent medical evaluation reports and indicated that his first report found a causal connection between Petitioner's then-current condition of ill being and his injury at work, but that in his second independent medical evaluation report and subsequent addendum report Dr. Singh found no causal connection

[2] The surgery performed on Petitioner was a laminotomy. PX6.

because Petitioner's disc herniation had resolved as reflected in a radiologist's report. *Id.* Dr. Rinella disagreed with Dr. Singh and opined that Petitioner's continued condition of ill being was still causally related to the injury at work. *Id.*

On August 10, 2012, Dr. Rinella ordered physical therapy. PX1. Petitioner then underwent post-operative physical therapy Flexion as ordered by Dr. Rinella from September 24, 2012 through December 14, 2012. PX14. He then had work hardening from January 4, 2013 through April 19, 2013. *Id.* Petitioner then underwent a functional capacity evaluation on April 22, 2013 as ordered by Dr. Rinella. PX15. The test results were deemed valid by the physical therapist who noted that Petitioner's "overall test findings, in combination with clinical observations, suggest the presence of high levels of physical effort on [Petitioner's] behalf[,]" and Petitioner was placed at a heavy physical demand level. *Id.*

Third Independent Medical Evaluation Report – Dr. Singh

On October 1, 2012, Petitioner attended a third Section 12 examination with Dr. Kern Singh. RX5. Dr. Singh maintained his earlier opinion that the disc herniation shown on the December of 2010 MRI resolved prior to the June 21, 2011 MRI, which was consistent with the radiological interpretation. *Id.* Dr. Singh opined that there was an interval change between June 21, 2011 and the October 19, 2011 MRI, unrelated to any work-related injury. *Id.* He also reiterated that Petitioner had reached maximum medical improvement as it related to the described work incident of November 4, 2010 and indicated that Petitioner would benefit from a functional capacity evaluation and two to four weeks of work conditioning. *Id.*

Deposition Testimony – Dr. Rinella

Dr. Rinella submitted to a deposition on August 29, 2012. PX16. In addition to general questioning about Petitioner's condition, diagnoses and medical treatment, Dr. Rinella testified about the June 21, 2011 MRI study that the interpreting radiologist noted was normal on which Dr. Singh, Respondent's Section 12 examiner, relied in finding no further causal connection between Petitioner's condition and his injury at work. *Id.* Dr. Rinella confirmed that he reviewed the actual MRI film and saw a "disc herniation causing a pinch on both the L5 and S1 nerve root." *Id.* While Dr. Rinella also addressed Dr. Singh's contention that Petitioner's disc herniation had resolved prior to the August 22, 2011 surgery and that most herniations will resorb over time, he also testified that he knew "for a fact" that the disc herniation was present at the time of this MRI because he "stared right at it." *Id.* Dr. Rinella testified that when he performed the L5-S1 laminotomy with microdiscectomy on August 22, 2011 he was able to actually visualize and see the disc herniation with a microscope, which was much more accurate than the viewing it on an MRI. *Id.*

Additional Medical Treatment

On May 3, 2013, Petitioner returned to Dr. Rinella who adopted the functional capacity evaluation test results and placed Petitioner at maximum medical improvement. PX1. This was the first time that Dr. Rinella cleared Petitioner to return to work after the August 22, 2011surgery. *Id.* Petitioner testified that Dr. Rinella recommended that he try to go back to work, but Petitioner did not do so. He was terminated by Respondent as of January of 2013 due to a reduction in workload. Petitioner testified that since his release by Dr. Rinella, he has been looking for work. He testified that he has applied for jobs including a maintenance position at a Motel 6, at companies in his area including a railroad company, and he also called his old employer at Kennedy Auto, but was turned down. Petitioner testified that he has been turned down for other jobs or receives no response

after he is asked for background information and he reports that he was injured at work had surgery and finished therapy.

Additional Information

Regarding his current condition, Petitioner still has pain in his lower back although the pain into his left leg is gone. He testified that he does take some pain medication including Hydrocodone 1-2 times per week. He also testified that he took Valium maybe 1-2 times per week until approximately 3-4 months ago, when he ran out of it and that he has no health insurance at the moment. On cross examination, Petitioner testified that he still has back pain after his second surgery. He also testified that he has not had any further follow up with Dr. Rinella. On re-direct examination, Petitioner testified that he has had no other accidents or injuries between surgeries and that his low back pain now is better than when first saw a doctor. Prior to his injury at work, Petitioner testified that he had never injured his back.

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 causally related to the injury sustained at work on November 4, 2010. In so concluding, the Arbitrator notes that the treating physicians, and Dr. Singh, do not disagree that Petitioner sustained an injury at work resulting in low back pain and left leg symptoms that he did not have before the accident or that he sustained an L5-S1 disc herniation resulting in the need for medical treatment as a result of his injury at work. Rather, the dispute centers on whether Petitioner's disc herniation had resorbed prior to Petitioner's fusion surgery as indicated in a June 21, 2011 MRI which the interpreting radiologist, and Respondent's Section 12 examiner, Dr. Singh, found normal.

At his deposition, Dr. Rinella testified that while he disagreed with the radiologist's interpretation of the MRI, he also essentially explained that his (Dr. Rinella's) opinion should be given more weight because he actually examined Petitioner over many occasions, he clinically correlated Petitioner's symptoms to his medical diagnoses, and he was able to visualize the disputed disc herniation intraoperatively under a microscope which provided a clearer view of the spine than the MRI. Given the totality of the evidence in this case, the Arbitrator agrees. Thus, the Arbitrator finds the opinions of Petitioner's treating physician, Dr. Rinella, to be more persuasive and adopts those opinions herein. Moreover, the Arbitrator finds Petitioner's testimony at trial to be credible. Petitioner's testimony is corroborated by both treating medical records and Petitioner's reports to Dr. Singh, and there is no indication that Petitioner's subjective symptoms were due to anything other than the sequelae of his injury at work particularly in light of his youth, lack of prior low back injuries, and lack of evidence of malingering or other inconsistency between his reports and his clinical medical condition.

Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed current condition of ill being in the low back is causally related to the injury sustained at work on November 4, 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:

As causal connection has been resolved in favor of Petitioner, as explained in detail above, the Arbitrator finds the opinions rendered by Dr. Rinella, Petitioner's treating physician, to be reasonable and persuasive and adopts them over the opinions of Dr. Singh given the facts in this case. The Arbitrator also notes that Dr. Rinella reasonably and persuasively opined that Petitioner's medical treatment was appropriate to treat Petitioner's condition which stemmed directly from his injury at work, which is corroborated by Petitioner's medical treatment at Occspecialists at Respondent's referral and by Dr. Singh in his first independent medical evaluation report. Dr. Singh's opinion in this case that Petitioner's herniation had resolved based on the June of 2011 radiologist's report (thus negating the need for further medical treatment or surgery) is not persuasive or a reasonable opinion given the overwhelming majority of the medical evidence from Dr. Rinella and Petitioner's credible testimony at trial regarding his ongoing symptoms after his first surgery. Based on all of the foregoing, the Arbitrator awards the medical bills incurred by Petitioner and submitted as exhibits into evidence as they

were reasonable and necessary to alleviate Petitioner of the effects of his injury at work to be paid by Respondent as provided in Section 8(a) and pursuant to Section 8.2 of the Act.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm.*, 201 Ill. App. 3d 880, 886 (1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Mechanical Devices v. Industrial Comm.*, 344 Ill. App. 3d 752, 760 (2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887. In this case, Petitioner claimed temporary total disability benefits from the date of his second surgery on August 22, 1011 through the date he was placed at maximum medical improvement by Dr. Rinella. The medical records reflect Dr. Rinella kept Petitioner off work during this period of time. Thus, in addition to the findings and conclusion that Petitioner has established causal connection as explained above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period beginning on August 22, 2011 through his release by Dr. Rinella on May 3, 2013.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole—which reflects that Petitioner underwent failed conservative medical treatment including injections and physical therapy followed by a first surgery (laminotomy with microdiscectomy at L5-S1) followed by additional conservative treatment including injections and physical therapy which also failed after Petitioner's disc herniation recurred and resulted in the need for a second surgery (a one-level transforaminal lumbar interbody fusion surgery at L5-S1 with placement of instrumentation and a cage) followed by additional rehabilitative physical therapy and work conditioning which returned Petitioner back to work at the heavy physical demand level, albeit with continued pain in the low back requiring use of continued prescription narcotic pain medication—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 25% loss of use of the person as a whole pursuant to Section 8(d)(2).

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

Charles Splechter,

Petitioner,

vs.

Nos. 08WC52978
08WC52979

South Central Transit,

Respondent.

14IWCC0625

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the appellate court. The appellate court dismissed the appeal, finding the circuit court's order interlocutory and not appealable and remanding the matter to the Commission for further proceedings as set forth in the circuit court's nonfinal order. The circuit court had reversed the Commission's order dismissing Respondent's petition for review and remanded the matter for consideration of the merits of the appeal.

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 causal connection, temporary total disability, 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, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the corrected Decision of the Arbitrator filed June 29, 2009, is hereby affirmed and adopted.

14IWCC0625

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 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: JUL 2 8 2014
SM/sk
o-05/29/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

SPLECHTER, CHARLES
Employee/Petitioner

Case# **08WC052978**

08WC052979

14IWCC0625

SOUTH CENTRAL TRANSIT
Employer/Respondent

On 06/29/2009, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0180 EVANS & DIXON LLC
JAMES M GALLEN
515 OLIVET ST SUITE 1100
ST LOUIS, MO 63101

0560 WIEDNER & MCAULIFFE LTD
SHAUN FOLEY
1 N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
) 14IWCC0625
COUNTY OF Jefferson)

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

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

Charles Splechter
Employee/Petitioner

v.

South Central Transit
Employer/Respondent

Case # **08** WC **52978**

08 WC 52979

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 **Jennifer Teague**, arbitrator of the Commission, in the city of **Mt. Vernon**, on **April 15, 2009**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☐ 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 amount of compensation is due for temporary total disability?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☐ Other _____

14IWCC0625

FINDINGS

- On **March 13, 2008 and August 22, 2008**, the respondent **South Central Transit** *was* operating under and subject to the provisions of the Act.
- On these dates, an employee-employer relationship *did* exist between the petitioner and respondent.
- On these dates, the petitioner *did* sustain injuries that arose out of and in the course of employment.
- Timely notice of these accidents *was* given to the respondent.
- In the year preceding the injuries, Petitioner's average weekly wage was $ **336.00**.
- At the time of the injuries, Petitioner was **52 and 53** years of age, ***married*** with **0** children under 18.
- Necessary medical services ***have in part*** been provided by the respondent.
- To date, $ **4,480.16** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- As a result of the accident of August 22, 2008, Respondent (CCMSI) shall pay the petitioner temporary total disability benefits of $ **224.00** /week for **24 3/7** weeks, from **September 8, 2008 through September 15, 2008** and from **November 11, 2008 through April 15, 2009**, 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.
- As a result of the accident of March 13, 2008, Respondent shall pay the medical expenses incurred through March 24, 2008. As a result of the accident of August 22, 2008, Respondent shall pay the medical expenses incurred thereafter as set forth in Petitioner's Exhibit 2. Said bills shall be paid in accordance with the Medical Fee Schedule and Respondent shall receive credit for all amounts previously paid. Further, Respondent (CCMSI) shall authorize and pay for the surgery recommended by Dr. Taylor.
- The respondent shall pay $ **N/A** in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ **N/A** in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ **N/A** in attorneys' fees, as provided in Section 16 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.

Signature of arbitrator

June 16, 2009
Date

JUN 29 2009

The Arbitrator hereby makes the following Findings of Fact:

Petitioner is a fifty-three year old bus driver for Respondent. On March 13, 2008, while driving a bus for Respondent, Petitioner was involved in an automobile accident. At that time, a vehicle made a left turn into the side of Petitioner's bus. Following that accident, Petitioner had complaints of neck and left shoulder pain.

Petitioner sought treatment from his family physician, Dr. Balavittal Varanasi, who ordered x-rays and prescribed muscle relaxers and pain relievers. While Petitioner continued to notice pain in his neck and left shoulder, Dr. Varanasi did not keep Petitioner off of work.

Over the next few weeks, Petitioner's complaints intensified and he noticed numbness and tingling in both of his legs. Petitioner described this as a little numbness and tingling, which was not constant and only present in the front thigh area. At that time, Dr. Varanasi ordered an EMG study, which showed mild bilateral L5-S1 radiculopathy.

On August 22, 2008, Petitioner was involved in another automobile accident. While driving the bus, Petitioner pulled into oncoming traffic and was struck by an SUV trailer/motor-home. Following this accident, Petitioner noticed a significant increase in his symptoms. After a few days, Petitioner had severe pain in his neck between his shoulder blades, which felt like a baseball was stuck there. Petitioner also started getting severe headaches, numbness down both of his arms, pain in his lower back, and numbness and pain running down both legs all the way into his ankles.

Following this second accident, Petitioner returned to Dr. Varanasi, who referred him to Dr. Don Kovalsky, an orthopedic specialist at the Orthopaedic Center of Southern Illinois. On October 1, 2008, at the first office visit, Petitioner's complaints were noted to be low back pain with radiation into his legs, left greater than right, and neck pain. The physical examination showed positive straight leg raising on the left at 80 degrees with positive bowstring and Valsalva test, which Dr. Kovalsky noted was consistent with a left lumbar radiculopathy.

Petitioner was diagnosed as suffering from left lumbar radiculopathy and cervical myelopathy. An MRI of Petitioner's neck noted a disc bulge at C3-4 and C6-7 and a disc protrusion at C5-6. An MRI of his lower back noted disc bulges at L2-3, L3-4, L4-5, and L5-S1, some of which were protruding. Following the review of the MRIs, Dr. Kovalsky referred Petitioner for epidural steroid injections. Dr. Kovalsky recommended focusing treatment on the low back, as a result of the radiculopathy, and indicated he would address the neck complaints at a later time. One injection was done, but Petitioner noted no improvement.

Following the unsuccessful injection, Dr. Varanasi referred Petitioner to another orthopedic specialist, Dr. Brett Taylor. On November 11, 2008, Petitioner presented with several complaints, including neck pain, radiating into right upper back, forearm, hand and finger and left forearm. He also had weakness in his upper extremities. Petitioner also had complaints of low back pain, with radiculopathy in both legs.

Dr. Taylor took a detailed history of Petitioner's spinal complaints, dating back to 1995. Of note, Dr. Taylor repeatedly noted that, following the August 2008 accident, Petitioner's symptoms increased

dramatically, and in most cases became a constant problem. In fact, Dr. Taylor opined that this motor vehicle accident "did aggravate his condition and is the reason for this dramatic increase in symptoms". Dr. Taylor ordered a battery of tests, including upper and lower extremity EMG studies, a CT myelogram and a whole body bone scan. At that time, Dr. Taylor took Petitioner off of work.

Following the review of the diagnostic tests, Dr. Taylor indicated that Petitioner was a surgical candidate. However, before surgery, Dr. Taylor recommended Petitioner see a pain specialist for cervical injections, as well as attempt physical therapy for his low back. Dr. Taylor continued to keep Petitioner off of work.

Petitioner underwent a course of injections from Dr. Bakul Dave, which helped some of his cervical complaints, but did not provide him any lasting relief in his low back. Dr. Taylor indicated that, while Petitioner was a surgical candidate, it was Petitioner's decision to continue to seek "non-operative treatment". Petitioner was returned to Dr. Dave to further explore pain management.

However, in February 2009, Petitioner returned to Dr. Taylor with no change in his symptoms. At that time, Petitioner indicated that he was willing to undergo surgical intervention to his neck. Dr. Taylor's pre-op diagnosis was "severe cervical myeloradiculopathy due to cervical stenosis with chronic bilateral C6-7 radiculopathy". Dr. Taylor ordered a host of pre-operative testing on Petitioner, as a result of his obesity, sleep apnea, diabetes and hypertension. Following the pre-op clearance, Petitioner was scheduled for a multi-level cervical decompression and fusion/hybrid procedure disc replacement.

Petitioner testified candidly regarding his history of spinal complaints, which included a neck surgery in 1996. Petitioner also testified that in 2007 he fell of his truck at home. However, Petitioner indicated that immediately before the accident of March 13, 2008 and August 22, 2008 he was able to work full duty with no problems. Following these accidents, according to Petitioner, everything was different. After the august 22, 2008 accident, Petitioner noticed a dramatic increase in his symptoms including constant numbness into his left hand and fingers, constant shooting pain down the left leg and into his feet, and severe headaches. Additionally, Petitioner was unable to get any relief from the muscle relaxers prescribed by Dr. Varanasi.

At the request of Respondent's insurance carrier for the accident of August 22, 2008, Dr. Frank Petkovich performed a Section 12 examination. Petitioner's encounter with Dr. Petkovich was brief. Petitioner provided a history of his complaints and then Dr. Petkovich performed a physical exam that was extremely short. Dr. Petkovich opined that following these motor vehicle accidents, Petitioner suffered only temporary exacerbations of his pre-existing conditions. However, like Dr. Taylor, Dr. Petkovich agreed that Petitioner was a surgical candidate, rather the need for surgery was not work related.

At the time of Arbitration, Petitioner continued to have complaints of extreme pain and discomfort. Petitioner was scheduled for surgery with Dr. Taylor on April 16, 2009.

Therefore, the Arbitrator concludes:

1. As a result of the accident of March 13, 2008, the Arbitrator finds that Petitioner suffered a sprain/strain injury to his neck and low back which ultimately resolved prior to August 22, 2008. The records of Dr. Varanasi clearly reflect Petitioner did not make complaints of neck or back pain after June 3, 2008. The Arbitrator finds that Petitioner had reached maximum medical improvement on or before that time.

   Petitioner's current condition of ill being and need for surgery is causally related to the accident of August 22, 2008. This is based on the chain of events and the records of Petitioner's treating physicians. Further, the Arbitrator finds the opinions of Dr. Taylor credible and relies on same.

   Following the August 2008 accident, Petitioner's symptoms increased dramatically and became constant in nature. Dr. Taylor opined that Petitioner's accident in August of 2008, which caused a dramatic increase in symptoms and severe aggravation of his degenerative conditions contributed to Petitioner's need for surgery and caused Petitioner's current condition.

2. The medical bills set forth in Petitioner's Exhibit 2 are reasonable and necessary and causally related to the accidents of March 13, 2008 and August 22, 2008.

   The following medical bills relate to the March 13, 2008 accident: Dr. Varanasi (3/14/08) - $100.00; St. Mary's Hospital (3/15/08 – x-rays) - $1864.00; Dr. Varanasi (3/24/08) - $100.00. Respondent (and their insurance carrier on March 13, 2008) is ordered to pay same and shall be entitled to receive credit for any and all sums previously paid toward these bills.

   Medical bills incurred on and after **August 22, 2008** shall also be the responsibility of Respondent (and their insurance carrier at that time, CCMSI). Said bills shall be paid in accordance with the provisions of the Medical Fee Schedule and Respondent shall receive credit for all amounts previously paid.

   Further, Respondent (and their insurance carrier, CCMSI) shall authorize and pay for surgical intervention per the recommendation of Dr. Taylor. Specifically the surgery scheduled for April 16, 2009.

3. As a result of the accident of August 22, 2008, Petitioner was temporarily totally disabled from September 8, 2008 through September 15, 2008 and from November 11, 2008 through April 15, 2009.

4. This award in no instance shall be a bar to a further hearing for determination of a further amount of temporary total compensation and or compensation for permanent disability.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Martha De La Vega,

Petitioner,

vs.

Nos. 03 WC 53357
04 WC 08918

Sanford Corp,

14IWCC0626

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition under Sections 19(h) and 8 (a) of the Act having been filed by the Petitioner herein and notice given to all parties. After considering the issue of whether Petitioner is entitled to an increase in the award of permanent partial disability on the basis of a material change in Petitioner's disability sufficient to warrant an increase in the award from 35% loss of use of the right arm to 50% loss of use or 25% disability pursuant to 8 (a) and Section 19 (h) of the Act, and being advised in the facts and the law The Commission denies petitions pursuant to Sections 19 (h) and 8 (a) finding that the Petitioner has failed to make a sufficient showing that there has been a material change in the disability sufficient to warrant an increase in the award for the reasons stated herein.

Petitioner brings this matter before the Commission for Review of her 8(A) and 19 (H) Petitions asserting that there has been a material change in her disability since her trial on June 23,2009. Petitioner appealed the Arbitrator's findings and on February 1, 2010 the Commission modified the Arbitrator's decision and increased the Arbitrator's award to 35% loss of the use of the right arm. Petitioner claims that she now presents with more disability than the 35% of the right arm previously awarded and seeks an increase of the award of loss to 50% of the right arm or 25% disability under Section 8(d) 2 of the Act.

Petitioner filed an Application for Benefits on September 22, 2003 which alleges that on August 8, 2003, Petitioner injured her right shoulder while doing repetitive work. In her current 8(a) and 19 (h) petition she asserts that since the award rendered by the Commission she now experiences additional pain in the right shoulder and arm, pain secondary to over-use in the right arm and gastritis resulting from the pain medications that she takes.

Petitioner is now having symptoms in her left arm, shoulder and neck because of over-use. The pain medication is damaging her stomach. Her doctor prescribed medication for gastritis. She takes Tylenol for pain and has a prescription for stronger pain medication. She is also taking medication for depression. She is taking the same medications currently that she was taking the last time she testified before the Commission.

She has been released from care by Dr. Guido Marra the physician who operated on her right shoulder. He told her he can do nothing further and referred her to the pain clinic at Loyola. She also received a psychiatric referral and was sent for accupuncture.

A party seeking modification of an award under Section 19 (h) has the burden of showing that there has been a material change in the level of disability. Whether that change has occurred is a question of fact for the Commission. *Gay v. Industrial Commission* (4th Dist. 1989) 178 Ill.App3d 129. In the instant case Petitioner testifies to increased pain that is constant.

The pain is located in the right arm, hand and superior shoulder with radiation to the medial aspect of the right scapula. On cross examination Respondent's counsel established that the complaints of pain and disability that the Petitioner relies on in seeking the increased award are identical to the complaints that Petitioner raised at the time of her initial trial.The Petitioner testified to additional complaints of gastritis caused by pain medications and pain in her left arm due to overuse but failed to produce any medical evidence whatsoever to support these additional complaints.

The medical records indicate that there is no additional surgery or therapy recommended to further treat the Petitioner. At the Petitioner's last visit with her treating physician, Dr. Marra, at Loyola University Medical Center he noted that there was no evidence of impingement syndrome which represents an improvement from her prior status.

Futhermore, the last medical records from Loyola Integrative Medicine Center introduced by Petitioner demonstrate that the Petitioner had been referred for acupuncture therapy and attended four out of the ten visits authorized by Traveler's. While reference is made to medical

care received at Cook County Hospital no records of any medical treatment were introduced at the hearing.

The Petitioner has failed to meet her burden under Section 19 (h) to show that a modification in the Section 8 (a) award made by the Commission is appropriate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petition for modification pursuant to Sections 8 (a) and 19 (h) of the Act is hereby denied for the foregoing reasons.

DATED: JUL 2 8 2014
SJM/msb
o-06/05/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

STATE OF ILLINOIS)
) SS.
COUNTY OF WHITESIDE)

☒ 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

Jacqueline Nason,

Petitioner,

vs.

NO. 08 WC 37509

14IWCC0627

Wahl Clipper,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on a timely petition for review filed by Respondent and a motion to issue a final Commission decision filed by Petitioner, with due notice given. The Commission, after considering the issues at bar 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. Further, the Commission finds that both of its decisions in this matter are now final and appealable.

On November 17, 2011, Arbitrator Holland filed a decision in this matter finding that Petitioner failed to prove accident and causal connection and denying her claim. On March 7, 2013, the Commission issued a decision and opinion on review, reversing the Arbitrator's decision, awarding benefits, and remanding the matter to the Arbitrator for a hearing to determine Petitioner's average weekly wage.

On April 3, 2014, Arbitrator Erbacci filed a decision stating that the parties stipulated during the year preceding the injury Petitioner earned $47,403.20 and the average weekly wage was $911.60. Respondent timely filed a petition for review of Arbitrator Erbacci's decision in order to preserve its right to judicial review of the Commission's interlocutory decision issued March 7, 2013. Contemporaneously, Petitioner filed a motion to issue a final Commission decision. In its response, Respondent concurred in Petitioner's motion to issue a final Commission decision.

14IWCC0627

The Commission hereby affirms and adopts Arbitrator Erbacci's decision. Further, the Commission finds that both of its decisions in this matter are now final and appealable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed April 3, 2014, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of 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: JUL 2 8 2014
SM/sk
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NASON, JACQUELINE
Employee/Petitioner

Case# **08WC037509**

WAHL CLIPPER
Employer/Respondent

14IWCC0627

On 4/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0021 REESE & REESE
TODD S REESE
979 N MAIN ST
ROCKFORD, IL 61103

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
PO BOX 1288
ROCKFORD, IL 61105

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

☐ 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

Jacquiline Nason
Employee/Petitioner

Case # 08 WC 37509

v.

Wahl Clipper
Employer/Respondent

14IWCC0627

A Decision of the Commission remanding this matter to the Arbitrator for a determination of the Petitioner's earnings and average weekly wage 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 **Rock Island**, on **March 5, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below.

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

The parties stipulated that in the year preceding the injury, Petitioner earned **$47,403.20**; the average weekly wage was **$911.60**.

14IWCC0627

ORDER

The Arbitrator finds that in the year preceding the injury, Petitioner earned **$47,403.20**; the average weekly wage was **$911.60**.

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

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

Arbitrator Anthony C. Erbacci

March 27, 2014
Date

APR 3 - 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tiffany Harris,

Petitioner,

vs.

NO. 11WC 46577

14IWCC0628

State of Illinois-DHS,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 20, 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.

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: JUL 28 2014

Stephen J. Mathis

Mario Basurto

David L. Gore

SJM/sj
o-6/26/14
44

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

HARRIS, TIFFANY
Employee/Petitioner

Case# **11WC046577**

STATE OF ILLINOIS-DHS
Employer/Respondent

14IWCC0628

On 11/20/2013, 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 0.10% 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:

0192 CUSACK GILFILLAN & O'DAY
DANIEL P CUSACK
415 HAMILTON BLCD
PEORIA, IL 61602

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

5116 ASSISTANT ATTORNEY GENERAL
GABIREL CASEY
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

NOV 20 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0628

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIFFANY HARRIS,
Employee/Petitioner

v.

STATE OF ILLINOIS – DHS,
Employer/Respondent

Case # 11 WC 46577

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, 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, **August 8, 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 **$43,950.40**; the average weekly wage was **$845.20**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **three** dependent children.

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

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, and under Section 8(a) of the Act.

ORDER

Respondent shall pay to Petitioner reasonable and necessary medical services in the amount of **$2,799.00**, pursuant to the medical fee schedule as provided by Section 8(a), and Section 8.2 of the Act.

Respondent shall authorize and pay for the right cubital tunnel surgical release, as prescribed by Dr. Blair Rhode, including all additional medical expenses and periods of temporary total disability resulting from same.

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

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 18, 2013
Date

ICArbDec19(b)

NOV 20 2013

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

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

Petitioner testified she since married after filing her Application for Adjustment of Claim in this matter, and is now known at Tiffany Harris-Nichols. She is currently enrolled in on-line classes in an attempt to obtain her degree. Petitioner testified she was employed by Respondent starting January, 2007. She was hired as an office assistant and worked that job for a year. In January, 2008, she was promoted to a Human Services Case Worker. Petitioner agreed that a job description of this position (Px6) is accurate, but that as a caseworker she typed 6-7 hours a day and did her own filing. Petitioner worked a 7.5 hour shift with a 30 minute lunch and two 15 minute breaks.

Petitioner testified that in the late Spring of 2011, she began to experience numbness and pain in her right elbow and forearm, along with her right small and ring fingers. Petitioner testified this became particularly painful when she would type at work. Petitioner testified she thought the pain and numbness would subside, but when it did not, she saw Dr. Anita Sabaral, her primary care physician, on August 1, 2011.

Petitioner testified and denied prior symptoms to her arms in the past. She testified that Dr. Sabaral performed an examination and EMG test in her office on August 1, 2011. When she returned to see Dr. Sabaral on August 8, 2011, she was diagnosed with right cubital tunnel and carpal tunnel syndromes. Dr. Sabaral then treated Petitioner conservatively, using heat, ice and supplements for nerve pain. Dr. Sabaral also prescribed pain medication including anti-inflammatories.

When conservative measures failed to relieve Petitioner's symptoms, Dr. Sabaral referred her for physical therapy. Petitioner underwent physical therapy from mid-October, 2011 through mid-November, 2011. When therapy failed to improve her condition, Dr. Sabaral eventually referred her to see Dr. Blair Rhode, an orthopedic surgeon.

Petitioner also saw Dr. Williams for an examination. This was at the request of Respondent. Dr. Williams reviewed a demand of the job sheet (Px7) filled out by Lisa Feinholz, where it notes the patient's demands of the job, use of hands for fine manipulation, typing and good finger dexterity was said to be in category A, 6 to 8 hours per day. Use of hands for gross manipulation, grasping, twisting, handling was said to be category B, 4 to 6 hours per day.

Dr. Williams testified by evidence deposition in this case. Dr. Williams testified he arrived at the diagnosis of cubital tunnel syndrome on the right. Dr. Williams testified that Petitioner did not have other risk factors to cause cubital tunnel syndrome. Williams testified that he relied on the Mayo Clinic study in rendering his opinion that typing was not a causative factor in carpal tunnel or cubital tunnel syndromes. Dr. Williams felt that someone who engages in a profession with a lot of vibration, such as using a jackhammer, could develop carpal tunnel and/or cubital tunnel syndrome. Dr. Williams further testified Petitioner was not exhibiting the sings of malingering and he felt she was an honest person. Dr. Williams did admit that doctors who belong to the American Society for Surgery of the Hand, of which he is a member, have differing opinions regarding causation in carpal tunnel and cubital tunnel syndromes.

Petitioner then saw Dr. Rhode, who examined her and prescribed right ulnar nerve surgery. Dr. Rhode authored a report that was introduced into evidence. Dr. Rhode in that report felt Petitioner demonstrated subjective and objective findings consistent with cubital tunnel syndrome to the right arm. Dr. Rhode further stated that Petitioner's constant typing and filing was an aggravating component in her right cubital tunnel syndrome. Dr. Rhode found no evidence of predisposing factors such as diabetes and thyroid dysfunction.

Petitioner testified she is right handed, but writes with her left hand. She performs almost all other functions with her right hand, including throwing a ball, use a computer mouse, and combing her hair.

Ms. Kim Gordon was called to testify by Respondent. Ms. Gorden testified she has worked for Respondent for 30 years and was Petitioner's direct supervisor on August 8, 2011. Ms. Gordon testified Petitioner's job duties included interviews with prospective clients where she would meet with the client and fill in blanks on template forms in the computer. Ms. Gordon testified that typing was not her entire job, but that she would type approximately 40% of the time during an intake interview. The interview would last 30 – 90 minutes. Each caseworker has approximately 600-700 cases. Ms. Gordon did admit that Petitioner was a good worker and that she believes she is an honest individual.

Ms. Lisa Feinholz was also called testify by Respondent. Ms. Feinholz testified that of the Petitioner's 7.5 hours at work each day, she would type 3-4 of those hours. Ms. Feinholz testified to filling out a "demand of job sheet", but she did not bring that sheet to the hearing.

When provided with a copy by Petitioner's attorney (Px7), Ms. Feinholz verified that she had filled out the sheet that was then forwarded to Dr. Williams prior to his examination. Ms. Feinholz was confronted with the document which she filled out, that stated: "it notes the patient's demands of the job, use of hands for fine manipulation, typing and good finger dexterity was said to be in category A, 6 to 8 hours per day. Use of hands for gross manipulation, grasping, twisting, handling was said to be category B, 4 to 6 hours per day."

Ms. Feinholz was unable to explain the contradiction between her testimony and the "demand of job sheet" which she filled out and sent to Dr. Williams.

Based upon the above, the Arbitrator finds that Petitioner did sustain a repetitive trauma injury while working for Respondent, which manifested itself on August 8, 2011. The Arbitrator finds Petitioner's testimony to be more reliable than that of Ms. Gordon and Ms. Feinholz concerning the work activities she performed on behalf of Respondent.

The Arbitrator further finds Dr. Rhode's opinions as the treating orthopedic surgeon to be more persuasive than the testimony of Dr. Williams.

Further the Arbitrator finds Petitioner's diagnosed condition of ill-being to be causally related to her work activities performed on behalf of this 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?

Petitioner introduced into evidence outstanding medical charges that were incurred after this accidental injury:

Dr. Sabaral	$ 440.00
Institute of Physical Medicine & Rehabilitation	$1,680.00
Orland Park Orthopedics	$ 659.00

These charges total $2,779.00.

See findings of this Arbitrator in "C" and "F" above.

Having found accident and causation in this matter, The Arbitrator further finds that the above charges represent reasonable and necessary medical care and treatment designed to cure or relieve the conditions of ill-being caused by this accident, and as a result, further finds Respondent to be liable to Petitioner for same.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" and "F" above.

Dr. Rhode stated that Petitioner underwent conservative management which included rest, oral medications, physical therapy and splinting, all of which were unsuccessful in relieving her right elbow and arm symptoms. Dr. Rhode has discussed injections that Petitioner has declined. He therefor has recommended and prescribed surgical intervention in the form of a right elbow cubital tunnel syndrome.

Having found this condition to be causally related to this accident, the Arbitrator further finds this surgery as prescribed by Dr. Rhode represents reasonable and necessary medical care designed to cure or relieve the condition of ill-being caused by this accidental injury, and orders Respondent to authorize and pay for same, including all additional medical treatment and charges relating to this surgery and periods of temporary total disability resulting from same.

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

Bruce Gutreuter,

Petitioner,

vs.

NO. 10WC 49468
11WC04796

SOI/Menard Correctional Center,

Respondent.

14IWCC0629

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, 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 December 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.

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

14IWCC0629

for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: JUL 2 8 2014
SJM/sj
o-6/25/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

GUTREUTER, BRUCE
Employee/Petitioner

Case# **10WC049468**
11WC004796

SOI/MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0629

On 12/12/2013, 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 0.09% 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:

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

DEC 12 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0629

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bruce Gutreuter
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # **10** WC **49468**

Consolidated cases: **11 WC 04796**

An *Application for Adjustment of Claim* was filed in each of these matters, and a *Notice of Hearing* was mailed to each party. These matters were heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Herrin**, on **October 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [ ] 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. [x] Other **physician choices under 8(a)**

FINDINGS

On the asserted dates of accident, **8/19/10 & 1/26/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did not*** sustain accidents that arose out of and in the course of employment.

Timely notice ***was not*** given to Respondent.

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

The parties stipulated that in the year preceding each claimed accident date, Petitioner earned **$57,528.00**; the average weekly wage was **$1,106.31**.

On each date of accident, Petitioner was **41** years of age, ***single*** with **1** dependent child.

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

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

Respondent is entitled to a credit of $-- 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

December 10, 2013
Date

ICArbDec19(b)

DEC 12 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRUCE GUTREUTER, Petitioner, vs. STATE OF ILLINOIS/MENARD C.C., Respondent.	No.	10 WC 49468 11 WC 04796

ADDENDUM TO ARBITRATION DECISION

The matters were consolidated and tried jointly pursuant to Section 8(a) and 19(b) of the Act. The parties requested a single decision encompassing both claims; given the overlapping issues and evidence, the Arbitrator concurs with this approach.

STATEMENT OF FACTS

The petitioner is a correctional officer at Menard Correctional Center who alleges bilateral carpal tunnel syndrome stemming from repetitive work activities. He asserts two effective manifestation dates, August 19, 2010 and January 26, 2011.

The petitioner first complained of carpal tunnel syndrome to his family physician, Dr. Garner at Belleville Family Medical. See generally PX3, RX1. The petitioner submitted records from 2010 through the present, but the full record shows that the petitioner established treatment there on July 11, 2008. RX1. Previous treatment records were brought to Dr. Garner noting a history of right hand numbness and possible carpal tunnel syndrome in April 2008. On March 3, 2009, the petitioner presented to Dr. Garner for several issues, and described bilateral carpal tunnel symptoms he had been having "for several years." Dr. Garner diagnosed the petitioner with bilateral carpal tunnel syndrome and provided him night splints. While the petitioner was instructed to follow up, the petitioner cancelled that appointment. RX1.

On June 10, 2010, the petitioner returned to Dr. Garner, who noted the claimant had "bilateral carpal tunnel syndrome he thinks he may have gotten at work. He is considering a workman's comp claim. He thinks he will need a future nerve conduction study at some point." He was given medication and told to follow up as needed. PX3, RX1. On August 2, 2010, he presented with "persistent carpal tunnel syndrome, right greater than left." He was prescribed an EMG. PX3, RX1.

On August 19, 2010, the petitioner underwent the EMG study. It indicated "very mild" bilateral carpal tunnel syndrome. PX4.

On November 29, 2010, Dr. Garner saw him again. At this point, he administered an injection into the right wrist for carpal tunnel symptoms. He was also prescribed medication for unrelated conditions. RX1.

On January 26, 2011, he saw Dr. Brown on the advice of his attorney. He reported to Dr. Brown that he first noticed symptoms in March 2009. Dr. Brown did not have the EMG study and recommended the petitioner secure it for his review. On February 4, 2011, Dr. Brown reviewed the EMG and assessed the petitioner with mild carpal tunnel syndrome. He recommended night splints and medication. He instructed the petitioner to return in two to three months, but the petitioner did not return to Dr. Brown. Dr. Brown's records are silent as to a causal relationship. See PX5, RX2.

The petitioner then sought treatment with Dr. Young. One section of Dr. Young's intake notes show that the patient had been referred by Dr. Garner, but another section notes that the claimant was there at the request of his attorney and was using his private insurance. PX6. The claimant testified his attorney had sent him to Dr. Young. Dr. Young saw the claimant on January 19, 2012; at that time, the petitioner reported a history of thyroid problems and asserted his hand symptoms began in January 2009. He reported a nerve conduction study in 2009 (the Arbitrator views this as a mistake about the date of the prior EMG, rather than a suggestion that an earlier EMG had been done in 2009). Dr. Young recommended new EMG studies as the prior ones were "2 – ½ years old" and instructed him to follow up thereafter. Dr. Young did not make a formal causal connection opinion in his records. PX6, RX3.

The petitioner testified that he usually worked the 3 P.M. – 11 P.M. shift, and usually as a gallery officer. The respondent submitted his assignment history (RX4) which showed that he worked the midnight shift (11 P.M. – 7 A.M.) from 2005 until April 2009, at which point he changed to the 3-11 shift. He acknowledged that the midnight shift did not perform bar rapping. His assignments show that he worked as a gallery officer from August 2005 through June 2008, at which time he shifted to detail and relief until April 2009. He was then assigned to the tower until August 2010. He has worked as either a gallery officer or escort from that time through the date of the instant hearing. He had worked segregation prior to 2005.

He testified he orally reported his medical condition to his supervisor prior to filling out the written report of injury, which was dated December 9, 2010. RX8. He presently requests authorization for the EMG.

OPINION AND ORDER

The petitioner asserts repetitive trauma as his theory of injury. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414

Ill. 326 (1953). The determination of an accident date for purposes of repetitive trauma is somewhat flexible but is not completely fluid. The accident date in such a case is the manifestation date, which is when the medical diagnosis and its causal relationship to the employment would be reasonably apparent. The petitioner had been provided the medical diagnosis from a competent medical provider of his choice years before the asserted accident dates and had mentally crystallized it from his own perspective as being linked to his employment months before the earlier of the two asserted dates. Any attempt to assert confusion as to his diagnosis fails in light of the fact that it was not a one-time finding or one that was incidental during an unrelated examination; while the initial 2008 diagnosis may have been so, the petitioner sought and received treatment specifically for the condition in 2009. The Arbitrator's review of the facts of this matter concludes the accident dates selected are not appropriate manifestation dates within the parameters of *Durand v. Industrial Commission*, 224 Ill.2d 53 (2007).

More critically, however, is that in cases relying on the repetitive trauma concept, a claimant generally relies on medical testimony to establish a causal connection between the work activities and the claimed disability, and when the question is one specifically within the purview of experts, expert opinion is mandatory. 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 an expert opinion. *Johnson v. Industrial Commission*, 89 Ill.2d 438 (1982).

In this case, while both Dr. Brown and Dr. Young took a history of the claimant's work activities, neither one rendered a causal connection opinion, be it in their records or an opinion report. Neither was called to provide testimony. Dr. Sudekum's report and testimony was in an unrelated matter and he did not examine this claimant or any medical records related to the claimant. Furthermore, his opinion refers to possible aggravating factors, rather than a specific causal analysis which could establish a relationship.

The Arbitrator finds a failure to prove accident and causal connection. The Arbitrator makes no findings as to Section 6 notice, excess physician choice under 8(a), medical bills incurred and prospective medical care, as these issues have been rendered moot by the above findings.

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

Danny Durbin ,
Petitioner,

vs.

NO: 13WC 15381

Federal Express,
Respondent,

14IWCC0630

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, penalties, fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 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: JUL 30 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

o072314
CJD/jrc
049

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

DURBIN, DANNY
Employee/Petitioner

Case# **13WC015381**

FEDERAL EXPRESS
Employer/Respondent

14IWCC0630

On 9/6/2013, 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 0.05% 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:

2126 BRANKEY & SMITH PC
SARAH D HOCKING
622 JACKSON AVE
CHARLESTON, IL 61920

2912 HANSON & DONAHUE LLC
KURT HANSON
900 WARREN AVE SUITE 3
DOWNERS GROVE, IL 60515

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)

Danny Durbin
Employee/Petitioner

v.

Federal Express
Employer/Respondent

Case # 13 WC 15381

Consolidated cases: ___

14IWCC0630

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 **Granada**, Arbitrator of the Commission, in the city of **Herrin**, 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. ☐ 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

14IWCC0630

On the date of accident, **4-8-13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,256.36**; the average weekly wage was $**504.93**.

On the date of accident, Petitioner was **36** years of age, *single* with **1** dependent children.

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

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

Respondent is entitled to a credit of $**5,454.22** under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proof regarding the issue of accident. Compensation is hereby denied.

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

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

Signature of Arbitrator

8/31/13
Date

ICArbDec19(b)

SEP 6 - 2013

14IWCC0630

FINDINGS OF FACT

On April 8, 2013, the 34 year old male Petitioner was employed as a part-time courier for the Respondent. The Petitioner had worked for the Respondent in that position since November of 2012.

The Petitioner's daily activities as a part-time courier included a pre-trip inspection, and then a "stretch and flex" in which the employees would briefly exercise in order to limber up. The Petitioner would then unload "cans" which were large freight containers similar in size to the back of a semi-truck, filled with packages. Those packages would be unloaded by hand on a conveyor belt, for further loading onto various tracks. The Petitioner was required to lift package weighing up to 75 pounds by himself, and up to 150 pounds with assistance. The Petitioner testified that, per the Respondent's requirements, he would always seek assistance for heavier packages. The Petitioner testified that he used all body parts while unloading cans, the process of which took approximately two hours. The Petitioner then spent the rest of his day driving his truck and delivering packages.

On April 8, 2013, after driving his truck for approximately two hours, the Petitioner experienced a sudden sharp pain in his left shoulder. He testified that after completing his shift, he notified his supervisor, Dan Sams, that he felt pain in his left shoulder. The Petitioner testified that there was no time when he felt pain while lifting any particular package, or while he was in the process of lifting packages. He did not report a work accident. The Petitioner denied any prior left shoulder pain or neck problems prior to April 8, 2013.

The Petitioner worked his regular shift the next day, April 9, 2013.

On the morning of April 10, 2013, the Petitioner testified that he was experiencing severe pain in his left shoulder, and he called his supervisor before reporting to work. He then presented himself to a work facility, at which time his supervisor sent him to the Bonutti Clinic for treatment.

Respondent called Dan Sams, the Petitioner's supervisor to testify. He testified that the Petitioner advised him on April 8, 2013, that he was experiencing pain in his shoulder, but that the Petitioner was not concerned. Mr. Sams testified the Petitioner did not report a work accident at that time.

On April 9, 2013, the Petitioner worked his regular shift.

Mr. Sams testified that the Petitioner called him on the morning of April 10, 2013 complaining of pain in his shoulder. Mr. Sams had the petitioner report to work, and then sent him to the Bonutti Clinic. Mr. Sams recalled that the Petitioner advised him that he could not pinpoint how he may have hurt his shoulder, but reported that it was not because of working out because he had not done that for a while. Mr. Sams documented his conversations at that time in a written statement. (Res. Ex. 4) He had the Petitioner complete a statement at that time. The Petitioner's statement, dated April 10, 2013, indicated that the Petitioner felt a pain on his left side at around 11 a.m. on April 8, 2013 while driving. The Petitioner confirmed that he reported sharp pain to his supervisor. The Petitioner further stated that he had lifted and unloaded cans at work that morning, and lifted several heavy boxes. (Res. Ex. 2)

The Respondent's First Report of Injury/Accident Report, completed April 11, 2013, confirms that the Petitioner reported that he did not know exactly when it occurred, and noticed a sharp pain while driving around 11 a.m. (Res. Ex. 3)

Steve Elam, a co-worker of the Petitioner who was also employed as a courier, testified that on April 9, 2013, that the Petitioner advised him that he had injured himself the night prior while working out. Mr. Elam testified that he had prior conversations with the Petitioner regarding working out and bodybuilding, and that the Petitioner was familiar with particular bodybuilders. Mr. Elam prepared a statement at the request of his supervisor, which was dated April 12, 2013, confirming his conversation with the Petitioner. (Res. Ex. 5) Mr. Elam also confirmed that the job duties as a courier did involve lifting unassisted up to 75 pounds, but that most packages weighed far less, and on average packages probably weighed in the range of 20 to 25 pounds.

The Petitioner was seen at the Bonutti Clinic on April 10, 2013. Under the history of present illness, and description of injury, "no known injury" was reported. The Petitioner complained of neck muscle pain extending down past his left scapula, and reported that the pain started Monday night. He denied any injury or accident. He indicated that he may lift and unload heavy boxes at work on Monday morning, but he did not file an incident report. The Petitioner submitted himself for treatment under his own group health insurance. The Petitioner reported that he had a prior muscle strain "just like this problem," and obtained treatment with a chiropractor which remedied the pain. In the Social History section, it was indicated that the Petitioner exercises regularly. The Petitioner was diagnosed with a thoracic strain and cervicalgia. (Pet. Ex. 6; Res. Ex. 1)

The Petitioner was referred for physical therapy to Central Illinois Physical Therapy, and reported for treatment on April 15, 2013. On that date, the Petitioner complained of left neck and shoulder pain starting on April 8, 2013, of unknown cause. He reported that he had a history of a similar issue a couple years prior, which was treated chiropractically. (Pet. Ex. 11)

The Petitioner testified at arbitration that he was experiencing pain on the level of 7 out of 10, mostly in the left shoulder. The Petitioner testified that he had also received treatment with Dr. Victoria Johnson of Carle Spine Institute. The records of Dr. Johnson indicate that the Petitioner was seen on June 6, 2013, reporting that he developed symptoms on April 8, 2013, at 11 a.m. while driving his truck. The Petitioner reported that two days later his neck began to bother him. His current symptoms mostly involved left shoulder pain. Dr. Johnson recommended an MRI scan of the Petitioner's left shoulder, to address a possible rotator cuff injury. (Pet. Ex. 5)

The Petitioner has not returned to work, as he had light duty restrictions, and was awaiting an MRI of his left shoulder, which was scheduled for the next week. The Petitioner reported that he was receiving job opportunity forms from the Respondent on a weekly basis, for potential light duty job openings. But the Petitioner testified that he was not aware of his current capabilities and restrictions, which he agreed would be important for him to know in order to respond to the potential job openings.

The Petitioner offered a narrative report from Dr. Karl Rudert of the Bonutti Clinic dated July 30, 2013, indicating that the Petitioner had a pre-existing condition of cervical spondylosis and degenerative disc disease in the neck, and that it was unknown whether this was caused by Fed Ex or if it was just part of the degenerative disc disease process. Dr. Rudert indicated a history of the Petitioner doing some lifting at the end of his shift, and unloading large heavy boxes that caused discomfort in his left shoulder and lateral neck. Based upon this history, Dr. Rudert indicated that the Petitioner may have aggravated his pre-existing condition while working as a Fed Ex driver. Dr. Rudert indicated that he was strictly going by the history as known. Dr. Rudert further stated that he did not believe the Petitioner's shoulder had anything to do with his complaints of pain. (Pet. Ex. 8)

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 notes that the Petitioner did not sustain any type of specific accident while working for the Respondent. Furthermore, the Petitioner failed to provide evidence supporting a repetitive trauma claim. The Petitioner did not identify any progressive development of pain associated with the performance of work activities. Further, the Petitioner did not specifically identify a particular repetitive activity and corresponding development of pain at a certain body area. There was no indication of repetitive or heavy overhead lifting. The mere performance of the Petitioner's usual work activities, even if it involves occasional heavy lifting of some boxes for a short duration on a daily basis, does not form the basis for a repetitive trauma claim without further specifics regarding association of discomfort or pain with the performance of those activities, and a valid medical opinion supporting a repetitive trauma claim. In this case, even the Petitioner's medical evidence in the form of the narrative report from Dr. Rudert is quite ambivalent on the question of causation. Based on the foregoing, 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)
) 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

Ollie Miller,
Petitioner,

vs.

NO: 08WC 56819

14IWCC0631

Cahokia Nursing Home,
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 causal connection, medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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: JUL 30 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

o072214
CJD/jrc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MILLER, OLLIE
Employee/Petitioner

Case# **08WC056819**

CAHOKIA NURSING HOME
Employer/Respondent

14IWCC0631

On 11/25/2013, 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:

2973 STORMENT LAW OFFICE
PAUL M STORMENT
310 E WASHINGTON
BELLEVILLE, IL 62220

0385 BONALDI CLINTON & DAVIS LTD
DAVID C DAVIS
2900 FRANK SCOTT PKWY W #988
BELLEVILLE, IL 62223

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

Ollie Miller
Employee/Petitioner

v.

Cahokia Nursing Home
Employer/Respondent

Case # **08** WC **56819**

Consolidated cases: **N/A**

14IWCC0631

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 **September 26, 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 **9/13/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$14,114.16**; the average weekly wage was **$271.43**.

On the date of accident, Petitioner was **54** years of age, ***single*** 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.

ORDER

Because Petitioner failed to meet her burden of proof regarding the issue of causation, her claim for TTD, medical expenses and permanent partial disability is denied.

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

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

Signature of Arbitrator

11/18/13
Date

NOV 25 2013

14IWCC0631

FINDINGS OF FACT

This case involves a Petitioner who alleges an accident on September 13, 2008. At the time, Petitioner was 54 years old and worked for the Respondent as a CNA. The parties stipulated to the Petitioner having an accident on September 13, 2008, but Respondent disputes that the Petitioner's current condition of ill-being is causally connected to the accident. Respondent also disputes their liability for any medical expenses, TTD or permanent partial disability.

Petitioner has worked as a CNA for Respondent, Cahokia Nursing Home, since August of 2004. In this capacity, she provides care to residents. She worked the night shift four days a week, seven and a half hours per shift. On September 13, 2008, she was walking at work, turned a corner, and slipped and fell on urine on the floor. Her right leg went back; her left leg went forward; her left shoulder struck a door jam; and she fell to the ground landing on her buttocks and bent wrists. She continued working, but her right knee became painful. Later that day, she presented to the emergency room at St. Elizabeth's Hospital complaining of right knee, right ankle and left wrist pain. (RX5, p. 9) A right knee x-ray showed severe osteoarthritis; a right ankle x-ray showed soft tissue swelling and a heel spur; and a left wrist x-ray showed osteoarthritis. She was diagnosed with contusions and a soft tissue injury, given an ace bandage, and instructed to see the occupational medicine department. (RX5, p. 8, 14)

On September 15, 2008, Petitioner completed a Report of Injury indicating that she had injured her right knee, right ankle, and both wrists. (RX1)

On September 16, 2008, Petitioner saw Dr. Bryon Gorton with St. Elizabeth's Occupational Medicine. (RX6) She was complaining of right knee, left wrist and left shoulder pain. She said her shoulder and wrist were improving and most of the pain was in the right knee and right ankle. She denied any previous history of a knee injury. On exam, the left shoulder was noted to be non-tender with a full range of motion; the left wrist had mild tenderness; the right knee had an effusion with diminished range of motion; and the right ankle had no swelling with a full range of motion. Dr. Gorton diagnosed left shoulder, left wrist, right ankle, and right knee strains. He prescribed medications, ordered an MRI of the knee, and imposed work restrictions. (RX6, p. 2) The September 22, 2008 right knee MRI showed severe degenerative disease, most marked in the medial tibiofemoral compartment; complete loss of the articular cartilage; a minimally displaced tear of the medial meniscus, subchondral cysts in the medial femoral condyle, medial tibial plateau, and lateral tibial plateau; and severe degenerative joint disease in the patellofemoral compartment. (PX6, Res. Dep. Exh. 4) On September 23, 2008, Dr. Gorton again noted that the left shoulder was non-tender with a full range of motion. (PX6, p. 162-164) The right knee no longer had an effusion. Petitioner was referred to Dr. Donald Johnston, orthopedic surgeon. (RX6, p. 3-4)

On October 1, 2008, Petitioner saw Dr. Johnston and complained only of right knee pain which she said had started with the work accident. (RX10) She denied having any prior right knee injuries, pain or treatment. (PX6, p. 77-78) Based on her exam, MRI and x-rays, he diagnosed osteoarthritis and a degenerative medial meniscus tear, but testified her clinical presentation was most consistent with osteoarthritis because there were no mechanical symptoms. (PX6, p. 106-107, 114) At that time, he offered no treatment for the meniscal tear. (PX6, p. 114) For the arthritis, he recommended conservative treatment and weight loss. He noted that she would eventually require a total knee arthroplasty due to her young age. Dr. Johnston also examined Petitioner's arms and found they were non-tender with a full range of motion. (RX10, p. 3)

Petitioner's past medical history contained in the medical records of her primary care physician, Dr. Charles Ampadu, document that she was complaining of severe right knee pain and stiffness in March of 2008, or just six months before the work accident. Dr. Ampadu's records show that an April 2, 2008 right knee x-ray showed moderate arthritis with bone spurs and moderate joint space narrowing. On April 16, 2008, Dr. Ampadu documented a decreased range of motion in her knee joints and a more than 50% reduced capacity for bending, stooping, turning, pushing and pulling. These records show that Dr. Ampadu was regularly prescribing anti-inflammatory medications through his July 24, 2008 office visit, the last one before the work accident. (RX7, p. 7-16)

At trial, Petitioner corroborated these medical records and said she continued taking the arthritis medications after July 24, 2008 because they helped control her pain. She also said that, prior to the September 13, 2008 work accident, her right knee pain would be aggravated by prolonged walking and standing and by bending her knee, which are the identical complaints she documented on October 1, 2008 on the "New Patient Medical Information" form she completed for Dr. Johnston, where she also wrote that her knee symptoms had started on July 13, 2008. (RX10, p. 1)

Dr. Johnston followed up with Petitioner on October 22, 2008, November 14, 2008 and December 15, 2008. She had no complaints of shoulder or other joint pain during these visits. (PX6, p. 167, Pet. Exhs. 3b, 3c and 3d) Dr. Johnston treated her knee with activity modification, medications, and home exercises. On December 15, 2008, Petitioner continued to report improvement with her knee, and Dr. Johnston's exam was normal except for some minimal tenderness along the posterior lateral joint line, a new finding. (PX6, p. 117-120) Dr. Johnston, who had maintained light duty restrictions, released her to return to work without restrictions at that point. (PX6, p. 123) Petitioner testified she then returned to her regular CNA duties. Dr. Johnston testified that the work accident caused an acute, temporary exacerbation of her right knee arthritis (PX6, p. 154); that as of December 15, 2008, Petitioner had recovered from that exacerbation as well as from any exacerbation of the medial meniscal tear; and that her knee condition had stabilized and plateaued. (PX6, p. 123-124, 129-130)

On December 8, 2008, Petitioner saw Dr. Ampadu, gave a history of the work accident, and complained of left shoulder pain which she attributed to the work accident. (RX7, p. 17) Her left shoulder was noted to be tender and stiff. She also had bilateral wrist pain. She was diagnosed with shoulder pain, prescribed Darvocet, and sent her for x-rays and MRIs. The shoulder x-ray showed degenerative changes of the AC joint; the left wrist x-ray showed no acute abnormalities; and the right wrist x-ray showed degenerative lucencies in the lunate bone. (RX7, p. 18-19) The left shoulder MRI showed a partial thickness tear of the supraspinatus tendon, degenerative changes of the AC joint and greater tuberosity of the humerus, and subacromial bursitis, and the left wrist MRI showed minimal degenerative changes. (RX7, p. 21-22)

On January 7, 2009, Petitioner returned to Dr. Johnston, stating her right knee was bothersome with prolonged walking at work. (PX6, Pet. Dep. Exh. 3e) Dr. Johnston testified this was a new acute exacerbation of her arthritis. (PX6, p. 134) He began injecting the knee.

Meanwhile, on January 29, 2009, Petitioner began receiving physical therapy for her left shoulder and wrists. She was discharged on February 10 2009 when her wrists were not painful and her shoulder had only mild soreness. (RX8)

On August 12, 2009, Petitioner saw Dr. Johnston and received her third knee injection. She also complained of left shoulder pain and blamed the work accident for same. (PX6, p. 36-37) Based on the shoulder x-rays and MRI, he diagnosed an impingement and a partial rotator cuff tear. He testified those conditions pre-dated the work accident. (PX6, p. 177-178) He injected the shoulder. (PX6, p. 37-43)

14IWCC0631

On September 29, 2009, Dr. Johnston did not believe Petitioner needed a total knee replacement surgery, noting that she was improved and her symptoms were waxing and waning. (PX6, p. 138-139) On October 21, 2009, Dr. Johnston said Petitioner's knee and shoulder were better. (PX6, p. 45-48)

After October 21, 2009, Petitioner did not see Dr. Johnston again for two and a half years or until May 22, 2012. (PX6, p. 50) During that time period, Petitioner continued working her regular CNA job, and on October 8, 2010, she began a part-time job as a home care aide for Addus HealthCare to assist her mother 20 to 24 hours a week for three days. In qualifying for this job, Petitioner had to successfully pass an Essential Job Functions Test, which she did. (RX11) In doing so, she had no difficulty or discomfort bending, squatting or reaching overhead and stated she had no physical condition that might affect her ability to perform the job. (RX11, p. 12) During these same two and a half years, Petitioner followed up with Dr. Ampadu on June 23, 2010, June 29, 2011, September 2, 2011 and January 26, 2012. Those office notes do not contain any complaints or exam findings relative to the right knee. (RX7, p. 26-30) The Arbitrator notes Petitioner testified that when she has pain, she goes to the doctor. In that regard, she did report left shoulder pain on June 23, 2010 and June 29, 2011, but not thereafter.

On May 22, 2012, Petitioner told Dr. Johnston that her knee pain had progressed and she wanted a total knee replacement surgery. (PX6, p. 50) At trial, she explained that by then she was having more bad days than good days and the medications were not as effective. She admitted that from March 2008, when she first began having knee pain, until she had the surgery in June 2012, her knee pain would come and go. On June 18, 2012, Dr. Johnston took her off work and performed the surgery. On September 18, 2012, he released her to return to work without restrictions. She was to return for a follow-up visit but never did. (PX3; RX10, p. 6) At trial, Petitioner had no knee complaints, stating her knee was fine.

While treating with Dr. Johnston from 5/22/12 through 9/18/12, Petitioner did not complain of any left shoulder pain. (PX6, p. 182) She offered no trial testimony regarding the current condition of her left shoulder.

Dr. Johnston, a board certified orthopedic surgeon who limits his practice to treating the joints, testified for Petitioner. On direct examination, he said the September 13, 2008 work-related fall had caused an aggravation of her knee arthritis and that she subsequently required the knee replacement surgery. (PX6, p. 6-7, 8, 61-62, 65) He further testified that if she injured her left shoulder during the fall, she aggravated her impingement syndrome and partial rotator cuff tear. (PX6, p. 64) On cross-examination, after reviewing the pre-accident records of Dr. Ampadu for the first time, he said he could not testify within a reasonable degree of medical certainty that any one of her knee arthritis flare-ups over the years were what caused the need for the surgery; that the reason for the surgery was her arthritis; and that the work-related accident had caused only a temporary exacerbation. (PX6, p. 151, 153, 154) Regarding her left shoulder, Dr. Johnston admitted that, based on the September 16, 2008 and September 23, 2008 office notes of Dr. Gorton and on his October 1, 2008 examination of her arms, any work-related shoulder pain had resolved by October 1, 2008 and any injuries to her AC joint or rotator cuff had become asymptomatic by October 1, 2008. (PX6, p. 162-164, 165-166)

Dr. Joseph Williams examined the Petitioner pursuant to Section 12 of the Act, on January 19, 2010. (RX4, p. 6) Dr. Williams is a board certified, general orthopedic surgeon who has been doing 200 knee replacement surgeries a year since 1978. (RX4, p. 4-5) He interviewed Petitioner and reviewed her relevant medical records and radiographic films. (RX4, Res. Dep. Exhs. 2 and 3) Dr. Williams testified that the work injury caused a right knee strain which reached MMI shortly thereafter. (RX4, p. 26) He further testified that the treatment provided to Petitioner by Dr. Johnston beginning on October 1, 2008 was for the knee arthritis which pre-dated the accident. (RX4, p. 28) Dr. Williams said Petitioner told him the arthritis had been bothering her for several months before the accident. (RX4, p. 52-53) Regarding the total knee replacement surgery, Dr. Williams

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testified it was not related to the accident, explaining that she was symptomatic before the accident, the arthritis had developed from wear and tear and her obesity, there were no acute findings on the x-rays and MRI after the accident, the accident did not advance or accelerate the arthritis or change the time frame for when surgery became necessary, there were no complaints of right knee pain in Dr. Ampadu's records from June 23, 2010 through January 26, 2012, and there was a more than three and a half year time gap between the date of accident and Petitioner's decision to have the surgery. (RX4, p. 12-13, 17, 18-19, 29-30, 39-41) Regarding the left shoulder, Dr. Williams testified all the pathology noted on the MRI was degenerative and pre-dated the work accident. (RX4, p. 22-23) He said this pathology can be asymptomatic but can become symptomatic from ordinary daily activities. (RX4, p. 31) He did not believe Petitioner sustained an acute shoulder injury as a result of the work accident because the examination findings of Dr. Gorton and Dr. Johnston through October 1, 2008 did not show any abnormalities, which is inconsistent with an acute injury. (RX4, p. 31-33) Thus, he believes any left shoulder injury had resolved by October 1, 2008. (RX4, p. 34) Although Dr. Williams conceded that trauma can aggravate knee arthritis, impingement syndromes, and partial rotator cuff tears, he did not believe that occurred in this case. (RX4, p. 56, 68, 70-71, 73, 78-79)

Ellen Lockett testified for Respondent. She has been the supervisor of all CNAs for Respondent for 13 years. If one of the CNAs is having difficulty performing their duties as a result of an injury, Ellen is supposed to be told at which point she would replace the CNA so the residents are not put in any danger. From September 29, 2009 to June 18, 2012, Ellen was never told by Petitioner or anyone else that Petitioner was having difficulty performing her CNA duties.

Charlene Chukukere also testified for Respondent. She has been employed by Respondent as an LPN since October 2010. As an LPN, she is a "charge nurse", that is, the supervisor of the CNAs on her shift. Ms. Chukukere and Petitioner worked the night shift together on the same hall from October 2010 until Petitioner began losing time from work in June 2012. Ms. Chukukere was Petitioner's immediate supervisor. They had a considerable amount of contact with one another during their shift. From October 2010 until Petitioner went off work for her surgery in June 2012, Petitioner never told Ms. Chukukere that she was having any pain or discomfort, and Petitioner never exhibited any overt signs of being in pain such as grimacing or limping. During this period of time, Ms. Chukukere had no reason to believe Petitioner was having any difficulty performing her regular CNA duties. Ms. Chukukere was not aware that Petitioner was claiming a workers' compensation injury, did not know what part of her body was being operated on, and did not know Petitioner had arthritis.

CONCLUSIONS OF LAW

1. The Arbitrator finds that Petitioner's current condition of ill-being is not related to the September 13, 2008 work accident. In support of this finding, the Arbitrator finds persuasive the opinions of Dr. Williams, which are supported by the Petitioner's own medical records. While the Petitioner's records show that she sustained a knee strain on the alleged accident date, the event merely served as a temporary aggravation of Petitioner's condition. Petitioner's medical records clearly show that she was actively treating for her right knee arthritis for months before her alleged accident, and was released from medical care on December 15, 2008. Additionally, the Petitioner failed to prove causation regarding her alleged left shoulder injury. The Arbitrator notes that no doctor offered an opinion that the left shoulder complaints Dr. Ampadu began treating in December of 2008 were work related.

2. Based on the Arbitrator's findings regarding the issue of causation, the Petitioner's claim for medical expenses, TTD and permanent partial disability are denied.

STATE OF ILLINOIS

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesse R. England,
Petitioner,

vs. No. 11 WC 044980

Diecker-Terry Masonry,
Respondent.

14IWCC0632

DECISION AND OPINION ON REVIEW

A Petition for Review having been timely filed by Respondent and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical treatment, and temporary total disability, and being advised of the facts and law, modifies the August 19, 2013 Section 19(b) Decision of Arbitrator Gallagher as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 3122, 35 Ill. Dec. 794 (1980).

Following a Section 19(b) hearing on June 14, 2013, Arbitrator Gallagher rejected Respondent's defense of intoxication and found that Petitioner's condition of ill-being at the time of hearing was causally related to a fall from scaffolding arising out of and in the course of his employment on October 27, 2011. Petitioner, a 42 year old laborer, was employed as a masonry attendant and fell 25-30 feet from defective scaffolding in the performance of his assigned duty to supply materials for the bricklayers. Respondent argued that Petitioner was intoxicated at the time of his injury, four hours after reporting for work, and that the Section 12 presumption of intoxication arose from his refusal to provide urine for ETOH testing at the hospital.

An ambulance was called to the scene of Petitioner's accident, and two paramedics attended to him on site and in route to Crossroads Community Hospital. Upon arrival at the Emergency Room, Petitioner complained of a slight headache and neck and back pain, and multiple diagnostic tests were performed. An x-ray of his left humerus revealed a mid-shaft fracture with angulation deformity, and lumbar x-rays showed an L1 compression fracture deformity resulting in 30% loss of disc height and multi-level osteoarthritic changes.

On October 28, 2011, Dr. Rerri performed an open reduction and internal fixation of the left humeral shaft and an L1 kyphoplasty of the lumbar spine. Petitioner was released from the hospital on October 30, 2011. Petitioner complained of persistent low back pain radiating down his left leg to his foot, and Dr. Rerri ordered a lumbar MRI and EMG of Petitioner's lower extremities. The EMG showed denervation affecting the L4-5 nerve roots, consistent with Petitioner's complaints, and the MRI showed foraminal stenosis at L3-4, L4-5, and L5-S1 bilaterally. Dr. Rerri ordered physical therapy to improve shoulder and elbow range of motion and an L4-5 epidural steroid injection. Dr. Rerri also administered a cortisone injection to Petitioner's left shoulder and a left L4-5 interlaminar ESI. He referred Petitioner to Dr. McIntosh for evaluation of both shoulders and his left arm, and Dr. McIntosh administered a subacromial injection at the left shoulder. Dr. Rerri administered another lumbar ESI, and Petitioner treated with his primary care physician for the high blood pressure that resulted from his injections.

Dr. Rerri also referred Petitioner to a neurologist in response to his family's report of irrational behavior, anger, tantrums, irritability, and memory lapses. Dr. Kosierkewicz recommended speech therapy and a brain MRI and EEG, both of which returned normal results, and noted Petitioner's anxiety problems. Petitioner was evaluated at Illinois Centre Behavioral Health, where he complained of depression, anxiety attacks and chronic pain, and was diagnosed with depression and multiple medical complaints. A January 10, 2012 speech language pathology evaluation revealed severe deficits in several areas and speech therapy was ordered.

Physiatrist Dr. Doll performed a Section 12 evaluation for Respondent on May 8, 2012 and opined that Petitioner's accident did not result in direct structural trauma to Petitioner's bilateral hip, knee or ankle joints, nor did it aggravate pre-existing degenerative conditions. The joint symptoms of which Petitioner complained were attributable to his degenerative conditions, not to the accident. Dr. Doll recommended a CT scan of Petitioner's lumbar spine and MRI of his pelvis, as well as additional physical therapy. The tests revealed bilateral femoral head lateral bumps which predisposed Petitioner to impingement symptoms and bulging discs at the two levels below L4.

Dr. Rende performed a second Section 12 evaluation on November 21, 2012, evaluating only Petitioner's right hip, knee and ankle. He found no evidence of injury or aggravation of any pre-existing conditions and attributed Petitioner's ankle pain to radiculopathy from his L4-5 nerve root and his knee and hip pain to arthritis.

Respondent's February 19, 2013 Utilization Review non-certified Petitioner's ongoing use of narcotics, finding that they should be discontinued in the absence of overall improvement in function. Dr. Rende adopted this finding in his March 18, 2013 addendum opinion, recommending that Petitioner taper his narcotic usage and initiate treatment with non-addictive

drugs like Lyrica or Cymbalta. Dr. Doll also agreed that Petitioner's narcotics usage should be discontinued.

Dr. Rerri authored three reports, indicating diagnoses of post-traumatic stress disorder (PTSD), L1 compression fracture, left humeral fracture, left rotator cuff impingement, left lumbar radiculopathy, right hip arthritis, left knee osteoarthritis, and post-traumatic right ankle pain. He related all of these conditions to Petitioner's October 27, 2011 fall.

Respondent initially accepted the claim and paid medical expenses and lost time benefits. However, these payments were terminated in June of 2012, and Respondent urges on appeal that Petitioner failed to overcome the presumption of intoxication that arose when he allegedly refused to cooperate with the urine screening ordered by the Emergency Room physician. Respondent also argues that any causal connection between Petitioner's current condition and his work accident was severed by Petitioner's failure to attend physical therapy and speech therapy appointments and by his failure to perform the home exercises prescribed by his physicians.

Intoxication

Arbitrator Gallagher noted that the bases for Respondent's denial of Petitioner's claim were that he was intoxicated at the time of his accident, and the intoxication was the proximate cause of his fall from the scaffold. Respondent notes that Petitioner was aware of the dangerous condition of the defective scaffold and argues that his failure to take adequate precautions constitutes evidence of his intoxication. Respondent also vigorously argues that a rebuttable presumption of intoxication under Section 11 of the Act arose when Petitioner refused to provide urine for a drug screening while in the Emergency Room following his accident. Respondent offered the testimony of the attending nurse, Nurse Bouser, who testified that she asked Petitioner for a urine sample, but he advised her that he did not need to urinate at that time; a response she testified commonly was used as an excuse to avoid drug testing.

Urine Test. Petitioner arrived at the Crossroads Emergency Room at 12:09 PM on October 27, 2011. Dr. Fung, the Emergency Room physician, ordered a urine ETOH test at 12:12 PM, along with a battery of other diagnostic tests. At 12:15 PM, blood drawn from Petitioner tested negative for alcohol. The outstanding order for a urine sample was rescinded at 12:15 PM, presumably because the blood test was negative for alcohol. Nurse Bouser made her request for urine at 1:10 PM, unaware that the urine test order had been cancelled. Nurse Bouser did not recall exactly what she had told Petitioner at the time she made her request, but the Commission finds it did not comply with the regulations associated with urine testing and was not sufficient to advise him of the ramifications of his failure to provide urine for testing. Petitioner estimated his pain level at the time of arrival in the hospital at 10/10 and he had just fallen at least 25 feet from scaffolding. The Commission finds that under these circumstances, it is less likely that he would refuse to comply with Nurse Bouser's demand for a urine sample for fear of detection of alcohol than that he simply did not need to urinate. Respondent failed to prove that Petitioner made a conscious, informed choice not to cooperate with Nurse Bouser's attempt to perform a urine ETOH test.

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Petitioner's Behavior. Respondent also argues that Petitioner knew of the dangerous condition of the scaffold, and his failure to observe the necessary precautions evidenced his intoxication. Petitioner notes that he had been on the job for at least four hours prior to his fall, yet Respondent offered no testimony of witnesses that he behaved as if he were intoxicated. Petitioner offered the testimony of two paramedics who attended to him at the accident site and in the ambulance. Neither noted any odor of alcohol nor any behavior indicating that Petitioner was not sober at the time of his accident. The Emergency Room personnel noted no evidence of intoxication at the time of his arrival, and the blood test at 12:15 PM confirmed his sobriety. The Commission finds Petitioner's misstep on the scaffold more likely to have resulted from his hurry to perform his assigned tasks than from any intoxication.

Vial of Liquid. In conjunction with its efforts to prove that Petitioner was intoxicated at the time of his accident, Respondent offered evidence that he possessed a small vial of yellow-green liquid, wrapped in a hand-warmer, when he fell. Petitioner admitted that he had this item in his pocket at that time and that he gave it to a co-worker who came to his aid. Petitioner testified that he had found the vial earlier that day and intended to turn it in to his supervisor, but had not yet taken time to do so. Respondent urges that the vial contained "clean" urine, which Petitioner intended to use in the event of a random drug test. However, no tests were ever conducted on the liquid, and the Arbitrator found that the vial was not persuasive evidence of Petitioner's intention to avoid detection of drug or alcohol abuse during work hours. Given the absence of any behavior indicating intoxication and any clear refusal to submit to ETOH urine testing, the Commission agrees with the Arbitrator's finding that Petitioner's possession of the vial is entitled to no weight in determining whether he was intoxicated at work. Moreover, Petitioner's blood test within the Emergency Room conclusively proved he was not intoxicated at the time of his accident, so any presumption of intoxication would have been overcome.

Based upon the foregoing evidence, the Commission affirms the Arbitrator's finding that no presumption of intoxication arose from Petitioner's purported refusal to provide a urine sample and that Respondent's defense of intoxication otherwise fails.

Causal Connection

Respondent argues that, even if it is found liable for Petitioner's medical expenses, it should not be found liable for the costs associated with Petitioner's two June 2, 2012 Emergency Room visits. On that date, Petitioner was arrested for domestic battery at his home, handcuffed, and taken to jail, where he testified he spent some time lying on a concrete floor before being released. Petitioner testified that the arrest and confinement aggravated his arm injury and back pain. After his release, Petitioner sought treatment first at Crossroads Hospital, where there was a wait, and then at St. Mary's Emergency Room. Respondent disputes liability for these charges, on the basis that the alleged aggravation of Petitioner's injuries by police in response to his voluntary misbehavior constituted an "injurious practice" that severed the causal connection between his fall and condition of ill-being at hearing. Respondent argues that the Emergency Room expenses were not incurred as the natural consequences of the work-related accident, but resulted from Petitioner's own volition. Respondent withheld payment of medical bills and temporary total disability for the entire month of June 2, 2012 in response to Petitioner's actions.

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Arbitrator Gallagher noted that Respondent did not pay Petitioner temporary total disability between June 8, 2012 and June 31, 2012, "apparently because of his arrest." However, Respondent filed no motion to suspend benefits during that time, and no letter of explanation for the suspension of benefits appears in the six volumes of records. It appears that Petitioner was incarcerated for only a brief period on June 2, 2012, and the Commission agrees with the Arbitrator's finding that Respondent's suspension of benefits for the entire month was not justified. The Commission does find persuasive Respondent's protest against liability for the two Emergency Room visits on June 2, 2012. The Commission reverses the Arbitrator's award to Petitioner for charges for both Emergency Room visits on June 2, 2012. The Commission finds these expenses were not work related, but were incurred as a result of Petitioner's conduct.

Respondent also alleges that Petitioner engaged in other "injurious practices" in failing to attend physical therapy and speech therapy appointments. Respondent argues that these missed appointments, together with Petitioner's arrest and incarceration, impaired his recovery and justified Respondent's suspension of benefits from June 8 through June 31, 2012. The Commission finds that Respondent failed to prove that Petitioner's irregular attendance at his various therapies interfered with his recovery. The Commission finds that although Respondent should not be held liable for the Emergency Room visits on June 2, 2012, it is liable for all other medical expenses contained in the record and for total temporary disability incurred from June 8 through June 31, 2012.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the August 19, 2013 Decision of the Arbitrator is hereby modified in part and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable, necessary, and related medical bills as identified in Petitioner's Exhibit 1, with the exception of the bills related to Petitioner's two Emergency Room visits on June 2, 2012, pursuant to the medical fee schedule, in accordance with and subject to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and make payment for the medical treatment recommended by Dr. Rerri and Dr. McIntosh, including, but not limited to, left shoulder surgery and the medical treatment recommended by Dr. Rerri and Dr. Rende for psychiatric treatment for post-traumatic stress disorder and drug dependence.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner temporary total disability benefits of $606.91 per week for 85-2/7 weeks, commencing October 27, 2011, through June 14, 2013, pursuant to Section 8(b) 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 injuries.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. 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: JUL 30 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-05/27/14
drd/dak
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

ENGLAND, JESSE R
Employee/Petitioner

Case# **11WC044980**

DIECKER-TERRRY MASONRY
Employer/Respondent

14IWCC0632

On 8/19/2013, 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:

0728 THOMAS W DUDA
3125 N WILKE RD
SUITE A
ARLINGTON HTS, IL 60004

2593 GANAN & SHAPIRO PC
IAN M WHITE
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

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)

Jesse R. England
Employee/Petitioner

v.

Diecker-Terry Masonry
Employer/Respondent

Case # 11 WC 44980

Consolidated cases: n/a

141WCC0632

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 June 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 _____

FINDINGS

On the date of accident, October 27, 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 $47,338.72; the average weekly wage was $910.36.

On the date of accident, Petitioner was 42 years of age, married 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 $45,094.84 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $45,094.84.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

Respondent shall authorize and make payment for the medical treatment recommended by Dr. Rerri and Dr. McIntosh including, but not limited to, left shoulder surgery and the medical treatment recommended by Dr. Rerri for and Dr. Rende for psychiatric treatment for posttraumatic stress disorder and drug dependence.

Respondent shall pay Petitioner temporary total disability benefits of $606.91 for 85 2/7 weeks commencing October 27, 2011, through June 14, 2013, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

August 13, 2013
Date

AUG 19 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 October 27, 2011. Respondent initially accepted the claim and paid both medical and temporary total disability benefits; however, Respondent subsequently disputed liability on the basis of accident and causal relationship. This case was tried as a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits and medical as well as prospective medical treatment.

The basis for Respondent's position that Petitioner did not sustain a compensable accident because they believed that Petitioner was intoxicated at the time of the accident and that said intoxication was the proximate cause of the injuries he sustained. Respondent also took the position that Petitioner refused to submit to urine testing after the accident thereby raising a rebuttable presumption that he was intoxicated. Respondent's statutory authority for the preceding was Section 11 of the Act.

In addition to the preceding, Respondent also suspended payment of temporary total disability benefits between June 8, 2012, and June 31, 2012, based on Petitioner's non-compliance with medical treatment and the fact that he was temporarily incarcerated. Based on Respondent's subsequent denial of the claim, temporary total disability benefits were again terminated effective April 27, 2013.

Petitioner worked for Respondent as a masonry attendant and, on October 27, 2011, he was working on a project at Good Samaritan Hospital in Mount Vernon. Petitioner's job was to provide sufficient mortar/mud and bricks to the bricklayers and provide them with other items on an as needed basis. In connection with the project, there was an area of scaffolding approximately 25 to 30 feet above the ground. Around lunchtime Petitioner was on the scaffold and was in the process of retrieving some wire for the use of one of the bricklayers. As he was in the process of doing this, Petitioner stepped onto a temporary plate, the plate gave way causing Petitioner to fall approximately 25 to 30 feet landing on the ground striking his left arm and shoulder on an angle iron.

Earlier that same day, Petitioner testified that he was climbing some stairs and that he observed a small plastic container on a step which he thought contained oil or some sort of foreign substance. Petitioner picked up the container, put it in his pocket and then forgot about it until after the accident. After Petitioner fell, he stated a couple of other employees came to his assistance. One of these employees was Craig Hicks, who was on the scaffolding with Petitioner at the time he fell. After he fell, Petitioner stated that the container was causing discomfort in his leg so he gave it to Craig Hicks. When Respondent's counsel cross-examined Petitioner, counsel produced the container in question which contained what appeared to be a few ounces of a yellow liquid and had a packet of some sort attached to it with a rubber band. Petitioner acknowledged this as being the container that he said he found on the step.

Craig Hicks appeared and testified for Respondent pursuant to a subpoena. Hick's testified that after the accident Petitioner reached into his pocket and gave him the container. Petitioner said

nothing to Hicks at that time and Hicks stated that it was his understanding that the container had "clean urine" in it. Subsequent to the accident, Hicks gave the container to Kyle Demsar, Respondent's President.

Another employee of the Respondent, Luke Valkamp, testified at the trial. He witnessed Petitioner fall from the scaffolding and also went to provide assistance to the Petitioner afterwards. He observed Petitioner hand the container to Hicks; however, he did not draw any conclusions as to what the contents may have been.

Kyle Demsar testified on behalf of Respondent and confirmed that Hicks gave him the container with the yellow liquid shortly after Petitioner's accident. The container was then stored in a vault until shortly before the case came to trial. The contents of the container were never tested so there was no evidence as to exactly what the substance in the container was. Demsar also testified that there were enhanced drug testing requirements at the job site and that any of the Respondent's employees could have been subjected to her random drug test.

Petitioner's counsel had two witnesses testify on his behalf, Gilbert Lee and Brandon Emrich, the paramedic and paramedic/firefighter, respectively, who both responded to the call. Both Lee and Emrich observed Petitioner at the scene and testified that Petitioner's mental status was conscious and alert. Further, both of them testified that there was no evidence of alcohol use by the Petitioner. Petitioner testified that he did not consume any alcohol or use any illegal recreational drugs at any time proximate to having sustained the injury.

Following the accident Petitioner was taken to Crossroads Community Hospital where he was hospitalized from October 27, 2011, to October 31, 2011. Petitioner was admitted to Crossroads at 12:09 PM and at 12:15 p.m. an IV was started and morphine was given to Petitioner to relieve the pain. At 1:20 PM Petitioner was seen by Kimberly Bowser, an RN, who informed Petitioner that he needed to provide a urine sample. At that time, Petitioner stated that he did not feel the need to urinate.

Kimberly Bowser was subpoenaed and testified at trial on behalf of the Respondent. She had no specific recollection at all of the Petitioner or the treatment she provided to him. When questioned by Respondent's counsel, Kimberly Bowser reviewed the relevant portions of the hospital records and confirmed that she did advise Petitioner that he needed to provide a urine sample but that he informed her that he did not feel the need to urinate. She testified that two common excuses for individuals who want to avoid drug testing is claiming inability to urinate or that they urinated shortly before.

The Crossroads Community Hospital records revealed that on October 27, October 28, October 29, October 30, and October 31, 2011, Petitioner had urine outputs of 550, 2,400, 2,000, 1,450 and 1,050, milliliters, respectively. A lab report regarding urinalysis was performed on urine collected on October 28, 2011, and it did not indicate the presence of any illegal substances.

Multiple diagnostic studies were performed on October 27, 2011. X-rays taken revealed Petitioner sustained a left humeral fracture, arthritic changes of the AC joint, and a compression fracture of the L1 vertebrae. While hospitalized, Petitioner came under the care of Dr. Bernard

Rerri, an orthopedic surgeon. On October 28, 2011, Dr. Rerri performed surgeries consisting of an open reduction and internal fixation of the left humeral shaft fracture with an intramedullary nail and locking screws and L1 kyphoplasty of the lumbar spine. Petitioner was discharged from Crossroads Community Hospital on October 31, 2011.

Dr. Rerri continued to provide medical treatment to Petitioner following his discharge from the hospital. Commencing November 10, 2011, Dr. Rerri treated Petitioner for multiple symptoms related to the accident including the left arm, neck and low back. Dr. Rerri had nerve conduction studies of the lower extremities performed on December 12, 2011, which revealed denervation at L4-L5 on the left side consistent with Petitioner's complaints. An MRI performed on that same day revealed foraminal stenosis at L3-L4, L4-L5 and L5-S1, bilaterally. Dr. Rerri referred Petitioner to physical therapy and, because of some complaints regarding vision, memory loss and emotional instability, Dr. Rerri referred Petitioner to Dr. Tomasz Kosierkiewicz, a neurologist.

Dr. Kosierkiewicz saw Petitioner on December 28, 2011, and diagnosed Petitioner with post-concussive syndrome. In addition to the physical therapy prescribed by Dr. Rerri, Dr. Kosierkiewicz recommended Petitioner have some speech therapy. At his direction, an MRI scan of Petitioner's brain was performed on January 13, 2012, which did not reveal any definitive abnormalities.

Dr. Rerri continued to treat Petitioner for his multiple problems and when he saw Petitioner on February 13, 2012, he recommended that Petitioner be seen by Dr. Jeffrey McIntosh, one of his associates, for further evaluation of the left shoulder. Dr. McIntosh saw Petitioner on February 28, 2012, and gave him an epidural steroid injection in the subacromial joint. He recommended Petitioner be seen by a physiatrist because of his multiple complaints. When Dr. Rerri saw Petitioner on March 8, 2012, he noted that there was a non-union in the area of the intramedullary rod in the left arm and recommended Petitioner use a bone stimulator. He concurred that a referral to a physiatrist was indicated.

At the direction of the Respondent, Petitioner was examined by Dr. James Doll, a physiatrist in St. Louis, on May 8, 2012. Dr. Doll reviewed medical records provided to him and examined the Petitioner. Dr. Doll noted that Petitioner had sustained a multi-trauma injury and he recommended that Petitioner have a CT/myelogram of the lumbar spine and he cautioned Petitioner about the dangers of long-term use of narcotic pain medications.

Petitioner was seen by Dr. Rerri on May 29, 2012, and Petitioner had complaints of panic attacks, claustrophobia, restlessness and poor sleep, in addition to his chronic pain issues. Dr. Rerri recommended referral to a psychiatrist. In June, 2012, Petitioner was arrested because of a domestic altercation between him and his wife. In Dr. Rerri's record of June 28, 2012, he noted that Petitioner's wife had left him. Dr. Rerri continued to treat Petitioner for his multiple complaints and, in January, 2013, he removed the metal hardware from Petitioner's left arm. Because of Petitioner's continued complaints, in particular, the left shoulder, Dr. Rerri referred him back to Dr. McIntosh who saw him on January 22, February 12, and February 26, 2013. Dr. McIntosh has recommended surgical decompression of the left shoulder.

Dr. Rerri had MRIs of Petitioner's hips and pelvis performed on July 10, 2012, and referred him to the Bonutti Orthopedic Clinic in August, 2012, because of Petitioner's hip/pelvis complaints. Petitioner was examined by Dr. Todd Wente on August 15, 2012, and regard to his hip/pelvis issues. Most of Petitioner's complaints were in regard to the right hip and Dr. Wente opined that Petitioner had impingement of the right hip but that surgery was not indicated. Dr. Wente also stated that Petitioner had osteoarthritis of both hips.

On August 2, 2012, Petitioner underwent a psychiatric evaluation at Illinois Centre Behavioral Health where records indicated Petitioner had depression, anxiety attacks and chronic pain. On November 2, 2012, Petitioner was seen at The H Group in Carbondale and was diagnosed with posttraumatic stress disorder, major depression disorder and panic disorder.

At the direction of the Respondent, Petitioner was examined by Dr. Richard Rende, an orthopedic surgeon, on November 21, 2012. Dr. Rende examined Petitioner in regard to the right hip, knee and ankle, but he did not evaluate Petitioner's left shoulder/arm or back. Dr. Rende opined that, in regard to all of the areas of the anatomy that he examined, Petitioner had degenerative changes and that Petitioner did not sustain any injury or aggravation of those conditions as a result of the work-related accident.

At the direction of Respondent, a utilization review was performed on February 19, 2013, by Dr. Michael Borkonski. Dr. Borkonski reviewed various medical reports/records regarding Petitioner's treatment and he opined that Petitioner needed to discontinue the use of narcotic pain medication because there was no evidence that Petitioner had experienced any improvement in functional level. Dr. Borkonski's report was provided to both Dr. Rende and Dr. Doll and in supplemental reports dated March 18, and March 20, 2013, respectively, they both indicated their agreement with Dr. Borkonski's opinion.

Dr. Rerri prepared a narrative report dated April 2, 2013, in which he summarized his medical treatment of Petitioner. Dr. Rerri stated that his diagnoses of Petitioner were; (1) posttraumatic stress disorder; (2) L1 vertebral fracture post kyphoplasty; (3) fractured left humeral shaft; (4) rotator cuff tear and impingement of left shoulder; (5) lumbar radiculopathy on left side, temporarily relieved by epidural injections; (6) right hip arthritis; (7) left knee osteoarthritis; and (8) posttraumatic right ankle pain. Dr. Rerri opined that all the preceding diagnoses were related to the work-related accident and that Petitioner was not at MMI. Further, Dr. Rerri previously opined that Petitioner should have a psychiatric examination to address posttraumatic stress disorder and anxiety.

Dr. Rende was deposed on April 16, 2013, and his deposition testimony was received into evidence at trial. Dr. Rende's deposition testimony was consistent with his medical reports and he reaffirmed his opinion in respect to causality. Dr. Rende also opined that Petitioner was in need of psychiatric care to address his dependence on narcotic medications.

Petitioner apparently missed some physical therapy sessions in February, March and April, 2012. As aforestated, Petitioner was briefly incarcerated in June, 2012, following his arrest in regard to the domestic dispute. The termination of Petitioner's temporary total disability benefits by Respondent between June 8 and June 31, 2012, were apparently because of his arrest.

Respondent did not file any sort of motion to suspend Petitioner's temporary total disability benefits.

Petitioner still has significant complaints to his left shoulder/arm, neck, head, hips, buttocks, low back and left knee. He has not been able to return to work in any capacity.

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 his employment for Respondent on October 27, 2011.

In support of this conclusion, the Arbitrator notes the following:

There was no dispute that Petitioner fell from a scaffolding approximately 25 to 30 feet to the ground and sustained injuries as a result thereof. Respondent's position was that Petitioner was allegedly intoxicated at the time of the accident and that the intoxication was the proximate cause of the injury thereby removing Petitioner's accident from arising out of and in the course of his employment for Respondent.

There was no evidence that Petitioner was intoxicated due to his consumption of alcohol. Both of the paramedics that responded to the accident and observed Petitioner testified that there was no evidence of alcohol use on the part of the Petitioner. Further, the medical records likewise do not indicate any evidence of Petitioner's being intoxicated due to alcohol consumption.

Respondent's position was that: (1) the bottle of yellow liquid tendered into evidence was "clean urine" and that Petitioner was purportedly going to use this in the event of a random drug test; and (2) Petitioner refused provide a urine sample when requested thereby creating a rebuttable presumption that he was intoxicated and that said intoxication was the proximate cause of Petitioner's injury.

While the Arbitrator had some suspicions regarding Petitioner's testimony that he found the bottle of yellow liquid on a step, the precise contents of this bottle was never been determined. Respondent had this bottle in its possession and control from the date of accident to the date of trial; however, Respondent presented no evidence of any type of laboratory testing of its contents. The Arbitrator does not believe that it is appropriate for him to conduct any testing or analysis of his own regarding what is contained in this bottle. The Arbitrator can only consider this evidence as being a plastic bottle of yellow liquid whose precise contents are unknown. While the Arbitrator ruled that this was admissible as an evidentiary exhibit, the Arbitrator assigns no weight to it.

The Arbitrator finds that Petitioner did not refuse to give a urine sample. Petitioner stated that when the urine sample was requested from him he did not feel the need to urinate. While hypothetically, this might be something an individual will do when attempting to avoid urine testing, as is noted herein, various quantities of urine were obtained from the Petitioner from

October 27 through October 31, 2011, and urinalysis was performed on October 28, 2011, which did not reveal the presence of any illegal substances. Further, Section 11 of the Act has a number of specific requirements for the collection and testing for the presence of alcohol and drugs. There was no evidence that any of these mandated procedures were followed or would have been followed.

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 October 27, 2011.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds the opinion of Petitioner's primary treating physician, Dr. Rerri, to be more persuasive than that of Respondent's Section 12 examiners, Dr. Doll and Dr. Rende.

Dr. Rerri has been Petitioner's treating physician since immediately following the accident and is the most familiar with Petitioner's complaints and issues. Further, Dr. Rerri's opinion as to Petitioner's conditions has been consistent.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes that Petitioner is entitled to prospective medical treatment including, but not limited to, the left shoulder surgery recommended by Dr. Rerri and Dr. McIntosh and psychiatric treatment for posttraumatic stress disorder and drug dependence as recommended by Dr. Rerri and Dr. Rende, respectively.

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

The Arbitrator concludes that Petitioner is entitled to payment of temporary total disability benefits for 85 2/7 weeks, commencing October 27, 2011, through June 14, 2013, as provided in Section 8(b) of the Act.

In support of this conclusion the Arbitrator notes the following:

The evidence clearly supports that Petitioner remains temporarily totally disabled at this time. In regard to Respondent's suspension of benefits in June, 2012, the Arbitrator finds that (1)

Respondent did not prove noncompliance on the part of the Petitioner and (2) no motion was filed on behalf of the Respondent to suspend Petitioner's temporary total disability benefits.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Johnson,
Petitioner,

vs.

09 WC 44822
09 WC 51367

Family Dollar Stores, Inc.,
Respondent.

14IWCC0633

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of employment, accident, notice, causal connection, and nature and extent of the permanent disability, and being advised of the facts and law, affirms and adopts with changes as stated below the July 19, 2013 Decision of Arbitrator Robert Williams, which is attached hereto and made a part hereof.

Petitioner, a 45 year old store manager, alleged she suffered two separate lumbar injuries or aggravations. On September 17, 2009, she was lifting a 55 pound tote while assisting a co-worker with unloading a delivery truck when she felt immediate low back pain shooting down her legs. On December 4, 2009, Petitioner was transferring tows from a U-boat cart to shelving when her back "locked up" and she became unable to move. Respondent denied both claims, arguing that Petitioner did not suffer an accident that arose out of and in the course of her employment and that her current condition was not causally connected to either alleged accident.

No. 09 WC 044822. Arbitrator Williams denied both claims, finding that Petitioner failed to prove accident or causation. With regard to the September 2009 claim, the Arbitrator noted that Petitioner's treatment records are devoid of any mention of a work accident on September 17, 2009. Petitioner had sought medical treatment two days earlier for low back pain with radiation down both legs necessitating her daily consumption of 16 Tylenols. Because her back and radicular complaints were documented before the date of accident, and because her medical records contain no mention of a work accident, the Arbitrator found that Petitioner had failed to prove that she suffered a work accident on September 17, 2009. He denied all benefits.

For the same reasons, the Commission affirms and adopts the Arbitrator's denial of benefits with regard to No. 09 WC 044822.

No. 09 WC 051367. Arbitrator Williams also found that Petitioner failed to prove accident or causal connection in No. 09 WC 051367. In that case, Petitioner alleged that her back "locked up" while she was stocking the shelves on December 4, 2009. Petitioner testified that she was taken by ambulance from the store and taken to the emergency room, where she was treated and released. She then began treating for her back pain with her chiropractor, primary care physician, and finally an orthopedic surgeon.

Although there was no dispute that Petitioner did suffer an accident in the course of her employment with Respondent on December 4, 2009, Arbitrator Williams found that the accident did not arise out of that employment. Petitioner testified that she was injured when she bent to pick up a toy and place it on a shelf. The Arbitrator found that the action of bending down to pick something up did not place Petitioner at a greater risk of injury than the general public, members of whom frequently must bend down to move items.

The Commission views the evidence differently. Petitioner's job as store manager did place her at greater risk than the general public, in that she was repeatedly required to bend down to retrieve items and reach up to place them on shelving. Such was the very nature of her job in unloading deliveries and stocking shelves. Therefore, the Commission finds that Petitioner did prove that an accident occurred on December 4, 2009 that arose out of and in the course of her employment and reverses the Arbitrator's finding in that regard.

Arbitrator Williams also found that Petitioner did not prove that her condition of ill-being at the time of hearing was causally related to her December 4, 2009 work accident. The Arbitrator noted in his Decision that Petitioner herself attributed her condition to her earlier work accident on September 15, 2009, rather than to a new accident on December 4, 2009.

Petitioner did present the causation opinions of her treating physicians that her herniated disc at L4-5 and compressed nerve at L5-S1 were causally related to her two work accidents that were the subjects of this hearing. However, the Arbitrator found these opinions were mere conjecture, as they were based upon Petitioner's reporting of accident and injury, and he had found Petitioner to be not credible.

Petitioner expressly denied any prior back trauma, yet her medical records reflect that she slipped and struck her back on the side of the dumpster in 2007, and an MRI from that time revealed spondylolisthesis. She reported the onset of symptoms with her September 17, 2009 accident, yet her records show she sought treatment two days earlier for back complaints of two weeks' duration. Moreover, Petitioner had a prior workers' compensation claim in 2007 and an MRI from that time documented her pre-existing spondylolisthesis. Her orthopedic surgeon admitted that his causation opinion might change if he knew that Petitioner had symptoms before her accident, and it is clear that Petitioner did have pre-existing symptoms. The causation opinions of her treating physicians are unreliable due to the false foundations on which they were constructed.

14IWCC0633

The Commission finds that Petitioner failed to provide a credible causation opinion relating her condition of ill-being to her December 4, 2009 accident, and therefore affirms the Arbitrator's denial of benefits related to that claim.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2013 is hereby affirmed with changes. The Commission finds Petitioner proved an accident occurred on December 4, 2009 that arose out of and in the course of her employment with Respondent. All else is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that all claims for benefits under No. 09 WC 044822 and No. 09 WC 051367 are denied.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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 the Circuit Court.

DATED: JUL 3 0 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-06/19/14
drd/dak
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JOHNSON, MARY
Employee/Petitioner

Case# **09WC044822**

09WC051367

FAMILY DOLLAR STORES INC
Employer/Respondent

141WCC0633

On 7/19/2013, 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:

BUDIN LAW OFFICES
JOHN J BUDIN
ONE N LASALLE ST SUITE 2165
CHICAGO, IL 60602

1296 CHILTON YAMBERT & PORTER LLP
DANIEL T CROWE
150 S WACKER DR SUITE 2400
CHICAGO, IL 60606

☐	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

MARY JOHNSON
Employee/Petitioner

Case #09 WC 44822
09 WC 51367

v.

FAMILY DOLLAR STORES, INC
Employer/Respondent

14IWCC0633

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 June 25, 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 September 17, 2009, and December 4, 2009, the respondent was operating under and subject to the provisions of the Act and are the subject matter of claim #09 WC 44822 and #09 WC 51367, respectively.

- On those dates, an employee-employer relationship existed between the petitioner and respondent.

- Timely notice of the accidents was given to the respondent.

- In the year preceding the injuries, the petitioner earned $41,600.00; the average weekly wage was $800.00.

- At the time of injuries, the petitioner was 45 years of age, *married* with no children under 18.

- The parties agreed that the respondent paid $2,133.12 in temporary total disability benefits for claim #09 WC 44822.

ORDER:

- All claims for benefits for claim #09 WC 44822 and 09 WC 51367 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.

Robert Williams

7/19/13
Date

JUL 19 2013

FINDINGS OF FACTS:

On September 15, 2009, the petitioner sought medical care at Advocate Medical Group for left low back pain with occasional sharp pain and radiation down her legs of two weeks duration. She was prescribed medication and work restrictions. The petitioner followed up for lower back pain on September 23rd. An MRI on September 24th revealed a tiny central disc herniation at L4-5, L5 spondylolysis and grade II L5-S1 spondylolisthesis with severe bilateral foraminal stenosis. She followed up on October 6th.

The petitioner sought chiropractor care for her back with Dr. G. J. Bohlin on October 12th. The doctor noted that the petitioner had a complete orthopedic and neurological examination on September 21st and followed up nine times through October 9th, however, those treating records are not in evidence. Dr. Zaki Anwar saw the petitioner for pain management on October 22, 2009. On November 27th, Dr. Bohlin noted that the petitioner had full and equal range of motion, limited spasms, lumbosacral spasms, limited reflexes with severe pain and major neuritis. The petitioner returned to work full duty without restrictions on November 30th.

On December 4, 2009, the petitioner was taken by ambulance from her workplace for emergency care. The petitioner told the paramedics that she was stocking shelves and started having back pain. The incident is the subject matter of claim #09 WC 51367. St. Margaret Mercy Healthcare Centers billed the petitioner for emergency service for December 4th but their records are not in evidence. The petitioner saw Dr. Mark K. Chang of Midwest SpineCare on December 10th and reported severe lower back pain for three months with radiation into her left leg. His impression of the September 24th MRI

and diagnosis was a mild bulging at L4-5, severe disc degeneration at L5-S1 and grade II isthmic spondylolisthesis. An MRI on March 2, 2010, revealed a central disc herniation with posterior annular tear at L4-5 and L5 and grade II spondylolisthesis of L5 on S1 with a diffuse posterocentral disc bulge. The petitioner was evaluated by Dr. Nicholas Angelopoulos on January 4, 2010, for a transforaminal injection. Dr. Chang noted on April 15, 2010, that injections did not reduce the petitioner's back pain. On May 28, 2010, Dr. Chang performed a L4-L5 and L5-S1 laminectomy, partial facetectomy, foraminotomy and posterolateral fusion and a L5-S1 discectomy. On October 21, 2010, Dr. Chang noted good progress with physical therapy and transitioned her to home exercise and a return to work in a week.

Dr. Chang noted on February 14, 2012, that overall the petitioner was doing poorly; she had chronic lower back pain and left leg weakness, overall deconditioning and weakness in both legs. An EMG/NCV on June 27, 2012, was abnormal but not consistent as to the results. On September 20, 2012, Dr. Chang noted persistent lower back pain and leg pain, limited function and range of motion, difficulty tolerating activities for more than a few minutes and diffuse tenderness. He recommended physical therapy to improve her functional ability. The petitioner received psychological counseling from October 3, 2012, through November 9, 2012, at WellGroup HealthPartners.

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 on September 17, 2009, arising out of and in the

course of her employment with the respondent. The treating records in evidence are devoid of a work injury or of any injury on September 17, 2009. Moreover, the petitioner sought treatment for left low back pain with occasional sharp pain and radiation down her legs on September 15, 2009, necessitating her daily consumption of sixteen Tylenols. Without the treating records after September 15, 2009, detailing the petitioner's complaints and symptoms, the history of injury and the clinical findings, it is not possible to discern whether there was an exacerbation of her pre-existing lumbar condition of ill-being. The petitioner's testimony is not sufficient or persuasive. The opinions of Drs. Chang, Anwar and Bohlin are conjecture and are not given any weight. All claims for benefits for claim #09 WC 44822 are denied.

Based upon the testimony and the evidence submitted, the petitioner failed to prove that she sustained an accident on December 4, 2009, arising out of and in the course of her employment with the respondent. The petitioner bent over to pick up a toy and couldn't straighten up. The petitioner was not exposed to a greater risk by bending. Moreover, the petitioner did not attribute her inability to straighten up to the act of bending or a new injury but to an incident on September 17, 2009. The petitioner failed to prove that she was exposed to an increased risk of injury by bending over to pick up a toy. All claims for benefits for claim #09 WC 51367 are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Samuel Trapps,
Petitioner,

vs. NO: 08 WC 08948

ADM,
Respondent.

14IWCC0634

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, causal connection and medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,000.00. 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: JUL 30 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-07/23/14
drd/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TRAPPS, SAMUEL
Employee/Petitioner

Case# **08WC008948**

ADM
Employer/Respondent

14IWCC0634

On 10/15/2013, 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 0.06% 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:

0149 WARREN E DANZ PC
MIKE SUE
710 N E JEFFERSON ST
PEORIA, IL 61603

0771 FEATHERSTUN GAUMER POSTLEWAIT ET AL
DANIEL L GAUMER
225 N WATER ST SUITE 200
DECATUR, IL 62525

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

SAMUEL TRAPPS
Employee/Petitioner

v.

ADM
Employer/Respondent

Case # **08** WC **8948**

Consolidated cases: _____

14IWCC0634

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 **Peoria**, on **July 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. ☐ 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 8, 2006**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$33,863.44**; the average weekly wage was **$651.22**.

On the date of accident, Petitioner was **52** years of age, *married* with **0** dependent children.

The parties stipulated that there has been no lost time as a result of this injury and that no TTD is claimed.

ORDER

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 THE FOLLOWING FACTS:

Petitioner has worked for Respondent since August, 2005 as a laborer. On 8-1-2006, the Petitioner was flushing some lines and was hit by some hot mash. He turned to get away and testified that he tripped over a steel beam that struck Petitioner on the left shin. He reported the injury promptly to his boss, Rich Lacy. According to the Petitioner, he did not lose any time as a result of the injury. In fact, he testified that since the date of the injury, he has still not lost any time from work as a result of this accident. He received some first aid care at the plant on 1-8-2006 but he continued working. The ADM accident report of 1-08-2006 notes that Petitioner had a one inch scrape just below his left knee. (Res. Ex. 1)

Petitioner's first actual medical care was at the Proctor Hospital emergency room on 1-15-2006. According to the Petitioner, at that time his leg was swollen up as big as a baseball, was blood red and had blood draining down his leg. (R. 13) He also claimed that his leg was x-rayed showing a hairline fracture. (R. 14) The Proctor Hospital emergency room records from 1-15-2006 show that an x-ray was performed. There was no fracture. The emergency room doctor, Dr. Prohaska, diagnosed a left leg contusion and subacute laceration of the left leg. He found no blood and noted that Petitioner "has had no drainage." (Res. Ex. 5) Petitioner's sensation was intact. He found some mild redness and noted that Petitioner reported no numbness or tingling. (Res. Ex. 5)

He then treated several times with Dr. Arlene Burke. Petitioner could not recall that Dr. Burke performed any tests. He specifically denied that Dr. Burke ever measured his legs. (R. 16-17, 45) On 8-9-2006, Dr. Burke diagnosed post-traumatic scarring of the left leg. Dr. Burke noted that Petitioner's complaints of left leg numbness began about six (6) months after the injury (Pet. Ex. 2, p. 15) Dr. Burke diagnosed a systemic presentation of symptoms and continued Petitioner on full duty work. Repeat x-rays were done on 8-9-2006 and were negative for any acute fracture. Dr. Burke found Petitioner's symptoms to no longer be work related and referred Petitioner to his primary care doctor for follow up as of 8-9-2006. (Pet. Ex. 2, p. 30) Dr. Burke found no functional impairment. (Res. Ex. 5, p. 10)

Petitioner also treated with his personal and family doctor, Dr. Popp. Petitioner saw Dr. Popp on 1-17-2006. (Res. Ex. 6) At several subsequent visits with Dr. Popp in 2006, Petitioner apparently made no complaints about his leg because nothing is noted about the leg in Dr. Popp's office visit of 3-27-2006, 4-24-2006, 9-15-2006, 9-22-2006 or 7-27-2007. The Petitioner did see Dr. Popp on 7-2-2007 at which time he did complain of symptoms in his left leg which Petitioner attributed to his January 2006 work injury.

Petitioner has also treated with Dr. Gene Cheng. He started treating with Petitioner on or about February 5, 2008. Dr. Cheng's records indicate that he saw Petitioner numerous times during 2008 and 2009. Dr. Cheng's records contain complaints of symptoms both in the left leg, the right foot and the left foot. Petitioner complained to Dr. Cheng of cramping symptoms in both feet along with spasms in both legs. Dr. Cheng's record of 3-7-2008 contains a diagnosis of polyneuropathy in disease with more involving the left peroneal nerve. Dr. Cheng did an EMG test on the Petitioner on 2-28-2008. That EMG test showed electrophysiological evidence of peripheral neuropathy with the left peroneal nerve MCA amplitude being lower than on the right. The doctor felt this could indicate more damage to the left peroneal nerve. (See Pet. Ex. 4, p. 7) Dr. Cheng's records show numerous complaints of numbness

and cramping in both lower extremities, including the right foot, also including spasms in both legs. (Pet. Ex. 4)

Petitioner also saw Dr. Dinh on 5-11-2009. This was a neurosurgical consultation primarily due to complaints of numbness in the left shin. Dr. Dinh did not think that the Petitioner was a surgical candidate. Petitioner told Dr. Dinh that he had sustained a hairline fracture of the left tibia after running into a steel beam. He told Dr. Dinh that he developed numbness in the left calf soon after the injury and over the last few months before seeing Dr. Dinh he noticed cramping and spasm in his left toes and thigh. There is no indication in Dr. Dinh's records that the Petitioner told him about his complaints of numbness, cramping and spasms in the right leg and foot as had been mentioned to Dr. Cheng.

By his own admission, Petitioner has not received any medical care for his left leg since seeing Dr. Cheng several years ago.

Petitioner conceded that for the last several years he has been off work for problems concerning liver disease which led to a liver transplant which was performed in 2012. Petitioner conceded that he has received short term and then long term disability from his employer as a result of the liver problems.

According to Petitioner, he "retired" from his job several weeks prior to arbitration. When asked about that retirement, Petitioner testified that the reason he retired was because of ongoing problems and complaints with reference to his left leg. (R. 27-28) Petitioner denied that he retired because of his liver problems even though he has been off work receiving disability payments for most of the last two (2) years with reference to his liver problems. Petitioner conceded that he worked his regular job from 2006 up until July, 2011. He conceded that his treating doctors have not placed any work restrictions on the Petitioner as a result of his left leg injury. He has not claimed any lost time as a result of this injury.

Petitioner's wife, Deborah Trapps, testified briefly. She testified that Petitioner does not walk as far as he did before and that they no longer go dancing. According to Mrs. Trapps, Petitioner has complained of numbness in his left leg ever since the January 8, 2006 injury. (R. 75)

Respondent presented the testimony of Petitioner's former supervisor, Richard Lacy. Lacy testified that Petitioner reported the 1-8-2006 injury to him on the day of the occurrence. Lacy recalled that Petitioner complained only of an injury to the left shin just below the knee. According to Lacy, Petitioner received first aid and kept working. What Lacy observed was a one inch scrape on Petitioner's shin area. (R. 78-79) According to Lacy, Petitioner never again complained of leg or legs to Lacy although Lacy only supervised Petitioner for the next five (5) or six (6) months. According to Lacy, he saw no difference in Petitioner's gait or ability to perform his job after January 8, 2006. (R. 79-80)

The Petitioner now asks the Arbitrator to conclude that Petitioner has retired from a good paying job at ADM because of problems with Petitioner's left leg rather than due to other reasons. That testimony is simply not credible in light of all of the other evidence in this claim. This case involves a one inch scrape on Petitioner's left shin that initially only required first aid treatment. Petitioner has never been restricted from work by any of his treating doctors and has never missed even a single day of work as a result of this injury. No treating doctor has placed any restrictions on the Petitioner. The suggestion that Petitioner would base his decision to retire on alleged residuals from this injury is ridiculous. Such a contention is not supported by the medical evidence. Petitioner has been off work collecting total disability benefits for the last two (2) years as a result of unrelated liver problems. Certainly no insurance company paid total disability payments based upon his 1-8-2006 left leg injury in

light of the fact that no treating doctor has in any way limited the Petitioner's work activities as a result of the left leg injury. Yet, Petitioner would have us believe that his inability to work due to kidney problems has suddenly ended and that, as of two weeks ago, he retired due to inability to perform his job as a result of a seven year old no lost time leg injury. That testimony is not credible.

The fact that Petitioner would attribute his decision to retire entirely to alleged problems from his 1-8-2006 left leg injury causes the Arbitrator to question the Petitioner's credibility about the rest of his testimony. Petitioner testified that the reason he went to the Proctor Hospital emergency room on 1-15-2006 is because he had a lump on his leg the size of a baseball. He testified that his leg had been bleeding with blood starting to drain down his leg. (R. 13) Yet review of the Proctor Hospital 1-15-2006 emergency room records reflects no such findings or complaints. (See Pet. Ex. 1, Res. Ex. 5) In fact, the 1-15-2006 Proctor emergency room record states: "He sustained a laceration. He states that since then he has had pain and swelling but it got worse yesterday. He notes a little bit of pain in his calf, but that actually has improved. He says that he has had no drainage. He has had a little bit of redness. No numbness or tingling.... He has had no blood clots." (Res. Ex. 5, p. 1) The emergency room doctor diagnosed a contusion/healing laceration. There is nothing in the emergency room records to suggest that the doctor found or saw any blood. There certainly is no suggestion that the doctor found any baseball size swelling. The x-rays taken at the hospital on 11-15-2006 showed no evidence of any fracture. (Res. Ex. 5, p. 3) Petitioner's later statements to various doctors in which he indicates that he had a hairline fracture is nowhere demonstrated in the medical opinions of any of the doctors who interpreted the x-rays. The fact that the Petitioner told the emergency room doctor that he had not had any type of drainage refutes Petitioner's claim that he went to the emergency room on 1-15-2006 because his leg was swollen as big as a baseball, was blood red and "blood started draining down my leg." (R. 13) The E.R. doctor found none of those things which Petitioner described as the very reasons he went to the E.R.

Petitioner's testimony has been impeached and contradicted in other respects. Petitioner testified that he has never had any leg pain before the 1-8-2006 work injury. (R. 34) Petitioner insisted that he had never had numbness in his left leg until after the 1-8-2006 injury. (R. 39) That testimony was contradicted by the records of family doctor, Dr. Popp. Those records show that on 2-19-2004, Petitioner saw Dr. Popp following a motor vehicle accident at which time the Petitioner had multiple complaints including persistent leg and back symptoms, complaints of "pain in legs & low back and then felt as if lt leg would give out." (See Res. Ex. 6, p. 4)

Petitioner testified that Dr. Burke did not perform any measurements on Petitioner's legs. That testimony is directly contradicted by Dr. Burke's 6-28-2007 examination findings in which she indicated that she specifically measured both legs noting "circumferential measurement 10 cm below the patella is 36 cm in both legs, and 12 cm below the patella is 37 cm on the right and 36 cm on the left." (Res. Ex. 2, p. 3)

Petitioner also testified that he has experienced weakness in his left leg ever since the 1-8-2006 injury. (R. 59) Yet his own family doctor, Dr. Lahood, contradicts that testimony. Dr. Lahood examined Petitioner's left leg on 10-17-2007 finding "normal strength and tone and normal range of motion without pain." (Resp. Ex. 4, last page) Dr. Lahood made similar findings with normal left leg strength on 1-10-2008 and 4-21-2008 according to Dr. Lahood's office records. The records of Petitioner's own personal doctor, Dr. Lahood, are more credible than Petitioner's conflicting testimony at arbitration.

On cross-examination, Petitioner was asked about previous injuries. He mentioned that his only prior claim involved a hernia. (R. 58) He did admit that he had prior shoulder and collarbone surgery (R. 57) but indicated that those conditions were no longer bothering him anymore. (R. 58) Respondent then introduced records of three previous worker's compensation settlements, 3.2% MAW for a hernia (05-WC-23030), 5% right arm PPD for a right elbow injury (94-WC-34738) and 25% left arm PPD for a shoulder injury (81-WC-84119). Petitioner testified that these injuries no longer both him. (R 58) Yet he now claims major permanency from a no lost time claim where no treating doctor has ever placed any temporary or permanent work restrictions. Petitioner's testimony is obviously biased because he is seeking a substantial award in the current claim. His testimony is not credible.

Claimant also insists that his complaints in the right leg are somehow related to his 1-8-2006 left leg injury. Dr. Cheng noted complaints of pain, spasms, numbness and cramping in both legs, feet and toes. (Res. Ex. 3) Petitioner claims that he has favored his right leg since injuring the left leg and that this has somehow caused his complaints of right leg numbness which were reported to Dr. Cheng. Petitioner testified that he told Dr. Cheng that he attributed his right leg symptoms to putting weight on that leg while at work (R. 59-60) yet Dr. Cheng's records do not contain any such history. (See Pet. Ex. 4) Petitioner contends that overuse of the left leg somehow caused or created the symptoms of numbness, spasm or cramping Dr. Cheng noted in Petitioner's right leg and foot. Petitioner testified that his only injury was to his left leg. No doctor has opined that Petitioner's right leg and foot symptoms are somehow related to the 1-8-2006 left leg injury. Petitioner is overreaching by trying to relate his right lower extremity symptoms to a left leg injury just as he is overreaching in his testimony that problems with the left leg caused him to retire from his job.

It is obvious from the records of Dr. Cheng that in 2008 and 2009, Petitioner was complaining of symptoms in both lower extremities. Dr. Burke concluded that Petitioner's problems were likely systemic and that they were not work related. The Arbitrator accepts Dr. Burke's opinion since neither Dr. Dinh, Dr. Cheng, nor Petitioner's examining doctor, Dr. Hoffman, offer any explanation as to how an injury to the left leg would have caused symptoms of numbness, tingling or spasm or cramping in both lower extremities. The fact that the symptoms are bilateral is not consistent with an injury to the left shin. While it has been suggested that Petitioner may have been a left peroneal nerve injury, that would not explain the symptoms in the right leg and foot.

Dr. Hoffman conceded in his deposition testimony that the 1-8-2006 left leg injury would not cause Petitioner's right leg numbness. (Pet. Ex. 7, p. 29) Dr. Hoffman's opinions were largely supportive of the Petitioner. Dr. Hoffman believed that Petitioner had suffered an injury to the left perineal nerve. Yet Dr. Hoffman had no explanation for Petitioner's symptoms in the right leg and foot other than to say that they would not relate to the 1-8-2006 left leg injury. Dr. Hoffman insisted that the EMG ruled out any systemic or multiple nerve problem because, according to Dr. Hoffman, the EMG simply showed an injury to the left peroneal nerve. A careful review of the EMG and the records from Dr. Cheng contradict Dr. Hoffman. Dr. Cheng interpreted the 2-28-2008 EMG as showing "peripheral neuropathy but left peroneal nerve MCA amplitude is lower than the right. This could indicate more damage on the left peroneal nerve." (Pet. Ex. 4, p. 7) Dr. Cheng used the term peripheral neuropathy when interpreting the EMG. Moreover in his office notes, Dr. Cheng repeatedly diagnosed or assessed the condition as "polyneuropathy in disease." (See Pet. Ex. 4, p. 9, 10, 22 (last page of Pet. Ex 4)) If one looks at the dictionary definition of polyneuropathy, one finds that the term "polyneuropathy" means an inflammation of several nerves at the same time or multiple neuritis. The term "polyneuropathy" refers to multiple nerves, not just to a single nerve. Dr. Hoffman's conclusion that the EMG study confined the problem to a single nerve is not consistent with the records of Dr. Cheng. Nor do Dr. Hoffman's opinions explain why the Petitioner repeatedly complained to Dr. Cheng of symptoms of

numbness, tingling and cramping in the right leg and foot in addition to experiencing similar symptoms in the left leg and foot. A diagnosis of polyneuropathy would explain bilateral symptoms. Injury to a single nerve in the left shin would not explain such bilateral symptoms.

For the foregoing reasons, the Arbitrator finds that Petitioner has failed to prove that his current condition of ill-being, including the treatment from Dr. Cheng and Dr. Dinh was causally related to the injury of 1-8-2006. What Petitioner has proven is that he sustained a contusion/laceration injury to his left shin, which injury has caused some residual scarring.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO "J" (WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner seeks reimbursement for medical bills outlined in Petitioner's Exhibit 10. These bills are for treatment by Dr. Cheng and Dr. Dinh, along with what appear to be medications provided by IWP, the patient advocate pharmacy. These include prescriptions for Metnax, Lyrica, Skelaxin and Clonazepam prescribed by Dr. Cheng in 2008 and 2009. These appear to be drugs used to treat Petitioner's complaints of numbness, cramping and muscle spasms in both legs and feet, which symptoms were reported to Dr. Cheng in 2008. Since the Arbitrator accepts the opinions of Dr. Burke that Petitioner's condition was no longer work related as of August 2006, Respondent is not responsible to pay the medical bills in question. Whatever the cause of Petitioner's bilateral lower extremity numbness spasms and cramping, those conditions are not causally related to the left shin injury of 1-8-2006 and thus Respondent is not responsible to pay the medical bills which are in dispute.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO "L" (WHAT IS THE NATURE AND EXTENT OF THE INJURY?), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner has sustained a compensable disfigurement injury to the left shin. There are two small areas of scarring just below the left knee on the shin area. Petitioner is entitled to have and received the sum of $390.00 per week for a period of 10 weeks for disfigurement to the left leg pursuant to Section 8(c) 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 T Mathis
Signature of Arbitrator

October 9, 2013
Date

OCT 15 2013

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Walsh,
Petitioner,

vs. NO: 11 WC 46213

14IWCC0635

City of Bloomington,
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, permanent partial disability and 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 January 3, 2014, is hereby affirmed and adopted.

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

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

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

DATED: JUL 30 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-07/23/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WALSH, LARRY
Employee/Petitioner

Case# **11WC046213**

14IWCC0635

CITY OF BLOOMINGTON
Employer/Respondent

On 1/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% 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:

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

RUSIN MACIOROWSKI & FRIEDMAN LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LARRY WALSH,
Employee/Petitioner

v.

CITY OF BLOOMINGTON,
Employer/Respondent

Case # 11 WC 46213

Consolidated cases: NONE.

14IWCC0635

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 **October 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On **October 17, 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 **$55,109.60**; the average weekly wage was **$1,059.80**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **two** dependent children.

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

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

Respondent shall be given a credit of $ **4,037.55** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **4,037.55**.

Respondent is entitled to a credit of $ **117,884.38** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$706.53**/week **11** weeks, commencing **November 7, 2011** through **December 12, 2011,** and again commencing **February 22, 2012** through **April 2, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$635.88**/week for **125** weeks, because the injuries sustained caused the **25%** loss to his **person as a whole,** as provided in Section 8(d)2 of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$133.35** to Orthopedic and Sports Enhancement, **$2,299.32** to Anesthesia Consultants, and **$1,940.27** to Petitioner, for out of pocket medical expenses, as provided in Section 8(a) and Section 8.2 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.

JOANN M. FRATIANNI
Signature of Arbitrator

December 27, 2013
Date

JAN 3 - 2014

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

Petitioner testified that on October 17, 2011, he worked for Respondent as a truck driver. On that date he was driving a leaf pick-up truck with a chute to pick up leaves from the street. Petitioner testified the chute jammed and he was standing in the street working on the chute when a co-employee driving an end loader struck him in his lower back. Petitioner testified he was pushed forward a few steps after being struck, but did not fall. The end loader was a large Komatsu truck with a scoop front. (Px16) Petitioner testified he was uncertain as to which part of the end loader struck him in the back. Following this, he continued working but noticed increasing back stiffness as the day progressed. Petitioner testified that during the evening after work he was pretty miserable and had aching and throbbing in his lower back. Petitioner testified that he had trouble sleeping due to the back pain.

Ms. Julian Kent Sigler, the driver of the end loader, testified in this matter under subpoena. Mr. Sigler testified he was driving the end loader behind Petitioner's vehicle on October 17, 2011. Mr. Sigler testified he was picking up leaves behind the leaf truck with the end loader. Mr. Sigler testified that prior to this accident, he leaned in to listen to the work radio and he looked up after he struck Petitioner and saw him moving forward quickly. Mr. Sigler testified he accompanied Petitioner when he reported the injury to Respondent.

Petitioner testified he reported to work the next day, but due to increasing pain, he scheduled an appointment to see Dr. Wingate, an orthopedic surgeon. The appointment was for October 19, 2011. Dr. Wingate on that date recorded a history that Petitioner was cleaning out leaves from a jammed leaf chute on October 17, 2011, when a loader operator, who was temporarily distracted, pulled forward and struck him in his right lower back. Dr. Wingate also recorded a history of a back injury many years ago, causing his primary physician to refer him to Dr. Benyamin. Dr. Wingate recorded a prior left sided L5-S1 disc herniation and torn discs at L4-L5 and L3-L4. Petitioner underwent a series of epidural injections and also saw Dr. Stroink, a neurosurgeon. Following conservative treatment, the symptoms resolved. Dr. Wingate was of the opinion that Petitioner did not have significant low back pain over the last year until the injury of October 17, 2011. Noted were complaints of pain radiating through his left buttocks into his left calf with a burning sensation to the left foot. Dr. Wingate testified that Petitioner also had a warm burning sensation on the left side of his lower back that he has not had for many years. Examination revealed atrophy to the left medial gastric that the doctor felt was chronic. Straight leg raise on the left reproduced calf and foot pain. Dr. Wingate diagnosed left S1 radiculopathy and prescribed an MRI. (Px7)

Petitioner underwent the MRI on November 7, 2011. This revealed a broad based foraminal bulge and central annular tear at L4-L5 with mild canal stenosis, mild disc bulge at L3-L4, and disc desiccation and decreased height with mild bulge and mild foraminal narrowing at L5-S1. (Px3)

On November 9, 2011, Dr. Wingate prescribed epidural steroid injections. Dr. Wingate performed left epidural injections at L4-L5 and L5-S1 on November 23, 2011 and December 6, 2011. (Px7) When seen on December 12, 2011, Dr. Wingate indicated in his office note that Petitioner did not benefit from the second epidural. Dr. Wingate reviewed the MRI and felt they revealed a herniated disc at L4-L5 left of the midline clinically contacting the exiting L4 and/or transiting L4 nerve roots on the left. Dr. Wingate diagnosed significant foraminal narrowing around the left L5 nerve root distally as it exited the spine ventral to the L5-S1 facet joint. Dr. Wingate noted Petitioner was unable to stand or sit for more than 20 minutes and unable to lift more than 20 pounds. Dr. Wingate prescribed medical restrictions of no repetitive twisting, bending or rotating. Dr. Wingate prescribed a laminotomy decompression surgery and contacted Respondent for authorization. Dr. Wingate felt it was in the best interest of Petitioner to proceed with surgery and not get delayed in the legal process. (Px7)

On January 16, 2012, Dr. Wingate referred Petitioner to Dr. Seibly, a neurosurgeon, for a second opinion. Dr. Seibly recorded a history of the injury of October 17, 2011 and noted complaints of a burning sensation from the left buttock into the posterior lateral aspect of the left thigh into the calf. The pain was described as being constant and not relieved since the accident. Dr. Seibly was of opinion that the radicular symptoms followed the L5 or S1 nerve distribution and was consistent with the lateral recess narrowing revealed by the MRI. Dr. Seilby was of the opinion that surgery was definitely a reasonable option, and that Petitioner could also consider additional conservative therapy. (Px4)

Petitioner testified that Respondent stopped payment of temporary total disability benefits on December 5, 2011, as he returned to work at that time.

Petitioner then saw Dr. Zelby for examination. This examination was at the request of Respondent. Petitioner saw Dr. Zelby on February 6, 2012. Dr. Zelby testified by evidence deposition (Rx1) that there was no mention of bruising when Petitioner first visited the emergency room following this accident. Dr. Zelby testified to his opinion that the "bump" on the right side was not a very hard hit. Dr. Zelby noted normal ankle reflex, which differed from Dr. Wingate's findings of a left Achilles reflex on October 19, 2011 and November 4, 2011. Dr. Zelby also noted the pre-accident MRI examinations from 2007 and 2008 revealed annular tears that preexisted this work accident of October 17, 2011. Dr. Zelby also felt the November 7, 2011 MRI did not reveal an acute tear. Dr. Zelby testified an acute annular tear and associated high-intensity zone can create a lot of halo of surrounding edema, but this was not seen in the MRI. Dr. Zelby felt this supported his conclusion that an acute annular tear did not exist.

Dr. Zelby testified it was his opinion that it was not reasonable or necessary to perform a two level fusion surgery on Petitioner. Dr. Zelby diagnosed mild degenerative disc disease and felt this disease process should not be treated with a fusion as there was no reasonable expectation of pain relief. Dr. Zelby was of the opinion that Petitioner may have sustained a right-sided contusion as a result of the accident of October 17, 2011. Dr. Zelby did acknowledge that Petitioner's symptoms improved following the surgery and that he might have needed a two level discectomy, but not a fusion. Dr. Zelby admitted a twisting injury can cause a lower back injury, but did not think that Petitioner twisted his back when struck on October 17, 2011.

On February 21, 2012, Respondent asked Petitioner to perform his full work duties. Petitioner testified he drove a dump truck that day and experienced so much pain he could barely keep his left foot on the controls.

The next day, he saw Dr. Wingate, who noted that Petitioner returned to full, unlimited work duties the day before against his physician recommendations. Dr. Wingate recorded a history of operating a loader and/or a dump truck for 8 continuous hours, and by the second hour had such severe leg pain he could barely keep his left foot on the foot control. By the fourth hour, he had such severe back pain he could no longer sit or stand comfortably. By the end of that day, Petitioner was absolutely miserable and unable to sleep that night. Dr. Wingate prescribed no work and lower back surgery. (Px7)

On February 27, 2012, Petitioner underwent surgery with Dr. Wingate. This surgery consisted of left sided hemilaminectomies at L4-L5 and L5-S1. Noted during surgery was a moderate bulge at L4-L5 that was sharply incised, and a large extruded foraminal disc herniation on the left at L5-S1. The nerve root at that site was described as being very swollen and erythematous in appearance. Dr. Wingate decompressed that level and performed a discectomy that included installation and placement of pedicle screw fixations with a plate at L4 through S1. (Px5)

Post surgery, Petitioner noted his left pain improved immediately. When seen by Dr. Wingate on March 14, 2012, he reported he felt no leg symptoms with the exception of some ghost-like intermittent pain at the front of his left ankle. Petitioner asked to return to work at that time. On April 3, 2012, Dr. Wingate indicated Petitioner was performing most of his normal day-to-day activities with no significant pain, and released him to return to work. (Px7)

Dr. Wingate testified by evidence deposition. (Px1) Dr. Wingate testified he reviewed the November 7, 2011 MRI films, which he felt revealed a large unhealed annular tear in the dorsal aspect of the L5-S1 disc space with some extruded disc material. Dr. Wingate further testified that the MRI revealed an older left sided disc herniation with no new annulus tear at L4-L5. Dr. Wingate testified there did not appear to be an acute change in pathology at L5. Dr. Wingate testified he also reviewed the pre-accident MRI films that revealed a measure of disc degeneration and some clinical symptoms, but it was his opinion within a reasonable degree of medical certainty that the high intensity zone lesion at L5-S1 was acute as shown on the post-accident MRI.

Dr. Wingate further testified that Petitioner's symptoms did not improve after steroid injections and he continued to experience severe left leg pain in spite of aggressive treatment. By December 5, 2011, Dr. Wingate had some concern that Petitioner could develop nerve damage if the case was not addressed surgically. Dr. Wingate testified he saw Petitioner on February 22, 2012, the day after Petitioner worked full duty at the demand of Respondent. Dr. Wingate noted Petitioner was in severe pain from working, and in addition to the left leg pain, his lower back pain recurred. As he had a four month history of severe left leg pain, Dr. Wingate performed surgery on February 27, 2012. Dr. Wingate testified that following surgery, the severe left leg pain was gone.

Dr. Wingate further testified that during surgery, he could visualize the disc herniation at L5-S1, and it was worse than what he expected based on the MRI findings. Dr. Wingate testified he found an extremely large extruded foraminal disc herniation around the left side of the L5-S1 nerve root space and that the nerve root was very swollen and erythematous. Dr. Wingate testified that this physical appearance revealed it was a very swollen and erythematous, and very likely the source of Petitioner's leg pain. Dr. Wingate testified a normal nerve root is white, but he found a red pink eye appearance instead.

Dr. Wingate testified that it was his opinion the intra-operative findings, with the acute inflammation of the nerve root, fit the time frame for Petitioner's work accident of October 17, 2011. Dr. Wingate further felt the key ingredient to Petitioner's misery over the four months prior to surgery was the degree of inflammation around the L5 nerve root.

Dr. Wingate testified he reviewed the pre-accident lumbar MRI scans along with the findings of the discogram dated May 25, 2008 and the EMG/NCV performed May 6, 2008. Dr. Wingate concluded Petitioner had an arthritic facet joint with a cyst at the left L4 nerve root that preexisted the work accident of October 17, 2011. Dr. Wingate testified that it was his opinion that as a result of the October 17, 2011 accident, Petitioner tore the back edge of the L5-S1 disc that was already degenerative. The injury to the disc according to Dr. Wingate was a big, fresh tear that had some herniation of the disc material out the back of the tear on the left side. Dr. Wingate was of the opinion that both the cyst and tear could have made a contribution to the left leg pain. Dr. Wingate further felt the work accident of October 17, 2011 caused the left leg symptoms and required the surgery performed on February 27, 2012.

Petitioner testified he experienced low back pain prior to his October 17, 2011 accident. Petitioner testified that on February 19, 2002, while working for Respondent, he lifted a television to put it in a dumpster and injured his back. He also lifted a camera out of a sewer by himself in November of 2007, and experienced left sided back pain and groin pain which radiated into his left leg. Following those incidents, he came under the care of Dr. Atwater, an orthopedic surgeon, and Dr. Stroink, a neurosurgeon.

On February 26, 2002, Dr. Atwater diagnosed L5 radiculitis with possible disc herniation. Dr. Atwater prescribed a lumbar MRI that was performed on March 19, 2002. This revealed L3-L4 and L4-L5 non-compressive central disc protrusions with disc dissecation, and borderline narrowing of the central canal at L4-L5. Dr. Atwater prescribed a second lumbar MRI that was performed on October 25, 2002. This revealed a broad-based annular disc bulge, superimposed upon a broad-based central disc bulge at L3-L4 and L4-L5, more so at L4-L5. Dr. Atwater treated Petitioner through November 5, 2002. (Px8, Px10)

Petitioner testified that during this time, Dr. Stroink performed injections to his back. Petitioner also underwent a lumbar MRI and discogram, and was released from medical care in 2008. Petitioner on December 30, 2002, was also released from care by Dr. Apolinario, following a left sacroiliac injection.

Petitioner first saw Dr Stroink on January 29, 2008. Dr. Stroink diagnosed an L5 nerve root irritation and referred him to see Dr. Jhee, a physiatrist, on February 22, 2008. Dr. Jhee recorded a history of injury of lifting a camera out of a sewer and reviewed the December 14, 2007 lumbar MRI. Dr. Jhee indicated that MRI revealed degenerative disc disease at L4-L5 and L5-S1 with associated small central disc herniations at both levels encroaching on the lateral recesses, slightly worse at L4-L5. Dr. Jhee also prescribed and performed an EMG/NCV study on May 6, 2008, which was described as being normal. (Px9, Px13)

Petitioner also was diagnosed with cubital tunnel syndrome on February 17, 2011 at Medical Hills Center. A history was noted at that time of chronic back pain. (Rx6)

Petitioner testified he did not file any Workers' Compensation claims against Respondent for either incident noted above, nor did he receive any settlements.

Petitioner also testified that on October 17, 2011, he was not experiencing any lower back or left leg pain when he reported to work, and that he had been symptom free for a long period of time. Petitioner testified after his injury of October 17, 2011, he experienced left leg pain until after his February 27, 2012 surgery.

Based upon the above, the Arbitrator finds the testimony of Dr. Wingate to be more credible than that of Dr. Zelby. Dr. Zelby's insistence that Petitioner's body did not twist in any way, shape or form seems unreasonable and it is unclear to this Arbitrator where he obtained such information or whether it was credible.

Based further upon the above, the Arbitrator finds that the conditions of ill-being as diagnosed and treated by Dr. Wingate are causally related to the accidental injury of October 17, 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 the following medical charges for treatment that were incurred after this accidental injury:

Orthopedics and Sports Enhancement	$ 133.35
Anesthesia Consultants	$2,299.32
Out of Pocket Medical Expenses by Petitioner	$1,940.27

These charges total $4,372.94.

In addition to the above charges, Respondent's Blue Cross/Blue Shield health insurance paid $117,884.38 in charges pertaining to this injury. (Px7, Px14)

See findings of this Arbitrator in "F" above.

Based upon said findings, Respondent is found to be liable to Petitioner for medical expenses in the amount of $4,372.94.

Based further upon said findings, Respondent is to hold Petitioner safe and harmless from all attempts at collection or reimbursements of amounts paid by Respondent's group health insurance carrier that total $117,884.38, in accordance with Section 8(j) of the Act.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" above.

The parties have stipulated that Petitioner was temporarily and totally disabled from work commencing November 7, 2011 through December 12, 2011.

Dr. Wingate prescribed no work for Petitioner on February 22, 2012, after he attempted to work his full duty job on February 21, 2012. Dr. Wingate released Petitioner to return to work on April 3, 2012.

Having found causation in "F" above between this accidental injury, the diagnosed conditions and the treatment rendered, the Arbitrator further finds Petitioner to be entitled to receive temporary total disability from Respondent commencing November 7, 2011 through December 12, 2011, and again commencing February 22, 2012 through April 2, 2012.

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

This accidental injury occurred after the Workers' Compensation Act was amended on September 1, 2011. Under Section 8.1b of the amended Act, the Arbitrator notes the following factors must be considered in determining permanent disability or permanent partial disability:

1. The reported level of impairment pursuant to the AMA 6th Edition Impairment 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 earnings capacity; and
5. The evidence of disability corroborated by the treating medical records.

Concerning the AMA Impairment Reports, Dr. Wingate testified that Petitioner has sustained a 25% impairment as a result of his injuries to the lumbosacral spine. Dr. Wingate further testified the injuries are consistent with a Class IV Motion Segment Lesion involving multiple levels, L4-L5 and L5-S1 with medically documented findings, with surgery, and documented signs of a residual multi-level radiculopathy at the appropriate levels.

Dr. Hauter testified by evidence deposition that he was asked to examine impairment on behalf of Respondent as per the AMA Guidelines. Dr. Hauter examined Petitioner on May 13, 2013, using the 6th Edition AMA Impairment Guidelines. Dr. Hauter referred to pay 70, Table 17.4 and found Petitioner had a Class I impairment, resulting in an impairment rating of 8% to his whole person.

Considering occupation, Petitioner testified he has been employed as a truck driver with Respondent for 20 years prior to October 17, 2011. Petitioner testified his job duties including driving a truck, and driving heavy equipment. Petitioner testified he experiences stiffness in his lower back after working all day, especially if he drives the loader at work. Petitioner testified he now takes Skelaxin, a muscle relaxer, to ease his pain symptoms before going to sleep, and he sometimes takes pain medication after work.

Considering age, Petitioner was 41 at the time of the injury and not near retirement age. Petitioner has additional work years ahead of him with residual pain and discomfort that comes with this type of injury.

Considering future earnings, Petitioner offered no evidence that his future earnings would be impacted as a result of this accidental injury.

Considering the medical evidence before this Arbitrator, evidence of disability is corroborated. On February 27, 2013, Dr. Wingate felt Petitioner was able to do everything required of him at work, but he did have some discomfort and use an anti-inflammatory and muscle relaxant. Dr. Wingate felt if Petitioner required stronger medication, he can take prescribed Percocet and/or Zanaflex as rescue type of medicines. On April 8, 2013, Dr. Wingate felt Petitioner had some recurrent pain over the last 2-3 weeks with some pain into his left leg. Dr. Wingate prescribed continued use of anti-inflammatory and pain medication. Dr. Wingate felt that Petitioner's flare-up with pain seems to correlate with some work duties like driving a dump truck, shoveling, sweeping, and operating the loader. Dr. Wingate indicated possible use of future epidural injections to manage pain. Dr. Wingate also noted Petitioner feels better at work on Mondays and Tuesdays, but is largely exhausted due to pain when working Wednesdays or Thursdays. Dr. Wingate felt this was not uncommon in anyone who has undergone a two level instrument insertion posterior lateral fusion after laminectomies. (Px17)

Based upon all of the factors as stated above, the Arbitrator finds the condition of ill-being to be permanent in nature, to the degree of 25% disability or loss of use pursuant to 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Young,
Petitioner,

vs. NO: 12 WC 30332

14IWCC0636

Village of Southern View,
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 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 December 5, 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.

14IWCC0636

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: JUL 30 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-07/22/14
drd/wj
68

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

YOUNG, BRIAN
Employee/Petitioner

Case# **12WC030332**

VILLAGE OF SOUTHERN VIEW
Employer/Respondent

14IWCC0636

On 12/5/2013, 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 0.10% 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:

2217 SHAY & ASSOC LAW FIRM LLC
TIMOTHY M SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

0445 RODDY LEAHY GUILL & ZIMA LTD
MICHAEL POWALISZ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

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)

Brian Young
Employee/Petitioner

v.

Village of Southern View
Employer/Respondent

Case # 12 WC 030332

Consolidated cases: N/A

14IWCC0636

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 **October 9, 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 **14IWCC0636**

On the date of accident, **May 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 $**35,391.85**; the average weekly wage was $**680.60**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**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 is ordered to pay for the prospective medical treatment recommended by Dr. Christopher Wottowa, including a left shoulder arthroscopy with arthroscopic subacromial decompression and arthroscopic distal clavicle resection.

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

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

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

Nancy Lindsey
Signature of Arbitrator

December 2, 2013
Date

ICArbDec19(b)

DEC 5 – 2013

When the arbitration hearing began the issues in dispute were causal connection and prospective medical care. During the proceedings issues were raised concerning the admissibility of certain evidence. The parties agreed to take those evidentiary issues with the case and address them in their proposed decisions. Subsequent to the arbitration hearing, the Arbitrator was advised (AX 5) that issues regarding Petitioner's termination were being waived and such evidence was to be stricken. Thus, the only issues remaining in dispute are causal connection and prospective medical care.

The Arbitrator finds:

Petitioner was employed by Respondent from December of 2005 through August of 2012. Petitioner worked for Respondent as a crewman and crew leader performing a variety of duties ranging from leaf raking, building maintenance, equipment operating, ditch digging and culvert installation.

Petitioner was involved in an undisputed work accident on May 10, 2010, while picking up items after Respondent's village-wide garage sale. Petitioner testified that Village residents would place items out near/in the street ditches for pick up by Respondent. Petitioner, with his crew, would come by, pick up the items, and load them into an end loader machine for dumping into a garbage truck. Petitioner testified the ditches were wet and slick on May 10th due to a recent rain. Consequently, Petitioner and his co-worker, Pat O'Connell, had to deal with slippery conditions while picking up items. Petitioner testified that he and O'Connell were picking up a large piece of timber when O'Connell dropped his side of the timber due to the slippery ditch and Petitioner jerked his left shoulder and dropped his end of the timber as well. Thereafter, the two picked up the timber and continued working.

Petitioner testified that he reported the accident by telephone to either Greg Hasman, the Trustee overseeing his department, or the Village's Mayor. He further testified he was told to get his left shoulder checked out. Petitioner explained that because bumps, bruises, and strains go with his job, he did not go to the doctor every time something happened on the job. He felt this situation was no different and, rather than get immediate medical attention, he waited a couple of days to see if his condition would improve. When it didn't, Petitioner sought medical care.

Petitioner presented to Dr. Neville White, his primary care physician, on May 17, 2010 with left shoulder complaints after injuring his left shoulder at work the prior week. (PX 1) Petitioner described jerking his arm and left shoulder and subsequently noticing less strength in his left arm and discomfort when performing horizontal arm raises. (PX 1) Petitioner also described difficulty sleeping comfortably with his left shoulder at night. On examination, Dr. White noted pain with adduction. Dr. White prescribed Ibuprofen and scheduled him to be seen by Dr. Christopher Wottowa, an orthopedic surgeon, at Springfield Clinic. Dr. White suspected an injection and rehabilitation might be necessary. (PX 1, pp. 33-34)

Petitioner presented to Dr. Wottowa on May 24, 2010 with complaints of left shoulder pain that radiated down from the lateral aspect of his shoulder to the deltoid area. According to Dr. Wottowa's office note, Petitioner "injured his left shoulder at work, he thinks at the beginning of this month." Petitioner described lifting some railroad ties from ground level to an end loader by hand and with another person. Petitioner noticed pain over the superior aspect of his shoulder while doing so and reported difficulty sleeping at night subsequent thereto. He noticed a catching and locking of his left shoulder. Petitioner was still working and had not yet had any real treatment to the shoulder. (PX 1, p. 29)

Upon physical examination, Dr. Wottowa noted positive impingement signs, occasional crepitation over the left shoulder, and tenderness over the left AC joint. Petitioner was noted to have excellent strength and range of motion. Dr. Wottowa diagnosed irritation of the left AC joint and rotator cuff tendons. Dr. Wottowa performed a cortisone injection into Petitioner's left shoulder and assigned strengthening exercises. Dr. Wottowa believed Petitioner's condition would quiet down with the injection and exercises. He was to work on strengthening his shoulder and was allowed to continue working full duty unless he has problems. (PX 1, pp. 29-30)

Petitioner testified that while the injection helped at first, providing about seventy-five percent relief, the relief eventually subsided to approximately fifty percent.

Petitioner returned to Dr. Wottowa on June 28, 2010 with complaints that movement such as reaching across his body and lifting overhead irritated his AC joint. As an example, Petitioner advised the doctor that turning his truck with his left hand to the right increased his symptoms and discomfort over the AC joint. On examination Petitioner's shoulder "look[ed] great." He had full range of motion, normal strength and negative impingement signs. Dr. Wottowa did note mild tenderness over the AC joint and some residual AC joint arthrosis Dr. Wottowa's impression was that Petitioner had done very well and while he appeared to have some residual joint arthrosis he instructed Petitioner to work through it. He advised Petitioner that if the pain increased and became more significant over the summer, he would give him a repeat injection. Ultimately, if Petitioner had long-term problems, surgical removal of the distal clavicle would be considered. Dr. Wottowa released Petitioner to full duty and advised him to return if his symptoms continued. (PX 1, p. 28)

Petitioner returned to Dr. White on September 16, 2011 reporting his work-related left shoulder pain, for which he had previously seen Dr. Wottowa, was getting worse again and he was noting less mobility. Petitioner explained that his symptoms began in May of 2010 when he and a co-worker were lifting a heavy container which slipped out of the co-worker's hand jerking Petitioner's arm. Dr. White reviewed Dr. Wottowa's records and Petitioner added that he had been experiencing progressively more and more trouble with his shoulder and was considering surgery. (PX 1, p. 20) Petitioner described symptoms located at toward the top of his left deltoid and Dr. White's office note states "he gives a great many other symptoms, including "significant pain at night." (PX 1, p. 21) Dr. White's plan was to refer Petitioner back to Dr. Wottowa. Petitioner was presently taking 800 mg. to 1000 mg. of ibuprofen and wanted something stronger. Petitioner was given hydrocodone/acetaminophen to take solely at bedtime because Petitioner "drive[s], etc." (PX 1, p. 21)

Petitioner testified he waited until September 16, 2011 to return to a physician because he kept hoping his left shoulder would improve and regain strength.

Petitioner presented to Dr. Wottowa's Physician's Assistant, David Purves, on September 21, 2011 with complaints of left shoulder pain, specifically over the lateral aspect of the arm that frequently occurred when he raised his left arm above shoulder level. Petitioner also complained of increased left shoulder pain at night. Mr. Purves noted Petitioner denied any new injury or trauma but acknowledged this was a work-related issue. "A lot of his work activities do seem to exacerbate his symptoms." (PX 1, p. 18) A physical examination revealed positive impingement signs on the left shoulder, and minimal tenderness at the AC joints. An x-ray of the left shoulder performed on September 21, 2011 revealed a relatively flat acromion, which had some mild downsloping, and slight degenerative changes. (PX 1) Purves recommended repeating injections and a comprehensive therapy program, which Petitioner would perform on his own. (PX 1, pp. 18)

Petitioner returned to Mr. Purves on November 22, 2011 for a follow-up for his left shoulder pain. Petitioner complained of ongoing pain over the lateral aspect of his left arm that occurred with movement above the head and activity across the body. (PX 1) Petitioner stated that his last injection provided only six weeks of relief from pain. He further stated that he was having difficulty sleeping at night because of his left shoulder

pain and discomfort. (PX 1) Purves performed a cortisone injection into Petitioner's left shoulder, recommended he continue performing a home exercise program, and to follow-up in a few weeks. If there was no significant improvement, Purves recommended an MRI. (PX 1, p. 16-17)

On January 17, 2012, Petitioner returned to Purves for a follow-up for his left shoulder pain. Petitioner described no improvement, and that he still experienced pain over the lateral aspect of the arm that occurred with any type of activity away from his body, overhead, or behind his back, as well as experienced pain at night. Upon physical examination, positive impingement signs of the left shoulder were noted. Purves recommended obtaining an MRI of the left shoulder. Purves noted that approval for the MRI would be necessary since "this is workers' compensation." (PX 1, pp. 15-16)

An MRI of Petitioner's left shoulder was performed on January 25, 2012 and revealed multiple abnormalities in the left shoulder, particularly involvement of the superolateral humerus, rotator cuff, and long head biceps tendon. (PX 2) Areas of the joint and bursal fluid were noted. The MRI also revealed a suspected component of a full-thickness rotator cuff tear of the distal-anterior supraspinatus tendon. The radiologist noted that detail through the region of the supraspinatus tendon was "not optimal." (PX1, p. 36; PX 2)

Petitioner presented to Dr. Wottowa on February 1, 2012. (PX 1) After viewing the MRI disc, Dr. Wottowa noted Petitioner had an impingement syndrome with spurring from his acromion and AC joint arthrosis. He prescribed Celebrex and advised him to continue doing strengthening exercises. The muscles above Petitioner's rotator cuff were normal and he did not see any area of full-thickness tearing on the MRI; however, he noted that was his impression based upon "less-than-ideal" images. Dr. Wottowa and Petitioner discussed the situation at length with the doctor desiring that petitioner try and get better without surgery if at all possible. Petitioner was given a script for Celebrex and advised to continue with his strengthening exercises. Each injection was noted to be less and less effective. Petitioner also indicated he did not have "the time or the inclination to take time off work to get this taken care of right now," so he hoped conservative measures would work. (PX 1, p. 13)

Petitioner was last seen by Dr. Wottowa on April 23, 2012. Petitioner continued to complain of pain in his left shoulder which he described as "a little bit worse than last time" and left shoulder pain at night that would cause him to wake. Dr. Wottowa noted that he had three injections, each providing temporary relief that only lasted a few weeks and had been decreasing in effectiveness with each given injection. Dr. Wottowa described Petitioner's left shoulder pain as located in the lateral aspect of the arm that worsened with abduction, in the plane of the scapula, and with cross-arm abduction. Upon physical examination, Dr. Wottowa noted a positive impingement sign and some tenderness over the AC joint. Dr. Wottowa noted Petitioner was a young, active, hard-working guy who had experienced over a year's worth of symptoms in his shoulder. His options were to continue on the way he was or consider a shoulder arthroscopy with arthroscopic subacromial decompression and arthroscopic distal clavicle resection. The doctor wrote, "Right now, …[Petitioner] is in the driver's seat. He has had this for a long time. He has been able to work around it, but it is getting harder and harder for him." Petitioner was unsure if he could afford to take the time off from work and understood the surgery might not alleviate all of his symptoms. Petitioner wished to confer with his fiancée and his attorney. Once Petitioner had made a decision, he was to advise the doctor. (PX 1, pp. 11-12)

At Respondent's request, Petitioner was examined by Dr. Nogalski on July 24, 2012. Petitioner described his accident of May 10, 2010 and summarized his care and treatment subsequent thereto. Petitioner's complaints included pain mostly over the front and side of his shoulder, pain and tenderness when reaching overhead, and the inability to sleep on his shoulder. He denied any prior left shoulder problems. (RX 2)

On physical examination, Dr. Nogalski indicated Petitioner had some mild pain to palpation of the anterior and lateral shoulder and some lateralized tenderness over the acromion, especially posteriorly.

Petitioner had a positive impingement sign and some distinct tenderness with rotator cuff isolation, especially with supraspinatus testing. Petitioner complained of a painful arc from about 90 to 120 degrees range of motion with the arm in abduction and in neutral plane. Dr. Nogalski reviewed a left shoulder x-ray which demonstrated a Type II acromion and some degenerative changes of the acromioclavicular joint. Dr. Nogalski did not have Petitioner's January 25, 2012 MRI available to review, only the report. He also reviewed Petitioner's medical records from Prompt Care West and Springfield Clinic. Dr. Nogalski was also provided with a copy of a June 11, 2012 Utilization Review report from Dr. Borkowski who essentially indicatd that further treatment for Petitioner's impingement syndrome appeared to be valid." (RX 2)

Dr. Nogalski's impression was rotator cuff tendinitis, probably impingement syndrome. He found no clear findings suggesting AC joint symptoms "today." He went on to state, "Diagnosis of rotator cuff tendinopathy and impingement does not appear to be clearly related to the claimed work event." Dr. Nogalski did believe Petitioner had suffered a rotator cuff strain but felt there was a "lag time" both with respect to the claimed injury and initial medical treatment and then another sixteen month gap. Dr. Nogalski further noted at while Dr. Wottowa noted some AC joint issues when he saw Petitioner in June of 2010 sixteen months thereafter when Petitioner presented to Mr. Purves, he had more of a rotator cuff impingement process, a different issue. (RX 2) While Dr. Nogalski believed arthroscopic shoulder surgery was reasonable, it would not be related to Petitioner's work accident. Dr. Nogalski believed Petitioner's treatment was reasonable through June 28, 2010. He felt Petitioner could work full duty although he might have some problems with heavier overhead work but, again, those problems would be unrelated to the work accident. Finally, Dr. Nogalski expressed interest in seeing the MRI although he did not believe it would dramatically change his opinion if he did so. (RX 2)

Petitioner's employment with Respondent was terminated in August of 2012.

Surveillance photographs were admitted into evidence as Respondent's Exhibit 7. These photographs, taken in September of 2012, show Petitioner on the roof of a ranch style home, cleaning out gutters using arm movement below shoulder level. (RX 7)

Surveillance videotapes dated 12/5/12 through 12/11/12 were admitted into evidence as Respondent's Exhibit 6. These surveillance videotapes show Petitioner carrying roofing materials up a ladder, using hand tools, and assisting on roof maintenance. (RX 6; see also RX 5 for the written reports)

Dr. Nogalski issued a second report for Respondent on January 31, 2013, after being provided with some correspondence from Respondent's attorney, the MRI study from January 25, 2012, and surveillance documents from December of 2012. Dr. Nogalski did not review the surveillance video; he summarized the written surveillance reports. Based on the foregoing, Dr. Nogalski's earlier opinions remained unchanged. He did not believe Petitioner's accident caused or permanently aggravated Petitioner's impingement, tendinitis, and/or acromioclavicular joint arthritis. (RX 3)

Dr. Nogalski issued a third report on March 21, 2013 after being provided with the surveillance video CDs. He skimmed through the longer versions and watched the "highlight video" in its entirety. Dr. Nogalski noted his observations and concluded they showed no sign of any shoulder issue or problem concluding Petitioner's problem had resolved or indicated Petitioner's subjective complaints were not validated by any objective findings. "In short, it does not appear [Petitioner] requires any further care based upon ... the video...." (RX 4)

The evidence deposition of Dr. Michael Nogalski, an orthopedic surgeon, was taken on April 22, 2013. (RX 1) Dr. Nogalski testified that he did not have a direct recollection of Petitioner. (RX 1, p. 23)

During his July 24, 2012 examination, Dr. Nogalski diagnosed Petitioner with rotator cuff tendinitis, probable impingement syndrome, and noted that there were no clear findings suggesting AC joint symptoms. (RX 1, p. 13) Dr. Nogalski testified that on July 24, 2012, Petitioner did have problems with his left shoulder. (RX 1, p. 13) He felt Petitioner sustained a rotator cuff strain as a result of the accident but that it was successfully treated by June of 2010. (RX 1, p. 14) The symptoms Petitioner presented to him with on July 24, 2012 were not related to the May 10, 2010 accident. (RX 1, pp. 13-14)

Dr. Nogalski testified that reviewing the January 25, 2013 MRI did not change any of his opinions as noted in his July 24, 2012 report. (RX 1, p. 18) Dr. Nogalski noted in his January 31, 2013 report that after viewing the MRI, his diagnosis of Petitioner remained impingement and tendonitis as well as AC joint arthritis. (RX 1, p 34) Dr. Nogalski testified that Petitioner's injury could have made his tendinitis symptomatic. (RX 1, p. 33) He noted that Petitioner's conditions could be intermittently symptomatic. (RX 1, p. 34)

Dr. Nogalski testified that Dr. Wottowa's treatment of Petitioner through June 28, 2010 was reasonable and necessary as a result of Petitioner's shoulder strain. (RX 1, p. 33)

Dr. Nogalski testified that Petitioner could return to full duty work as of July 24, 2012, but might have problems with his left shoulder when performing heavier overhead work. (PX 4, p. 33)

Dr. Nogalski testified that he noted Petitioner denied previous problems with his left shoulder. (RX 1, p. 23) Dr. Nogalski testified that he had not seen anything to the contrary which would demonstrate Petitioner had problems of the shoulder prior to May 10, 2010. (RX 1, p. 23)

Dr. Nogalski opined in his first report that the surgery recommended by Dr. Wottowa was reasonable for Petitioner's condition at that time. (RX 1, pp. 15; 34-35) Dr. Nogalski testified that after reviewing the surveillance videotapes, he opined that there did not appear to be a sign of any shoulder issues or problems based upon the videos. (RX 1, p. 19) He testified that he believed Petitioner's problem had either resolved or that his subjective complaints were not validated by the objective findings. (RX 1, pp. 19-20) Dr. Nogalski testified that he did not find Petitioner to be a candidate for future clinical evaluation and treatment based upon the surveillance videos. (RX 1, pp. 20; 35) Dr. Nogalski kept his original opinion that Petitioner could work full duty. (RX 1, p. 21)

On cross-examination Dr. Nogalski acknowledged that Petitioner's conditions of impingement, tendinitis, and AC joint arthritis could be intermittently symptomatic. (RX 1, p. 34)

The evidence deposition of Dr. Christopher Wottowa, an orthopedic surgeon, was taken on July 29, 2013. (PX 4)

Dr. Wottowa is board certified in orthopedics and hand surgery. (PX 4, p. 6) Dr. Wottowa's practice focuses primarily on the upper extremity, including the shoulder, elbow, wrist, and hand. (PX 4, p. 7)

Petitioner first presented to Dr. Wottowa on May 24, 2010. (PX 4, p. 9) Dr. Wottowa testified that Petitioner did not give any history as to left shoulder problems prior to May 10, 2010, when he injured his left shoulder at work. (PX 4, p. 13) Dr. Wottowa testified his initial diagnosis was some AC joint irritation and rotator cuff tendinosis. (PX 4, p. 12) Dr. Wottowa thought that at this time the best treatment was an exercise program combined with an injection to the left shoulder, which was performed. (PX 4, p. 12)

Petitioner had two subsequent injections on September 21, 2011 and November 22, 2011. (PX 4, pp. 15; 18) Dr. Wottowa testified that Petitioner's three injections had no lasting improvement, and as a result, he recommended that Petitioner undergo an MRI of his left shoulder. (PX 4, p. 20)

Dr. Wottowa testified that the January 25, 2012 MRI of the left shoulder "showed evidence of spurring from the acromion with AC joint arthrosis. The actual musculature of the rotator cuff was normal. I did not see any area of full- thickness tearing, although the radiologist's report says there may be. Less than ideal images because of the machine that was used". (PX 4, p 23) Dr. Wottowa also described that the MRI revealed signs of impingement. (PX 4, p. 23)

Dr. Wottowa opined that the AC joint arthrosis was probably pre-existing, but he could not state an opinion as to the tendinitis findings on the MRI. (PX 4, p. 24) Dr. Wottowa testified that a person can have Petitioner's MRI findings and be without symptoms. (PX 4, p. 25) Dr. Wottowa testified a trauma, such that Petitioner experienced on May 10, 2010, can exacerbate an underlying condition to render him symptomatic. (PX 4, p. 25) Dr. Wottowa opined after reviewing information including the history of trauma described by Petitioner, MRI findings, and information acquired during his office visits, that Petitioner's left shoulder complaints were an exacerbation of problems that occurred throughout this time. (PX 4, pp. 25-26)

Although there is a fifteen month gap in time between June 28, 2010 and September 16, 2011 office visits, Dr. Wottowa did not record that in any point in time was Petitioner pain free. (PX 4, p. 17)

Dr. Wottowa testified that in relation to the fifteen month gap in treatment, during the June 28, 2010 visit, he had told Petitioner "basically to go away until he was at the point where he could not do much more. If he can work and live with it, then he stays away from me. If it gets to the point where he cannot, then we can sit down and discuss where he is at that time." (PX 4, pp. 26-27)

Dr. Wottowa testified that within a reasonable degree of medical certainty that the surgery he proposed on April 23, 2012 was reasonable given Petitioner's presentation and his MRI findings. (PX 4, p. 30, 33) Dr. Wottowa testified that he reviewed the IME provided by Dr. Nogalski and Nogalski's review of the video surveillance of Petitioner. (PX 4, p. 31) Dr. Wottowa testified that he disagreed with Dr. Nogalski's opinion that Petitioner was performing a lot of overhead activity in the surveillance videotapes. (PX 4, p. 31) Dr. Wottowa added that people who have rotator cuff tendinosis can do a lot with their shoulders at times, and that if one has a labor-intensive job, he has to do that labor-intensive job (PX 4, p. 31)

Dr. Wottowa testified that looking at surveillance videotapes is not fruitful because if you have a bad shoulder or a shoulder that does not work very well, you can put in an eight-hour day sometimes, work through the pain, and look normal on videotape, and be miserable at night. (PX 4, p. 31)

Dr. Wottowa testified that there are people who can function reasonable well with rotator cuff issues every day, and that he assumes that is the case with Petitioner. (PX 4, p. 33)

Dr. Wottowa testified that his ultimate diagnosis of Petitioner's left shoulder injury is rotator cuff tendinitis with AC joint arthrosis. (PX 4, p. 34)

Dr. Wottowa testified that he knows the Petitioner well and has treated him before for an unrelated issue. (PX 4, 26) Dr. Wottowa testified that in his experience with Petitioner, "he is not the type of guy to go to the doctor pretty frequently." (PX 4, p. 27) Dr. Wottowa described Petitioner as a relatively rugged and tough gentleman. He further testified that he does not think in this case there is any evidence of symptom magnification or fabrication of symptoms. (PX 4, p. 42)

Petitioner testified he completed his junior year of high school and then received his GED in order to become a member of the carpenters' union. Petitioner testified he has performed manual labor all his life and knows no other type of employment.

Petitioner testified he worked in the same position for the Village of Southern View until his termination. He further testified that during this time he never took a day off due to left shoulder pain. However, he did testify that his left shoulder pain would fluctuate based on the duties assigned on a given day. He further testified he performed the strength exercises Dr. Wottowa assigned during this time as well.

In response to Petitioner's cleaning out gutters of a home using movement below shoulder level in September 2012, and helping roof a house in December 2012, Petitioner testified that Dr. Wottowa never placed him on any work restrictions and told Petitioner to simply not do an activity if it hurt his left shoulder. Petitioner added that during this time, he continued to have left shoulder pain.

Petitioner testified that he had never injured his left shoulder before the May 10, 2010 work related injury.

Petitioner testified that he still experiences a dull ache in his left shoulder, but added that he suffers sharp pain when his elbow is above the height of his shoulder. Petitioner testified he currently experiences pain in his left shoulder two inches down from the top of his shoulder. The Arbitrator described his left shoulder pain location as where the "seam is on his T-shirt at the top of his shoulder."

Petitioner testified that reaching up overhead, extending his left arm away from his body, and conducting any sweeping motion causes pain. The Arbitrator described the motion as "when one goes to a drive-up banking facility and places the card in the machine."

Petitioner also testified he experiences left shoulder pain when turning a big steering wheel or other mechanisms that require similar movement. Additionally, moving his left shoulder in a circular motion causes a lot of pain, clicking, and popping of the left shoulder.

Petitioner testified that it is necessary to have a functioning shoulder to effectively perform his line of work. Petitioner testified that in his current condition, he cannot perform any construction work. Specifically, his left shoulder will not allow him to hold up drywall with one hand and insert screws with another. He cannot lift heavy lumber, or similar items overhead. He cannot set trusses or floor joints. He testified that simply getting dressed and putting on a shirt causes him left shoulder pain.

The Arbitrator concludes:

1. Causal Connection (Issue F). The issue is not whether Petitioner needs surgery at this time as both Respondent's doctor and Petitioner's doctor agree that arthroscopic left shoulder surgery is reasonable in light of Petitioner's current condition. The dispute is whether the need for surgery is causally related to the undisputed work accident of May 10, 2010, with the doctors focusing their differences of opinion on Petitioner's fifteen month gap in treatment and the surveillance evidence showing Respondent assisting with roofing a home. Dr. Nogalski viewed the video surveillance and didn't believe it showed someone with significant impingement or a shoulder problem requiring arthroscopic surgery. Dr. Wottowa did not view the surveillance video and testified it didn't matter if he did or did not. Dr. Nogalski also testified that he had no direct recollection of Petitioner; Dr. Wottowa testified he remembered him well as he had treated him for a hand injury years before this particular accident. Neither doctor noted any evidence of symptom magnification in their involvement with Petitioner.

   While the fifteen month gap in treatment is concerning, the explanation for it, in this case, is plausible. When last seen by Dr. Wottowa on June 28, 2010, Petitioner's condition was better due to the injection

he had previously received; however, he was not asymptomatic. He explained that certain movements, such as reaching across his chest and lifting overhead, irritated his AC joint. On examination the doctor noted ongoing mild tenderness over the AC joint and some residual AC joint arthrosis that he instructed Petitioner to "work through." Dr. Wottowa further advised Petitioner that he was released and should return if his symptoms continued, and that if his pain increased, he would repeat the injection. He further advised that if it became a long-term problem, he would consider surgical removal of Petitioner's distal clavicle. Petitioner continued working for Respondent and did so without any restrictions. While he did not obtain any further medical treatment for another fifteen months, when he did do so, he reported a "progressive" increase in his symptoms. Petitioner testified that he waited to go back to a doctor because he kept hoping his shoulder would improve and regain strength. Dr. Wottowa described Petitioner as an individual with a high pain tolerance and a "hard-working" young man. He further testified that during the June 28, 2010 visit he had told Petitioner "basically to go away until he was at the point where he could not do much more. If he [could] work and live with it, then he [should stay] away from me. If it gets to the point where he cannot, then we can sit down and discuss where he is at that time." (PX 4, pp. 26-27)

There is nothing in the record suggesting Petitioner was motivated by anything else except his pain to resume medical treatment in September of 2011. The Arbitrator further notes that Dr. Nogalski did not appear to give any consideration to the fact Petitioner continued to work full duty between June 28, 2010 and September 16, 2011. When Dr. Wottowa released Petitioner in June of 2010 Petitioner was not completely asymptomatic. Dr. Wottowa provided detailed guidance and instruction for Petitioner noting he wanted Petitioner to work through the residual AC joint arthrosis, cautioned him on the possibility of another injection if Petitioner's pain worsened, and suggested there might be a need for surgery if Petitioner's problem continued on a long-term basis. Thus, while Dr. Wottowa released Petitioner and allowed him to continue working, he suspected the possibility of ongoing problems. Even Dr. Nogalski acknowledged working full duty could cause problems with heavy overhead work. That is the very type of work Petitioner performed for Respondent. While Dr. Nogalski believed Petitioner's condition when he resumed treatment in 2011 was different than that which he had been treated for in 2010, he did not consider whether they could have naturally resulted from the nature of the injury combined with ongoing full duty work. It is axiomatic that in Illinois, an injured employee need only show that some phase or factor of the employment contributed to the resulting injury or disabling condition for which benefits are sought.

Petitioner testified that he had no problems with his left shoulder before May 10, 2010. On May 10, 2010 he jerked his left shoulder and experienced pain. While there is some discrepancy in the medical records regarding what Petitioner was doing at the time he experienced shoulder symptoms[1], accident is undisputed. Petitioner continued to experience the pain, it did not improve, and he sought medical care. Petitioner has continued to experience pain since the undisputed accident and has had no intervening accidents. Dr. Wottowa testified that his ultimate diagnosis of Petitioner's left shoulder injury is rotator cuff tendinitis with AC joint arthrosis. (PX 4, p. 34) Dr. Wottowa testified a trauma, such as that Petitioner experienced on May 10, 2010, can exacerbate an underlying condition so as to render Petitioner symptomatic. (PX 4, p. 25) Dr. Wottowa opined after reviewing information including the history of trauma described by Petitioner, MRI findings, and information acquired during his office visits, that Petitioner's left shoulder complaints were an exacerbation of problems that occurred throughout this time. (PX 4, pp. 25-26)

The video surveillance shows Petitioner working on a house. Yet, at that time he was under no work restrictions. Thus, under these circumstances, the surveillance video is of little, if any, significance.

[1] Springfield Clinic records have a history of lifting a railroad tie and a "heavy container."

2. Prospective Medical Care (Issue K). Petitioner is awarded prospective medical care in the form of left shoulder surgery as recommended by Dr. Wottowa.

As indicated above under "Causal Connection," both doctors agree Petitioner needs surgery. Dr. Wottowa testified that Petitioner had a total of three injections with no lasting improvement. (PX 4, p. 20) Dr. Wottowa has recommended Petitioner consider undergoing a left shoulder arthroscopy with arthroscopic subacromial decompression and arthroscopic distal clavicle resection. (PX 1) Dr. Wottowa testified that within a reasonable degree of medical certainty that the surgery he proposed was reasonable given Petitioner's presentation and his MRI findings. (PX 4, p. 30, 33)

In this instance, the Arbitrator is not as impressed with the surveillance video and adopts the opinion of Dr. Wottowa. Therefore, the Arbitrator concludes that Dr. Wottowa's surgical recommendation (a left shoulder arthroscopy with arthroscopic subacromial decompression and arthroscopic distal clavicle resection) is reasonable and necessary treatment and orders Respondent to authorize and pay any and all medical bills for treatment related to the preparation for, performance of, and recovery from the surgery.

****

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

14IWCC0637

Kevin Walsh,
Petitioner,
vs.

NO: 12 WC 9143

City of Bloomington,
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, 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 January 8, 2014 is hereby affirmed and adopted.

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

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

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

DATED: JUL 31 2014
KWL/vf
O-6/3/14
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0637

WALSH, KEVIN
Employee/Petitioner

Case# **12WC009143**

CITY OF BLOOMINGTON
Employer/Respondent

On 1/8/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

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

RUSIN MACIOROWSKI & FRIEDMAN LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0637

KEVIN WALSH,
Employee/Petitioner

v.

CITY OF BLOOMINGTON,
Employer/Respondent

Case # 12 WC 09143

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 **October 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: _____

14IWCC0637

FINDINGS

On **December 30, 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 **$56,258.80**; the average weekly wage was **$1,081.90**.

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

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

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

Respondent shall be given a credit of $ **2,782.16** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **2,782.16**.

Respondent is entitled to a credit of **$100,328.61** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$721.27**/week **16-2/7** weeks, commencing **July 11, 2012** through **November 1, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$649.14**/week for **125** weeks, because the injuries sustained caused the **25%** loss to his **person as a whole,** as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner **$1,188.20** in certain out of pocket medical expenses, pursuant to Section 8(a) of the Act, subject to the medical fee schedule as created by Section 8.2 of the Act. Respondent shall also hold Petitioner safe and harmless at all attempts at reimbursement of the medical charges that were paid by Respondent's group health insurance company in the amount of **$100,328.61**, pursuant to Section 8(j) of the Act.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

December 30, 2013
Date

ICArbDec p. 2

JAN 8 - 2014

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

Petitioner testified that on December 30, 2010, he worked for Respondent as a truck driver. On that date he was driving a garbage truck and was picking up garbage when he slipped on some ice and fell, landing on his buttocks. Petitioner testified he experienced low back pain and within a few hours, pain in his buttocks.

Petitioner first sought treatment with Dr. Carrington on January 4, 2011 and complained of low back pain. X-rays were prescribed that same day along with an MRI, which was performed on January 7, 2011. Dr. Carrington noted that Petitioner had dealt with back pain for years and had been having more pain in the last few months. Dr. Carrington recorded a history that Petitioner slipped on some ice while working at a residence and landed on his right buttock. On January 18, 2011, Dr. Carrington diagnosed a herniated vertebral disc and referred Petitioner to see Dr. Stroink. (Px11)

Petitioner saw Dr. Seibly, a neurosurgeon affiliated with Dr. Stroink, on January 21, 2011. Dr. Seibly testified by evidence deposition that he recorded a history of injury similar to Petitioner's testimony. Petitioner complained of pain radiating across the lumbar region, worse on the right with radiation into the right leg and calf. Dr. Seibly reviewed the lumbar MRI and felt it revealed a rightward disc herniation at L5-S1 with severe end plate changes and edema of the L5 and S1 vertebral bodies, which he felt were traumatic in nature. Dr. Seibly prescribed physical therapy and testified he was of the opinion within a reasonable degree of medical and surgical certainty that the fall at work on December 30, 2010 was the cause of the back symptoms and MRI findings and prescribed treatment. Dr. Seibly testified that if Petitioner did not respond to physical therapy, he may prescribe steroid injections. Surgery would be a possibility if all else fails.

Petitioner returned to Dr. Seibly on March 3, 2011, following a period of physical therapy. Dr. Seibly noted the physical therapy was not helping. Dr. Seibly reviewed the MRI findings again and noted bone marrow edema at L5 and S1. Dr. Seibly testified the inflammation was quite profound and prescribed a second MRI. Dr. Seibly prescribed that Petitioner refrain from any heavy lifting or strenuous activity and to maintain sedentary work. (Px8)

Petitioner underwent the MRI with and without contrast on March 23, 2011. Dr. Seibly reviewed these films on April 1, 2011, and felt they did not reveal an infection process. Dr. Seibly felt Petitioner had a very advanced disc injury at L5-S1 with MODIC changes along the L5 and S1 endplates along with loss of disc height. Dr. Seilby further noted a rightward disc herniation at L5-S1, which would explain the radiculopathy. Dr. Seilby testified that Petitioner was a surgical candidate, but felt it was reasonable to refer him first to a pain center for right sided epidural injections.

Petitioner underwent the right L5 epidural steroid injections on May 3, 2011 and May 20, 2011. He then returned to Dr. Seibly who noted symptom relief from the first injection for 3 weeks, and complete relieve following the second. Dr. Seibly noted that Petitioner was pleased with his recovery and was eager to return to work. Dr. Seibly released him to return to work at that time and advised him to return if his symptoms recurred.

Petitioner then returned to his regular job for Respondent. After 2-1/2 months, Petitioner testified his symptoms recurred. He then returned to see Dr. Seibly on September 8, 2011, who noted most of the pain was in the right gluteal area that radiated along the posterior aspect of the leg. Dr. Seibly prescribed additional epidural injections.

Petitioner then underwent a right L5 epidural injection on October 6, 2011 and October 20, 2011. The pain specialist, Dr. Vallejo, then recommended possible facet joint injections. Petitioner then underwent bilateral facet blocks at L3-L4, L4-L5, L5-S1. These took place on January 24, 2012 and February 7, 2012.

On February 20, 2012, Dr. Seibly noted continuing pain across the lower lumbar region that was severe, along with radiating pain following an L5 or S1 pattern. Dr. Seibly prescribed a new MRI. Petitioner underwent the new MRI on February 29, 2012. This revealed a small focal central disc herniation with a posterior disc tear at L4-L5 that was unchanged from the last MRI. Also noted was a moderate sized broad based central and slightly right paracentral disc herniation at L5-S1, which appeared to have slightly processed since the early MRI performed on January 7, 2011, and the lateral recesess were severely narrowed, with the right greater than the left. Following this MRI, Dr. Seibly on March 7, 2012 prescribed surgery.

On May 21, 2012, Petitioner saw Dr. Ghanayem at the behest of Respondent. Following this examination, Respondent refused to authorize surgery. Dr. Ghanayem testified by evidence deposition that he is an orthopedic surgeon. During examination, the neurologic exam was normal. X-rays of the lumbar spine from 2009 revealed significant collapse of the lumbar disc at L5-S1. When compared to the early 2011 X-rays, the height of the L4-L5 disc appeared the same. Dr. Ghanayem testified he reviewed the three lumbar MRI scans, and they all revealed the same findings. Dr. Ghanayem diagnosed a significant collapse at L5-S1 with foraminal narrowing from the collapse without a disc herniation. Dr. Ghanayem also indicated the L5-S1 level had a broad based disc ridge that had collapsed with the annulus becoming redundant causing some canal stenosis.

Dr. Ghanayem testified it was his opinion Petitioner aggravated his underlying disc degeneration as a result of the accident of December 30, 2010. He felt the accident caused the need for treatment through June 9, 2011. Dr. Ghanayem felt that Petitioner reached maximum medical improvement in June 2011 and the disease process would have been unchanged even without this work injury.

On July 11, 2012, Petitioner underwent surgery in the form of a decompressive lumbar laminectomy at L4-L5 and L5-S1, bilateral foraminotomies and facectomies, postrolateral arthrodesis at L4-L5 and L5-S1, with autograft and allografting, insertion of bilateral pedicle screw instrumentation at L4-L5 and L5-LS1, and microsurgical dissection, with Dr. Seibly. Dr. Seibly post surgery prescribed physical therapy and noted improvement in right leg pain, but Petitioner began experiencing a new weakness to his left foot.

The Arbitrator notes that Dr. Ghanayem testified the surgery was necessary due to the end stage disc degeneration. Dr. Ghanayem also felt the surgery performed by Dr. Seibly was reasonable and note the operative report found calcified bulges at both levels but there was no frank disc herniation or extrusion. Dr. Ghanayem testified that Petitioner suffered an aggravation of a pre-existing lumber spine condition with a sprain/strain as a result of this accident. Dr. Ghanayem testified the type of fall Petitioner sustained on December 30, 2010 could cause a permanent change in a degenerative condition. Dr. Ghanayem did not explain his contradiction on this issue during this testimony.

Dr. Ghanayem also testified that steroid injections do not reduce swelling, but are used to help with pain. Such steroid injections are not used diagnostically, but as a form of treatment.

Dr. Seibly testified that when he saw Petitioner on June 9, 2011, he did not feel he had reached maximum medical improvement. He based this opinion on the significant disc herniation and degeneration of the L5-S1 segment. Dr. Seibly expected the relief of symptoms following steroid injections to be temporary and the pain had returned by September 8, 2011. By February 20, 2012, the pain was radiating down the right leg, a sign the disc disease was progressing, and the MRI performed on February 29, 2012 confirmed his opinions.

As indicated above, Petitioner suffered from back pain prior to this accident. Dr. Seibly reviewed treatment records of Dr. Pegg and noted he diagnosed peripheral neuropathy in 2008. Dr. Seibly testified this had no bearing on his treatment to Petitioner after this accident. Dr. Seibly did testify the bone marrow edema noted on the February 29, 2012 MRI had resolved since the first post-accident MRI findings. The edema indicated trauma. The calcification resulted or developed from the time period between the date of accident and the date of surgery. Dr. Seibly felt it is sometimes better to perform surgery shortly after an injury as the disc is still soft. It was difficult to determine how long it took for the disc to calcify.

Petitioner testified he sustained a prior work injury when he fell at Respondent's garbage dump in 2009. He did not file a claim for that injury. On October 21, 2008, Petitioner reported left arm numbness, hypertension and bilateral leg pain. An EMG from Dr. Pegg revealed peripheral neuropathy, likely related to heavy alcohol usage. Petitioner testified he did not continue any treatment for low back symptoms and was relatively well until his December 30, 2010 accident.

Based upon the above, the Arbitrator finds the opinions and testimony of Dr. Seibly to be more credible than those of Dr. Ghanayem, who appeared to be reaching during his testimony. Based further upon the above, the Arbitrator finds the conditions of ill-being as diagnosed by Dr. Seibly to be causally related to the accidental injury of December 30, 2010.

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 for treatment that were incurred after this accidental injury that total $100,328.61, that were paid by Respondent's group health insurance carrier.

Petitioner also introduced into evidence medical charges of $1,188.20 that he paid for out of pocket. (Px13)

Respondent introduced into evidence an exhibit reflecting payments made towards certain medical expenses of $20,334.83. (Rx1)

See findings of this Arbitrator in "F" above.

Based upon said findings, Respondent is found to be liable to Petitioner for medical expenses in the amount of $1,188.20.

Based further upon said findings, Respondent is to hold Petitioner safe and harmless from all attempts at collection or reimbursements of amounts paid by Respondent's group health insurance carrier that total $100,328.61, in accordance with Section 8(j) of the Act.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" above.

Petitioner underwent surgery to his spine on July 11, 2012 and was released to full duty work by Dr. Seibly on November 26, 2012. The evidence before this Arbitrator reflects that Petitioner received wages starting on November 2, 2012.

Having found causation in "F" above between this accidental injury, the diagnosed conditions and the treatment rendered, the Arbitrator further finds Petitioner to be entitled to receive temporary total disability from Respondent commencing July 11, 2012 through November 1, 2012.

All claims made by Petitioner for temporary total disability benefits prior to July 11, 2012 are hereby denied, as both parties failed to prove such benefits existed or were paid. Respondent is entitled to a credit of $2,782.16 in benefits paid.

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

See findings of this Arbitrator in "F" above.

Petitioner testified he now experiences right leg pain since his surgery, and experiences stiffness to his low back in the morning. It takes a period of time for him to work out that stiffness. Petitioner testified he is careful in what he lifts at work and he tries to avoid heavy lifting.

Based upon all of the factors as stated above, the Arbitrator finds the condition of ill-being to be permanent in nature.

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

14IWCC0638

Edwin Gladney,
Petitioner,

vs. NO: 12WC 29263

State of Illinois/Menard 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 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 January 31, 2014 is hereby affirmed and adopted.

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

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

DATED: JUL 31 2014
KWL/vf
O-7/29/14
14

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0638

GLADNEY, EDWIN
Employee/Petitioner

Case# **12WC029263**

ST OF IL/MENARD CORRECTIONAL CENTER
Employer/Respondent

On 1/31/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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 PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

JAN 31 2014

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

14IWCC0638

Edwin Gladney
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # 12 WC 29263

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, 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 July 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 $47,484.00; the average weekly wage was $913.15.

On the date of accident, Petitioner was 43 years of age, married with 1 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. The Respondent has agreed to pay all reasonable and necessary related medical bills.

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 reasonable and necessary medical services 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 for 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 benefits of $547.89 per week for 75 weeks because the injury sustained caused the 15% loss of use of the body 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.

William R. Gallagher, Arbitrator

January 27, 2014
Date

JAN 31 2014

 Findings of Fact

This case was previously tried in a 19(b) proceeding on November 21, 2012. The Arbitrator's Decision was filed with the Commission on January 15, 2013, which awarded Petitioner medical bills, temporary total disability benefits and prospective medical treatment. Respondent filed a review of the Arbitrator's Decision and, on November 21, 2013, the Commission entered its Decision and Opinion on Review in which it affirmed and adopted the Arbitrator's Decision and remanded the case to the Arbitrator for further proceedings (Petitioner's Exhibit 10).

At trial, the primary disputed issue was the nature and extent of disability; however, Respondent disputed causal relationship "as to neck at C3-C4." (Arbitrator's Exhibit 1). While the prior 19(b) Decision ordered Respondent to pay medical bills, Petitioner tendered into evidence medical bills for services provided to Petitioner both before and after the prior hearing and Respondent disputed liability for same.

On July 21, 2012, Petitioner slipped on a wet floor and fell down a flight of stairs and sustained injuries to multiple areas of the anatomy including the head, neck, both shoulders, low back and right knee. Subsequent to the accident, Petitioner was seen in the ER of Memorial Hospital in Chester. Multiple x-rays and CT scans were obtained all of which were negative for any fractures. The CT scan of the cervical spine noted a mild scoliosis indicative of muscular spasm. The diagnosis was multiple contusions and a neck strain and Petitioner was directed to obtain treatment from his family physician (Petitioner's Exhibit 4).

Petitioner was seen by Dr. Philip Greene, his family physician, on July 25, 2012, and Dr. Greene opined that Petitioner had neck, trapezius and back strains. Dr. Greene referred Petitioner to Dr. James Rhodes, a chiropractor, for physical therapy. Dr. Rhodes' primary diagnoses were cervical, thoracic and lumbar strains/sprains. He treated Petitioner with chiropractic treatment from July 25 through August 29, 2012, and again on March 13, March 20, and March 27, 2013 (Petitioner's Exhibits 5 and 6).

At the direction of his attorney, Petitioner was seen by Dr. Matthew Gornet, an orthopedic surgeon, on August 7, 2012. At that time, Petitioner complained of headaches, bilateral trapezius pain more on the left and right, left shoulder pain, numbness/weakness of the left arm and low back pain with right leg symptoms (Petitioner's Exhibit 7).

At the time of Petitioner's examination of August 7, 2012, Dr. Gornet ordered MRI scans of both the cervical and lumbar spine which were performed that same day. In regard to the MRI of the cervical spine, the radiologist's report indicated that there was a minimal diffuse annular bulge without significant central canal stenosis or neural foraminal exit stenosis at C3-C4. Again, according to the radiologist, there were no abnormalities at the C4-C5 level (Petitioner's Exhibit 8). In Dr. Gornet's medical record of August 7, 2012, he stated that he reviewed the MRI and that it revealed a subtle disc herniation on foraminal views at C4-C5 on the left side, that correlated with Petitioner's shoulder and upper arm symptoms (Petitioner's Exhibit 7).

In regard to the MRI of the lumbar spine, the radiologist noted the presence of an annular tear and protrusion at L4-L5 and a protrusion at L5-S1 (Petitioner's Exhibit 8). Dr. Gornet reviewed

this scan and opined it revealed a central disc herniation/annular tear at both L4-L5 and L5-S1, with pathology at L4-L5 being more to the right and correlating with Petitioner's symptoms (Petitioner's Exhibit 7). Dr. Gornet recommended physical therapy, oral steroids and other medications and authorized Petitioner to be off work. He opined that Petitioner's symptoms were causally related to the work accident.

When Dr. Gornet saw Petitioner on September 24, 2012, Petitioner had improved but still had symptoms. Dr. Gornet opined that Petitioner was not at MMI but released him to return to work without restrictions effective October 15, 2012, but on a trial basis. Dr. Gornet saw Petitioner again on November 29, 2012 (eight days after the 19(b) trial) and noted that Petitioner still had significant neck pain, bilateral trapezius shoulder pain and headaches. He made specific reference to the prior MRI which "...showed some subtle disc herniation, particularly at the C3-4 level." Dr. Gornet opined that Petitioner was not at MMI, that further evaluation may be needed and that Petitioner could continue to work full duty (Petitioner's Exhibit 7).

Dr. Gornet saw Petitioner again on June 27, 2013, and Petitioner continued to complain of neck pain, bilateral trapezius/shoulder pain, more on the left than right, and headaches. Dr. Gornet recommended Petitioner have a new MRI scan but stated Petitioner could continue to work full duty. An MRI scan of the cervical spine was performed on September 5, 2013, which, according to the radiologist, revealed a disc protrusion at C3-C4 on the left side. The radiologist also noted that it was relatively unchanged from the prior scan of August 7, 2012. Dr. Gornet saw Petitioner that same day and also reviewed the MRI scan. He stated in his record that the new MRI scan still showed a foraminal herniation at C3-C4. Dr. Gornet also opined that Petitioner was at MMI, no further treatment was required and that Petitioner could continue to work full duty (Petitioner's Exhibit 7 and 8).

At trial, Petitioner testified that he was able to return to work as a Correctional Officer when Dr. Gornet released him to do so in October, 2012. Petitioner stated that he continues to experience pain/soreness in his neck, low back and right knee but that his neck and right knee symptoms are the most severe. In January, 2013, Petitioner became a member of the tactical team and he is required to participate in training twice a week. The purpose of the tactical team is to deal with uncooperative inmates and members of the team are trained to restrain combative inmates, perform cell extractions, etc. This training is physically demanding and Petitioner testified that when he participates in it that it exacerbates his right knee pain. Petitioner testified that he wears an ace bandage on his right knee virtually all of the time.

Petitioner agreed that he was working without restrictions and had worked over time when it was offered to him. Petitioner has not had any performance evaluations since the time he returned to work.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being, including the disc pathology at C3-C4, is causally related to the accident of July 21, 2012.

In support of this conclusion the Arbitrator notes the following:

The Request for Hearing (stipulation sheet) stated that the dispute regarding causality pertained to the neck at C3-C4. Accordingly, the Arbitrator finds that there was no causality dispute in regard to the injuries sustained to the other parts of the Petitioner's anatomy. Further, in the prior 19(b) decision, the Arbitrator ruled that Petitioner's condition of ill-being was causally related to the accident.

As noted herein, Dr. Gornet's medical record of August 7, 2012, stated that the disc pathology was at C4-C5; however, the radiologist's report of that same MRI stated that the disc pathology was at C3-C4. When Dr. Gornet saw Petitioner on November 29, 2012, he referred to the MRI of August 7, 2012, and noted that the disc herniation was at C3-C4. When another MRI scan was obtained on September 5, 2013, both Dr. Gornet and the radiologist opined that the disc pathology was at C3-C4. The preceding indicates clearly that the reference in Dr. Gornet's record of August 7, 2012, to C4-C5 is erroneous and that it should have been to C3-C4.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services 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 for 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 Petitioner has sustained permanent partial disability to the extent of 15% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither the Petitioner nor Respondent tendered an AMA impairment rating report.

Petitioner's occupation is a Correctional Officer and his job requires the active use of both upper extremities. Further, Petitioner is a member of the tactical team whose purpose is to deal with uncooperative inmates.

Petitioner was 43 years of age at the time of the accident meaning he will have to live with the effects of these injuries for a significant period of time.

Petitioner was able to return to work without restrictions and has worked over time. There was no evidence that the injuries will have any effect on Petitioner's future earning capacity.

As a result of the accident, Petitioner sustained herniated discs at C3-C4, L4-L5 and L5-S1. Most of Petitioner's symptoms have been in the neck and adjacent trapezius/shoulder areas, more on the left than right. Dr. Gornet opined that Petitioner's neck/shoulder symptomatology was consistent with the MRI findings. The fact that Petitioner continues to experience pain/soreness in the neck, trapezius/shoulder and low back, especially when engaging in the tactical training exercises, is consistent with the medical records.

Petitioner also complains of significant right knee pain and wears an ace bandage; however, Petitioner's complaints in regard to the right knee are not corroborated by medical treatment records. No doctor has made any diagnosis in respect to any right knee condition. There is no medical basis for a finding of permanent partial disability in regard to the right knee.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ 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

Rebecca Marquis,
Petitioner,
vs.

14IWCC0639

NO: 12 WC 5920

Mapower Temporary Service,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability 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 15, 2014 is hereby affirmed and adopted.

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

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

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: JUL 31 2014
KWL/vf
O-7/29/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0639

MARQUIS, REBECCA
Employee/Petitioner

Case# **12WC005920**

MANPOWER TEMPORARY SERVCES
Employer/Respondent

On 1/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

2126 BRANKEY & SMITH PC
RODNEY SMITH
622 JACKSON AVE
CHARLESTON, IL 61920

2904 HENNESSY & ROACH PC
PAUL BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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)

14IWCC0639

Rebecca Marquis
Employee/Petitioner

v.

Mapower Temporary Services
Employer/Respondent

Case # **12** WC **5920**

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 **D. Douglas McCarthy**, Arbitrator of the Commission, in the city of **Urbana**, on **December 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 3, 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 **$4,951.45**; the average weekly wage was **$419.45**.

On the date of accident, Petitioner was **32** 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 **$00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** 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

All benefits are denied to Petitioner. Petitioner has failed to prove accident and causal connection.

As there is no compensation payable by virtue of this award, Respondent is not entitled to any credit for benefits paid.

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

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

D. Dhee McCarthy
Signature of Arbitrator

Jan. 13, 2014
Date

ICArbDec19(b)

JAN 15 2014

BEFORE THE STATE OF ILLINOIS WORKERS' COMPENSATION COMMISSION

Rebecca Marquis, Petitioner, v. Manpower Temporary Services Respondent.	)	14IWCC0639 No. 12 WC 05920

ADDENDUM

STATEMENT OF FACTS

Petitioner is alleging a repetitive injury to her hands resulting in bilateral carpal tunnel syndrome which manifested on February 3, 2012. On that day, Petitioner was working for Respondent as a BMC Molding Operator for North American Lighting. Petitioner testified that she began working at North American Lighting in October of 2011 as a BMC Molding Operator. She could not recall her exact start date. Petitioner testified that she began to have pain and numbness in both of her hands in November 2011. Petitioner testified that her hands hurt from the repetitive nature of her job as a molding operator from deflashing headlights. Petitioner testified that she has not returned to work for North American Lighting since February 3, 2012.

On cross-examination, Petitioner testified that October 31, 2011, sounded right as the date she first began employment at North American Lighting. Petitioner corrected her previous testimony by testifying that she actually began working as an inspector, which consisted of simply picking up and looking at headlights, for approximately the first four weeks working for Respondent. Petitioner testified that she did not begin her job as a BMC molding operator until December of 2011.

Respondent's representative, Kim Stewart, testified to Petitioner's job duties and job assignment dates. Ms. Stewart testified that she is a branch manager for Respondent and is knowledgeable of Petitioner's job duties and dates of assignments. Ms. Stewart testified that Petitioner started working as an inspector on October 31, 2011. Ms. Stewart testified that Petitioner's job as an inspector simply

entailed picking up and inspecting headlamps. Ms. Stewart testified that Petitioner did not start her job duties as a BMC molding operator until December 5, 2011.

Petitioner first sought care for her hands on February 3, 2012, with Dr. John Rowe. (PX 3). Petitioner reported having a three week history of swelling, numbness and tingling in both hands. (PX 3). Petitioner was placed on work restrictions and told to following up in ten days. (PX 3). Petitioner sought follow-up care with Dr. Rowe on February 13, 2012, and an EMG was ordered. (PX 3). An EMG was performed by Dr. Kenneth Aronson on March 1, 2012, which was normal with no signs of carpal tunnel syndrome. (PX 3).

Petitioner returned to Dr. Rowe on March 12, 2012. (PX 3). Dr. Rowe noted that Petitioner's EMG was normal, however, he continued Petitioner's work restrictions of no repetitive grasping, pushing, pulling or fine manipulation with either hand. (PX 3). Petitioner began occupational therapy at Paris Community Hospital on March 19, 2012. (PX 4). At her March 23, 2012, occupational therapy appointment, Petitioner reported hurting her hands on March 22, 2012, while picking up her 55 pound son. (PX 4). At her occupational therapy appointment on April 2, 2012, Petitioner reported only having tingling and numbness in her fingertips when she is engaged in increased activity at home. (PX 4).

Petitioner was evaluated by Respondent's IME physician, Dr. James Stiehl, on March 28, 2012. (RX 1). Dr. Stiehl testified that Petitioner reported that she was working as a molding operator and doing frequent reaching and twisting activities when she began experiencing numbness and tingling in both of her hands. (RX 1 at 9). Dr. Stiehl testified that Petitioner reported to him that this was a new problem and had never had this problem before. (RX 1 at 10).

Petitioner sought a second opinion with Dr. Fadhil Alsikafi at UAP Clinic Bone and Joint Center on May 10, 2012. (PX 5). Petitioner reported noticing bilateral numbness in her index, middle and ring fingers in December 2011. (PX 5). Dr. Alsikafi recommended a repeat EMG. (PX 5). Petitioner's repeat EMG was conducted on July 10, 2012, by Dr. Pragnaben Patel and revealed evidence of mild left carpal tunnel syndrome and no evidence of right carpal tunnel syndrome. (PX 5). On July 12, 2012, Dr. Alsikafi recommended a left carpal tunnel release. (PX 5).

Petitioner was reexamined by Dr. Stiehl on August 29, 2012. (RX 1 at 19). Dr. Stiehl's repeat IME report reiterated his opinion that Petitioner's carpal tunnel symptoms were not related to her work at North American Lighting. (RX 1) Dr. Stiehl subsequently testified that he did not believe Petitioner's ongoing problems were related to her employment at North American Lighting. (RX 1 at 22-23). Dr. Stiehl testified that he did not find any inciting factor in Petitioner's short period of employment that would cause her ongoing problems. (RX 1 at 22-24). Dr. Stiehl testified that Petitioner could return to work full-duty by the time of his repeat IME on August 29, 2012. (RX 1 at 25).

Dr. Rowe testified that Petitioner first sought care with him on February 3, 2012. (PX 7 at 6). Dr. Rowe testified that Petitioner initially experienced an improvement in her symptoms after first seeking care. (PX 7 at 21). Dr. Rowe testified that he was aware of Petitioner's worsening condition after an accident involving her 55 pound son. (PX 7 at 21). Dr. Rowe initially testified that Petitioner's carpal tunnel symptoms were most consistent with cumulative repetitive overuse from her job at North American Lighting. (PX 7 at 9-10). Dr. Rowe continued to testify that he had a difficult time understanding why Petitioner had persistent symptoms when she did not continue her job duties and that she also had symptoms that were not consistent with carpal tunnel syndrome. (PX 7 at 22).

On cross-examination, Dr. Rowe testified that he was not privy to Petitioner's work-related activity. (PX 7 at 24). Dr. Rowe testified that he is not able to provide an opinion on whether Petitioner's current condition is causally related to her work at North American Lighting. (PX 7 at 24). Additionally, after Dr. Rowe was advised that Petitioner never returned to her job at North American Lighting after February 3, 2012, he testified that it was more likely then not that her condition as related to her work had resolved and her ongoing treatment would be unrelated to her work. (PX 7 at 25).

Dr. Alsikafi testified that his understanding of Petitioner's job duties were based on what Petitioner explained to him. (PX 8 at 7). Dr. Alsikafi testified that it was his opinion, based on Petitioner's description of her work, that her symptoms are work related. (PX 8 at 12-13).

On cross-examination, Dr. Alsikafi was hostile and refused to answer Respondent's attorney's questions. (PX 8 at 14-31). Dr. Alsikafi testified that it was irrelevant whether Petitioner ever returned to

work after she initially sought treatment. (PX 8 at 19). Additionally, Dr. Alsikafi testified that his causation opinion is based on Petitioner's subjective history that she uses her hands repetitively at work and conservative treatment failing to resolve her symptoms. (PX 8 at 20-21). Dr. Alsikafi was not aware that Petitioner did not return to work after February 3, 2012, or of her hand complaints in November of 2011, yet he continued to opine that Petitioner's job duties were the cause of her symptoms. (PX 8 at 25-27).

CONCLUSIONS OF LAW

C & F. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent and is Petitioner's current condition of ill-being causally related to the accident?

The Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of her employment by Respondent. Petitioner testified that she began having hand pain and numbness in November 2011. At that time, Petitioner was not performing the job duties of a molding operator at North American Lighting. The evidence at trial established that Petitioner began working for North American Lighting on October 31, 2011, and did not begin her job as a molding operator until December 5, 2011. Dr. Rowe and Dr. Alsikafi both testified that their opinions were based on Petitioner's subjective history of her molding operator job duties. Dr. Rowe and Dr. Alsikafi were not aware of Petitioner's prior complaints from November 2011. They rendered no opinions as to a causal relationship between her inspection work and carpal tunnel syndrome.

Petitioner's medical records establish that she first reported to Dr. Rowe that she began experiencing hand pain and numbness three weeks before her February 3, 2012, appointment. Petitioner reported to Dr. Stiehl that her hand numbness and tingling was a new problem and she had never had it before. This contradicts Petitioner's own testimony at trial when she testified that she first began experiencing hand pain and numbness in November 2011.

Petitioner initially testified that she began working as a molding operator in October of 2011. However, on cross-examination, Petitioner admitted that she did not begin working as a molding operator until December 5, 2011. Petitioner's testimony and subjective histories provided to her physicians and Respondent's IME physician are inconsistent and raise a serious question of credibility. The undisputed

facts are that Petitioner testified that she began experiencing hand pain and numbness in November 2011 and Petitioner did not begin her job duties as a molding operator until December 5, 2011. Neither Petitioner nor her physicians have ever related Petitioner's initial job duties as an inspector to her carpal tunnel symptoms.

The Arbitrator finds that Petitioner's current condition of ill-being is not causally related to her alleged injury. Petitioner testified she first began noticing pain and numbness in her hand in November of 2011, after a few weeks into her job at North American Lighting as an inspector. Petitioner and Ms. Stewart both testified to Petitioner's job duties as an inspector and their testimony establishes that Petitioner simply had to pick up, inspect and place headlamps in a bin. Additionally, after Dr. Rowe was advised that Petitioner never returned to work after February 3, 2012, he opined that it was more likely than not that Petitioner's current condition of ill-being was not causally related to her work. There was no testimony or evidence presented at trial that related Petitioner's job duties as an inspector to her carpal tunnel symptoms.

Dr. Stiel's and Dr. Rowe's testimony should be provided more weight because they take into account Petitioner's last day of work. Dr. Stiehl's opinions and Dr. Rowe later opining, after he was advised of Petitioner's last day of work, that Petitioner's continued hand complaints were not related to her job at North American Lighting are compatible. Additionally, Dr. Rowe's and Dr. Alsikafi's testimony establishes they were not aware that Petitioner had a prior history of hand pain and numbness that began prior to her job duties as a molding operator. Dr. Alsikafi's testimony is the least credible because he was not aware of Petitioner's last day of work when forming his opinions and when he was advised of Petitioner's last day he went on to testify that it was irrelevant to his opinions. The fact that Petitioner initially had a negative EMG after her last day at North American Lighting and then her symptoms got worse after not returning to work, and eventually a mild positive left EMG five months after her last day, is relevant to the cause of Petitioner's symptoms. Additionally, none of the three physicians were aware of Petitioner's prior hand complaints in November 2011 before she even began working as a molding operator which is the most telling of all regarding the cause of Petitioner's symptoms.

In summary, the evidence and testimony at trial establishes that Petitioner first began experiencing hand pain and numbness in November 2011 after a couple of weeks working as an inspector for North American Lighting. There is no evidence establishing any repetitive duties involved with Petitioner's job as an inspector. Petitioner provided inconsistent and conflicting histories to her physicians. Petitioner's physicians' testimony establishes that they based their opinions on Petitioner's subjective history. There was no evidence presented relating Petitioner's symptoms to her job as an inspector. Both Petitioner's own treating physician, Dr. Rowe, and Respondent's physician, Dr. Stiehl, testified that Petitioner's symptoms increasing after her last day of work for North American Lighting indicate that her job duties were not the cause of her ongoing complaints. Dr. Alsikafi testified that he was not aware of Petitioner's last day of work.

Based on the findings above, the Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of her employment by Respondent and has not proved a causal relationship between her job at North American Lighting and her condition of ill being.

Date and Entered Jan. 13, 2014.

D. Douglas McCarthy, Arbitrator

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

Juana O. Burchell,
Petitioner,

14IWCC0640

vs.

NO: 12 WC 6179

Illinois State Board of Education,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 10, 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: JUL 31 2014
KWL/vf
O-7/28/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0640

BURCHELL, JUANA O
Employee/Petitioner

Case# **12WC006179**

12WC006175

IL STATE BOARD OF EDUCATION
Employer/Respondent

On 12/10/2013, 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 0.10% 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:

2427 KANOSKI BRESNEY
KATHY A OLIVERO
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

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

5002 ASSISTANT ATTORNEY GENERAL
JOSEPH P BLEWITT
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 PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

DEC 10 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

14IWCC0640

JUANA O. BURCHELL
Employee/Petitioner

Case # 12 WC 6179

v.

Consolidated case: 12 WC 6175

ILLINOIS STATE BOARD OF EDUCATION
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the cities of **Springfield**, on **September 17, 2013,** and in **Urbana**, on **October 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. ☒ 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 **July 14, 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 alleged accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$75,132.20**; the average weekly wage was **$1,444.85**.

On the date of alleged accident, Petitioner was **52** years of age, ***married*** with **1** dependent child.

Petitioner ***has*** received 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 by a preponderance of the evidence that an accident occurred that arose out of and in the course of her employment; therefore, no benefits are awarded.

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

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

Signature of Arbitrator

12/02/2013
Date

DEC 10 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JUANA O. BURCHELL
Employee/Petitioner

v.

ILLINOIS STATE BOARD OF EDUCATION
Employer/Respondent

14IWCC0640

Case # 12 WC 6179
Consolidated Case: 12 WC 6175

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed two Applications for Adjustment of Claim in this matter. (See Arbitrator's Exhibits (AX) 3 and 4). Case number 12 WC 6175 was assigned to the current arbitrator, and case number 12 WC 6179 was assigned to Arbitrator Nancy Lindsay. The parties moved to consolidate the later filing with case number 12 WC 6175, and said motion was granted at the time of trial.

Petitioner, Juana Burchell, was employed by Respondent, the Illinois State Board of Education, as a principal consultant when she alleged that two work-related injuries occurred, the first on July 14, 2011, and the second on October 19, 2011. Both times, she alleges that she fell in her office. The parties do not dispute that Petitioner suffered a left distal radius intraarticular fracture after the July 2011 fall, and a contusion on her left forearm after the October 2011 fall. However, there are disputes as to whether the falls arose out of and in the course of Petitioner's employment and whether her current condition of ill-being was causally related to those respective falls.

On the morning of July 14, 2011, Petitioner reported for work at her regular duty location, an office building in Springfield. During the time in question, Petitioner took approximately six steps toward a microwave where her cup of water was warming to make tea. During this walk, she fell down. Petitioner does not assert that she tripped over anything, or that some defect existed in her path. Kathy Stratton, a co-worker and social friend of Petitioner who observed Petitioner minutes after she fell, testified that Petitioner did not appear to have blacked out. Petitioner was transported via ambulance to St. John's Hospital. (Petitioner's Exhibit (PX) 1). The ambulance records indicate that Petitioner reported she became dizzy and fell. (PX 1, p. 15). Petitioner told a nurse that she "got dizzy and fell." (PX 1, pp. 6, 18). A nurse described Petitioner as "awake" and "alert" at 9:16 a.m., 11:00 a.m. and 12:00 p.m. (PX 1, pp. 6-8). Petitioner was discharged at 1:55 p.m. (PX 1, p. 8). While at St. John's, Petitioner signed the Patient Care Report generated after her ambulance ride, signed a form indicating she read and understood the instructions given to her by her caregivers, and signed the hospital's general consent form for medical care. (PX 1, pp. 16, 19, 57-60).

Later that day, Petitioner was examined by Dr. Saadiq El-Amin at Southern Illinois University School of Medicine. Dr. El-Amin noted that Petitioner "got dizzy and fell down." He further noted that Petitioner "did not black out and did not hit her head." The doctor also noted chronic pain in Petitioner's right knee and dizziness in

her medical history. (PX 1, p. 24). He discussed Petitioner's x-rays, diagnosis, and prognosis with her, as well as surgical matters. (PX 1, pp. 25-26, 65). Petitioner elected to proceed with surgery the following day. Dr. El-Amin noted that he further explained the risks, benefits and alternatives to surgery, and that Petitioner decided to proceed with the operation. (PX 1, pp. 65-66). In the "Indications for Procedure" section of Dr. El-Amin's operative report, he notes that Petitioner sustained a left distal radius fracture "secondary to a syncopal event while at work." (PX 1, p.65). Dr. El-Amin performed an open reduction/internal fixation of the left distal radius and an application of a volar splint. (PX 1, pp. 65-66). Petitioner stated at trial that she does not recall the ambulance ride, first meeting with Dr. El-Amin or her subsequent surgery.

Petitioner returned to work in early October 2011. On October 19, 2011, Petitioner suffered another fall at her office during her regular workday. On this date, she claims to have tripped on wires as she stood up from her desk. Petitioner testified that the wires were connected to her computer, which was sitting on the floor. There are no photographs of the wires that allegedly caused Petitioner to fall, or of the workspace or computer setup. Petitioner and her co-worker, Kathy Stratton, both testified that they had cameras built into their cell phones. Neither could recall what color the wires were. Petitioner described her workspace as having a computer, a monitor, and a printer.

Petitioner presented to Dr. Diana Widicus after her fall on October 19, 2011. An assessment was made of left forearm contusion. (PX 6).

On February 29, 2012, Dr. Christopher Maender noted Petitioner's functional status was good, and proposed the surgical removal of hardware that was installed on July 14, 2011. (PX 4). This surgery was performed on March 13, 2012. (PX 1, pp. 76-78).

On January 20, 2011 (prior to either alleged work accident), Petitioner saw Dr. Carol Bauer complaining of vertigo. (PX 2). The records from that date indicate that Petitioner experienced "veering when walking," and that her dizziness "occurs in attacks," and that those attacks last "hours" and occur "several times a year" without warning. (PX 2, p. 15). Petitioner also indicated she has a family history of dizziness. (PX 2, p. 15). Five days later, Petitioner returned for treatment with complaints of vertigo. The doctor noted that "for approximately 20 years [Petitioner] has had a persistent sensation of dysequilibirum. This is present the majority of the time..." (PX 2, p. 7). The doctor further noted that about six months prior, Petitioner "had an episode of imbalance that was quite severe. She was unable to walk in a straight line and had to use the wall to support herself." (PX 2, p. 7). Petitioner later "had a second episode like this, but slightly less severe." (PX 2, p. 7). The following was also noted: "Both episodes lasted less than four hours. On one occasion she lost her balance and fell." (PX 2, p. 7). Petitioner testified that she suffered dizzy spells "only in the morning," but she did not feel dizzy on the morning of July 14, 2011.

CONCLUSIONS OF LAW

Issue (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, 820 ILCS 305/1 *et seq.* (hereafter the "Act"), Petitioner has the burden of proving by a preponderance of the credible evidence that the accidental injury both arose out of and occurred in the course of her employment. *Horath v. Industrial Comm'n*, 96 Ill.2d 349, 449 N.E.2d 1345 (1983). An injury arises out of the 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. *Warren v. Industrial Comm'n*, 61 Ill.2d 373, 335 N.E.2d 488 (1975). The mere fact that the worker is injured at a place of employment will not suffice to prove causation. *Quarant v. Industrial Comm'n*, 38 Ill.2d 490, 491, 231 N.E.2d 397 (1967). The case law in Illinois is well settled that falls that result from some hazard associated with employment do arise out of said employment and are compensable; however, falls resulting from some disease or

previous injury, inherent to the claimant, are classified as idiopathic falls and usually are not compensable. *Oldham v. Industrial Comm'n*, 139 Ill. App. 3d 594, 487 N.E.2d 693 (2d Dist. 1985).

In the case at bar, it is apparent that Petitioner suffers from an inherent and ongoing disease that causes dizziness and imbalance. She sought treatment for this condition prior to her July 14, 2011 fall. She also told ambulance personnel, nurses and her treating physician that she got dizzy at work and fell on July 14, 2011. Petitioner's testimony that she does not remember her conversations with medical personnel after her fall is simply not credible. Medical documents generated by multiple staff members record their conversations with Petitioner and her signature appears on forms that were signed during the period in which she claims to have no memory. Although Petitioner claimed to not remember a period of over 24 hours, her treating medical providers note specifically that Petitioner was awake, alert, oriented, and did not black out after her fall.

The evidence at issue supports the contention that Petitioner's fall was idiopathic in nature, and that no aspect of her employment increased the danger of her fall. Accordingly, the Arbitrator finds that Petitioner has failed to prove that she suffered an accident that arose out of and in the course of her employment on July 14, 2011.

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

Based on the foregoing conclusions concerning the issue of accident, discussed *supra*, the Arbitrator also finds that Petitioner's current condition of ill-being is not causally related to the July 14, 2011 fall.

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

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

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

Based on the foregoing conclusions concerning the issues of accident and causal connection, discussed *supra*, the Arbitrator does not award any medical expenses, temporary total disability benefits or permanent partial disability benefits in this matter.