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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christine Cooper,

Petitioner,

14IWCC0832

vs.

NO: 13 WC 16305

Advocate Bromenn Medical Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 10, 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.

14IWCC0832

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $13,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 2 2014
CJD:yl
o 9/24/14
49

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOPER, CHRISTINE
Employee/Petitioner

Case# **13WC016305**

14IWCC0832

ADVOCATE BROMENN MEDICAL CENTER
Employer/Respondent

On 1/10/2014, 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

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McClean)

☐ 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

14IWCC0832

CHRISTINE COOPER,
Employee/Petitioner

v.

ADVOCATE BROMENN MEDICAL CENTER,
Employer/Respondent

Case # 13 WC 16305

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 **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Bloomington**, on **12/11/13**. 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 _____

14IWCC0832

FINDINGS

On **4/24/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$45,262.88**; the average weekly wage was **$870.44**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services for the treatment petitioner received for her left shoulder from McLean County Orthopedics from 4/24/13-8/7/13, Advocate BroMenn Healthcare from 4/24/13-8/7/13, Advocate Medical Group from 4/24/13-5/28/13, and Bloomington Radiology for 4/24/13, 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.

Respondent shall pay Petitioner permanent partial disability benefits of $522.26/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

1/6/14
Date

ICArbDec p. 2

JAN 10 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 51 year old supervisor for centralized scheduling, insurance verification, and the switchboard department alleges she sustained an accidental injury to her left shoulder that arose out of and in the course of her employment by respondent on 4/24/13.

On 4/24/13 petitioner arrived at work at approximately 7:45 am. It was a rainy day. Petitioner parked in a lot designated for respondent's employees only, that was a block and a half away from respondent's facility. Petitioner was then picked up by respondent's shuttle bus and taken to respondent's campus. The shuttle bus dropped petitioner off at the south end of respondent's building at the Conference Center entrance. Petitioner entered through the Conference Center doors. Petitioner agreed that the public might enter through these doors if they were going to the Conference Center. There were no signs that indicated that this entrance was for employees only.

Petitioner was wearing rubber soled dress shoes with 2 inch heels. As petitioner entered the doors there was a platform and rug. There were 5 steps to the floor level landing. Petitioner was carrying her purse and lunch bag on her right arm and her coffee cup in her right hand. Petitioner grabbed the railing with her left hand and descended the stairs. As she reached the floor level landing she slipped and fell and landed on her left side. She stated that her feet went out from underneath her. Petitioner testified that she did not know how she fell. She testified that she did not know if she fell on the floor or the rug. A nurse from the Rapid Response Team, Cathy Brown, came to help her. Petitioner observed the rug at the bottom of the steps pushed to the left and then being moved back into place while she lay on the floor.

Cathy Brown completed a Rapid Response Team Record. She identified the Situation as "coming to work and fell down stairs. landed L shoulder c/o pain left shoulder and arm." The Background she identified as "wet floors from rain and slick shoes."

Petitioner completed an Employee Report of Occupational Injury or Illness. She described the nature of the injury/illness as "walked down steps-when I got to the bottom I slipped and fell on left side."

Petitioner was transported to respondent's emergency room on a stretcher. She gave a history that she "slipped and fell injuring her left shoulder and left upper extremity." Petitioner complained of pain with any range of motion of the left shoulder. X-rays were taken of her left shoulder. They confirmed a left humeral neck fracture and left humeral head fracture. No dislocation was noted. Petitioner was referred to Dr. Hansen.

Petitioner was taken off work through 4/28/13. As of 4/29/13 she was released to light duty with restrictions of no lifting.

On 4/24/13 petitioner presented to Dr. Hansen at McClean County Orthopedics. Petitioner treated with Dr. Hansen for her fractured proximal humerus. Dr. Hansen released petitioner to work on 4/29/13 with no use of the left arm, other than typing. On 5/15/13 petitioner reported that her pain was slowly improving. An examination revealed decreased tenderness of the proximal humerus. Her passive motion was almost 90 degrees. She was weak, as Dr. Hansen expected. An x-ray revealed maintained acceptable alignment of the greater tuberosity fracture. Dr. Hansen ordered a course of therapy. Petitioner last followed-up with Dr. Hansen on 8/7/13.

Petitioner was contacted by Nicole Wolfgram, Senior Claims Adjuster from Gallagher Bassett. Petitioner told Wolfgram that she did not know what caused her fall. She did not make mention that the rug was moved or missing. Petitioner told Wolfgram that it had rained earlier in the day and she did not have an umbrella. Petitioner told her that she wiped her shoes at the top of the stairs on the rug and walked down the stairs. She told Wolfgram that she saw nothing on the stairs. She reported that she slipped and tried to catch herself and then fell on the floor level landing. Petitioner reiterated that she did not know how she fell. Wolfgram's notes indicate that petitioner stated that "she was going down the steps and she was at the bottom. she didn't trip over anything. All she knows is that she began to slip and tried to catch herself but wasn't able to and she fell forwards landing on her left side." Wolgram's notes also indicate that petitioner stated that she wiped her shoes at the door, went down the stairs, there was nothing on the steps. She tried to catch herself.

Petitioner underwent a course of physical therapy. On 8/7/13 petitioner's mobility of the left shoulder was within normal limits. She had good strength in her shoulder muscles. No functional deficits were noted. Her goals were partially met. Petitioner was instructed to continue with a home exercise program.

Petitioner testified that currently the pain in her shoulder is a 1 on a scale of 10. She reports pain when she makes odd movements, but then it goes away. Odd movements include putting on a coat or putting on a shirt overhead. Petitioner testified that she cannot reach as high as she used to. She stated that it feels like she is limited in reaching. She reported that her strength is less in her left arm than in her right arm. She reported weather sensitivity in her left shoulder that includes pain and aching. Petitioner testified that she does home exercises 15-20 minutes a day.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

It is unrebutted that petitioner slipped and fell on the floor level landing after descending 5 steps after entering respondent's building through the Conference Center entrance. Petitioner always entered through this entrance since this is where the parking lot shuttle bus dropped her off each day. Each day petitioner would

park in the parking lot designated by respondent, get on the shuttle bus provided by respondent, and enter into respondent's building at the entrance designated by respondent.

Petitioner reported that it had been raining all night. After entering through the Conference Center doors petitioner wiped her shoes on a rug right inside the door. Petitioner then descended down 5 stairs to the floor level landing. Petitioner testified that when she hit the floor level landing she slipped and fell. Petitioner unequivocally testified that she did not know what caused her fall. Absent any other evidence the arbitrator would find that petitioner's fall was an unexplained fall and not compensable.

However, the arbitrator finds that there is additional credible evidence in this case to show that there was something that caused petitioner's fall. Cathy Brown, a nurse from the Rapid Response Team, came to petitioner's assistance right after she fell. Petitioner observed the rug at the bottom of the steps pushed to the left and then being moved back into place while she lay on the floor. When Nurse Brown completed her Rapid Response Record she identified the background as "wet floor from rain and slick shoes." Based on Nurse Brown's report of what transpired that day and the condition of the area where petitioner fell, and the fact that petitioner slipped and fell once she reached to the floor level landing, the arbitrator finds the petitioner's fall was caused by the wet floor at the bottom of the stairs and petitioner's slick shoes, which were rubber soled with 2 inch heels.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained an accidental injury that arose out of and in the course of her employment by respondent on 4/24/13. The arbitrator finds the petitioner was at a greater risk than the general public in that the Conference Center entrance she used each day to enter the building was the entrance respondent determined she was to enter each day based on the fact that that is the entrance the respondent's shuttle bus would drop her off at each day after she parked in the parking lot she was directed to park in by respondent. Given the fact that it had been raining all night, that Nurse Brown reported that the cause of petitioner's fall was the wet floor, that petitioner slipped and fell, and that petitioner was directed to enter respondent's building through this entrance by respondent, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that her left shoulder injury arose out of and in the course of her employment by respondent on 4/24/13.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found the petitioner sustained an accidental injury that arose out of and in the course of her employment by respondent on 4/24/13, and that her current condition of ill-being as it relates to her left shoulder

is causally related to the injury 4/24/13, the arbitrator finds the treatment petitioner received for her left shoulder through 8/7/13 was reasonable and necessary to cure or relieve petitioner from the effects of the injury she sustained on 4/24/13.

Petitioner is claiming that the treatment she received for her left shoulder from McLean County Orthopedics from 4/24/13-8/7/13, Advocate BroMenn Healthcare from 4/24/13-8/7/13, Advocate Medical Group from 4/24/13-5/28/13, and Bloomington Radiology for 4/24/13. Absent any objection from respondent, other than liability, the arbitrator finds the treatment the petitioner received from these providers was reasonable and necessary to cure or relieve her from the effects of her injury on 4/24/13.

Respondent shall pay all unpaid bills from these providers for these periods pursuant to Sections 8(a) and 8.2 of the Act. The 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.

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

As a result of the accident on 4/24/13 petitioner sustained a left humeral neck fracture and left humeral head fracture. No dislocation was noted. Petitioner was off work for 4 days and then returned to light duty work while undergoing a course of physical therapy and treating with Dr. Hansen. Petitioner was ultimately returned to full duty work.

On 8/7/13 petitioner's mobility of the left shoulder was noted as being within normal limits. She had good strength in her shoulder muscles. No functional deficits were noted. Her goals were identified as being partially met. Petitioner was instructed to continue with a home exercise program.

Petitioner testified that currently the pain in her left shoulder is a 1 on a scale of 10. She reports pain when she makes odd movements, but then it goes away. Odd movements include putting on a coat or putting on a shirt overhead. Petitioner testified that she cannot reach as high as she used to. She stated that it feels like she is limited in reaching. She reported that her strength is less in her left arm than in her right arm. She reported weather sensitivity in her left shoulder that includes pain and aching. Petitioner testified that she does home exercises 15-20 minutes a day.

As a result of the accident on 4/24/13 the arbitrator finds the petitioner sustained a 5% loss of her person as a whole pursuant to Section 8(d)2 of the Act. Pursuant to Section 8.1b of the Act the arbitrator, in determining the level of permanent partial disability, bases her decision 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.

In the case at bar neither party offered into evidence the reported level of impairment pursuant to subsection (a). The petitioner was employed as a supervisor for centralized scheduling, insurance verification and the switchboard department. Following her injury petitioner was ultimately returned to her regular duty job without restrictions. Petitioner was 51 years old on the date of accident. Petitioner failed to offer into evidence anything to support a finding that her future earning capacity was impacted by this injury. The final treatment record of 8/7/13 indicated that petitioner's mobility of the left shoulder was within normal limits. She had good strength in her shoulder muscles. No functional deficits were noted and her goals were partially met.

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

Tonya Smith f/k/a Tonya D. Kiner,

Petitioner,

vs.

State of Illinois Menard Correctional Center,

Respondent.

14IWCC0833
NO: 10 WC 18711

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability, 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 20, 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: OCT 0 2 2014
CJD:yl
o 9/24/14
49

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, TONYA F/K/A KINER, TONYA D Case# **10WC018711**
Employee/Petitioner

MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0833

On 12/20/2013, 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 0.09% 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:

4852 FISHER KERHOVER & COFFEY
JASON COFFEY
P O BOX 191
CHESTER, IL 62233

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
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

DEC 20 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 14IWCC0833

TONYA SMITH f/k/a TONYA D. KINER
Employee/Petitioner

v.

MENARD CORRECTIONAL CENTER
Employer/Respondent

Case # **10** WC **18711**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **JOSHUA LUSKIN**, Arbitrator of the Commission, in the city of **HERRIN**, on **10/10/13**. 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. ☐ 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 **04/08/11**, 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 not*** sustain 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 **$56,985.00**; the average weekly wage was **$1095.87**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **1** dependent child.

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, **$0** for maintenance, and **$if any** for other benefits, for a total credit of **$if any**.

Respondent is entitled to a credit of **$Any bills paid** 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

Dec. 17, 2013
Date

DEC 20 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TONYA SMITH f/k/a TONYA D. KINER,	)	**14IWCC0833**
	)	
Petitioner,	)	
	)	
vs.	)	**No. 10 WC 18711**
	)	
MENARD CORRECTIONAL CENTER,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The claimant is a right hand dominant woman, 48 years old at the time of trial. She is a Corrections Nurse 1 at the Menard Correctional Center, in that position since February 2012. Prior to that time, she was a Correctional Med Tech at that institution since 2004. She testified she generally works the day shift, five days per week, and that the job duties between these positions were effectively similar. She asserts bilateral cubital tunnel syndrome incurred via repetitive trauma.

The petitioner testified that her job includes writing notes with an ink pen for the sick call, keeping charts and progress notes, filing and pulling charts for sick call, and passing out medications, including popping pills from medication bubble packages. The petitioner testified that she only does the medication pass if she works overtime. She admitted that the charts are commonly pulled by the night staff and left for the day staff to review, enter notes, and re-file once complete. She testified she used keys to access locked cabinets and doors. Job descriptions and analyses were introduced as PX1 and RX2. The job duties reported included a myriad of other duties, including first aid and responding to inmate medical emergencies and assisting the prison doctor. The petitioner admitted that assignments did vary day by day and involved varied tasks. The petitioner testified she began experiencing increasing symptoms of numbness, tingling, and pain in her elbow up to her shoulder without a specific injury.

The petitioner sought treatment with her primary care physician, Dr. James, on March 26, 2010. PX2, RX8. She reported numbness in her hands and pain in her right elbow which had worsened over the last several months. He referred her for nerve conduction studies. On April 8, 2010, Dr. Alam performed a nerve conduction study. He noted symptoms of about one year's duration. His interpretation of the results was of mild bilateral ulnar neuropathy and mild right carpal tunnel syndrome. PX2, RX8. On April 28, 2010, the petitioner followed up with Dr. James. At that point, she advised him

that it was a work related injury and he noted she would call back with the name of a neurosurgeon or hand surgeon.

On June 9, 2010, she sought medical treatment with Dr. Brown. She had negative Tinel's and negative Phalen's signs on examination. Dr. Brown noted the "cause of Ms. Kiner's symptoms is not entirely clear." He noted discrepancy between the EMG and her clinical examination and prescribed a new EMG/NCV study.

On June 10, 2010, the petitioner underwent repeat EMG testing with Dr. Phillips. The results of this examination were normal. PX3. Dr. Brown noted the results and recommended conservative care with a re-evaluation if symptoms did not improve. PX4.

The petitioner continued to complain of symptoms. She returned to Dr. Brown on November 3, 2010. She continued to demonstrate negative Tinel's and Phalen's signs. Dr. Brown referred her for another nerve conduction study. PX4. This was done that day by Dr. Phillips. Results were again normal, and Dr. Phillips suggested possible evaluation for arthritis should be considered. PX3. Dr. Brown recommended NSAIDs and discharged her on an as-needed basis. PX4.

The petitioner testified her symptoms did not abate. She saw Dr. James again on October 11, 2011, and made additional complaints of neck and right shoulder pain. He referred her to Dr. Mirly and prescribed EMG testing. PX2.

EMG testing was done by Dr. Alam on December 16, 2011. He interpreted it as suggestive of bilateral ulnar neuropathy, left greater than right. It was negative for carpal tunnel syndrome. PX5.

The respondent commissioned a Section 12 examination with Dr. Katz, who saw the petitioner on May 16, 2012. Dr. Katz performed a physical examination, which was again negative for clinical pathology, and reviewed the nerve studies. He opined the petitioner did not have ulnar neuropathy given the equivocal nerve studies and generally benign physical examinations. He opined her job duties were not causing her medical condition, whatever it was, and recommended cessation of care. He testified via deposition in support of his findings and opinions. See generally RX5.

Dr. Mirly first saw the petitioner on August 21, 2012; his records were introduced by the respondent as RX7. The petitioner introduced his deposition as PX6. He noted the various EMG results and noted that he did not have Dr. Brown's records. He assessed her with bilateral cubital tunnel syndrome and recommended conservative care at that time. RX7. The petitioner returned on February 4, 2013. She reported progressive symptoms. He offered additional nerve conduction studies, which she declined, and then offered right elbow surgery, which she wished to pursue. RX7.

On May 8, 2013, the petitioner underwent right elbow nerve transposition surgery. On May 16, 2013 she was noted to be healing well and Dr. Mirly released her to regular work effective June 8, 2013. He advised her she could follow up as needed; she

has not sought further treatment with Dr. Mirly. RX7. In deposition, Dr. Mirly opined that the petitioner's job duties as he understood them could be a contributing factor to the development of the condition; his records are silent as to causal connection. PX6, RX7.

OPINION AND ORDER

The petitioner is relying on a repetitive trauma theory, as opposed to an acute injury[1]. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to demonstrate the condition of ill-being and that the claimant's work activities caused such condition. See, e.g., *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987).

In this case, the claimant has failed to prove to a medical and surgical certainty via expert testimony that her conditions are causally linked. An examination of her treating medical records with Dr. Brown shows that repeated physical examination and clinical testing for the diagnoses was effectively negative. Moreover, the EMG testing was highly equivocal. Dr. Katz credibly testified that his physical examination was not suggestive of neural entrapment and explained that Dr. Alam's conclusions of the EMG results were questionable; however, even disregarding Dr. Katz on this point, Dr. Phillips' repeated negative EMG examinations cast substantial doubt on the reliability of Dr. Alam's testing. Worse, there is no credible explanation for the inconsistency, further undermining the diagnosis and treatment protocol pursued by the claimant.

While treating physicians are usually given a degree of deference, in this case the objective evidence of the dubious and inconsistent EMGs and repeated negative clinical examinations has fatally undermined the credibility and reliability of Dr. Mirly's causal assessment. His testimony is insufficient to prove a link between the petitioner's employment and any claimed injuries. The Arbitrator finds a failure of proof establishing a work-related accidental injury due to repetitive trauma with such being causally connected to any condition of ill-being.

Medical Services Provided, Notice, TTD and Nature and Extent

While the petitioner testified the medical services assisted her, the Arbitrator is troubled by significant diagnoses and surgery in the face of essentially negative physical tests and extremely equivocal EMG studies, which are the primary diagnostic tool in nerve entrapment scenarios. Even assuming causal relationship, surgery would not be reasonably medically necessary given the provisional diagnosis. Given the above findings as to causal relation, this issue is moot; the submitted medical expenses are denied. All other issues are moot given the above findings.

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[1] The Arbitrator notes the petitioner asserts an accident date of April 8, 2011 rather than 2010 on the request for hearing (Arb. Ex. I) and views this as a typographical error. However, if the petitioner actually does intend to assert 2011 as the manifestation date, the claim would fail, as such a date is not rationally chosen within the parameters of *Durand v. Industrial Commission*, 224 Ill.2d 53 (2007).

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

ERIC LILL,

Petitioner,

14IWCC0834

vs.

NO: 11 WC 07804

PACKEY WEBB FORD,

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

With regard to the issue of temporary total disability benefits, the Commission finds the Arbitrator erroneously awarded Petitioner 7-1/7 weeks of temporary total disability benefits for 50 "intermittent days" lost during the period of August 9, 2011 through June 12, 2013.

Petitioner is required to demonstrate not only that he did not work, but also that he was unable to work. Mechanical Devices v. Industrial Commission, 344 Ill.App.3d 752(2003). The Commission finds that while Petitioner presented a general spreadsheet of dates he missed from work during the period of August 9, 2011 through July 12, 2013, and he testified he missed some

days from work intermittently based on how his knee was feeling when he woke up for work, Petitioner failed to prove he was unable to work. The Commission notes that Petitioner was treating with Dr. Freedberg on a regular basis during the entire time period from August 9, 2011 through July 18, 2012, yet the doctor's office notes fail to indicate Petitioner ever reported a need to take a day off of work every other week due to his knee symptoms, nor was he ever authorized off work on any date falling within that period.

Although the spreadsheet tendered into evidence by Petitioner contains a listing of dates Petitioner was off work during the period of August 9, 2011 through June 16, 2013(PX11), Petitioner failed to testify that he was off work on those specific dates due to his right knee condition. The Commission finds that the spreadsheet fails to indicate the reason for Petitioner's lost time, and that the record is void of any testimony on the issue.

Petitioner testified that at some point after he returned to work light duty for Respondent, he needed to take an extra day off every week and a half to two weeks, unplanned, and based on how he felt the morning he woke up. (T25-26). Petitioner also testified that it was during his July 19, 2012 office visit with Dr. Freedberg, that he advised the doctor that he "had been taking days off when I needed to for my knee; and he changed my work duty status so that I would be allowed to take the day off when I needed to." (T32). The July 19, 2012 office visit note of Dr. Freedberg indicates that Petitioner reported he had been taking "a day off work every week and a half or so, the knee gets so bad, that he has to rest," and that he advised that he needed his "duty status modified to say that he may need to take a day off every week or so. States it is not predicable as to when this happens." Dr. Freedberg noted that it was reasonable that Petitioner take time off work prior to his July 19, 2012 office visit secondary to pain in the knee. Based upon Petitioner's request for the work status modification, on July 19, 2012 Dr. Freedberg issued a Work Duty Status report reflecting that the "patient about one time every other week may need to take a day off and rest the knee." (PX4). Dr. Freedberg testified that at the time of the July 19, 2012 office visit he "modified his duty status that he might need to take a day off every so often because his knee is just problematic." (T36).

The Commission finds suspect that at the time of his July 19, 2012 office visit with Dr. Freedberg, Petitioner advised the doctor for the first time that he had been taking a day off work every week and half or so over the past, which Petitioner claims was from August 9, 2011 through the date of his July 19, 2012 office visit, that he wanted a general off work status slip allowing him to take off work as he himself deemed he needed, and that based upon Petitioner's request, the doctor issued a general one day off work authorization every other week. The Commission also finds suspect the authorization essentially back-dated the off work authorization, noting that this general off work authorization would have been given to Petitioner prior to that July 19, 2012 office visit had Dr. Freedberg known in advance that Petitioner was taking time off. The Commission finds that Dr. Freedberg's July 19, 2012 authorization for Petitioner to take one day off work every other week was based only upon Petitioner's subjective reporting that he had to take a day off now and again depending on how he felt in the morning

14IWCC0834

when he woke up, and that there was no objective basis for issuing what essentially is an authorization to remain off work one day every other week at Petitioner's discretion.

Based upon a review of the record as a whole, and for the reasons stated above, the Commission vacates the Arbitrator's award of 7-1/7 weeks of temporary total disability benefits covering intermitted dates during the period of August 9, 2011 through June 12, 2013.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 11, 2013, is hereby modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 7-1/7 weeks for temporary total disability benefits for intermittent days from August 9, 2011 through June 12, 2013, under §8(b) of the Act is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $26,467.54 for medical expenses under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the reasonable and necessary costs associated with the right total knee arthroplasty as prescribed by Dr. Freedberg, pursuant §8(a) and §8.2 of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including $18,133.20 for temporary total disability benefits and $711.60 in temporary partial disability benefits that have been paid.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,600.00. 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: OCT 0 3 2014
KWL/kmt
O-08/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0834

LILL, ERIC
Employee/Petitioner

Case# **11WC007804**

PACKEY WEBB FORD
Employer/Respondent

On 10/11/2013, 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 0.06% 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:

1600 LAW OFFICES OF STEVEN J MALMAN
ADAM MEADOW
205 W RANDOLPH ST SUITE 610
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
DANIEL J UGASTE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

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

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

14IWCC0834

Eric Lill,
Employee/Petitioner

v.

Packey Webb Ford,
Employer/Respondent

Case # **11** WC **7804**

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 **7/17/13**. 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 _____

14IWCC0834

FINDINGS

On the date of accident, **1/31/11**, 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 **$56,666.71**; the average weekly wage was **$1,089.74**.

On the date of accident, Petitioner was **37** 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 **$18,133.20** for TTD, **$711.60** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$18,844.80**.

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 $726.49 per week for 7-1/7 weeks, for intermittent days from August 9, 2011 through June 12, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 2/1/11 through 7/17/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $18,133.20 for temporary total disability benefits and $711.60 in temporary partial disability benefits that have been paid. (See Arb.Ex.#1).

Respondent shall pay reasonable and necessary medical services of $26,467.54, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner is entitled to prospective medical treatment in the form of a right total knee arthroplasty as prescribed by Dr. Freedberg, and Respondent shall pay for the reasonable and necessary costs associated therewith pursuant to §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.

Signature of Arbitrator

10/09/13
Date

ICArbDec19(b)

OCT 11 2013

STATEMENT OF FACTS:

On January 31, 2011, Petitioner, Eric Lill, was employed by Respondent, Packey Webb Ford, as a journeyman automobile mechanic. On that day, Petitioner had just worked on a vehicle and was walking through the used car parking lot on the east side of the building when he slipped and fell on a patch of ice and immediately felt pain in his left elbow and right knee. That evening, he took Advil, iced and elevated his knee. The following morning, the pain in his knee had worsened so he called Tony Renello, the Service Manager at Packey Webb Ford, to let him know that he slipped and fell the previous day at work, he was having knee pain, and he did not think he could work that day. Petitioner testified that he never had pain in his right knee, never complained of pain in his right knee to Respondent, and never saw a doctor for his right knee prior to the work accident. He also testified that he did not have any accidents after the January 31, 2011 work accident.

On February 3, 2011, the Petitioner went to Danada Convenient Care (a/k/a Central DuPage Hospital Convenient care) to have his right knee examined. (Px2, pp. 34-49). On that day, he gave a history of the work accident, indicating that he had no previous injury to his knee. (Px2, p. 34). His knee was examined, an x-ray was taken, he was given a knee immobilizer, prescribed pain medication, and instructed to follow-up with at Central DuPage Business Health. (Px2, p. 42). On February 4, 2011, Petitioner presented to Central DuPage Business Health with complaints of severe right knee pain, and again on February 7, 2011, complaining that his right knee was getting worse. (Px1). He attended one session of physical therapy at Central DuPage Business Health on February 9, 2011, but made several complaints with respect to his right knee. (Px2, pp 29-31). An MRI revealed, among other things, an osteochondral lesion involving the anterior aspect of the medial femoral condyle, a focal lesion anteriorly, underlying complete thinning of the articular cartilage consistent with grade IV chondromalacia, and adjacent horizontal tear of the mid-body of the medial meniscus. (Px2, p. 8).

On February 14, 2011, Petitioner presented to Dr. Howard Freedberg, M.D. at Suburban Orthopaedics. (Px4). He gave the Doctor a history of the work accident and complained of pain in his right knee. (Px4). He also denied having any prior injuries or problems with respect to his knee. (Px4). Dr. Freedberg examined him, took an additional x-ray, gave him a steroid injection, and prescribed a Lidoderm Patch and other medications for the pain. (Px4). Dr. Freedberg also prescribed a course of physical therapy, which Petitioner had at Accelerated Rehabilitation Centers beginning February 23, 2011. (Px7). After seven physical therapy sessions, Petitioner returned to Dr. Freedberg on March 23, 2011, complaining of continued pain in his right knee. (Px4).

Petitioner also indicated that there were no changes in his symptoms, not even from the steroid injection, and the physical therapy was making his symptoms worse. (Px4). As a result, Dr. Freedberg recommended surgical intervention of arthoscopy with debridement of the meniscal tear with possible microfracture, which Petitioner elected to undergo. (Px4).

On April 4, 2011, Dr. Freedberg performed a right knee arthroscopy, partial lateral meniscectomy, chondroplasty of the patella, removal of multiple loose bodies, and chondroplasty to the medial femoral condyle. (Px6). Petitioner continued to have swelling following that procedure for longer than the Doctor expected. (Px4). On April 27, 2011, Petitioner followed-up with Dr. Freedberg and complained of having quite a bit of pain, but a different pain than before the surgery. (Px4). The Doctor examined his knee and recommended that he continue wearing the shield's brace and work on increasing strength and flexibility through rehabilitation. (Px4). On June 23, 2011, Petitioner indicated that his knee was feeling good, until a week prior when he began doing a lot of squatting and lifting during rehabilitation, and since then had increased sharp pain on the inner knee. (Px4). Dr. Freedberg felt that he was symptomatic due to the recurrent effusion, prescribed medication, instructed him to wear the shield's brace and continue rehabilitation. (Px4). The Doctor

also noted that Petitioner may return to work after his next appointment, but if the pain continued, he would give him another steroid injection. (Px4).

On July 21, 2011, Petitioner explained to Dr. Freedberg that the pain in his right knee acted up when he started increasing his physical activity and that he still had pain when squatting, kneeling, using stairs, and stretching during rehabilitation. (Px4). Dr. Freedberg recommended that he continue to rehabilitate his knee, wear the shield's brace, and attempt to return to work with light duty restrictions as of July 27, 2011. (Px4). Petitioner followed the Doctor's recommendations, however, he was still experiencing severe pain in his knee and had swelling and stiffness, which made it difficult for him to work. (T, pp. 23-24). Although he did not have an appointment until September, Petitioner presented to Dr. Freedberg on August 8, 2011 with these complaints. (Px4). He explained to the Doctor that it felt like he had knives in his knee and the pain was very bad at the end of the work day. (Px4). Dr. Freedberg was no longer pleased with his progress and noted that his swelling had recurred. (Px4). He gave Petitioner another steroid injection and told him to continue rehabbing the knee and working with restrictions. (Px4).

On August 18, 2011, Petitioner met with Dr. Daniel Kuesis at Core Orthopedics and Sports Medicine for a §12 examination at the request of the Respondent. (Rx1). Petitioner gave Dr. Kuesis a full description of the work accident and described the pain he was still experiencing in his knee. Dr. Kuesis opined that Petitioner's complaints were consistent with his pathology, which he felt was a chronic condition, but that this accident was a temporary exacerbation, and Petitioner reached medical maximum improvement from the surgical procedures performed by Dr. Freedberg. Dr. Kuesis further opined that the medical treatment had been reasonable and necessary in relation to the work injury, but that if his underlying condition continued to cause him pain and difficulty, it was unrelated to his work related injury. Still, Dr. Keusis felt that Petitioner would require future intervention, ultimately likely a knee replacement, but that the future treatment would not be related to his work accident. Dr. Keusis opined that the work restrictions Petitioner had been working with were permanent. (Rx1).

On September 12, 2011 Dr. Freedberg noted severe chondromalacia of the knee, which may require a unicompartmental or total knee arthroplasty at some time in the future. (Px4). Dr. Freedberg also discussed with Petitioner the option of Supartz injections, which were never approved. (Px4). Petitioner was discharged from physical therapy on November 30, 2011 because there was no significant improvement with his chronic right knee pain. (Px7). When he followed up with Dr. Freedberg on December 5, 2011, he explained to the Doctor that his knee popped a lot, it was still stiff and sore, and he continued to have swelling. (Px4). Dr. Freedberg noted that the Supartz injections were being denied and that he may need the unicompartmental or total knee arthroplasty, so he continued prescribing various medications and having him continue working with restrictions. (Px4).

On February 6, 2012, Dr. Freedberg noted in his report that the work accident exacerbated Petitioner's preexisting condition and the surgery that he performed on April 4, 2011 had not relieved his problems. (Px4). Therefore, he noted, the degenerative joint disease (DJD) was causally connected to the work accident and the injections were necessitated because of the lingering ill effects of the problem and DJD. (Px4). Following that examination, Petitioner continued following up with Dr. Freedberg with complaints of stiffness, pain and popping in his right knee, especially after standing and walking all day at work. (Px4).

On July 19, 2012, Petitioner explained to Dr. Freedberg that he had been taking a day off from work every week and a half or so because his knee gets bad and he wanted to rest it. (Px4). On the days he took off from work in order to rest his knee, he called the service manager in the morning to inform him that he would not be coming in that day. (T pp. 25-28). Petitioner testified that he did not know in advance that he would not be able to work on a particular day because sometimes his knee was painful and stiff during work and later that evening, but

may not be as painful and stiff the next morning, so he would go to work. (T pp. 25-28). He would only take the day off from work if, when he woke up in the morning, his knee was too painful and stiff for him to tolerate working. (T pp. 25-28). On July 19, 2012, Petitioner explained to Dr. Freedberg that his knee swells and is painful for days. (Px4). As for Petitioner taking a day off from work about one time every week and a half in order to rest his knee, Dr. Freedberg felt that, from a clinical standpoint, it was a reasonable action, and agreed with the decision. (Px4). Dr. Freedberg then modified Petitioner's work duty status beginning July 19, 2012 reflecting same. (Px4).

Respondent created a spreadsheet of the days Petitioner called off from work after he returned with restrictions on July 27, 2011. (Px11). Petitioner's first day off was August 9, 2011 and he continued taking a day off about every other week through June 12, 2013. (Px11). During that period, Petitioner missed 50 days of work and did not receive TTD benefits for those days. Petitioner also testified that, to this day, he continues to take a day off from work about every other week to rest his knee. (T p. 26).

On November 8, 2012, Petitioner explained to Dr. Freedberg that it really didn't matter whether he was sitting or standing, he would still have pain and discomfort in his knee, and could hardly work. (Px4). At that time, Dr. Freedberg noted that Petitioner was horribly dysfunctional and much worse than he thought. (Px4). Again, Dr. Freedberg discussed with Petitioner the total knee arthroplasty and Petitioner continued working with restrictions. (Px4).

At his deposition on November 27, 2012, Dr. Freedberg testified that Petitioner had pre-existing degenerative problems, such as the grade two of the patella and the medial femoral condyle, but that they were exacerbated by the accident of January 31, 2011. (Px10, pp. 18-19). The Doctor testified that the accident produced the radial tear and the exacerbation of the degenerative problems produced loose bodies within Petitioner's knee. (Px10, p.19). Dr. Freedberg testified that one could have grade two chondromalacia of the patella with no symptoms. (Px10, p. 19). Dr. Freedberg confirmed that, based upon a reasonable degree of medical and surgical certainty, the degenerative joint disease was causally connected to the work accident of January 31, 2011, and the injections were necessary because of the lingering ill effects of the problem. (Px10, pp. 33-34). When asked why he thought the degenerative joint disease was causally connected to the work accident, Dr. Freedberg answered that it was materially exacerbated by the accident, even though it was pre-existing, as he didn't have any symptoms prior to the accident, and he had a documented accident with consistent and persistent problems that had not abated. (Px10, p.34).

On January 25, 2013, Petitioner saw Dr. Kuesis for a second §12 examination. Petitioner had the same complaints of knee pain at that visit, which he said many times were at a level of ten out of ten, and was contemplating a knee replacement. Dr. Kuesis' opinion, that as a result of the work accident, Petitioner had a temporary exacerbation of a chronic knee condition, remained the same as his previous opinion in 2011. Dr. Kuesis agreed with Dr. Freedberg's current treatment plan, and noted that if Petitioner's knee failed all conservative treatment, a knee replacement is warranted. He also opined that Petitioner was not able to work without restrictions.

On February 28, 2013, Petitioner told Dr. Freedberg that being on his feet all day at work made his symptoms worse. (Px4). He also advised the Doctor that his low back and bilateral hip felt fatigued and sore and he was having pain in his left ankle. (Px4). Dr. Freedberg's opinions and recommendations remained the same at that visit. (Px4). At his May 23, 2013 appointment with Dr. Freedberg, Petitioner indicated that he wanted to go forward with the unicompartmental or total right knee arthroplasty. (Px4). Petitioner testified that, while he does not like the idea of having another surgery, he can no longer live and work with this pain, and therefore, he wants to have this procedure. (T pp. 33-34, 36). He noted that

the knee is trending worse and that he doesn't even go shopping at the store anymore. He also indicated that he had no pain or anything wrong with his right knee before the accident in question.

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

It has long been recognized that, in preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206, 797 N.E.2d 665, ___, 278 Ill.Dec. 70, ___ (2003); citing *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36-37, 65 Ill. Dec. 6, 440 N.E.2d 861 (1982); *Caradco Window & Door v. Industrial Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266, 49 Ill. Dec. 702, 418 N.E.2d 722 (1981); *Fitrro v. Industrial Comm'n*, 377 Ill. 532, 537, 37 N.E.2d 161 (1941).

Furthermore, it is axiomatic that employers take their employees as they find them. *Baggett*, 201 Ill. 2d at 199. "When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment." *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d at 36; *Williams v. Industrial Comm'n*, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981); *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 18, 12 Ill. Dec. 716, 370 N.E.2d 520 (1977); *Town of Cicero v. Industrial Comm'n*, 404 Ill. 487, 89 N.E.2d 354 (1949) (It is a well-settled rule that where an employee, in the performance of his duties and as a result thereof, is suddenly disabled, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health). Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

In the present case, there would appear to be no question that Petitioner suffered from a pre-existing degenerative arthritic condition in his right knee. However, Petitioner credibly testified that he neither sought treatment nor lost time from work prior to the accident as a result of this underlying condition despite the fact that his job duties as a journeyman auto mechanic for Respondent involved standing and walking all day long as well as frequent kneeling and occasional lifting up to 100 pounds.

Furthermore, treating orthopedic surgeon Dr. Freedberg testified that Petitioner's degenerative problems were exacerbated by the work accident. Dr. Freedberg also testified that the work accident produced the radial tear, and the exacerbation of the degenerative problems produced loose bodies within Petitioner's knee. Dr. Freedberg opined that the degenerative joint disease (DJD) was causally connected to the work accident, as it was materially exacerbated by the accident, because Petitioner did not have any symptoms prior to the accident and had consistent and persistent problems that had not abated.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being with respect to his right knee is causally related to the accident on January 31, 2011. Along these lines, the Arbitrator finds the opinion of Dr. Freedberg to be more persuasive than that of Respondent's §12 examining physician, Dr. Kuesis.

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 medical services provided to Petitioner for his January 31, 2011 work accident have been reasonable and necessary and Respondent has not paid all appropriate charges. Petitioner's medical treatment consisted of doctor's visits, therapy, diagnostic testing, injections, and pain medications. All of these treatments constitute reasonable and necessary medical treatments for the type of right knee injury sustained by Petitioner from his work accident. Therefore, Respondent is responsible to pay these charges.

Based on the above, and the record taken as a whole, as well as the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses in the amount of $26,467.54, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act, said expenses broken down as follows: $289.32 to Central DuPage Business Health, $11,123.69 to Suburban Orthopaedics, and $15,054.53 to Prescription Partners.

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

The evidence shows that Petitioner's right knee has not made any improvements since the arthroscopic surgery of April 4, 2011. In fact, Petitioner's right knee has worsened. He cannot perform his job at a regular level and works each day for Respondent while in pain and with restrictions. As a result, Dr. Freedberg has recommended treatment in the form of a unicompartmental or total right knee arthroplasty. (Px4). The Arbitrator finds this recommended treatment option to be reasonable and necessary under the circumstances, and hereby orders Respondent to pay for the reasonable and necessary medical expenses associated with said procedure pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act. Along these lines, the Arbitrator finds the opinion of Dr. Freedberg to be more persuasive than that of Respondent's §12 examining physician, Dr. Kuesis.

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

Petitioner returned to work on July 27, 2010. He testified that he is currently working light duty and that he has not been back to work in a full duty capacity since the accident. Petitioner also testified that he had started taking off an extra day every 1-1/2 to 2 weeks due to pain in his knee. Dr. Freedberg eventually changed Petitioner's work status to allow him to take such days off, as needed. Petitioner noted that Respondent has been accommodating him in this regard.

Petitioner submitted into evidence a spread sheet setting forth the days he missed from work as a result of his knee pain. (Px11). This record shows that Petitioner missed a total of fifty (50) days during the period extending from August 9, 2011 through June 12, 2013.

Based on the above, and the record taken as a whole, as well as the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for intermittent days extending from August 9, 2011 through June 12, 2013, for a period of 7-1/7 weeks.

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

KEITH ROHM,

Petitioner,

14IWCC0835

vs.

NO: 07 WC 041093

LOREN J. CRITCHETT & SONS,

Respondent.

DECISION AND OPINION ON REVIEW

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

Each party provided Arbitrator Flores with options as to how to decide the issue of wage differential benefits under Section 8(d)1 of the Act. Petitioner provided a vocational rehabilitation evaluation, authored by Susan Entenberg, in which it was determined Petitioner had an hourly earning capacity of between $8.50 and $9.00 an hour. Respondent commissioned a labor market survey report, and one was provided by Kenneth Maxey of Coventry Workers' Comp Services. Within the report, several possible employment opportunities with hourly rates of pay of between $8.50 and $14.00 were found. After considering the options, Arbitrator Flores used the hourly rate of $14.00 an hour to calculate Petitioner's wage differential rate. The Commission declines to use that figure as no explanation was offered as to why that wage was chosen over the other competing wages.

The Commission also declines to use the figures offered by Ms. Entenberg as her claim that Petitioner could earn between $8.50 and $9.00 was made without any supporting evidence. Absent from both her evaluation and testimony was any claim that a job survey was conducted that provided her insight as to the prevailing wages for someone with Petitioner's abilities. Nor did she cite her experience in the field of vocational rehabilitation as giving her, at least, an innate appreciation as to what Petitioner earn. Given as it was, Ms. Entenberg's opinion concerning what Petitioner can earn cannot be relied upon.

The Commission finds using the stated wages for the numerous positions identified by Mr. Maxey as possible employment opportunities to be the most credible and least speculative means to

14IWCC0835

determine an appropriate wage differential figure. In so doing, the low-end of the wage rates as contemplated by Ms. Entenberg, $8.50 an hour, is incorporated into the calculation as Mr. Maxey found a parking enforcement position that indicated an hourly rate of $8.50. Including the parking enforcement position, Mr. Maxey identified an additional ten other potential employment opportunities. The wages for these opportunities varied, but, when averaged, the hourly salary became $10.28. It is this average the Commission uses to determine Petitioner's wage differential benefit.

Petitioner's pre-injury average weekly wage is found to be $719.23. The Commission-determined post-injury weekly wage is found to be $411.20, resulting in a diminution of earnings in the amount of $308.03 per week. As set forth in Section 8(d)1, the compensation rate is equal to 66-2/3% of the difference between what Petitioner did earn prior to his injury and what he is found capable of earning after his injury. When applied, the Commission finds the wage differential to be $205.35. It is that amount Respondent is to pay Petitioner per week for the duration of his disability.

With respect to the other contested issue, permanent disability, the Commission affirms and adopts Arbitrator Flores' finding that Petitioner failed to prove permanent and total disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $205.35 per week for the duration of the disability due to the compensable injuries causing a loss of earning as provided for in Section 8(d)1 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of 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
KWL/mav
O: 08/19/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0835

ROHM, KEITH
Employee/Petitioner

Case# **07WC041093**

LORAN J CRITCHETT & SONS
Employer/Respondent

On 11/7/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0612 DWYER McCARTHY & ASSOC LTD
JAMES E COOGAN
39 S LASALLE ST SUITE 610
CHICAGO, IL 60603

4038 MICHAEL D WALSH PC
10730 S CICERO AVE
SUITE 201
OAK LAWN, IL 60453

1454 THOMAS & ASSOCIATES
JOSEPH D FITZPATRICK
300 S RIVERSIDE PLZ SUITE 2330
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0835

Keith Rohm
Employee/Petitioner

v.

Loren J. Critchett & Sons
Employer/Respondent

Case # 07 WC 41093

Consolidated cases: N/A

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **August 22, 2013**. By stipulation, the parties agree:

On the date of accident, **January 31, 2007**, 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 **$37,399.96**; the average weekly wage was **$719.23**.

At the time of injury, Petitioner was **46** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of **$117,475.05** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$45,072.06** for other benefits, for a total credit of **$162,547.11**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits, commencing November 12, 2011, of $106.15/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Signature of Arbitrator

November 6, 2013
Date

NOV - 7 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
NATURE AND EXTENT ONLY

14IWCC0833

Keith Rohm
Employee/Petitioner

v.

Loren J. Critchett & Sons
Employer/Respondent

Case # 07 WC 41093

Consolidated cases: N/A

FINDINGS OF FACT

Background

Prior to working for Respondent, Petitioner testified that 80% of the time he was out towing and repossessing cars for Healy's towing from 1980-1999. He testified that he repossessed cars and described circumstances to be a little "rougher" back then because cars were not computerized and he would have to "steal" cars. Petitioner also worked for himself from 1992 through 1999/2000 at Toontown Beeper, a company that he owned. In this job, Petitioner testified that he programmed a 7-digit code into a pager at a storefront located in Worth, Illinois. His cousin and ex-wife worked there also. Petitioner testified that there was no paperwork to do in this job or written work orders and that any paperwork was completed by his attorney or accountant who did accounting and payroll. Petitioner testified that he signed documents as told by his attorney and that he did not read any of the documents, rather his lawyer, ex-wife or accountant would read things to him. Petitioner testified that he paid his employees and ran the business, but never read anything.

Petitioner testified that he then worked as a recovery specialist from 2000 through 2004 with Walsh. In this job, Petitioner testified that he drove all stick shift trucks and would have to get a vehicle off the street quickly, clean up debris with a broom, and use the winch on his truck to recover a vehicle and move it 25-100 feet away from an accident scene. He testified that he used 4 to 6 hydraulic levers on the trucks that required use of both hands.

Petitioner testified that he has a 9th grade education and that he did not finish high school. He also testified that he was in special education classes with students that could not read or write and that he was almost 18 years old as a freshman. At this age, Petitioner testified that he was offered and accepted a job to drive as a fork lift operator at Electromotive. Petitioner testified that he can only read very little and that he tried to obtain his GED three times, but failed. He also testified that he is unable write and that what he does write down does not correspond to what is in his head. He has never been able to put together a one page essay, had no degrees or technical certifications, and had a commercial driver's license which he obtained during a "vocal" test that was read to him after failing the written tests twice.

Petitioner testified that he started working for Respondent in 2004 repossessing and transporting cars. He testified that he would take a semi-truck or tow truck to recover cars or transport cars from one auction to another. When repossessing cars, Petitioner testified that some people would go to great lengths to keep their cars, including removing the tires, and he would regularly have to drag the cars up onto truck beds or create a pulley system to get the cars onto the tow truck bed which required a lot of strength (e.g., "J" chains could weigh anywhere from 50-100 lbs., snatch hooks weigh about 25 lbs., the cars were heavy, etc.). Petitioner also testified that he would engage in physical activities such as crawling under cars, chaining/attaching cars to the bed of a tow or semi-truck for transport, and driving the trucks which is difficult. He testified that he would

shift with his right hand and he had to physically slam it into gear. He would also use a clutch with his left leg. Petitioner testified that he could not shift with his left hand and that he had to use both hands to steer the truck.

January 30, 2007

On January 30, 2007, Petitioner testified that he was driving into Plainfield, Illinois through an ice storm and arrived at an auction destination after picking up a truck at Respondent's location. It was still raining and icing when he arrived at the auction location to unload the cars. He explained that the truck bed tilts and that when he went to lower a car from the roof deck he removed the safety chains, but was not aware that there was an extra safety chain placed on the car. When he went up to the car, the extra chain was stuck in the ice and when it went loose he fell over the side to the ground striking his outstretched right arm.

Medical Treatment

Petitioner went to the emergency room at Indiana University West Hospital. PX1. X-rays revealed a severely comminuted displaced intra-articular fracture of the distal radius, a possible radiocarpal dislocation, and significant soft tissue swelling. *Id.* Petitioner underwent a closed reduction and was discharged from care with instructions to follow up with Dr. Semba at Parkview Orthopedics. *Id.*

Petitioner was admitted at Silver Cross Hospital on February 1, 2007 and saw Dr. Semba who performed an open reduction internal fixation with placement of a plate and screws the following day on February 2, 2007. PX2. Post-operative radiographs showed that the metallic fixation plate and screw were in place, a possible mild residual displacement and step-off of the articular surface of the radial fracture fragments was suggested, and possible dissociation was noted with widening of the scaphoid and lunate space. *Id.*

On May 16, 2007, Petitioner underwent an EMG/NCV as ordered by Dr. Semba, which showed no evidence of right sided carpal tunnel syndrome. PX4 at 510-512. After additional visits and in consideration of Petitioner's continued symptomatology in the right hand and wrist, Dr. Semba recommended a carpal tunnel syndrome and removal of screws, which he indicated had a slight chance of success in alleviating some of Petitioner's symptoms. PX4.

Petitioner also underwent a right elbow MRI on June 26, 2007, which the interpreting radiologist noted showed mild lateral epicondylitis and mild tendinosis with no evidence of a tear or rupture. PX4 at 479. On August 7, 2007, Petitioner underwent another EMG/NCV as ordered by Dr. Semba, which showed some development of electro-physiologically mild sensory distribution carpal tunnel syndrome. PX4 at 513-515. On August 27, 2007, Dr. Semba performed a carpal tunnel release surgery on the right and he removed three distal locking screws on the right. PX4 at 505-506. On August 30, 2007, he ordered occupational therapy. PX4 at 475.

On September 25, 2007, Dr. Semba noted Petitioner's continued reports of clunking and grinding in the wrist which had persisted all along and he ordered a triple phase arthrogram of the right wrist. PX4 at 473. On October 15, 2007, Petitioner underwent the arthrogram which showed a full thickness tear of the lunotriquetal ligament. PX3 at 374-375; PX4 at 508-509. Dr. Semba referred Petitioner to Dr. Chow, a surgeon specializing in hand surgery, micro surgery, and plastic surgery. PX7.

On October 3, 2007, Petitioner saw Dr. Chami at PainCare Specialists for symptoms in the neck and along the ulnar aspect of the right arm. PX5 at 519-520. Petitioner reported that his symptoms changed as of June of 2007 while during recovery he began experiencing a throbbing, burning, tearing discomfort in the ulnar aspect

of the right forearm and along the ulnar aspect of the right hand. *Id.* He also reported numbness, tingling, burning, and hypoesthesia in the medial aspect of the right upper extremity. *Id.* Petitioner described his pain at a level of 9/10 and reported some difficulty bending his neck backward without eliciting pain. *Id.* Dr. Chami diagnosed Petitioner with cervical radiculopathy and degenerative disc disease. *Id.* He recommended three cervical epidural steroid injections with the possibility of a ganglion block in the future. *Id.*

On October 29, 2007, Petitioner saw Dr. Chow for a second opinion regarding a right wrist ligament injury. PX7 at 553-554. After reviewing Petitioner's arthrogram on November 6, 2007, he recommended an open reduction internal fixation surgery to decrease Petitioner's pain, but he noted that Petitioner "will not have full recovery[.]" PX7 at 555-556 (emphasis in original).

On December 5, 2007, Petitioner was admitted to Palos Community Hospital for a lunate triquetal ligament tear on the right. PX3 at 315-360; PX7 at 593-601. Dr. Chow noted Petitioner's reports of numbness and pinching in the right hand, pain in the right thumb, inability to do work due to pain in his wrist, "no power" in his wrist, dropping things all the time, and pain on both sides of his wrist. PX3 at 319-320. On examination, he also noted a very weak grip strength in the right wrist, a slight deviation to the radial side, inability to actively ulnar deviate his wrist, most of the pain over the lunate triquetal joint, and ongoing numbness and tingling in the right fifth finger all of the time. *Id.* He diagnosed Petitioner with a torn lunate triquetal ligament and again recommended an open reduction internal fixation of the lunate triquetal bone. *Id.* Petitioner underwent his third surgery on the same date. PX3 at 337. Dr. Chow performed a reconstruction of the lunotriquetal ligament and right wrist arthrotomy. *Id.*

Petitioner continued to follow up with Dr. Semba and Dr. Chow post-operatively. PX4; PX7. On January 31, 2008, Dr. Chow ordered physical therapy. PX7 at 574. By February 21, 2008, Petitioner reported popping and snapping in his right elbow to Dr. Chow. PX7 at 575. He recommended another surgery consisting of ulnar shortening and removal of the plate in his wrist by Dr. Semba at the same time. *Id.* On March 4, 2008, Petitioner's ulnar shortening surgery was approved and Dr. Chow referred Petitioner to Dr. Cohen on March 13, 2008 for further evaluation. PX6 at 541-542; PX7 at 558-559.

On April 9, 2008, Petitioner saw Dr. Cohen who recommended an electrical study, but indicated that he was unsure what was causing Petitioner's ulnar-sided wrist pain. PX4 at 462-464. He believed that Petitioner may have a synovial plica at the radiocapitellar joint of the right elbow and also noted that Petitioner had reported that "in no way do I believe that this is his chief problem." *Id.* He indicated that he did not specialize in shoulder issues and that he would not recommend surgery for the elbow at that time. *Id.*

On July 1, 2008, Petitioner saw Dr. Semba who offered to remove the plates in Petitioner's wrist to see if that would help resolve some of his symptoms. PX4 at 470.

On September 15, 2008, Dr. Semba performed a fourth surgery to remove the internal plate and multiple screws from the right wrist. PX4 at 499. On the same date, Dr. Chow performed surgery. PX4 at 407; PX7 at 602. Specifically, he performed an exploration and release of the right carpal tunnel and release of the second, third, and sixth dorsal compartments of the right wrist. *Id.*

On October 29, 2008, Dr. Chow diagnosed Petitioner with DeQuervain's disease with signs of superficial radial sensory neuritis and painful right lateral epicondylitis. PX7 at 582. He administered a cortisone injection into the right wrist for the DeQuervain's. *Id.* On November 11, 2008, Dr. Chow noted that Petitioner had a nonunion of the ulnar styloid fracture and positive ulnar variance in the wrist. PX7 at 583. He requested

approval to treat Petitioner's right elbow before addressing the right wrist. *Id.*

On March 30, 2009, Petitioner underwent a third EMG/NCV as ordered by Dr. Chow, which showed no more presence of mild sensory distribution carpal tunnel syndrome s compared to the August 7, 2007 study, no evidence of distal neuropathy or radial sensory dysfunction although some of Petitioner's symptoms were consistent with radial sensory irritation, and no more proximal neuropathy in the right upper extremity or denervation in the more proximal right upper extremity muscles. PX7 at 588-590.

On April 2, 2009, Dr. Chow noted his review of Dr. Carroll's independent medical evaluation report. PX7 at 592. After again examining Petitioner, Dr. Chow opined that Petitioner would not improve any further without investigating the right shoulder and elbow. *Id.* He also opined that Dr. Carroll's recommendation for a functional capacity evaluation would be of minimal use as Petitioner's right arm function was poor and indicated that unless Respondent had one-handed work for Petitioner it would be difficult for him to return to work or drive. *Id.*

Records Review – Dr. Carroll

On July 20, 2009, Dr. Carroll performed a records review at Respondent's request. RX1. With regard to Petitioner's right wrist complaints, Dr. Carroll indicated that Petitioner's mild carpal tunnel syndrome reflected in his March 30, 2009 EMG study had resolved, it did not appear that he needed any further treatment for the wrist, and that Petitioner was coming to maximum medical improvement. *Id.* With regard to his right arm complaints, Dr. Carroll indicated that Petitioner would benefit from a consultation with a neurologist regardless of causality to determine the source of Petitioner's global right arm complaints. *Id.* He withheld any opinion on causality for the right arm until reviewing the neurologist's report. *Id.*

Section 12 Examination – Dr. Shenker

On December 16, 2009, Petitioner saw Dr. Shenker, a neurologist, at Respondent's request. RX2. After taking a history from Petitioner, examining him, and reviewing various medical records, Dr. Shenker opined that the arm and wrist treatment rendered to Petitioner to date was reasonably related to the work accident. *Id.* He also opined that the jerking/shaking movements of Petitioner's right arm were attributable to the trauma that he sustained at work; however he also noted that Petitioner's EMG testing did not demonstrate evidence of ongoing nerve involvement. *Id.* Dr. Shenker further opined that Petitioner's complaints of tinnitus, dizziness and daily occipital headaches were not related to his injury at work. *Id.*

In a supplemental report dated April 19, 2010, Dr. Shenker further indicated that Petitioner had reached maximum medical improvement within approximately one year of his injury at work and reiterated that the tremors/jerking/shaking in the right arm were causally related to Petitioner's injury at work. *Id.*

Deposition Testimony – Dr. Chow

Petitioner offered the deposition testimony of Dr. Chow taken on May 19, 2010. PX11. In addition to reviewing the course of Petitioner's treatment, he offered opinions on the causal relationship of Petitioner's right upper extremity condition and his injury at work. *Id.* Specifically, Dr. Chow opined that it makes sense that when one fractures the wrist from a hard fall (like that sustained by Petitioner) the bones impacted would affect the elbow and possibly the shoulder as well. PX11 at 28-29. On cross examination, Dr. Chow opined that Petitioner's fall from such a height using the right arm to brace himself created an impact that did not stop

at the wrist; "[i]t keeps going to the shoulder and perhaps even higher." PX11 at 31-32.

He also opined that the diagnostic tests that he was recommending for Petitioner's right upper extremity above the wrist were treatment related to Petitioner's injury at work. PX11 at 28-29. Dr. Chow further opined that as of the last time that he saw Petitioner in April of 2009, Petitioner continued to be disabled from his work as a truck driver. PX11 at 30. On cross examination, Dr. Chow conceded that while Petitioner reported that he was involved in three motor vehicle accidents as of April 7, 2009 occurring after his injury at work, he did not have the details of those accidents including how severe they were or whether Petitioner injured his right elbow or shoulder. PX11 at 40-42.

Supplemental Records Review – Dr. Carroll

On June 14, 2010, Dr. Carroll performed a supplemental records review at Respondent's request. RX1. He reviewed Dr. Shenker's reports and Petitioner's most recent EMG studies. *Id.* He noted that no evidence of distal neuropathy or radial sensory nerve irritation was evident from the studies and that they do not substantiate Petitioner's very profound median nerve or subjectively reported symptoms. *Id.* Dr. Carroll opined that Petitioner had reached maximum medical improvement, did not require further treatment other than observation, and he recommended a functional capacity evaluation to determine if Petitioner required work restrictions. *Id.*

Continued Medical Treatment

On July 29, 2010, Petitioner returned to Dr. Semba who diagnosed Petitioner with right arm radiculopathy with no obvious problems and ordered a right arm MRI. PX4 at 379. On August 16, 2010, Petitioner underwent the recommended MRI of the right arm which the interpreting radiologist noted showed a probable SLAP tear of the superior labrum, acromioclavicular arthrosis, and articular surface fraying of the supraspinitus tendon with no full thickness tear identified. PX4 at 411. Petitioner returned to Dr. Semba who referred him to Dr. Fuentes on August 26, 2010. PX4 at 380.

Petitioner saw Dr. Fuentes for the first time on October 12, 2010 and reported experiencing shoulder pain since his injury at work. PX4 at 381. Dr. Fuentes diagnosed Petitioner with a SLAP tear and recommended a cortisone injection. *Id.* On November 16, 2010, Dr. Fuentes administered the recommended injection into Petitioner's right shoulder. PX4 at 383. After failed conservative treatment including the injection and physical therapy, Dr. Fuentes recommended surgery on January 4, 2011. PX4 at 388.

Section 12 Examination – Dr. Marra

Petitioner submitted to an independent medical evaluation at Respondent's request on January 6, 2011[1] with Dr. Marra. RX3. Dr. Marra also issued a supplemental report of the same date after reviewing additional requested records. *Id.* Ultimately, Dr. Marra diagnosed Petitioner with a SLAP tear in the right shoulder with significant pain. *Id.* He opined that Petitioner's tear was causally related to his injury at work indicating that such a condition was consistent with Petitioner's fall although he indicated that Petitioner's prognosis was very

[1] Dr. Marra's report refers to his examination of Petitioner on January 6, 2010 as well as Petitioner's date of injury at work occurring on January 3, 2010. RX3. The Arbitrator infers that the examination date and date of injury are clerical errors and utilizes Dr. Marra's report date as the date of examination, particularly given that the first recommendation for shoulder surgery occurred only two days earlier as recommended by Dr. Fuentes. *Id.*

guarded as he noted some evidence of symptom magnification. *Id.* He recommended either conservative care (i.e., live with the shoulder as it is) or undergo an arthroscopic SLAP repair surgery. *Id.*

Continued Medical Treatment

Petitioner underwent surgery to the right shoulder on June 24, 2011. PX4 at 403-404. Pre-operatively, Dr. Fuentes diagnosed Petitioner with internal derangement of the right shoulder. *Id.* He performed a shoulder arthroscopy, subacromial decompression/partial acromioplasty, and an open biceps tenodesis. *Id.* Post-operatively, he diagnosed Petitioner with a type 2 SLAP lesion and impingement syndrome of the right shoulder. *Id.*

Petitioner followed up with Dr. Fuentes thereafter and underwent physical therapy. PX4. On September 6, 2011, Dr. Fuentes noted that a recent physical therapy report found "full active range of motion" in the shoulder. PX4 at 397. He instructed Petitioner to continue with home exercises and referred Petitioner back to Dr. Semba for treatment of the right wrist. *Id.*

On October 5, 2011, Dr. Semba ordered a functional capacity evaluation. PX4 at 398. The functional capacity evaluation was performed on October 10, 2011. RX6. The examining physical therapist determined that the results were invalid because Petitioner showed inconsistencies during muscle testing, hand grip strength testing on both sides, right five span vs. right grip testing, and right hand pinch strength testing and that the invalidity was due to "sub-maximum effort demonstrated by Mr. Rohm during his performance of a variety of functional tasks." *Id.* The report also reflects that Petitioner's pain reports during testing were unreliable and that it was determined to be 50%. *Id.* The examiner also noted that Petitioner "presented with significant observational and evidence based contradictions" which resulted in "consistency of effort discrepancies and self limiting behaviors." *Id.* Ultimately, the examiner found that Petitioner was "functionally employable[,]" and capable of working light duty with restrictive use of the right hand. *Id.* Petitioner testified that he did give full effort at the functional capacity evaluation.

After the functional capacity evaluation, Petitioner followed up with Dr. Semba on October 26, 2011 reporting that the problems on the ulnar side of his wrist had disappeared and presenting with a "somewhat newer problem on the radial side of the wrist." PX4 at 400. Petitioner also reported that he never had problems with his thumb until the plate in his wrist was removed although Dr. Semba noted that he did not "remember independently that [Petitioner] ever complained of pain on the radial side of his wrist. His symptoms predominantly were on the ulnar side of his wrist. This is somewhat new to me, but [Petitioner] insists that he had told me in the past. He also was referred for an FCE, which shows fairly large inconsistencies with his behavior, which leaves an open interpretation as to what his capacities truly are." *Id.* Dr. Semba administered a cortisone injection into Petitioner's thumb and noted "[Petitioner] *is extraordinarily demonstrative of the pain from the shot, and afterwards, he describes his symptoms in a contradicting fashion in that it feels completely numb, yet he has pain. I am not sure how it can be both.*" *Id* (*emphasis* added).

When Petitioner returned to Dr. Semba on November 2, 2011, he noted that Petitioner "*has had an unusual reaction to his treatment in that he had a very, very hypersensitive right arm. He has pain* over his 1st extensor compartment *that he describes simultaneously as numbness and burning pain. He has numbness over what I would attribute to the superficial radial nerve; although, I am not sure how this was involved, in that this nerve is on an area removed from where he has had most of his problems and surgery. … [Petitioner also] said he did get some relief [from the injection], but his soft tissue is still exquisitely painful to touch.*" PX4 at 401 (*emphasis* added). Dr. Semba referred Petitioner to either Dr. Baylis or Dr. Chow, hand specialists, or a pain

doctor for evaluation. *Id.* He indicated that Petitioner may well be at maximum medical improvement. *Id.*

Petitioner then saw Dr. Fuentes on November 11, 2011 who placed him at maximum medical improvement per the functional capacity evaluation results. PX4 at 402, 447. Dr. Fuentes did not comment on the validity of the test results and released him from his care. *Id.* Petitioner testified that he received these work restrictions from Dr. Fuentes and that he does not use his right arm.

Vocational Rehabilitation – Susan Entenberg & Kenneth Maxey

Petitioner then saw Susan Entenberg ("Ms. Entenberg") of Rehabilitation Services Associates on February 21, 2012 at his attorney's request. PX9. She issued a report dated March 24, 2012 in which she opined that he was a very poor candidate for vocational rehabilitation within a very limited job market. *Id.* Ms. Entenberg based her opinion on Petitioner's past work history and treating physician's permanent restrictions per a functional capacity evaluation (limiting Petitioner to occasional 2-handed lift of 13 lbs. from floor to waist and of 12 lbs. to shoulder level, difficulty with fine motor coordination and occasional gross motor coordination) indicating that Petitioner was definitely precluded from returning to his former job. *Id.* She also noted his age (52 years old), limited education to 9th grade with special education, difficulty reading, lack of transferable skills within restrictions, lack of clerical skills, poor hearing and difficulty in noisy environments and use of telephones, and very limited functional use of his dominant right arm and hand. *Id.*

Ms. Entenberg opined that Petitioner may have a very limited labor market as a courier or messenger that would accommodate his restrictions at an entry-level wage of $9.21 per hour. *Id.* She also noted that with rehabilitation services, Petitioner's prognosis for a return to work was guarded given his medical restrictions coupled with the aforementioned education and work history. *Id.* Thus, she recommended job search for 90-120 days to determine if there were opportunities available for Petitioner and, if he could not be placed within that period of time, she indicated that she would conclude that no stable labor market existed for Petitioner at that time. *Id.* Ultimately, Ms. Entenberg reiterated that Petitioner could not return to his prior occupation as a truck driver, that he was a candidate for vocational rehabilitation, albeit a poor one, within a very limited labor market based on his restrictions, education, hearing difficulties, and work experience, and that at the time his earning capacity was about $8.50-$9.00 per hour. *Id.* She noted that "[w]ithout vocational rehabilitation, it [was her] opinion that [Petitioner would] be unable to secure gainful employment." *Id.*

On April 6, 2012, Respondent arranged to have a labor market survey performed by Kenneth Maxey ("Mr. Maxey") of Coventry Workers' Comp Services. RX4. He concluded that there were positions for which Petitioner was qualified within his restrictions and he recommended that Petitioner pursue his GED and computer classes to expand his job opportunities. *Id.* In his survey, he identified numerous positions requiring physical demands which were within Petitioner's restrictions including jobs as a cashier, inventory associate, parking enforcement officer, security guard, hospital laundry and linen associate, hotel breakfast bar attendant, retail door guard, and assembler that would pay the Petitioner up to $14.00 per hour. *Id.*

Respondent also offered the initial vocational report from Coventry and several subsequent activity progress reports. RX5. At trial, Mr. Maxey testified that these reports generally contain whatever happened at the meetings with Petitioner, discussions had during the meetings, and his opinions and recommendations for next steps. He also testified that he did not believe that Petitioner believed that he could work. He testified that Petitioner's response at his meetings to this issue was always the same; that he could not work.

Mr. Maxey testified that he helps people to create an email address if they do not have one, but that Petitioner

already had one (with a "softtail" handle). Petitioner applied for jobs online and told Mr. Maxey that he could do so with the assistance of his wife. Mr. Maxey also testified that he followed up with prospective employers through letters to see if they received applications, although he did not recall whether he ever got any responses and that he did not recall getting information that Petitioner did not apply to those prospective employers, as well as following up with Petitioner. Mr. Maxey also testified that he sent job leads to Petitioner through email as well as made periodic phone calls to him. He testified that Petitioner did also look for work on his own, but that he applied to a lot of staffing agencies some of the work falling in the light duty category, but that he did not know whether Petitioner went to apply to the staffing agencies in person. Mr. Maxey acknowledged that Petitioner's prior work consisted primarily of work in car repossession and that he owned a beeper shop, and that he would have to speak loudly sometimes as Petitioner had trouble hearing.

Ultimately, Mr. Maxey testified that he was unsuccessful finding a job for Petitioner and he issued a closure report on January 29, 2013. RX5. He testified that he does not believe that Petitioner made a full effort during the vocational rehabilitation process and that he never got the sense that Petitioner wanted to, or felt he could, work. On cross examination, Mr. Maxey testified that he felt that Petitioner did not think that he would find work because he (Petitioner) did not think that employers would want to employ him.

On cross examination, Mr. Maxey also testified that Petitioner was cooperative in vocational rehabilitation and that he was diligent and responsive. However, he also testified that, while Petitioner followed some of Mr. Maxey's directions, he would have to remind Petitioner about certain things like staying away from applying to staffing agencies. Mr. Maxey also acknowledged that while Petitioner previously had a Class B driver's license, he had to surrender it, that Petitioner's positive attitude is reflected in his activity reports, and that lots of places were not hiring.

On February 22, 2013, Ms. Entenberg authored a new report at Petitioner's counsel's request in which she indicated that she reviewed Coventry's rehabilitation reports and labor market survey from April of 2012 through January of 2013 as well as Petitioner's job search logs. PX8. She noted that Petitioner was unsuccessful in finding a job and now indicated that "there is not a stable labor market available to [Petitioner] given [his age, limited education with special education and difficulty reading, lack of transferable skills within restrictions, lack of clerical skills, poor hearing and difficulty in noisy environments and use of telephones, and very limited functional use of his dominant right arm and hand]." *Id.*

Petitioner offered the deposition testimony of Ms. Entenberg taken on August 9, 2013. PX10. Ms. Entenberg maintained her opinions as expressed in both of her reports. *Id.* On cross examination, she acknowledged that Petitioner interacted with customers in a sales position at Toontown Beepers for years, he surfed the internet and downloaded movies and pictures online, he was able to twist his upper torso, climb stairs, and drive left-handed albeit with difficulty turning his neck. PX10 at 20-27, 31.

Additional Information

Regarding his current condition, on cross examination, Petitioner testified that his arm has gotten worse since his functional capacity evaluation. Petitioner also testified that he has problems hearing in both ears including a loud ringing in his head, which he says occurred as a result of the fall at work. He attributed the condition to when he snapped his head when he fell and being knocked unconscious such that he did not awake until an ambulance arrived. On cross examination, Petitioner testified that he is not seeing any doctor for his hearing issue, but that he stopped because he could not afford it anymore. He added that he was told that he needed hearing aids sometime in 2010.

Petitioner also testified that he tried to find a job after he received permanent restrictions and that Respondent would not take him back to work. He testified that he cannot drive trucks like he used to do and that, while he had some help with his job search through a vocational rehabilitation counselor, he received a piece of paper and was told to apply for five jobs per week which he was left to do on his own. He added that once in a while he would get an email with jobs coming up and that he applied for the required jobs per week and sometimes more. He applied for a cashier job at a Speedway gas station, but that required lifting for stock, etc. He went to PetCo to apply for a stocker position, but he had to lift over 25 lbs. which he could not do. He also testified that he went to two grocery stores to apply for work, but that the warehouse jobs there required him to use both hands to operate a fork lift.

Petitioner testified that he met with the vocational rehabilitation person every week or two weeks, that he went to job fairs, and that the process lasted approximately nine months. He testified that he did receive a job offer at Speedway, but was then told that due to the insurance risk they could not offer him the position. Mr. Maxey testified that Petitioner never told him that he was offered a position anywhere. Petitioner testified that he would want to return to work as a truck driver and that he is interested in working and bored sitting at home.

On cross examination, Petitioner testified that his work history was predominantly in car repossession for approximately 35 years during which he drove a truck to a location, locked up car for tow, and took it somewhere. He testified that when he dropped off the cars at the required location he did not speak to anyone. He testified that he know where to return the car because his boss would tell him the impound lot or other location and that he used to use paper maps on which his boss would draw lines showing him where to go before he obtained a GPS that verbalized directions for him to get to the location.

Petitioner further testified that he is capable of surfing the internet sometimes and that his email address (with a "softtail1960" handle) was created for him by Mr. Maxey. He also testified that he can only print, he cannot write, and that even if he did no one would be able to understand what he writes down.

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. The parties' dispute regarding permanency centers on whether Petitioner sustained a wage differential loss or if he is permanently and totally disabled pursuant to Section 8(f) of the Act using an "odd-lot" analysis. After reviewing the evidence and due deliberation, the Arbitrator finds that Petitioner has established that he sustained a wage differential loss pursuant to Section 8(d)1 of the Act.

"To qualify for a wage differential award, a claimant must prove (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings." *Wood Dale Electric v. The Illinois Workers' Compensation Commission*, 2013 IL App (1st) 113394WC, *15-16, 986 N.E.2d 107, 369 Ill. Dec. 158 (1st Dist. 2013) (*citing* 820 ILCS 305/8(d)(1)). Alternatively, in the absence of medical evidence of permanent and total disability where a claimant's "disability is limited in nature so that he is not obviously unemployable... he may qualify for 'odd-lot' status." *City of Chicago v. Illinois Workers' Compensation Commission*, 373 Ill. App. 3d 1080, 1089 (1st Dist. 2007). It is the claimant's burden to establish that he is not altogether incapacitated from work, but nonetheless not regularly employable in any

well-known branch of the labor market. *Ceco Corp. v. Industrial Commission*, 95 Ill. 2d 278, 286 (1983); *City of Chicago*, 373 Ill. App. 3d at 1089-90. A claimant can establish that he falls in the odd-lot category by showing either: (1) that he engaged in a diligent, but, unsuccessful job search; or (2) that his age, training, education, experience, and physical condition prevent him from engaging in stable and continuous employment. *Westin Hotel v. Industrial Commission*, 372 Ill. App. 3d 527, 544 (1st Dist. 2007). If the claimant meets his burden by a preponderance of the evidence, the burden then shifts to the employer to show that work is actually available for the claimant. *City of Chicago*, 373 Ill. App. 3d at 1091.

Petitioner was relatively young at 46 years old at the time of his injury at work. He has a ninth grade education restricted to special education classes and he was 18 while a freshman in high school. He worked for Respondent—and for decades with other employers beforehand—in a narrow field of work repossessing cars. Petitioner even described his duties to be those of "stealing" cars back in the 1980's when cars were not computerized. This evidence is undisputed and, thus, the Arbitrator finds that Petitioner has established that his age, education, and experience could prevent him from engaging in a stable and continuous job market.

However, other facts weigh strongly against a finding that Petitioner is permanently and totally disabled. While Petitioner clearly sustained a severe injury to his dominant arm which required several wrist surgeries and a right shoulder surgery, the extent of Petitioner's disablement as he posits is undermined by evidence in the record contradicting his testimony at trial.

First, Petitioner did have his own beeper sales business for years before working for Respondent. He testified that any paperwork was read to him and otherwise processed by his lawyer, accountant or ex-wife; however, he successfully maintained such a business for years despite his lack of education and reportedly limited reading and writing abilities (the latter of which could reasonably be limited now given Petitioner's right wrist condition post-accident, but which nonetheless do not diminish his sales or comprehension skills).

Second, Petitioner submitted to a functional capacity evaluation which was deemed invalid. The evaluating physical therapist noted troubling indications in his report that Petitioner failed to provide his full effort which, in a record otherwise devoid of facts raising questions about Petitioner's credibility, would not be dispositive on the question of Petitioner's credibility. However, Petitioner's own treating physician, Dr. Semba, highlighted these inconsistencies and further noted additional inconsistencies between Petitioner's subjective reports and his objective findings during some follow up visits after the functional capacity evaluation. He noted Petitioner's inexplicable pain complaints in the thumb, wrist and forearm, for example, where Petitioner should not anatomically feel pain while simultaneously reporting complete numbness, as another example, in the area where Dr. Semba had administered a cortisone injection. These notations by Dr. Semba lend credence to the notation by Dr. Marra, Respondent's Section 12 examiner of Petitioner's right shoulder, that Petitioner's prognosis regarding his right shoulder condition was very guarded due to some evidence of symptom magnification that he displayed during his independent medical evaluation. Moreover, Petitioner's right shoulder treating physician, Dr. Fuentes, released Petitioner back to work with permanent restrictions as noted in the functional capacity evaluation without any comment on the invalidity of the test results. Neither party presented testimony from Dr. Fuentes at trial; thus, it is unknown whether Dr. Fuentes considered the invalidity of the test results at all before imposing the restrictions or releasing Petitioner from his care.

Third, after careful observation of Petitioner at trial and in consideration of his testimony compared with the record as a whole, the Arbitrator does not find Petitioner to be credible. In so concluding, the Arbitrator turns to Respondent's argument that Petitioner failed to engage in a diligent job search. The ability to perform some work and a claimant's failure to search for work within his restrictions are both factors militating against a

finding that the claimant is permanently and totally disabled. *Hallenbeck v. Industrial Commission*, 232 Ill. App. 3d 562, 569 (1st Dist. 1992) (citations omitted). However, Petitioner does not need to establish both prongs of an "odd-lot" analysis in order to prove that he is permanently and totally disabled under that theory.

It is wholly plausible that Petitioner would rather be driving a truck than sitting at home "bored" as he testified at trial, but in the Arbitrator's view the question is whether he is as disabled as he claims such that his permanent restrictions are truly indicative of his physical capabilities and, consequently, whether his physical condition prevents him from engaging in a stable and continuous employment as claimed. The Arbitrator finds that Petitioner's permanent restrictions are not truly indicative of his physical capabilities and, thus, that his physical condition does not prevent him from engaging in stable and continuous employment.

Mr. Maxey's testimony and reports indicate that Petitioner cooperated in vocational rehabilitation; however Mr. Maxey's testimony coupled with Petitioner's testimony and the aforementioned indicators undermining the latter suggest that Petitioner was single-minded with regard to what work he would perform (i.e., driving a truck) and not what work he could perform (i.e., work in any indoor environment) which is in sharp contrast to the majority of his career repossessing cars in a relatively unsupervised job performed mostly outdoors.

Even Petitioner's vocational rehabilitation specialist, Ms. Entenberg, indicated that Petitioner had some opportunity to find a stable labor market, albeit a limited opportunity, at her initial evaluation. She later concluded that no such labor market existed because he had engaged in the vocational rehabilitation efforts that she recommended. Ms. Entenberg's ultimate opinion that Petitioner was not employable, however, is not persuasive in this case. She based her opinion on Petitioner's subjective reports and his permanent restrictions as ordered by Dr. Fuentes stemming from an invalid functional capacity evaluation on which Petitioner's other treating physician, Dr. Semba, had already commented negatively. Contrarily, in his survey Mr. Maxey identified numerous positions requiring physical demands that fell within Petitioner's permanent restrictions—which are more restrictive than Petitioner needs as evidenced by the invalidity notations by the physical therapist and Dr. Semba—including jobs that would pay the Petitioner up to $14.00 per hour (equaling $560.00 per week).

Based on all of the foregoing and in consideration of the record as a whole, the Arbitrator finds that Petitioner has established that he is partially incapacitated from pursuing his usual and customary line of employment and that he suffered an earnings impairment. *See Wood Dale Electric*, 2013 IL App (1st) 113394WC. Thus, Petitioner established his entitlement to a Section 8(d)1 wage differential benefit of $106.15[2] per week for the duration of the disability beginning on November 12, 2011 after being placed at maximum medical improvement by Dr. Fuentes.

[2] The Arbitrator calculates Petitioner's benefits pursuant to Section 8(d)1 of the Act as follows: (17.98/hr. x 40 = $719.23 average weekly wage) – ($14.00 x 40 = $560.00 weekly estimated earnings) = $159.23 x 2 ÷ 3 = $106.15.

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

Jason Carlile,

Petitioner,

14IWCC0836

vs.

NO: 07 WC 1899
07 WC 1906

Wal-Mart,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes again before the Illinois Workers' Compensation Commission ("Commission") pursuant to the November 30, 2012, Order of Judge Barbara Crowder of the Third Judicial Circuit of Madison County, Illinois. In said Order, the findings and conclusions of the Commission were reversed and the matter remanded to the Commission based on findings that Petitioner proved his entitlement to additional benefits under the Illinois Workers' Compensation Act by a positive showing that the current condition of his lumbar spine is causally related to the uncontested accidents to his lumbar spine on March 4, 2005, and December 8, 2006. 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).

Manifest weight of the evidence was the standard of review employed by Judge Crowder, and, in employing this standard, she found Petitioner's treating medical records to be demonstrative evidence of the causal relationship between the abovementioned injuries and the

current condition of his lumbar spine. Most significant to Judge Crowder appears to be that his medical records and physicians were all in agreement that petitioner suffered work-related injuries, including a probable annular tear at the L5-S1 level, and that Petitioner was seen for complaints of lumbar spine pain related to his workplace injuries prior to his 2008 deployment to Afghanistan as a member to the United States Army. Judge Crowder found, contrary to the Commission, that no evidence of an intervening event occurring while Petitioner was deployed that would have severed the causal relationship between Petitioner's work-related injuries and the current condition of his lumbar spine.

In finding as she did, Judge Crowder finds less persuasive than did the presiding Arbitrator and the Commission of the presented evidence of Petitioner claiming his lumbar spine to be healthy prior to his deployment, of Petitioner demonstrating the physical conditioning necessary for deployment and also the medical history of Petitioner seeking medical treatment for his spine on February 23, 2009, after helping to lift a tire weighing "several hundred pounds," specific facts considered by the presiding Arbitrator and the Commission to arrive at their respective decisions. Also a factor for both the presiding Arbitrator and the Commission was the lack of evidence of Petitioner being a surgical candidate until only after his return from deployment. With respect to the February 23, 2009, lifting incident, Judge Crowder indicated that the Commission's finding on an intervening event is not supported by the medical testimony or medical records.

In accordance to the November 30, 2012, Order of Judge Crowder, the Commission awards Petitioner the prospective surgery as contemplated by Dr. Thomas Lee as well as the necessary aftercare and also temporary total disability benefits commencing on January 8, 2010, and continuing through the date of the arbitration hearing, May 4, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $242.16 per week for a period of 68-5/7 weeks, for the period of January 8, 2010, through May 4, 2011, 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 authorize the prospective surgery as recommended by Dr. Thomas Lee and all reasonable and necessary post-operative care.

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 $16,639.85. The party commencing the 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
KWL/mav
O: 09/30/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD BOOTEN,

Petitioner,

vs. NO: 12 WC 13829

ILLINOIS DEPARTMENT OF TRANSPORTATION, 14IWCC0837

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 benefits and permanently partial 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.

We modify the Arbitrator's awards of temporary total disability benefits and permanent partial disability benefits. The Arbitrator awarded Petitioner temporary total disability benefits from May 23, 2012 through June 4, 2012 for a period of two weeks. The Commission finds the time period between those dates is 23 days. Therefore, we modify the Arbitrator's decision and award Petitioner temporary total disability benefits for 2-1/7 weeks.

Additionally, we modify the Arbitrator's nature and extent finding and award Petitioner permanent partial disability benefits of 12.5% of the leg.

According to Section 8.1(b) of the Act, for injuries that occur after September 1, 2011, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

1) The reported level of impairment pursuant to the AMA Guidelines;
2) The occupation of the injured employee;
3) The age of the employee at the time of the injury;
4) The employee's future earning capacity; and
5) Evidence of disability corroborated by the treating medical records.

1) The reported level of impairment pursuant to the AMA Guidelines.

The parties did not provide an impairment rating. As such, this factor does not influence the impairment rating.

2) The occupation of the injured employee.

Petitioner works as a highway maintainer and continues to work in that capacity for Respondent. As part of his job duties, Petitioner stands or walks for two to four hours a day, lifts weight pads up to 50 pounds, and drives for six to eight hours a day. Petitioner testified he still has some right leg pain but does what he can.

3) The age of the employee at the time of the injury.

Petitioner was 49 years old at the time of his injury and will likely be employed for several years. His position requires him to be on his feet often and use his knee throughout the day.

4) The employee's future earning capacity.

Petitioner did not submit evidence to demonstrate that his future earning capacity was affected in any way by the injury and so this factor also does not influence the impairment rating.

5) Evidence of disability corroborated by the treating medical records.

All of the medical evidence supports that Petitioner suffered a compensable work injury on March 15, 2012. Petitioner sought medical treatment shortly after his accident and voiced consistent complaints throughout his treatment. An MRI showed several issues in Petitioner's right knee. Petitioner's treating physician Dr. Morgan opined that Petitioner probably aggravated his post meniscectomy arthrosis when Petitioner exited the van on March 15, 2012. Dr. Morgan diagnosed Petitioner with tear of the posterior horn of the lateral meniscus and performed arthroscopic surgery on him. Following surgery, Petitioner underwent a series of injections and reported feeling much better. Dr. Morgan released Petitioner from his care.

Based on the five factors outlined in the Act, we find that Petitioner is entitled to 12.5% loss of the leg. Petitioner suffered a work related injury and underwent arthroscopic surgery to repair his lateral meniscus. Following the surgery and rehabilitation, Petitioner failed to report any major issues. He did not testify that he continuously struggles with his job duties or is otherwise limited as a result of his work injury. He is able to successfully perform the same job

14IWCC0837

duties he did before the accident.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $896.11 per week for a period of 2-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 26.875 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 12.5% loss of the leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses per the Fee Schedule under §8(a) of the Act.

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

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

DATED: OCT 0 3 2014
TJT: kg
O: 8/11/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BOOTEN, TODD
Employee/Petitioner

Case# **12WC013829**

ILL DEPT OF TRANSPORTATION
Employer/Respondent

14IWCC0837

On 9/3/2013, 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 0.06% 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:

2138 REED HELLER MANSFIELD & GROSS
BRIAN K ZIRKELBACH
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1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
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0558 ASSISTANT ATTORNEY GENERAL
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0498 STATE OF ILLINOIS
ATTORNEY GENERAL
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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

SEP 3 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

14IWCC0837

☐ 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

Todd Booten
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # 12 WC 013829

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 **May 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0837

On **03/15/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$69,897.00**; the average weekly wage was **$1,344.17**.

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

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $896.11/week for 2 weeks commencing May 23, 2012 through June 4, 2012 as provided in Section 8(b) of the Act.

Respondent shall pay any and all related, reasonable and necessary medical expenses, subject to the Fee Schedule, as provided in Section 8(a) of the Act.

Respondent shall be given a credit for those bills or portions of those 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 $695.78/week for 43 weeks, because the injuries sustained caused the 20% loss of the 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.

Gerald A. Granado

Signature of Arbitrator

8/28/13

Date

SEP 3 - 2013

14IWCC0837

FINDINGS OF FACT

Petitioner was 48 years of age when he sustained an injury to his right knee on March 15, 2012, when he exited the passenger's side of the van he was sitting in to redirect an incoming semi-truck that was to be weighed on portable scales at the direction of the Illinois State Police. Petitioner has been employed with the Illinois Department of Transportation for 29 years as a highway maintainer. He described his job duties as traveling to various locations to place portable scales weighing approximately 50 pounds apiece to weigh commercial vehicles. He drives a one-ton commercial van to the various locations including the location he was at when the injury occurred which was US highway 60/62 just south of Cairo, Illinois. The driver's and passenger's side of the van have a step down platform for use from the interior floor of the van to the ground. The height of the floorboard of the van is approximately 25 inches off the ground. The actual van operated by the Petitioner that day was at the arbitration hearing location and was examined by the parties and the Arbitrator.

Petitioner testified that on the morning of March 15, 2012, he was working in conjunction with Illinois State Trooper Matthew Johnson. They had located themselves and the portable scales at the old State Police headquarters off of US highway 60/62. Petitioner testified that Trooper Johnson was located on the highway flagging in commercial vehicles that had just crossed the US 60/62 bridge coming into Illinois. Petitioner was located on the east side of a divided parking lot sitting in the passenger side of his van doing paperwork when Trooper Johnson flagged in a semi-truck to be weighed. Petitioner testified that the semi-truck was attempting to enter the west side of the parking lot and he jumped out of the van to redirect the semi-truck into the east side of the parking lot. Petitioner testified that he did not recall whether he used the step down platform or not but felt immediate pain in his right knee once on the ground. Petitioner testified that he had paperwork in his hands that he had been working on at the time the semi-truck entered the parking lot.

Following the accident he was examined by his family physician Dr. Alexander and an MRI of the knee was ordered which revealed a large tear of the lateral meniscus. Petitioner was referred to Dr. Richard Morgan who performed a partial lateral meniscectomy on May 23, 2012. Petitioner returned to work without restriction on June 4, 2012. Petitioner testified that all of his medical expenses submitted at the hearing were paid by his group health insurance carrier and that he did not receive TTD during the two week period he was off work following his surgery.

Respondent called Illinois State Trooper Johnson as a witness. Trooper Johnson gave conflicting testimony regarding his location and the location of Petitioner's van. On cross examination Trooper Johnson admitted that he was on the highway when he flagged in the semi-truck to be weighed and to his memory, Petitioner exited the driver's side of his van not the passenger's side. Trooper Johnson admitted that he did not see whether Petitioner was seated in the driver's seat or the passenger's seat as he drove by the van after following the semi-truck into the parking lot. Trooper Johnson did not recall whether Petitioner had paperwork in his hands when he came around to the back of the van. The height of the van floorboard and step down is the same on the driver's side of the van as it is on the passenger's side of the van so the side of the van that Petitioner exited is not relevant to whether the injury occurred in the scope and course of Petitioner's employment.

CONCLUSIONS OF LAW

1. Petitioner has met his burden of proof regarding the issue of accident. Petitioner testified that he is required to drive a one-ton van provided by the Respondent to various locations to do his job. The van is a commercial van in appearance in that it is a large box van with an elevated ride height. On the date of

14IWCC0837

the accident Petitioner testified that he jumped out of the van in a hurried manner to redirect an incoming semi-truck to the correct location while he had paperwork in his hands. The general public does not operate this type of commercial van with an elevated ride height. The general public is not required to observe and direct commercial trucks to a specific area for purposes of enforcing weight restrictions. These various factors created an increased of risk of injury to a greater extent than that to which the general public was exposed.

2. Petitioner has met his burden of proof regarding the issue of causation. Petitioner testified that before the injury on March 15, 2012, he was not having any problems with his right knee. Petitioner testified that after the injury he had immediate pain in his right knee. The Respondent's exhibits which include the CMS Notice of Injury, the supervisor's report of injury or illness and worker's compensation witness report all document that Petitioner sustained an injury to his right knee when he exited the Illinois Department of Transportation van on March 15, 2012. Dr. Morgan's office note dated April 5, 2012, documents his opinion that the Petitioner probably aggravated his prior post meniscectomy arthrosis in exiting the van episode.

3. Given the Arbitrator's findings regarding the issues of accident and causation, the Arbitrator finds that the medical services that were provided to the Petitioner were reasonable and necessary and that Respondent shall pay $17,781.00 in past medical expenses subject to a credit for those bills or portions thereof paid by the group health insurance carrier – subject to the Fee Schedule and in accordance with Sections 8(a) and 8.2 of the Act. Respondent shall hold the Petitioner harmless for any medical expenses paid through group medical insurance.

4. Petitioner is awarded TTD for the two weeks of lost time as a result of his March 15, 2012 accident. Accordingly, Respondent shall pay Petitioner temporary total disability benefits of $896.11/week for 2 weeks commencing May 23, 2012 through June 4, 2012 as provided in Section 8(b) of the Act.

5. Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Applying this standard to this claim, the Arbitrator notes that: (i) no impairment rating was provided; (ii) Petitioner is highway maintainer and continues to work in that occupation following this injury; (iii) Petitioner was 49 years old at the time of his injury and has potentially many future years to continue in his current occupation; (iv) Petitioner has not demonstrated any loss in future earning capacity; and (v) Petitioner has provided evidence of disability corroborated by the treating medical records showing he sustained a torn and displaced meniscus in Petitioner's right knee, which required surgical repair and subsequent injections with evidence of some lateral compartment narrowing from his last office visit. Based on these five factors, the Arbitrator finds that the Petitioner has sustained 20% loss of use of his right leg.

14IWCC0838

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

Henry Taylor,
Petitioner,

vs.

City of Chicago,
Respondent.

NO: 12 WC 006664

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of permanent partial disability, 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 4, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §1,(n) of the Act, if any.

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

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

DATED: OCT 0 6 2014
MJB/bm
o-8/19/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TAYLOR, HENRY
Employee/Petitioner

Case# **12WC006664**

CITY OF CHICAGO
Employer/Respondent

14IWCC0838

On 12/4/2013, 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 0.10% 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:

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0113 CITY OF CHICAGO LAW DEPT
MICHAEL GENTITHES
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

14IWCC0838

☐	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

HENRY TAYLOR
Employee/Petitioner

Case #12 WC 6664

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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on November 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. ☒ 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 November 23, 2011, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $91,104.00; the average weekly wage was $1,752.00.
- At the time of injury, the petitioner was 57 years of age, *married* with one child under 18.
- The parties agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.
- The parties agreed that the respondent paid $43,218.22 in temporary total disability benefits.
- The parties agreed that the petitioner is entitled to temporary total disability benefits for 46-1/7 weeks, from December 14, 2011, through November 1, 2012.

ORDER:

- The respondent shall pay the petitioner the sum of $695.78/week for a further period of 15.05 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of an additional 7% loss of use of his left leg.

- The respondent shall pay the petitioner compensation that has accrued from November 23, 2011, through November 20, 2013, 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.

Robert E. Williams

Signature of Arbitrator

December 3, 2013

Date

DEC 4 – 2013

FINDINGS OF FACTS:

The petitioner, a foreman of sheet metal workers, twisted and injured his left knee on November 23, 2011. The petitioner started care with Dr. Michael Maday on December 14, 2011, whose assessment was meniscus tear. On February 16, 2012, Dr. Maday performed arthroscopic partial left medial and lateral meniscectomies and a removal of loose bodies. The petitioner was started with physical therapy on March 16, 2012, and followed up with Dr. Maday through June 26, 2012, at which time he was released to work with restrictions. He was given a full duty release for November 1st on October 12, 2012. At his last follow-up on November 20, 2012, the petitioner reported doing well with only occasional pain since returning to work. Dr. Maday noted a nearly full range of motion, no medial or lateral joint line or iliotibial band tenderness and negative Lachman, anterior drawer and posterior drawer testing.

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 left leg is causally related to the work injury.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

There is no evidence of an AMA impairment rating or evidence of the impact of the petitioner's injury regarding his occupation, age or future earning capacity, as delineated in Section 8.1(b)(i) through (iv) of the Act, nor can any effect be inferred from the evidence. Regarding Section 8.1(b)(v), the petitioner complains of left leg pain, a burning sensation and difficulty with stairs. The last medical record of his care with Dr. Maday does not corroborate his testimony. The petitioner returned to the regular work

duties of a foreman. He does only deskwork since there are sufficient employees to do all the physical tasks.

The petitioner was awarded 25% loss of use of his left leg in claim #97 WC 31128. The respondent shall pay the petitioner the sum of $695.78/week for a further period of 15.05 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of an additional 7% loss of use of his left leg.

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

WINONA BUCKNER,

Petitioner,

vs.

14IWCC0839

NO: 05 WC 39106

ILLINOIS DEPARTMENT OF HUMAN SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Petitioner failed to prove the loss of her occupation and, as such, failed to prove an entitlement to twelve percent person-as-a-whole pursuant to Section 8(d)(2) of the Act. The evidence demonstrates that Ms. Buckner returned to her prior job following her bilateral carpal tunnel surgeries. The Respondent has accommodated all her restrictions. There is no evidence that Petitioner sustained an impairment of earnings or that she was not promoted due to her restrictions.

The record establishes that Ms. Buckner underwent two surgeries on the right side and one surgery on the left side. The Commission finds that Petitioner sustained 35% loss of use of the right hand and 30% loss of use of the left hand as the result of her work-related injuries. The Respondent is entitled to a credit pursuant to Section 8(e)(17) of the Act for Petitioner's prior settlement of 20% loss of use of the right hand and 17.5% loss of use of the left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the

14IWCC0839

Arbitrator filed on July 9, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $572.38 per week for a period of 133.25 weeks, as provided in §8(e)(9) of the Act, for the reason that the injuries sustained caused the loss of use of 35% of the right hand and 30% of the left hand. The Respondent is entitled to a credit pursuant to Section 8(e)(17) of the Act for Petitioner's prior settlement (01 WC 46159) of 20% loss of use of the right hand and 17.5% loss of use of the left hand.

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

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

DATED: OCT 0 6 2014

MJB/tdm
O: 09-08-14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUCKNER, WINONA
Employee/Petitioner

Case# **05WC039106**

STATE OF ILLINOIS
Employer/Respondent

14IWCC0839

On 7/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1067 ANKIN LAW OFFICE LLC
HOWARD H ANKIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

5132 ASSISTANT ATTORNEY GENERAL
STACEY R LASKIN
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

JUL 9 - 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

WINONA BUCKNER
Employee/Petitioner

Case #05 WC 39106

v.

STATE OF ILLINOIS
Employer/Respondent

14IWCC0839

An *Application for Adjustment 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 May 23, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

K. ☐ What temporary benefits are due: ☐ TPD ☐ Maintenance ☐ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 23, 2005, 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 $49,606.99; the average weekly wage was $953.97.
- At the time of injury, the petitioner was 40 years of age, *married* with three children under 18.
- The parties agreed that the petitioner received all reasonable and necessary medical services.
- The parties agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.
- The parties agreed that the respondent paid $107,120.57 in temporary total disability benefits and $43,101.28 in medical bills.
- The parties agreed that the petitioner is entitled to temporary total disability benefits for 168-3/7 weeks, from March 16, 2006, intermittently through December 1, 2010.

ORDER:

- The respondent shall pay the petitioner the sum of $572.38/week for a further period of 60 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 12% loss of the man as a whole.

- The respondent shall pay the petitioner compensation that has accrued from August 23, 2005, through May 23, 2013, 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.

Robert Williams

7/8/13
Date

JUL 9 - 2013

FINDINGS OF FACTS:

On July 21, 2003, the petitioner, a file clerk, settled claim #01 WC 46159 for bilateral carpal tunnel for 20% of her right hand and 17.5% of her left hand. While on a medical leave after hip surgery on June 14, 2005, the petitioner saw Dr. Jay Brooker of Midland Orthopedics Associates on August 23, 2005, who noted that she was following up for her bilateral carpal tunnel syndromes. The same day the petitioner reported to the respondent a bilateral carpal tunnel injury for August 23rd. The respondent does not dispute the petitioner's bilateral carpal tunnel claim for August 23rd but denies liability for any condition of ill-being with her right arm, elbow or shoulder, neck, back, bilateral Guyon's canal, epicondylitis, fibromyalgia and complex regional pain syndrome.

The petitioner had a left carpal tunnel release by Dr. Brooker on September 19, 2005, and a right carpal tunnel release on February 28, 2006. Pursuant to a referral from Dr. Brooker, the petitioner saw Dr. John Sonnenberg of Midland Orthopedics Associates and reported pain in both hands and right arm. Dr. Sonnenberg gave the petitioner an injection into the lateral epicondyle of her right elbow, which did not provide any significant relief. An EMG on June 13, 2006, indicated mild nerve compression in the right median nerve and no evidence of left median neuropathy or cervical motor radiculopathy. Dr. Sonnenberg noted on June 21, 2006, that the petitioner had successful carpal tunnel releases and no further surgery was needed. The doctor opined on October 26, 2006, that petitioner's fibromyalgia symptoms seem to be related to her carpal tunnel surgery.

On January 5, 2007, Dr. Sonnenberg performed a right carpal tunnel release, a median neurolysis, flexor synovial removal and a fat pad graft of the median nerve. The

petitioner reported increased pain responses to Dr. Sonnenberg at follow-ups, which the doctor initially attributed to CRPD Type II, then cubital tunnel syndrome on May 7, 2007. An EMG/NCV on July 25, 2007, was within normal limits. An MRI of her left wrist on August 8, 2007, revealed early arthritic changes, findings suggestive of a small dorsal ganglion and a negative ulnar variance. Dr. Sonnenberg noted on August 13, 2007, that an MRI of the petitioner's right wrist revealed no abnormalities. An FCE on November 19, 2007, revealed light-level work capabilities. Dr. Sonnenberg imposed a sedentary work level for an 8-hour day and a light work level for intermittent periods on December 3, 2007.

She sought treatment with Dr. Sonnenberg for fibromyalgia in her back on September 22, 2008. On April 27, 2009, she reported a flare-up of her bilateral hand symptoms. At the petitioner's last follow-up with Dr. Sonnenberg on October 8, 2009, she reported increased right arm pain. The doctor noted some tenderness over her midpalm of her right hand and to a lesser degree over her surgical scar in her right palm and multiple trigger points in her right arm. The petitioner had full range of motion of her wrist. The doctor recommended a voice recognition system for the petitioner. At the respondent's request, the petitioner was evaluated on July 25, 2012, by Dr. Michael Vender, who opined that there should be no limitations placed on the petitioner's work.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that her current condition of ill-being with her bilateral carpal tunnel syndrome is causally related to the work injury. The petitioner's complaints and treatment for bilateral hand pain has been consistent since the date of her undisputed work injury.

The petitioner failed to prove that her current condition of ill-being with her right arm, elbow or shoulder, neck, back, bilateral Guyon's canal, right elbow epicondylitis, fibromyalgia and complex regional pain syndrome is causally related to the work injury on August 23, 2005. The petitioner had a pre-existing condition of ill-being with her neck and right arm and only sought care for bilateral carpal tunnel syndrome on August 23, 2005. Moreover, bilateral carpal tunnel syndrome is the only condition of ill-being the petitioner reported to the respondent or claimed.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner sustained an injury that partially incapacitates her from pursuing the duties of her customary employment. Although the petitioner has the same job title and performs the same work activities, she is aided by ergonomic equipment and voice recognition software. The work restrictions imposed due to her bilateral carpal tunnel syndrome partially incapacitate her from pursing the duties of her customary employment, preclude advancement to some supervisory positions and disable her from pursuing other occupations.

The respondent shall pay the petitioner the sum of $572.78/week for a further period of 60 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 12% loss of the man as a whole.

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

14IWCC0840

Pedro M. Nadela,

Petitioner,

vs. NO: 07WC 004231

Midwest Orthopaedic Consultants SC,

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 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 August 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.

14IWCC0840

Bond for 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: OCT 0 6 2014
MJB/bm
o-8/19/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
AMENDED

NADELA, PEDRO Case# **07WC004231**
Employee/Petitioner

MIDWEST ORTHOPAEDIC COUNSULTANTS SC
Employer/Respondent

14IWCC0840

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:

0905 NEWMAN BOYER & STATHAM LTD
JAMES S HAMMAN
18400 MAPLE CREEK DR SUITE 500
TINLEY PARK, IL 60477

0091 LAW OFFICES OF CAPUANI & SCHNEIDER
EDWARD JANUSZKIEWICZ
135 S LASALLE ST SUITE 2950
CHICAGO, IL 60603

14IWCC0840

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
AMENDED ARBITRATION DECISION

Pedro Nadela
Employee/Petitioner

v.

Midwest Orthopaedic Consultants, SC
Employer/Respondent

Case # **07** WC **4231**

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 **May 15, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 22, 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 as explained *infra*.

In the year preceding the injury, Petitioner earned **$110,000.00**; the average weekly wage was **$2,115.38**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of **$25,459.44** for TTD, **$0** for TPD, **$0** for maintenance, and **$14,269.39** for other benefits (i.e., medical bills paid through the workers' compensation insurance carrier), for a total credit of **$38,728.83**. *See* AX1.

Respondent is entitled to a credit of **$N/A** under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, Petitioner failed to establish that his condition of ill being is causally related to the injury sustained at work on December 22, 2006 after August 14, 2007. Thus, the Arbitrator finds as follows:

Respondent shall pay Petitioner temporary total disability benefits of $1,120.87/week for 22 and 5/7th weeks, commencing January 6, 2007 through June 13, 2007, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from December 22, 2006 through May 15, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $25,459.44 for temporary total disability benefits that have been paid.

Petitioner's claim for payment of any outstanding medical bills after August 14, 2007 is denied.

Respondent shall pay Petitioner permanent partial disability benefits of $619.97/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

August 1, 2013
Date

AUG 6 – 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION *ADDENDUM*

Pedro Nadela
Employee/Petitioner

v.

Midwest Orthopaedic Consultants, SC
Employer/Respondent

Case # **07** WC **4231**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute include causal connection, Respondent's liability for certain medical bills, a period of temporary total disability benefits, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he was employed by Respondent as a physical therapist on December 22, 2006 and had been so employed for approximately five years. On the date of accident, Petitioner testified that he was walking and tripped over a piece of exercise equipment. He testified that when he fell, he hit his head and rolled over on his left shoulder. On cross examination, Petitioner testified that he tripped over the equipment and fell forward, hitting his head first then his shoulder and then hitting the floor.

Petitioner testified that he immediately felt pain in the middle of his back and pressure building in the left scapula. Petitioner testified that he did not have pain in neck at that time, but did experience neck pain later at some point.

Petitioner also testified that he did have a car accident in 1990 requiring one month of physical therapy which completely resolved any issues and that he did not lose any time from work as a result.

Medical Treatment – Dr. Chang, Dr. Angelopoulos & Dr. An

Petitioner sought medical treatment at an urgent care center and then saw Dr. Chang as recommended by a friend.

The medical records reflect that Petitioner underwent a thoracic spine MRI in December 28, 2006. PX4. The interpreting radiologist noted diffuse disc bulges from T5-6 through T10-11 causing minimal to mild central spinal compromise without significant neural foraminal stenosis and straightening of the normal thoracic kyphosis. *Id.*

Petitioner then saw Dr. Chang on January 18, 2007 reporting mid back pain radiating into both legs worse on the left after his injury at work. *Id.* On examination, Petitioner had mild-to-moderate tenderness in the mid thoracic spine extending down to the lumbosacral spine, flexion to 60°, extension to 10°, down-going Babinski, no clonus, no tension sign, and a normal neurologic exam. *Id.* Dr. Chang diagnosed Petitioner with acute mid back pain, multiple levels of disc degeneration, and a T7-8 moderate sized disc herniation. *Id.* Dr. Chang noted that the mid back pain was due to an aggravation of multiple levels of disc bulging, recommended thoracic

epidural injections, and placed Petitioner off work. *Id.* On cross examination, Petitioner acknowledged that he did not indicate any neck or upper extremity pain at this time.

Petitioner followed up with Dr. Chang from January 23, 2007 through June 7, 2007 and underwent the recommended injections with Dr. Angelopoulos. *Id.* On cross examination, Petitioner acknowledged that he did not report neck or upper extremity pain to Dr. Chang during his treatment.

On January 31, 2007, Petitioner saw Dr. Angelopoulos and reported mid thoracic back pain which wrapped anteriorly around the thoracic back just below the midline, pain exacerbation when he flexed his neck forward, increased pain while working, and no prior thoracic back pain. *Id.* Petitioner also reported being an avid cyclist biking over 100 miles per day. *Id.* On examination, Petitioner had tenderness in the periscapular musculature with deep palpation with spasticity although the greatest sensitivity was over the midline of the thoracic spine from roughly T5 to T9 or T10, pain and pressure over the interspinous ligament, and an otherwise normal or unremarkable neck and back examination. *Id.* Dr. Angelopoulos diagnosed Petitioner with T5-11 diffuse disc bulges with moderate disc herniation at T7-8 and recommended midline thoracic epidural steroid injections. *Id.*

On February 28, 2007, Petitioner saw Dr. Angelopoulos for his first injection. *Id.* Petitioner underwent the second injection on March 13, 2007. *Id.* Then he returned to Dr. Chang on March 22, 2007 and reported a lot of mid back pain radiating around the left side. *Id.* Dr. Chang referred Petitioner to a colleague due to his continued symptomatology. *Id.*

On April 13, 2007, Petitioner saw Dr. An at Midwest Orthopedics at Rush reporting mid back pain radiating towards the left side of the thorax that worsened with sitting, standing, and bending, as well as numbness in the ball of his left foot with no other radiculopathy. PX5. On examination, Petitioner had no tenderness to palpation of the thoracic spine, slight decreased sensation in the left sole of his foot toward the ball of his foot, no lower extremity weakness, negative Babinski, no clonus, 1+ reflexes and symmetrically bilateral patellar and ankle reflexes. *Id.* Dr. An did not recommend surgery at that point, but recommended continued physical therapy and anti-inflammatory medications. *Id.*

Petitioner underwent physical therapy at HealthSouth (later known as NovaCare) from April 26, 2007 through August 14, 2007. RX3. At his initial visit, Petitioner reported numbness and tingling on the left side to the third toe worse with standing, thoracic pain wrapping around ribs from the mid back especially with chest flexion, constant back pain pressure and a feeling "like I broke my spine [and s]harp pain." *Id.* Petitioner also reported formally riding [a bike] 50-200 miles in a week which he was now unable to do. *Id.* Regarding the mechanism of injury, Petitioner "reportedly tripped over a 'stepper' piece of PT ex equipment while walking. Voiced having pain/pressure in mid back later at night. Pt reported he initially fwd then went backward like a whiplash." *Id.* Petitioner continued through physical therapy with improvement in his symptomatology. *Id.*

On cross examination, Petitioner acknowledged that he returned to work and that he did not report any neck or upper extremity pain during physical therapy.

In the interim, Petitioner returned to Dr. Chang on June 11, 2007 at which time he was released to full duty work for a one month trial period and instructed to return in five weeks. PX4. Dr. Chang's records do not reflect that Petitioner returned after June 11, 2007. *Id.*

Petitioner testified that he last worked for Respondent in December of 2007 and that he resigned, but continued to have pain. On cross examination, Petitioner acknowledged that he continued to work through December of 2007 with Respondent and then went to work for another employer in January of 2008.

On cross examination, Petitioner acknowledged that, between time that he returned to work for Respondent and when he first saw Dr. Templin in 2009, he only saw Dr. Luken at Petitioner's counsel's request, but did not otherwise receive any treatment and he continued to work full time.

Dr. Kornblatt Section 12 Examination Report

On October 13, 2008, Petitioner submitted to an independent medical evaluation with Dr. Kornblatt at Respondent's request. RX1 (Exh. 2). At that time, Petitioner reported a mechanism of injury when he tripped over exercise equipment and did not fall, although he twisted his mid to lower back. *Id.* Petitioner reported middle and lower thoracic pain which was constant but did not cause disability and worsened at night, ability to perform all activities including writing a bike 50 miles on Sundays, and taking Mobic to two times per week. *Id.* Petitioner denied hard radicular leg pain or upper extremity symptomatology. *Id.*

After an examination and reviewing various treating medical records, Dr. Kornblatt opined that Petitioner injured his back at work on December 22, 2006 resulting in thoracic myofaciitis, thoracic strain. *Id.* Dr. Kornblatt added that the thoracic MRI of December 28, 2006 reflective degenerative disc disease at multiple levels that preexisted the injury at work. *Id.* He noted that Petitioner had mild symptomatology with a normal physical examination and that no specific treatment was indicated referral to the thoracic spine. *Id.* He placed Petitioner at maximum medical treatment, indicated that no work restrictions were necessary, and that no further workup was indicated. *Id.*

On February 9, 2009, Dr. Kornblatt issued an addendum to his earlier report after reviewing Petitioner's November 21, 2008 thoracic spine MRI report and noted that it did not change or alter his prior opinion regarding causality. RX1 (Exh. 3).

Dr. Luken Independent Medical Evaluation

On May 8, 2009, Petitioner submitted to an independent medical evaluation at his attorney's request with Dr. Luken. PX3 (Exh. 2). At the time of this examination, Petitioner reported experiencing neck and back pain following his injury but no focal neurologic symptoms and being away from work approximately 6 months following the accident after which he returned to essentially unrestricted work. *Id.* Petitioner also reported leaving Respondent's employment and taking a similar position elsewhere during which he continued to work full-time unrestricted work through the date of his examination. *Id.* He further reported persisting severe mid back pain radiating anteriorly on the left in a distribution approximately tracing his coastal margin on that side, no extremity symptoms, particularly troublesome pain at night, and the ability to ride his bicycle "in complete comfort." *Id.*

Dr. Luken opined that Petitioner's treatment to date was entirely reasonable and appropriate. *Id.* He diagnosed Petitioner with chronic pain syndrome precipitated by the injury on December 22, 2006 with an anatomical basis of severe spinal sprain sustained at that time with critical aggravation of chronic degenerative changes of the thoracic and cervical spine more likely than not contributing to his pain. *Id.* He added that Petitioner's clinical examination demonstrated unequivocal myelopathic signs that had yet to be adequately investigated are explained and might relate to the December 22, 2006 injury given that Petitioner was entirely well and

asymptomatic prior to that injury. *Id.* Dr. Luken recommended brain and cervical spine MRIs as well as EMG/NCV testing. *Id.*

Hedges Clinic

Approximately two years and one month after concluding physical therapy, Petitioner went to the Hedges Clinic for an unrelated medical condition in the mouth. PX6. He returned on November 6, 2009 and saw Dr. Demaertelaere to review his blood work from a health fair. *Id.* He reported a history of diabetes in his family and that he was trying to be very active, but chronic back pain decreased his exercise ability. *Id.* Dr. Demaertelaere recommended that Petitioner obtained a third opinion for his back pain due to concern that if Petitioner stopped exercising secondary to pain he could become diabetic. *Id.* Dr. Demaertelaere referred Petitioner to Dr. Templin at Hinsdale Orthopedic Associates. *Id.*

Dr. Templin

Petitioner first saw Dr. Templin on December 4, 2009. PX1. Petitioner reported pain in the thoracic spine over three years that initially started when he tripped over an object at work and strained his back. *Id.* Petitioner also reported that the pain was localized in the mid thoracic spine and radiated around the left side in what appeared to be a dermatomal fashion. *Id.* The pain worsened with exercise, bending forward, and at night. *Id.* It was reduced with standing, walking, and taking medication. *Id.* Petitioner also reported pins and needles occasionally to the plantar surface of the left foot, pain at a level of 5-6/10, and taking Mobic for the pain. *Id.* Petitioner did not report any neck pain. *Id.* On cross examination, Petitioner acknowledged that he was not restricted from working by Dr. Templin. He further acknowledged that he reported thoracic spine pain only and no neck or upper extremity pain.

In a hand written form, Dr. Templin noted that Petitioner's chief complaint was "T-spine pain x 3 yrs." *Id.* Dr. Templin examined Petitioner's cervical spine which showed full range of motion, no tenderness, and no lymphadenopathy. *Id.* He ordered cervical and thoracic spine x-rays which Petitioner underwent. *Id.* Dr. Templin found that the cervical spine x-rays showed a well aligned spine in the coronal plane, well preserved disc heights, no evidence of instability on flexion and extension, and a small interior osteophyte at C5-6. *Id.* He also found that the thoracic spine x-rays showed moderate spondylosis, no evidence of scoliosis or coronal plane abnormality, some straightening of the thoracic kyphosis and disc height loss at multiple levels. *Id.*

Dr. Templin noted that Petitioner had multilevel thoracic disc herniations after reviewing Petitioner's November of 2008 MRI. *Id.* He also noted it was possible that these were causing his pain, but difficult to determine given the involvement of so many levels. *Id.* Dr. Templin ordered a repeat MRI and a cervical spine MRI "to see if there is anything there that may be contributing to his periscapular pain. *Id.*

On December 11, 2009, Petitioner underwent the recommended cervical and thoracic MRI's. *Id.* The interpreting radiologist found mild disc protrusions at T4-5 through T9-10, no significant change compared to the previous study of November 21, 2008, no other disc protrusion, and no spinal stenosis. *Id.* He also found a moderate sized focal left central disc protrusion at C6-7 in the cervical spine MRI. *Id.*

Petitioner returned to Dr. Templin on December 18, 2009 reporting continued mid thoracic pain, pain extending into the right arm "ever since he was injured at work number of years ago[,]" occasional headaches now extending up into the cervical spine, and a stabbing pain over the midthoracic region coming around the left side at a level of 6/10. *Id.* Petitioner also completed a questionnaire in which he indicated that 80% of his pain came

from the back, 5% from the neck, 5% from the arms, and 10% from the legs. *Id.* On cross examination, Petitioner acknowledged that this was the first time that he complained of pain in his neck and arms since his injury at work.

Dr. Templin reviewed Petitioner's MRIs noting a large C6-7 left paracentral disc protrusion which caused significant accord deformity and mild neuroforaminal stenosis. *Id.* He examined Petitioner and indicated that Petitioner's problems may be related to the C6-7 disc. *Id.* He recommended a C6-7 epidural injection and noted that if it changed his pain a fusion maybe an option. *Id.* With regard to the thoracic spine, Dr. Templin indicated it would be futile given the multiple levels to determine his pain generator. *Id.* He also indicated that he saw no evidence of significant foraminal stenosis to suggest that his left sided pain radiating around the chest wall was radicular in nature. *Id.* Dr. Templin diagnosed Petitioner with cervical and thoracic spondylosis without myelopathy, cervicalgia, and thoracic pain. *Id.*

On February 12, 2010, Petitioner returned to Dr. Templin reporting upper back and periscapular pain on the left side, pain radiating down to his foot on the left side, and severe pain with extension of his neck and at night when he lays down. *Id.* Dr. Templin noted that he again reviewed Petitioner's cervical spine MRI and that it showed a large C6-7 herniated disc to the right which looked to be calcified. *Id.* Based on Petitioner's pain relief of approximately 3 days after his injection, Dr. Templin noted that Petitioner would be a good candidate for an ACDF at C6-7 and indicated that Petitioner would stand to benefit significantly "given his continued pain three years out from his injury." *Id.*

Dr. Hersonskey

Petitioner saw Dr. Hersonskey on one occasion on February 25, 2010 and reported tingling and numbness in both hands that appears when he is sleeping using a pillow and continuous aching between his shoulder blades. *Id.* On examination, Petitioner had a positive left Hoffman sign, borderline up-going toes on the right side, reflexes that were not risk, normal gait, no spasticity on examination, normal strength in upper and lower extremities, symmetric sensation, and normal positioning sensation and proprioception. *Id.* Dr. Hersonskey reviewed Petitioner's cervical spine MRI and noted it showed multilevel degenerative disease at C6-7 and milder disease at C4-5. *Id.* He also noted a disc that was definitely indenting the anterior surface of the spinal cord, more on the left, but also with some central affect. *Id.* Dr. Hersonskey indicated his belief that whenever Petitioner flexed his neck using the pillow, there was pressure on the spinal cord creating the above mentioned symptoms. *Id.* After reviewing Petitioner's thoracic spine MRI, he noted multilevel degenerative disease which can be a small portion of the problem because there are probably multiple levels affected from T4 to T10. *Id.* He ordered a lumbar spine MRI, and upper and lower extremity EMG, and indicated that Petitioner needed surgery; likely and ACDF at C6-7. *Id.* On cross examination, Petitioner acknowledged that his bilateral hand tingling/numbness complaints were new and not what he told Dr. Templin or Dr. Chang.

Dr. Luken Independent Medical Evaluation Addendum

On June 22, 2010, Dr. Luken provided an addendum to his earlier 2009 report. PX3 (Exh. 3). He stated "I am at a loss to provide an entirely convincing explanation for the mid-back and coastal margin pain [Petitioner] described to me at the time of our initial visit yes, in fact, that pain persists now, somewhat more than a year later. *Id.* Nonetheless, Dr. Luken agreed that Petitioner's "reported persisting neck pain, clinical evidence of spinal cord compromise, and demonstrated cervical disk herniation together are compelling indications for the recommended anterior cervical diskectomy and fusion." *Id.* Dr. Luken added that in his view, Petitioner's

cervical disk abnormality was precipitated were critically exacerbated by his work injury given that he was essentially a symptomatic prior to his injury. *Id.*

Continued Treatment with Dr. Templin

Petitioner returned to Dr. Templin on October 29, 2010 after spending approximately 8 months in the Philippines due to his brother's death. *Id.* Petitioner reported that things had been going okay, but he sneezed recently and had a drastic increase in pain in the lower thoracic region as well as occasional weakness in his legs. *Id.* Dr. Templin examined Petitioner and noted that given Petitioner's continued symptoms, "although a slight change in their location to the lower thoracic spine," he recommended a repeat cervical and thoracic MRI and prescribed pain medication. *Id.*

Petitioner underwent the recommended thoracic spine MRI on November 5, 2010, which the interpreting radiologist found to show mild to moderate disc protrusions from T4-T5 through T9-T10 causing at least mild spinal stenosis with a minimal impression on the cord at multiple levels without cord edema and less pronounced degenerative change scattered elsewhere. *Id.* Petitioner also underwent the recommended cervical spine MRI which the interpreting radiologist noted showed findings similar to those in the December 11, 2009 MRI with redemonstrated moderate left paramedian disc herniation at C6-C7 causing mild anterior impression on the cervical cord to the left without discrete cord edema and mild degenerative change scattered elsewhere without significant encroachment on adjacent neural elements. *Id.*

Dr. Brown

Petitioner saw Dr. Brown for the first time on November 23, 2010. *Id.* Petitioner reported neck pain, bilateral arm pain, and midthoracic pain which started December 22, 2006 after a fall at work with pain starting in his posterior neck and upper back. *Id.* He reported that he had no symptoms in his arms at the time of his fall at work and that his symptoms improved after physical therapy in 2007 and that he was able to go back to work. *Id.* Petitioner also reported a re-exacerbation of previous symptoms in 2009, seeing a neurosurgeon, having an MRI showing several disc bulges in the thoracic spine and one at C6-C7, and a significant exacerbation of his symptoms in seeing another neurosurgeon recommended a cervical fusion approximately 2 months ago. *Id.* Petitioner further reported pain in the lower cervical spine and mid back which keeps him from sleep and wraps around the side of his chest at a pain level of 8/10 and numbness in the bottom of his left foot at the time of this visit. *Id.* After an examination and reviewing Petitioner's 2010 MRIs, he diagnosed Petitioner with C6-C7 disc herniation with C7 radiculopathy, recommended a C6-C7 anterior cervical discectomy and fusion, and indicated that although Petitioner had degenerative changes in the thoracic spine, the cervical disc herniation should be addressed first. *Id.*

Petitioner returned to Dr. Templin on January 21, 2011 and reported considerable pain to the upper thoracic region in the periscapular region since his injury at work. *Id.* Dr. Templin indicated that he was "trying to pin down whether this is more coming from his 6-7 herniation versus what we find at the spondylosis in his thoracic spine." *Id.* Petitioner reported pain at a level of 8/10 extending from the neck and into the upper thoracic region as well as achy pain to the arm and some numbness into the left leg. *Id.* Dr. Templin reviewed Petitioner's recent MRI's and indicated that, after conservative measures had failed, he recommended surgery to address Petitioner's C6-7 herniation. *Id.*

Dr. Templin performed the recommended surgery on March 31, 2011. *Id.* Pre- and postoperatively, he diagnosed Petitioner with a C6-C7 herniated disc without myelopathy. *Id.* He performed the following

procedures: (1) C6-C7 anterior cervical discectomy and fusion; (2) application of allograft bone, structural for C6-C7 fusion; (3) application of instrumentation C6-C7 using the nuvasive helix plate; and (4) neural electric/physiologic monitoring, as well as use of the intraoperative microscope for the decompressive portion of the procedure. *Id.*

Petitioner continued to follow up with Dr. Templin postoperatively from April 27, 2011 through July 22, 2011. *Id.* On April 27, 2011, Petitioner reported no pain in the arm or upper back, no weakness/numbness/tingling, and no need for pain medication. *Id.* Petitioner remained off work. *Id.* On may 27 2011, Petitioner reported no periscapular pain, no arm pain, and being 75% better than at his last visit. *Id.* Petitioner was released to light duty work with a 30 pound lifting restriction effective two weeks thereafter. *Id.* on July 22, 2011, Petitioner reported only some mild pain in the upper peritrapezial region when doing a rowing machine type activity, but otherwise no arm pain, and being 90% better than before. *Id.* He was released to work with a 40 pound lifting restriction and scheduled for follow up in three weeks. *Id.* On cross examination, Petitioner testified that he did not undergo formal physical therapy after his surgery because he is a physical therapist so he treated himself.

Dr. Luken Deposition Testimony

On May 3, 2011, Dr. Luken submitted to a deposition. PX3. Dr. Luken maintained his prior opinion that Petitioner's cervical spine, thoracic spine, and chronic pain syndrome conditions are were either caused or aggravated by his injury at work. *Id.* On cross examination, he acknowledged that Petitioner's symptoms leading up to his examination of Petitioner were primarily located on the left side of the chest and in the mid back as opposed to the cervical spine. *Id.* He also acknowledged that he was unaware of any history of neck complaints from the time of his accident through the time that he first examined Petitioner in May of 2009. *Id.*

Dr. Kornblatt Section 12 Report Addenda

On May 16, 2011, Dr. Kornblatt issued a second addendum to his earlier reports after reviewing additional treating medical records. RX1 (Exh. 4). He diagnosed Petitioner with multilevel cervical degenerative disc disease with a documented C6-C7 herniated disc and status post a C6-C7 anterior cervical discectomy, interbody fusion. *Id.* Ultimately, he opined that the testing, treatment, and surgery prescribed by Dr. Templin and Dr. Luken was not necessitated or causally related to Petitioner's injury at work. *Id.* He stated that Petitioner's December 22, 2006 injury at work "resulted in a self-limiting thoracic strain." *Id.* He added that Petitioner's cervical spine condition was secondary to multiple level degenerative disc disease which was unrelated to Petitioner's injury at work. *Id.*

On June 6, 2011, Dr. Kornblatt issued a third addendum to his earlier reports after reviewing MRI films and maintained his prior opinions. RX1 (Exh. 5).

Dr. Templin Narrative Report & Deposition Testimony

On or about August 20, 2011, Dr. Templin completed a narrative report at Petitioner's counsel's request after reviewing Respondents section 12 examiner, Dr. Kornblatt's, report. PX2 at 18-19 & PX2 (Exh. 2). Therein, Dr. Templin opined that Petitioner's cervical and thoracic wind conditions were causally related to his injury at work based on his lack of pain complaints in the cervical or thoracic spine prior to his injury at work, his diagnostic test results since his accident, Petitioner having to work full duty despite pain through the time of his injury moving forward, the failure of conservative measures, and the drastic relief provided to Petitioner after his ACDF surgery at C6-C7. *Id.* Dr. Templin agreed with Dr. Kornblatt that Petitioner's thoracic findings

preexisted his injury at work, but he disagreed with Dr. Kornblatt insofar as his feeling that the C6-C7 condition was a causative factor in Petitioner's pain. *Id.*

Dr. Templin submitted to a deposition on October 7, 2011. PX2. Dr. Templin again opined that Petitioner's condition of ill being was directly related to his injury at work. *Id.*

On cross-examination, Dr. Templin acknowledged that Petitioner's December of 2006 thoracic MRI showed pre-existing degenerative changes and that he did not see anything in that MRI related to the cervical spine that was anything other than degenerative. *Id.* He added that the MRI was incompletely imaged so he could not draw conclusions based on that MRI related to Petitioner cervical spine which is what prompted him to order a cervical spine MRI. *Id.* Dr. Templin also acknowledged that he could not rule out the possibility that Petitioner's herniation at C6-C7 was present before December 22, 2006. *Id.* He further acknowledged that he was unable to date the onset of the significant calcification that he noted at C6-C7 during Petitioner's surgery. *Id.*

Dr. Kornblatt Section 12 Deposition Testimony

Dr. Kornblatt submitted to a deposition on February 27, 2012. RX1. Dr. Kornblatt testified consistent with his reports that the Petitioner suffered a self-limiting thoracic strain on December 22, 2006, that he had reached MMI for that injury, and that the first time the Petitioner reported symptoms referable to the cervical spine was not until February 12, 2010. *Id.* He also disagreed with Dr. Luken's conclusions, and further testified that the 2006 work accident did not result in any aggravation of a preexisting condition of the cervical spine condition. *Id.* Finally, Dr. Kornblatt testified that Petitioner did not suffer a cervical herniation during his work accident and, on cross examination, testified that it was not possible for a patient to have a cervical spine injury without the customary symptoms of such an injury. *Id.*

Continued Medical Treatment

Approximately 8 months later on March 16, 2012, Petitioner returned to Dr. Templin reporting no arm pain whatsoever and no periscapular pain. *Id.* Dr. Templin indicated that he was unable to fully assess whether Petitioner had a 100% solid fusion, but Petitioner had no pain so he might have been asymptomatic non-union with no need for intervention at that time. *Id.* He scheduled Petitioner for follow-up visit in six months. *Id.*

On September 21, 2012, Petitioner returned to Dr. Templin with some mild pain to the thoracic spine, but no radicular complaints were referred pain from the neck. *Id.* With regard to the thoracic spine, Dr. Templin noted that Petitioner had some continued pain for which he uses a stimulation machine which helps. *Id.* Dr. Templin indicated that Petitioner had a solid fusion, that he was at maximum medical improvement with no work restricions, and that he should return on an as-needed basis. *Id.* Petitioner testified that he requested this release for "job security." He also testified that he received the stimulator from a physical therapist and that he had no physician's prescription for it.

Additional Information

Regarding his current condition, Petitioner testified that his middle back pain is manageable, but constant. He described the pain as a constant dull ache in the middle back that was sometimes sharp, especially when he bends forward. He testified that he stops from time to time to stretch, that he takes Tylenol as needed, and that he uses an electrical stimulator for his middle 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 failed to establish that his condition of ill being is causally related to the injury sustained at work on December 22, 2006 after August 14, 2007. In so finding, the Arbitrator notes that a large gap in time between any complaints referable to the cervical spine and the injury at work and that Petitioner's testimony at trial is inconsistent with the medical records.

Petitioner initially treated conservatively with Dr. Chang, Dr. Angelopoulos and Dr. An. He underwent physical therapy and two thoracic epidural steroid injections through August of 2007. At trial, Petitioner admitted that he did not report any neck or upper extremity pain during his treatment. While the medical records reflect that Petitioner indicated one instance of pain exacerbation when he flexed his neck forward, he did not report any other symptomatology referable to the neck, upper extremities, or hands until treating with Dr. Templin almost three years after his accident. Moreover, after a short period of light duty work restrictions while undergoing physical therapy, Petitioner returned to full duty work for Respondent through December of 2007. When he left Respondent's employment, he continued working as a physical therapist performing all of his duties with no physician-imposed work restrictions for years after his release by Dr. Chang on June 11, 2007. Even when Petitioner saw Dr. Templin on December 4, 2009 over two years after his last medical treatment, he did not report neck pain and no work restrictions were imposed. Petitioner also treated with other physicians, including Dr. Brown and Dr. Templin, to whom he reported new symptoms that he had not reported to any medical providers in 2007 or 2009 (i.e., bilateral hand numbness/tingling, neck pain). The Arbitrator finds that this large gap in treatment, lack of reported symptomatology referable to the cervical spine or thoracic spine, and Petitioner's ability to work full duty as a physical therapist for years after completing physical therapy in August of 2007 is fatal to Petitioner's causal connection argument thereafter.

Notwithstanding, there is a plethora of doctors rendering opinions on Petitioner's diagnoses and their relatedness, if any, to his injury at work on December 22, 2006. The Arbitrator finds the opinions of Respondent's Section 12 examiner, Dr. Kornblatt, to be persuasive in light of the record as a whole. The Arbitrator does not find the opinion of Dr. Luken, Petitioner's independent medical evaluator, or Petitioner's treating physician, Dr. Templin, to be persuasive.

These physicians place emphasis on Petitioner's lack of symptomatology in the cervical or thoracic spine prior to the injury at work, but overlook Petitioner's lack of reported cervical or thoracic spine symptomatology for years after his accident, lack of medical treatment to the cervical spine or thoracic spine for years after his accident, ability to work full duty as a physical therapist for years without any medical treatment or restrictions, and ability to ride his bike for miles (which the Arbitrator infers is performed in a somewhat hunched-over position) for years thereafter. Dr. Templin's records also reflect an inconsistent notation at the beginning of treatment on December 18, 2009 that Petitioner *had* reported continued mid thoracic pain, pain extending into the right arm "ever since he was injured at work number of years ago[,]" occasional headaches now extending up into the cervical spine, and a stabbing pain over the midthoracic region coming around the left side at a level of 6/10. These notes are inconsistent with prior medical records and Petitioner's testimony at trial during cross

examination.

While the Arbitrator notes that Dr. Chang released Petitioner back to full duty work on June 11, 2007, he continued to undergo physical therapy through August 14, 2007 and Dr. Kornblatt does not opine that this course of physical therapy was unnecessary to treat Petitioner's thoracic strain. Thus, based on all of the foregoing, the Arbitrator finds that Petitioner failed to establish that his condition of ill being is causally related to the injury sustained at work on December 22, 2006 after August 14, 2007.

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 his claimed current condition of ill being and his work injury beyond June 11, 2007 and the Arbitrator finds the opinion of Respondent's Section 12 examiner, Dr. Kornblatt, that Petitioner sustained a thoracic strain to be persuasive. Thus, Petitioner's claim for payment of any outstanding medical bills after August 14, 2007 is denied.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

Respondent does not dispute Petitioner's entitlement to temporary total disability benefits from January 6, 2007 through June 13, 2007. Thus, such benefits are awarded. Moreover, there is no evidence that Petitioner was restricted from working from December 22, 2006 through January 5, 2007. Thus, such benefits are denied. In addition, based on the facts and conclusions explained in detail above, Petitioner's claim for additional temporary total disability benefits beginning on March 31, 2011 through June 13, 2011 is denied.

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, and as explained in detail above, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 5% loss of use of the person as a whole pursuant to Section 8(d)(2).

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD THEEL,

Petitioner,

14IWCC0841

vs.

NO: 07 WC 41086

MONTEREY COAL COMPANY,

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 occupational exposure, notice, statute of limitations, evidentiary issues, causal connection, and permanent partial disability, 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 notes that Richard Theel worked underground in the coal mine for over 30 years. He was exposed to coal dust, and various fumes and vapors during his working career. This exposure led to the development of coal workers' pneumoconiosis. The Commission further notes that Petitioner's condition is permanent and has negatively impacted his activities of daily living. The Commission, therefore, finds that the Petitioner is entitled to fifteen percent loss of use of the person-as-a-whole pursuant to Section 8(d)(2) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 25, 2014, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $619.97 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the

reason that the injuries sustained caused the loss of use of 15% person-as-a-whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,600.00. 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: OCT 06 2014

MJB/tdm
O: 8-11-14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THEEL, RICHARD
Employee/Petitioner

Case# **07WC041086**

14IWCC0841

MONTEREY COAL COMPANY
Employer/Respondent

On 2/25/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0755 CULLEY & WISSORE
BRUCE WISSORE
399 SMALL ST SUITE 3
HARRISBURG, IL 62946

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
P O BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

14IWCC0841

☒ 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

RICHARD THEEL,
Employee/Petitioner

v.

MONTEREY COAL COMPANY,
Employer/Respondent

Case # **07** WC **41086**

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 **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **1/16/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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 the occupational disease arise out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the disablement?
E. ☒ Was timely notice of the disablement given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to his disease?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the disablement?
I. ☐ What was Petitioner's marital status at the time of the disablement?
J. ☐ Were the 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 disablement?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0841

FINDINGS

On **8/20/06**, 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 occupation disease that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$60,685.28**; the average weekly wage was **$1,167.02**.

On the date of accident, Petitioner was **56** 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 **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $619.97/week for 37.5 weeks, because the injuries sustained caused the 7.5% 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

2/19/14
Date

ICArbDec p. 2

FEB 25 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 56 year old coal miner, alleges he sustained an occupational disease to his lungs and/or heart that arose out of in the course of his employment on 8/20/06. He alleged it was due to the inhalation of coal mine dust including, but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 30 years. Petitioner is alleging shortness of breath and exercise intolerance.

The parties stipulated that petitioner was born on July 3, 1950, and at the time of arbitration was 63 years old. Petitioner is married to Trudy Ann Theel. His education consisted of graduating from high school and then attending college for a few semesters. After his second year of college, petitioner joined the United States Navy, and was honorably discharged after a tour of four years, during which he spent one year in Vietnam. Following his return from the Navy, petitioner was hired by respondent. While working for respondent he took advantage of the GI Bill and went back to college in 1980. He also obtained a junior college degree in coal mining technology at Wabash Valley Community College, in Virden, IL. Petitioner's mining career consisted of approximately 30 years of mining, all of which were underground, and all of which were for respondent.

Petitioner testified that for 15 of the 30 years he worked for respondent he worked as a ventilation man. This position entailed building stoppings out of solid concrete blocks to isolate different air course, and using various sealants over the years to seal the solid concrete blocks so that no air would leak through. Petitioner further testified that he also built overcasts. Petitioner also worked as a belt man for a total of two years that was split between a consecutive year and a half at one time, and six months at another time.

During the course of his coal mining career, in addition to coal dust, petitioner was regularly exposed to rock in silica dust, the fumes from roof bolting glue containing isocyanates, petroleum products, diesel exhaust, and trowel on containing isocyanates. When he worked with the glues and trowel on, he was supplied at first with white paper masks, and later with masks which had filters. Petitioner testified that the paper masks filtered the dust you could see. The mask with a filter covered his mouth and nose and had a filter. Petitioner stated that due to his heavy manual labor he would sweat and his glasses would fog up. As a result petitioner would at times work without his respirator.

Petitioner's exposure to the roof bolting glues occurred because broken tubes of glue were always in the areas where he worked, and he had to travel through these areas on his way to work. Petitioner also testified that he was exposed to roof glue when he would take dumpsters out of the mine. Petitioner testified that he believes he talked to his supervisor about his reaction to roof bolting glue, and was told there was nothing they could do about it. However, petitioner could not recall when he had this conversation with his supervisor.

Petitioner's exposure to "trowel on" or "strong seal" occurred while he was working on the belt crew. The belt would occasionally be shut down due to various problems. As soon as this would occur, a crew would be rushed in to begin the process of strengthening the coal chutes by applying a two-part adhesive at weak spots. It consisted of two epoxy's which were mixed on the spot, put on a pallet, and troweled onto the chute. Many times, ceramic tiles were also put on the weak spots using the adhesive. Petitioner testified that when he was exposed to trowel on fumes he got a sick feeling and his lungs hurt. Petitioner testified that he also talked to his supervisors about trowel on and was told that nothing could be done.

Petitioner's exposure to silica came in all his work and near the areas where rock dusting was being, or had been conducted. His exposure to diesel fumes occurred constantly, because in the mid-90s, the equipment in the mine became all diesel powered. Petitioner testified that all transportation and equipment ran on diesel fuel. Petitioner testified that if there was a lot of equipment in one spot the fumes would be so intense that there was a blue haze and he could smell it. He testified that this made him very sick to his stomach and in extreme cases he would develop phlegm.

Petitioner last worked for respondent on 8/20/06. At that time petitioner worked in the mine in Carlinville, Illinois. On 8/20/06 petitioner was 56 years of age and worked as a bottom man. Petitioner worked underground for the entire day, and was exposed to, and breathed coal mine dust, as well as roof bolting glues, trowel on adhesive, and diesel fumes. In his work as a bottom man, petitioner ran repair parts into the mine when they needed them. He also ran other equipment and materials needed in the mining process into the mine. The bottom man position was classified as a wage grade 4 in the Bituminous Wage Agreement, and if he were still working, it would pay approximately $28.10 per hour.

8/20/06 was petitioner's last day working for respondent at the mine in Carlinville, IL. Petitioner testified that he left the mine because he was told respondent was going to sell it in October 2006 (the mine did not actually close until sometime in 2007). Another reason petitioner retired in August of 2006 was because in July 2006 his wife contracted breast cancer and underwent a double mastectomy. When petitioner heard the mine was going to be sold in October of 2006, he was concerned that he would not have a job or any healthcare after that, and decided that he would retire early to ensure that he had his pension and health insurance for him and his wife. Petitioner testified that when he quit working at the mine it was a difficult decision for him. He testified that he had worked 30 years for respondent when he retired.

After his wife recovered, petitioner decided that he did not want to go back to the mine, even though it was still open, because he did not think he could pass a physical for another job at that mine. Petitioner never made any attempt to return to work.

After petitioner terminated his employment with respondent he performed a job search. He became a volunteer at Memorial Health Center in Springfield, Illinois. He was part of a group of men called "redcoats". Petitioner would take the patients from check-in to where they were supposed to go in the hospital. Petitioner performed these duties for one year. Petitioner testified that he quit this job because he was afraid that he could not take the patients where they needed to go safely because he was having difficulty breathing.

Petitioner's next position was as a substitute janitor at Girard High School for six months. In this position petitioner worked 2 to 3 days a month, for a period of 2 to 3 hours each day. Petitioner's job was performing the minimal things necessary that the regular crew was not able to do after special events at school, i.e. after basketball game. Petitioner testified that he quit this job because it got to the point where it was not easy to do. Petitioner earned about $8.00 per hour in late 2006 and early 2007.

Before working for respondent petitioner worked four years in the United States Navy, and a year and a half for International Vermiculite manufacturing a high temperature block installation. Since this was a very small plant, petitioner did a little bit of everything.

The parties stipulate that in addition to petitioner's breathing problems, he has atrial fibrillation and is on medications for his cholesterol levels and high blood pressure. Petitioner has never smoked cigarettes. If petitioner were offered a coal miner's job today he would not take it.

At trial, petitioner testified that when he was around glues and diesel exhaust he could smell the fumes through his respirator. He claimed these exposures were constant.

Petitioner testified that his breathing affects his activities of daily living. He reported trouble walking the dog farther than around the block without stopping to rest. Petitioner stated that on most days he stops and takes a break while walking his dog. He no longer raises animals on his property, because it got to the point where he could not take care of the animals the way they needed to be taken care of.

Petitioner testified that the onset of his breathing problems at work was gradual and started in the early 2000's. Petitioner reported problems with everyday work. He testified that he did heavy manual work most of the time and could no longer do it the way he used to. Petitioner testified that as time went on his breathing problems became constant, but not to the extremes like when he was working with fumes.

Petitioner voluntarily gave up his Examiner Papers because he was worried that he would be able to get in and not be able to get out.

Currently, petitioner testified that when he walks on level ground at a normal pace he becomes short of breath within 100 yards. He further testified that since leaving the mine his breathing problems have not gotten any better, and may have gotten a little worse. Petitioner can climb one flight of stairs before he has to rest.

Petitioner's medical records show that he has had some heart issues over the years. In October 2003 he was seen and underwent some tests. Since then petitioner has been on some medication for his heart for his atrial fibrillation. Petitioner also follows up with a cardiologist as needed.

Frank Barrett, Jr. was called as a witness on behalf of petitioner. Barrett testified that he worked with petitioner at the mine on several jobs including supply/motor, ventilation, and built crew. Barrett worked at the mine two months short of 37 years. For two years he worked on the belt crew and pod dusting. He testified that he had exposure to roof bolting glue, trowel on, diesel exhaust, other petroleum products, and rock dust (silica). Barrett testified that when he was working with petitioner he noticed that petitioner had breathing problems on the belt crew. He admitted that it was a heavy job. Barrett testified that the MSDA sheets were in the warehouse and available for them should they choose to go and get them. Barrett did not work with petitioner from the years 2001 to 2007.

Donald Stewart was called as a witness on behalf of petitioner. Stewart testified that he worked with petitioner for 31 years. Stewart has been on the State Coal Mining Board since 2005, and had been on the Examining Board. Stewart has been a union official since 1970, and is the president today. He also stated that he held positions as safety committeeman and mine committeeman. Stewart claims that there was exposure in the mine to roof bolting glue, diesel, rock dust, and sometimes coal dust. Stewart testified that petitioner talked to him about his problems with his exposure and petitioner's withdrawing his examiner papers due to his breathing problems. Stewart testified that there is a lot of silica exposure in the mine. He stated that it is in the roadways and in every coal section. He testified that you cannot avoid it. Stewart also testified that there has been diesel in the mine since 1980s. Stewart testified that isocyanates are in roof glue and trowel ons.

On 6/29/07 petitioner presented to Dr. Nallamothu with a chief complaint of chest pain and shortness of breath. Petitioner gave a history of symptoms of dyspnea on exertion for the past two months, occasional PND, and recurrent episodes of chest pressures. A history of smoking and drinking significant amounts of alcohol, 12 cans of beer a day, was noted. Dr. Nallamothu noted the results of a stress test on 10/23/03 that showed an EF of 40%. A non-stress echo performed 1/6/04 revealed mild concentric left ventricular hypertrophy, moderately to severely dilated left and right atrium, mild mitral regurgitation, and no thrombus in the left atrial appendage. He also reviewed a chest x-ray dated 10/21/03 that revealed cardiomegaly, and a successful cardioversion

performed 1/6/04. Following an examination Dr. Nallamothu diagnosed palpitations, shortness of breath, chest pain, hyperlipidemia, alcohol dependence, benign hypertension, and atrial fibrillation.

On 7/17/07 Dr. Henry Smith, D.O., AOBR Certified/NIOSH B-Reader read petitioner's chest x-ray. He rated the quality of the film as grade 2/underinflated. His impression was pneumoconiosis with interstitial fibrosis s/t, mid to lower zones involved, profusion 1/1, with left mid lateral circumscribed calcified plaque and bilateral calcified diaphragmatic plaques.

On 1/23/08 petitioner was seen by Dr. William Houser at the request of petitioner's attorney. Petitioner had complaints of shortness of breath when walking about 100 feet, climbing one flight of stairs, or lifting various objects. Petitioner reported an occasional cough, that did not produce sputum. Petitioner stated that he has not had hemoptysis or pleuritic type chest pain. Petitioner gave a history of being treated for bronchitis by Dr. Johnson when he had at least one episode three years ago. He stated that his symptoms are aggravated by exposure to smoke. Petitioner gave a past medical history that included atrial fibrillation, GERD, hypercholesterolemia, and hypertension. Petitioner gave a consistent history of his occupation.

Following a physical examination and laboratory data that showed O2 saturation on room air at 95%, and spirometry findings that showed moderate airway obstruction with modest bronchodilator response, s/t opacities in both mid-and both lower long zones, category 1/0 pneumoconiosis, and calcified pleural plaque most likely secondary to prior asbestos exposure, Dr. Houser's assessment included coal worker's pneumoconiosis category 1, chronic obstructive pulmonary disease, and diaphragmatic calcification/plaque, obesity, hypercholesterolemia, atrial fibrillation, hypertension, and GERD. Dr. Houser had the opportunity to review the chest x-ray report in short form prepared by Dr. Harry Smith, B-Reader, who noted s/t opacities in the mid and lower long zones bilaterally, category 1/1 pneumoconiosis, plus calcified pleural plaques and diaphragmatic calcifications. Dr. Houser was of the opinion that petitioner has sufficient occupational exposure and chest roentgenographic findings appropriate for the diagnosis of coal worker's pneumoconiosis category 1/0. Dr. Houser noted that petitioner is a non-smoker, and also has moderately severe chronic obstructive pulmonary disease, most likely related to the inhalation of coal and rock dust. Dr. Houser was of the opinion that the evidence of pleural and diaphragmatic calcification/plaque is most likely related to prior asbestos exposure. He was of the opinion that petitioner should avoid additional exposure to coal and rock dust because it would increase the likelihood of progression of the disease process. Because of petitioner's chronic obstructive pulmonary disease, Dr. Houser was of the opinion that petitioner should also avoid exposure to smoke and fumes, as it would increase the likelihood of both exacerbation of the chronic obstructive pulmonary disease and progression of the disease process.

On 3/23/09, following a request to amend petitioner's medical record dated 6/29/07, Dr. Nallamothu noted that clearly there was in error when he referred to continued smoking in petitioner's case. He clarified that petitioner never smoked.

On 6/16/09 the evidence deposition of Dr. Houser, a pulmonary specialist, was taken on behalf of petitioner. Dr. Houser stated that the screening test for COPD is not a physical exam but a pulmonary function test. He stated that exposures in the coal mine including coal dust, silica, diesel fumes, welding fumes, smoke and fumes from high sulfur coal fires, cable fires, and glues used in roof bolting can be harmful to a person's pulmonary health. Dr. Houser opined that coal workers pneumoconiosis by definition is a tissue reaction to the dust that is manifested as varying degrees of either cellular infiltration and/or deposition of fibrin and collagen with associated scarring and fibrosis. He stated that the hallmark of coal worker's pneumoconiosis is the dust macule, and frequently areas of focal emphysema. He was of the opinion that if one has coal worker's pneumoconiosis they have an impairment of pulmonary function at the site of the scarring. He was further of the opinion that this person can have pulmonary function tests within the range of normal and still have shortness of breath.

Dr. Houser was of the opinion that it's possible for a miner to begin his mining career with a pulmonary function test within the range of normal and lose as much as a third of his breathing capacity due to injury or lung disease prior to the end of his mining career, and still end up with pulmonary function tests within the range of normal. Dr. Houser was of the opinion that individuals with a category 1 coal worker's pneumoconiosis most likely have a normal pulmonary function, but cannot have any further exposure to coal mine dust without endangering their health. He was further of the opinion that coal worker's pneumoconiosis can progress after a miner leaves the mines. Dr. Houser opined that petitioner has damage to his lungs as a result of his occupational exposures to coal mine dust. Dr. Houser stated that petitioner's chest exam was normal, and his oxygen saturation was 95%, which is normal. Dr. Houser noted that his pulmonary function results showed a mild reduction in force vital capacity, and no change with bronchodilator. With respect to the FEV1, there was improvement with bronchodilator administration. As a result, Dr. Houser was of the opinion that petitioner had a mild reduction in the forced vital capacity and moderately severe airway obstruction. Dr. Houser believed that petitioner would be precluded from performing medium or heavy work. Dr. Houser attributed petitioner's pleural plaque to prior asbestos exposure. Dr. Houser testified that he relied on the B reading of Dr. Harry Smith.

Dr. Houser opined that petitioner has coal worker's pneumoconiosis. He based this on petitioner's history of occupational exposure as a miner for approximately 30 years and on the chest roentgenographic findings. Dr.

Houser opined that petitioner's coal worker's pneumoconiosis is related to each and every exposure to coal and rock dust that he experienced during his 30 year history of coal mine employment. Dr. Houser opined that petitioner also has COPD, secondary to inhalation of coal and rock dust. Dr. Houser opined that a chronic lung disease could complicate the management of petitioner's heart problems. Dr. Houser opined that petitioner has clinically significant pulmonary impairment caused by COPD and coal worker's pneumoconiosis. He further opined that petitioner has radiographically apparent abnormalities that are consistent with pulmonary impairment caused by coal worker's pneumoconiosis secondary to inhalation of coal and rock dust. Dr. Houser opined that the pleural plaque and pleural calcification was most likely secondary to a prior asbestos exposure. When asked by petitioner's attorney if petitioner's asbestos exposure could or might have contributed to petitioner's pleural plaque, he stated that it could. Dr. Houser opined that petitioner is permanently totally disabled from working as a coal miner. Dr. Houser opined, after reviewing petitioner's prior treatment records that petitioner's pulmonary condition placed an additional burden on his heart.

Dr. Houser was of the opinion that CT scans are not recognized by NIOSH under the B-reading system for diagnosing coal worker's pneumoconiosis. He also stated that there are no standard films to guide the reader in determining whether there is pneumoconiosis or not.

On cross-examination Dr. Houser stated that he did not diagnose chronic bronchitis in petitioner. With respect to the diagnosis of COPD, Dr. Houser did not diagnose anything specific with regard to any specific diagnosis under the heading of COPD. Dr. Houser did not believe that petitioner had asthma. Dr. Houser admitted that category 1/0 coal worker's pneumoconiosis is the lowest positive category for that diagnosis. Dr. Houser was of the opinion that petitioner's ejection fraction varies from time to time, and if it were a persistent finding it could mean that his condition was deteriorating. With respect to petitioner's exposure to asbestos, Dr. Houser stated that petitioner could have been exposed to it in the Navy or during the 1 1/2 years he spent in a factory job. Dr. Houser indicated that this evidence of prior exposure to asbestos reflects damage to petitioner's diaphragm and pleura. Dr. Houser admitted that the opacities on the chest x-ray are considered consistent with coal worker's pneumoconiosis as well as other diseases. Dr. Houser also admitted that petitioner's excess weight can have an effect on some of the pulmonary function results, and a contributing factor to the reduction in vital capacity. Dr. Houser had no evidence that petitioner was ever a welder or roof bolter, or that he had been around any type of fires in the underground coal mine. The main jobs he had that petitioner worked on were the conveyor belt, ventilation, and supply. Dr. Houser saw no evidence of progressive massive fibrosis or any cor pulmonale.

On 9/25/09 petitioner was seen by Dr. Peter Tuteur, at the request of the respondent. Dr. Tuteur is board certified in internal medicine and pulmonary diseases, and reviews pulmonary function studies on a regular basis. Dr. Tuteur is the director of the Pulmonary Function Lab at Washington University School of Medicine. When Dr. Tuteur saw petitioner he reviewed petitioner's chest x-ray films and pulmonary function study. He also took a history and did a physical examination.

Petitioner gave a history of working for three months at Valley Steel in Carlinville Illinois in 1969 cutting metal tubing. For the next three months he worked in home construction where he did not perform any roofing or work with any insulation. In 1970 he joined the United States Navy and served as a torpedo man's mate for four years. In that capacity he repaired and installed torpedoes. He had no known asbestos exposure. For 18 months from 1974 to 1976 petitioner worked for International Vermiculite where he made high temperature insulation blocks. Petitioner was not sure if the origin of the vermiculite used was from the Libby Mine. The basic process was mixing vermiculite out of fiberglass and concrete, first dry and then adding water, molding and heating it, and pressing it and cutting it. This activity was located 15 to 20 feet away from the mixers and petitioner entered and removed the mold from the furnace and sawed the block. When sawing, petitioner tended to wear a cartridge-based respirator. Petitioner did not know the source of the vermiculite, but recalled it was brought in by train from the west. Petitioner began his work for respondent in August 1976 as an underground miner, and did so for 30 years until he quit on 8/23/06 when he anticipated the closing of the mine. While in the mine he worked on the track gang laying track on a level course for about nine years. Only rarely were the tracks sanded. Petitioner also worked on the belt line in maintenance and repair, and on a ventilation crew for 15 years. Dr. Tuteur was of the opinion that clearly, petitioner was exposed to sufficient amounts of coal mine dust to produce coal worker's pneumoconiosis in a susceptible host.

Petitioner gave Dr. Tuteur a history of drinking alcohol regularly, 6 to 12 cans a day, for three days each week, for 40 years. Following his retirement, the drinking increased to 24 cans per day until August 2007 when he entered rehab and has been sober since. Dr. Tuteur noted that petitioner's most significant health problem began while working underground in October 2003, when he suddenly developed dizziness and breathlessness. Medical evaluation at that time identified cardiomegaly, "a leaky valve", and atrial fibrillation never before discovered. Cardioversion resulted in sinus rhythm for only a brief period of time, and petitioner has been treated to control rate since. Petitioner noted that he takes Coumadin, Digoxin, Toprol and aspirin. Despite this, petitioner becomes short of breath when walking 100 yards or climbing a flight of stairs. Petitioner had no cough, expectoration, wheezing, or chest pain. Petitioner weighed 300 pounds and had heartburn, and GERD treated successfully with Prilosec. In 2000 and petitioner was diagnosed with hypertension. Dr. Tuteur was of

the opinion that should the origin of the vermiculite be the Libby Mine, one must be concerned about asbestos exposure in the form of tremolite.

Following an examination, review of petitioner's chest x-ray, and pulmonary function studies dated 9/25/09, Dr. Tuteur was of the opinion that petitioner experiences mild to moderate exercise intolerance clearly related to a combination of treated hypertension and marked obesity. Dr. Tuteur did not believe there was any convincing evidence whatsoever to indicate the presence of coal worker's pneumoconiosis. He noted that petitioner's oxygen saturation while sitting, breathing room air was 95%, which was within the normal range. He noted that there was no evidence of legal coal worker's pneumoconiosis since there are no signs or symptoms of airflow obstruction, nor a clinical picture similar to that of chronic obstructive pulmonary disease that may be cigarette smoked induced. Second, with respect to medical pneumoconiosis, although petitioner has breathlessness, a typical symptom of his condition, it is fully explained by obesity and hypertensive treatment. Dr. Tuteur was of the opinion that there was no physical examination evidence of late inspiratory abnormality, and no radiographic change. Dr. Tuteur was of the opinion that there were bilateral diaphragmatic calcified plaques typical of extensive asbestos exposure, which historically resulted from the exposure to vermiculite, which regularly is contaminated with tremolite, and asbestiform silicate. Dr. Tuteur noted no significant change of FEV1. He was of the opinion that there is no impairment of O2 gas exchange at rest by ABG. He also noted that there was no impairment of O2 gas exchange at rest, nor during exercise by SpO2 and ABG.

On 12/18/09 Dr. Jerome Wiot, professor of radiology drafted a letter to respondent's attorney. Dr. Wiot reviewed a PA and lateral chest x-ray of petitioner dated 9/25/09 and found them of acceptable quality by ILO standards (quality – 1). He was of the opinion that there was no evidence of coal worker's pneumoconiosis. He noted that there were calcified pleural plaques present in both hemidiaphragms, no pleural plaques, and no evidence of interstitial fibrosis to suggest asbestosis. On the lateral projection, he noted a density seen behind the heart which could represent a small hiatus hernia, that was not a manifestation of occupational exposure.

On 8/26/10 the evidence deposition of Dr. Tuteur was taken on behalf of respondent. Dr. Tuteur testified that petitioner never told him that he worked as a roof bolter. Dr. Tuteur opined that petitioner's shortness of breath was not in any way related to him being exposed to coal dust as a miner. He further opined that petitioner's left ventricular dysfunction was due to petitioner's slowing rate of atrial fibrillation. He was of the opinion that petitioner's moderate to severely dilated left atrium was due to petitioner's atrial fibrillation. Dr, Tuteur was of the opinion that petitioner has no worse than a minimal obstructive abnormality, which is very much a non-clinically significant entity, and does not limit exercise. He further stated that petitioner does not have any oxygen gas exchange limitation to exercise. Dr. Tuteur was of the opinion that petitioner has atrial

fibrillation associated with bilateral atrial enlargement, has an ejection fraction of 40%, which is below normal, and almost certainly has diastolic dysfunction resulting from the hypertension, and effects of the beta blockers. He noted that beta blockers will limit cardiac function or the total amount of oxygenated blood that flows during exercise. Dr. Tuteur opined that petitioner's cardiac limitation to exercise is unrelated to the inhalation of coal mine dust or the development of coal worker's pneumoconiosis.

Dr. Tuteur opined that the source of petitioner's asbestos exposure was not only vermiculite contaminated with Tremolite, but more likely than not, it was Vermiculite from The Libby Mine in Montana that was a primary source. Dr. Tuteur noted that he compared his pulmonary function results to those of Dr. Houser, and noted there was significant and substantial improvement between 1/23/08, when Dr. Houser tested petitioner, and 9/25/09 when he tested petitioner. Dr. Tuteur identified the likely source of this change was improvement in the control of some degree of the left ventricular dysfunction. Dr. Tuteur opined that the minimal obstructive abnormality that he found on his pulmonary function study was increased lung water, that was the result of left ventricular dysfunction. Dr. Tuteur opined that petitioner did not have coal miner's pneumoconiosis or any other coal mine dust related disease process of sufficient severity and perfusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic abnormalities. Dr. Tuteur did not diagnose petitioner with chronic obstructive pulmonary disease.

On cross-examination Dr. Tuteur opined that if one has breathlessness due to coal worker's pneumoconiosis, physiologic testing would demonstrate abnormalities. He opined that he would expect breathlessness to occur typically in persons with progressive massive fibrosis with conglomerate nodules radiographically at the B level or greater. Dr. Tuteur was of the opinion that shortness of breath, or the perception of breathlessness, does not mean that the shortness of breath is due to a lung problem. Dr. Tuteur stated that he uses Knudson's predicted normals, despite the fact that the American Thoracic Society and the American Medical Association recommend the use of Crapo normals. He indicated that he chooses not to follow these guidelines because they are not laws, but rather just man-made guidelines. Dr. Tuteur agreed that pulmonary function testing, specifically spirometry, will tell you the type of abnormality and how severe it is, but not the etiology of it. Dr. Tuteur was of the opinion that both restrictive and obstructive defects can be multi-factorial in etiology, and each of them could be aggravated by some exposure, even if it were not caused by that specific exposure. Dr. Tuteur admitted that his opinion regarding the relative risk of cigarette smoking and coal mine dust exposure was different from the conclusions of the Department of Labor, NIOSH, and the literature that they relied on. Dr. Tuteur admitted that coal mine dust includes exposures that can harm a lung in addition to just coal dust. He identified these things as silica, diesel fumes, smoke that accompanies the welding

process when the material that is being welded has high sulfur coal dust on it, smoke and fumes from fires of high sulfur coal, and fumes from roof glues used in the roof bolting process. Dr. Tuteur agreed that inhalation of silica dust as a component of coal mine dust can cause obstructive ventilatory defect, and can aggravate a defect that was caused by some other insult. Dr. Tuteur stated that NIOSH has not developed any standards for those settings or algorithms that are used in CT scans because the CT scan is not an epidemiologic tool, and that NIOSH and the reader system is an epidemiologic tool. Dr. Tuteur was of the opinion that exposure to the glues used in a roof bolting process can cause reactive airway disease. Dr. Tuteur opined that there is virtually no possibility that petitioner has pulmonary hypertension, because petitioner had normal spirometry and lung volumes, and normal rest and exercise arterial blood gas analysis. Dr. Tuteur opined that the obstructive defect which he measured could not be a contributor to petitioner's shortness of breath. He was of the opinion that the best measured FEV1 at the time of his testing was 103% of predicted, which he called minimal obstructive abnormality. Dr. Tuteur testified that it is possible for a person to have exposure to asbestos in a mine. Dr. Tuteur agreed that if petitioner's exposure to coal mine dust included a significant exposure to silica, that could be consistent with an obstructive defect. Dr. Tuteur opined that if petitioner had a significant response to a bronchodilator, that would be consistent with chemically induced bronchial reactivity. Dr. Tuteur was of the opinion that chemically induced bronchial reactivity can be caused by TDI, and TDI can be found in the glues used in the roof bolting process. Other exposures in the environment of a coal mine that can cause chemically induced bronchial reactivity include petroleum products, diesel exhaust, sprayed on paints that contain isocyanates, and adhesives that contain isocyanates. Dr. Tuteur was of the opinion that if a person has chemically induced bronchial reactivity, that he would recommend they avoid the exposures that can trigger reactions. He was further of the opinion that if a person has chemically induced bronchial reactivity, it can result in a waxing and waning of pulmonary function testing.

On cross-examination Dr. Tuteur stated that petitioner specifically indicated that he did not have a cough. He also stated that he asked petitioner a number of questions about chemically induced bronchial reactivity and did not find any evidence of such a problem in petitioner when he evaluated him. However, he did find that there was evidence of reactive airways disease. Dr. Tuteur saw no evidence that petitioner was exposed to asbestos while working at the coal mine. He further stated that asbestos exposure would not cause any pulmonary function abnormality. Dr. Tuteur opined that petitioner does not have coal worker's pneumoconiosis, progressive massive fibrosis, or cor pulmonale. Dr. Tuteur was of the opinion that CT images are more resolute and without confounding variables that can be seen with a standard chest x-ray. Dr. Tuteur uses CT images.

On 10/18/10 Dr. Tuteur drafted a letter to respondent's attorney after reviewing the images of the CT scan of the thorax performed on petitioner on 7/28/09. He was of the opinion that the images document what appears to be an acute infiltrate/consolidation involving the posterior segment of the right upper lobe and the superior segment of the right lower lobe dominantly. Careful examination of the long parenchyma demonstrated no indication of the presence of an interstitial pulmonary process consistent with coal worker's pneumoconiosis. Dr. Tuteur specifically noted that no peripheral upper lung fields and nodular densities were seen. An incidental finding that he noted was extensive bilateral posterior diaphragmatic plural calcification with mild diffuse pleural noncalcified thickening bilaterally, right greater than left. Dr. Tuteur was of the opinion that the calcifications seen on the diaphragm were the result of exposure to abestiform material, historically tremolite contaminating vermiculite. He was of the opinion that there is absolutely no evidence to indicate the presence of radiographically identifiable coal worker's pneumoconiosis.

On 6/16/11 Dr. Robert Cohen, Certified B-reader interpreted the x-ray dated 7/17/07. His impression was positive for the opacities of pneumoconiosis p/s in shape at a profusion of 1/0. Dr. Cohen noted no pleural or mediastinal abnormalities. He noted degenerative joint disease of the thoracic spine, and that the bony structures, soft tissues and mediasinum were normal.

On 3/27/12, petitioner's attorney drafted a letter to Dr. Johnson. He asked 4 questions. In response Dr. Johnson indicated that he was of the opinion that petitioner has COPD. He based this on an understanding that petitioner never smoked, was an underground coal miner for 30 years, has symptoms of a cough, wheeze, and shortness of breath, was diagnosed with bronchitis, and has COPD. Dr. Johnson was of the opinion that there is a significant possibility, not probability, that these conditions are related to his exposures as a coal miner. He was further of the opinion that further exposure to a coal mine environment would present a risk to petitioner's health in terms of possible progression and worsening of his pulmonary condition. Based on his clinical impression of petitioner, Dr. Johnson did not believe petitioner had the pulmonary capacity to work full 8 hour days, at least 5 days a week, in the heavy manual labor of coal mining.

On 7/27/12 petitioner underwent a vocational rehabilitation performed by Delores Gonzalez, a vocational rehabilitation counselor. Gonzalez took a social, vocational and educational history, performed a client interview that included petitioner's activities of daily living, summary of his vocational history, and summary of petitioner's medical records. Gonzalez then performed a transferability skill analysis. Based on the above, Gonzalez was of the opinion that petitioner has a residual functional capacity which allows for work at the unskilled sedentary level of work, and does not have the capability of performing manual labor on a full time basis. She was further of the opinion that petitioner would sustain a significant wage loss based on his prior

earnings of $41,600 per year, and her opinion that petitioner may only be able to find an entry level job earning between $8.50 and $10.00 per hour as evidenced by his employment with the Girard School District and the B&B Book Bindery. Gonzalez was of the opinion that it is extremely doubtful that petitioner would ever be able to earn what he had been earning. She also believed that prospective employers in the usual course of selecting new employees for jobs that offer significant and competitive wages would avoid hiring an individual with petitioner's overall profile in favor of individuals who are younger, more work ready, who would have higher academic skills, and who would not have to be accommodated. Gonzalez was not asked to engage petitioner in any specific job search or training. Gonzalez did not review the deposition of Dr. Johnson.

On 2/28/13 the evidence deposition of Dr. Johnson, petitioner's primary care physician, was taken on behalf of the petitioner. Dr. Johnson stated that there are many entries of wheezing, coughing, shortness of breath, dyspnea, cough (productive, dry or persistent), and numerous diagnoses of bronchitis in his treatment records of petitioner. Dr. Johnson also stated that there are many entries of atrial fibrillation treatment of congestive heart failure of petitioner in his records. Dr. Johnson opined that the existence of chronic lung disease that petitioner has has placed an extra burden on the functioning of his heart. Dr. Johnson was of the opinion that petitioner's reactivity could be related to his history of working as a coal miner.

On cross examination Dr. Johnson stated that he treated petitioner in the hospital in October of 2003. At that time petitioner had atypical chest pain, atrial fibrillation, rapid ventricular response, probable coronary artery disease, abnormal cholesterol, elevated liver enzymes, history of heavy alcohol use, and proteinuria. Dr. Johnson had treated petitioner before this for elevated blood pressure. Dr. Johnson was of the opinion that when he saw petitioner in the hospital in October of 2003 there were no diagnoses related to his lungs. Dr. Johnson was of the opinion that in general atrial fibrillation would not cause chest pain. He was further of the opinion that the moderate to severe dialation of the left and right atriums were tied to petitioner's atrial fibrillation. Dr. Johnson was of the opinion that feelings of fatigue and general weakness may be components of atrial fibrillation. Dr. Johnson indicated that following his diagnosis of atrial fibrillation in October of 2003, petitioner continued to perform his full duty job as a coal miner until he retired on 8/21/06. He noted that whenever he saw petitioner his being overweight was always an issue, and being overweight can cause someone to feel short of breath with activities. He was also of the opinion that feeling short of breath is a symptom of atrial fibrillation.

Dr. Johnson stated that in late June of 2007, petitioner had some chest pressure, dyspnea on exertion and left ventricular dysfunction. At that time petitioner was examined by Dr. Nallamothu who diagnosed chronic atrial fibrillation. Petitioner was again seen in January of 2009 by Dr. Nallamothu. A stress test was performed

that revealed normal work capacity, normal cardiopulmonary exercise study, and adequate respiratory reserve. The only abnormality noted was a mild decline in exertional oxygen saturation. Dr. Johnson opined that while treating petitioner he recalled petitioner having heart failure issues or fluid overload, but could not recall if it was due to the left ventricular or right heart failure. He further opined that there can be a tie between atrial fibrillation and congestive heart failure. Dr. Johnson was of the opinion that atrial fibrillation can be idiopathic in nature.

On redirect examination, Dr. Johnson opined that atrial fibrillation can be acute, intermittent or chronic, and can be caused or aggravated by a number of different things. He also opined that it can be related to chronic lung disease in terms of aggravating it or helping trigger an acute episode of it. Dr. Johnson was of the opinion that someone can have chronic lung disease along with atrial fibrillation and congestive heart failure at the same time, and each one could aggravate or compound the other.

Petitioner offered into evidence the medical records of Litchfield Family Practice. On 10/9/07 petitioner told Dr. Johnson that he had pneumoconiosis based on a chest x-ray in July 2007. Dr. Johnson had not received a copy of the report. Dr. Johnson made no further references to this condition in his office notes after this date. A dry cough was noted on 12/21/07 associated with a runny nose, wheezing was noted on 11/6/07, a cough and sputum production on 1/15/07, a cough and sputum production associated with a runny nose and diagnosis of an upper respiratory infection on 6/26/07, nasal drainage and pulmonary cough, as well as a few scattered light rhonchi due to bronchitis and a viral infection on 1/11/05, shortness of breath on 10/23/03 and 10/31/03, and a diagnosis of bronchitis with clear lungs on 1/12/05. On all other visits between 2003 and 2008 petitioner had no cough or difficulty breathing, and his chest and lung exams were normal. On 1/11/05 petitioner underwent a chest x-ray that showed no active lung disease. A chest x-ray performed 10/21/03 demonstrated an enlarged heart, but no evidence of interstitial edema or infiltration, no pleural effusions, and mild prominence of the ascending segment of the thoracic aorta.

Petitioner also entered into evidence the records of Dr. Johnson from 10/29/03 through 2/27/12. During this period petitioner saw Dr. Johnson on 131 occasions. On 4/27/11 petitioner reported a non-productive cough for 6 days. His chest and lung examination was normal. On 4/27/06 petitioner reported a cough and sputum production following a cough and runny nose for 4 days. On 1/17/05 petitioner was diagnosed with bronchitis, but his lungs were clear. On 2/8/05 his bronchitis was much better and his lungs were clear. On 5/16/05 petitioner was diagnosed with bronchitis. On 7/27/09 petitioner had a progressive cough over the last 3 weeks, some low-grade fevers, and a sore throat. He reported shortness of breath, but no orthopnea or wheezing. He had coarse breath sounds in his right middle lobe area. He was diagnosed with pneumonia. On

7/27/09 his oxygen saturation resting was 92% and normal. On 1/27/09 Dr. Nallamothu drafted a letter to Dr. Johnson stating that petitioner had undergone a cardiopulmonary stress test that showed a combination of both cardiac and pulmonary etiologies for his shortness of breath, both moderate in degree. Dr. Nallamothu saw no overwhelming evidence of obstructive coronary disease, but noted that petitioner has some obstructive lung disease. On 1/6/09 petitioner presented with progressive shortness of breath over the past 6 months. Petitioner had no cough or sputum production. On 5/5/08 petitioner underwent an MRI of the brain. The findings were suggestive of sinusitis. On 6/29/09 petitioner had complaints of chest pain, shortness of breath and fatigue. Petitioner's chest was clear.

C. DID PETITIONER SUSTAIN AN OCCUPATIONAL DISEASE 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 DISEASE?

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after it's contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. No compensation shall be payable for or on account of any occupational disease unless disablement occurs within two years after the last day of the last exposure to the hazards of the disease, except in cases of occupational diseases caused by berrylliosis, or by the inhalation of silica dust or asbestos dust and, in such cases, within three years after the last day of the last exposure to the hazards of such disease.

In the case at bar petitioner is alleging he sustained an occupational disease to his lungs and/or heart that arose out of and in the course of his employment on 8/20/06. Petitioner alleges his occupational disease is due to the inhalation of coal mine dust including, but not limited to, coal dust, rock dust, fumes and vapors for a period in excess of 30 years. Petitioner is alleging shortness of breath and exercise intolerance.

The parties stipulate that petitioner's mining career consisted of approximately 30 years of mining, all of which were underground, and all of which were for respondent. During this period petitioner worked as a

ventilation man, and belt man. During this period petitioner was regularly exposed to rock and silica dust, the fumes from roof bolting glue containing isocyanates, petroleum products, diesel exhaust, and trowel on containing isocyanates. Although petitioner was supplied with masks that had filters, he stated that due to his heavy manual labor he would sweat and his glasses would fog up, and as a result he would need to work without his respirator. Petitioner testified that when he was around glues and diesel exhaust he could smell the fumes through his respirator. Petitioner's exposure to the roof bolting glues occurred when he traveled through areas where there were broken tubes of glue. He was also exposed to roof glue when he would take the dumpsters out of the mine. Petitioner's exposure to trowel on or strong seal occurred while he was working on the belt crew. Petitioner's exposure to silica was when he worked in areas where rock dusting was being, or had been conducted. His exposure to diesel fumes occurred constantly, because in the mid-1990s the equipment in the mine became all diesel powered.

Petitioner's medical records from Dr. Johnson and the Litchfield Family Practice for the period 2003 through 8/20/06 were offered into evidence. A chest x-ray performed 10/21/03 demonstrated an enlarged heart, but no evidence of interstitial edema or infiltration, no pleural effusions, and mild prominence of the ascending segment of the thoracic aorta. Shortness of breath was noted on 10/23/03 and 10/31/03; nasal drainage and pulmonary cough, as well as a few scattered light rhonchi due to bronchitis and a viral infection were noted on 1/11/05; and, a diagnosis of bronchitis with clear lungs on 1/12/05. On 1/11/05 petitioner underwent a chest x-ray that showed no active lung disease. On 1/17/05 petitioner was diagnosed with bronchitis, but his lungs were clear. On 2/8/05 his bronchitis was much better and his lungs were clear. On 5/16/05 petitioner was diagnosed with bronchitis. On 4/27/06 petitioner reported a cough and sputum production following a cough and runny nose for 4 days. On all other visits between 2003 and 8/20/06 petitioner had no cough or difficulty breathing, and his chest and lung exams were normal.

In October 2003 petitioner was diagnosed with atrial fibrillation. A chest x-ray dated 10/21/03 revealed cardiomegaly, and a successful cardioversion was performed 1/6/04 that revealed mild concentric left ventricular hypertrophy, moderately to severely dilated left and right atrium, mild mitral regurgitation, and no thrombosis in the left atrial appendage.

Following his retirement petitioner presented to Dr. Nallamothu on 6/29/07 with a chief complaint of chest pain and shortness of breath. Dr. Nallamothu diagnosed palpitations, shortness of breath, chest pain, hyperlipidemia, alcohol dependence, benign hypertension, and atrial fibrillation.

On 7/17/07 Dr. Henry, a certified/NIOSH B-reader read petitioner's chest x-ray. His impression was pneumoconiosis with interstitial fibrosis s/t, mid to lower zones involved, perfusion 1/1, with a left mid lateral circumscribed calcified plaque and bilateral calcified diaphragmatic plaques.

Dr. Houser examined petitioner on 1/23/08. Dr. Houser's assessment included coal worker's pneumoconiosis category one, chronic obstructive pulmonary disease, diaphragmatic calcification/plaque, obesity, hypercholesterolemia, atrial fibrillation, hypertension, and GERD. Dr. Houser opined that petitioner had sufficient occupational exposure and chest roentgenographic findings appropriate for the diagnosis of coal worker's pneumoconiosis category 1/0. He further opined that petitioner's moderately severe COPD, was most likely related to the inhalation of coal and rock dust. Dr. Houser was of the opinion that exposures in the coal mine including coal dust, silica, diesel fumes, welding fumes, smoke and fumes from high sulfur coal fires, cable fires, and glues used in roof bolting can be harmful to a person's pulmonary health. Dr. Houser opined that petitioner has damage to his lungs as a result of his occupational exposures to coal mine dust. Dr. Houser based his opinion of coal worker's pneumoconiosis on petitioner's history of occupational exposure as a miner for approximately 30 years and on the chest roentgenographic findings. Dr. Houser opined that petitioner's COPD was secondary to inhalation of coal and rock dust, and that he has radiographically apparent abnormalities that are consistent with pulmonary impairment caused by coal worker's pneumoconiosis secondary to inhalation of coal and rock dust. Dr. Houser opined that CT scans are not recognized by NIOSH under the B-reading system for diagnosing coal worker's pneumoconiosis. Dr. Houser admitted that petitioner's excess weight can have an effect on some of the pulmonary function results, and be a contributing factor to the reduction in vital capacity.

Dr. Wiott reviewed AP and lateral chest x-rays dated 9/25/09 and found them of acceptable quality by IOL standards (quality – 1). He was of the opinion that there was no evidence of coal worker's pneumoconiosis.

Dr. Tuteur was of the opinion that clearly, petitioner was exposed to sufficient amounts of coal mine dust to produce coal worker's pneumoconiosis in a susceptible host. He believed petitioner's most significant health problem began while working underground in October 2003, when he suddenly developed dizziness and breathlessness. Medical evaluation at that time identified cardiomegaly, and atrial fibrillation never before discovered. Dr. Tuteur did not believe there was any convincing evidence whatsoever to indicate the presence of coal worker's pneumoconiosis. He noted that petitioner's oxygen saturation while sitting and breathing room air was within the normal range. He saw no signs or symptoms of airflow obstruction, nor clinical picture similar to that of chronic obstructive pulmonary disease to support a finding of legal coal worker's

pneumoconiosis. Dr. Tuteur was of the opinion that although petitioner has breathlessness, it is fully explained by his obesity and hypertensive treatment.

Dr. Tuteur opined that petitioner's shortness of breath was not in any way related to him being exposed to coal dust as a miner. He was of the opinion that petitioner's moderate to severely dilated left atrium was due to petitioner's atrial fibrillation. He noted that petitioner had no worse than a minimal obstructive abnormality, which is very much a non-clinically significant entity, and does not limit exercise. He attributed petitioner's problems to the effects of the beta blockers that he takes. He noted that beta blockers will limit cardiac function or the total amount of oxygenated blood that flows during exercise. He opined that petitioner's cardiac limitation to exercise is unrelated to the inhalation of coal mine dust or the development of coal worker's pneumoconiosis. Dr. Tuteur was of the opinion that the improvement in the pulmonary function results of Dr. Houser in 2008 versus those when he tested petitioner in 2009 were due the improvement in the control of some degree of the left ventricular dysfunction. Dr. Tuteur did not diagnose petitioner with COPD. Dr. Tuteur was of the opinion that both restrictive and obstructive defects can be multi-factorial in etiology, and each of them could be aggravated by some exposure, even if it were not caused by that specific exposure.

Dr. Tuteur's opinion regarding the relative risk of coal mine dust exposure was different from the conclusions of the Department of Labor, NIOSH, and the literature that they relied on. He admitted that coal mine dust includes exposures that can harm a lung in addition to just coal dust. These exposures were identified as silica, diesel fumes, smoke that accompanies the welding process when the material that is being welded has high sulfur coal dust on it, smoke and fumes from fires of high sulfur coal, and fumes from roof glues used in the roof bolting process. Dr. Tuteur also agreed that inhalation of silica dust as a component of coal mine dust can cause obstructive ventilatory defect, and can aggravate a defect that was caused by some other insult. He agreed that a CT scan is not an epidemiologic tool, and that NIOSH and the reader system are epidemiologic tools. Dr. Tuteur also admitted that exposure to the glues used in the roof bolting process can cause reactive airway disease. He also stated that other exposures in the environment of a coal mine that can cause chemically induced bronchial reactivity include petroleum products, diesel exhaust, sprayed on paints that contain isocyanates, and adhesives that contain isocyanates. He did not believe petitioner has chemically induced bronchial reactivity.

On 6/16/11 Dr. Cohen, also a certified B-reader, interpreted the x-ray dated 7/17/07. His impression was positive for the opacities of pneumoconiosis p/s in shape at a profusion of 1/0.

Dr. Johnson diagnosed petitioner with bronchitis and COPD, and was of the opinion that there is a significant possibility, not probability, that these conditions are related to petitioner's exposures as a coal miner.

Dr. Johnson admitted that petitioner's feelings of fatigue and general weakness may be components of atrial fibrillation. He also stated that being overweight was always an issue for petitioner, and being overweight can cause someone to feel short of breath with activities. He also stated that feeling short of breath is a symptom of atrial fibrillation. Dr. Johnson was of the opinion that someone can have chronic lung disease along with atrial fibrillation and congestive heart failure at the same time, and each one could aggravate or compound the other.

Based on the above as well as the credible evidence, the Arbitrator finds that the petitioner sustained an occupational disease that arose out of and in the course of his employment by respondent on 8/20/06. The arbitrator bases this finding on the fact that petitioner worked in the coal mines for 30 years; that during this period he was regularly exposed to rock in silica dust, the fumes from roof bolting glue containing isocyanates, petroleum products, diesel exhaust and trowel on containing isocyanates; that petitioner's treating records from 2003 to 2006 when petitioner worked in the coal mine included reports of shortness of breath, pulmonary cough, bronchitis, and a cough with sputum; and that Dr. Houser, Dr. Henry, Dr. Cohen, all certified B-readers, interpreted petitioner's chest x-ray dated 7/17/07 and found it positive for pneumoconiosis. The arbitrator finds the readings of these doctors more credible than those of Dr. Tuteur, who based his finding that petitioner did not have pneumoconiosis on a CT scan, which is not recognized by NIOSH under the B-reading system for diagnosing coal worker's pneumoconiosis. Although Dr. Wiott, who is also a certified B-reader interpreted a chest x-ray performed 9/25/09, and found no evidence of coal worker's pneumoconiosis, he did not interpret the x-ray dated 7/17/07.

The arbitrator further finds that petitioner's current condition of ill-being became aggravated and disabling as a result of his occupational exposures to coal dust, silica diesel fuel, welding fuels, smoke and fumes from high sulfur coal fires, cable fires, and glues used in roof bolting. The arbitrator finds, based on the credible evidence, that these exposures can be harmful to a person's pulmonary health. Although it is unrebutted that petitioner has had atrial fibrillation since 2003, and is obese, Dr. Tuteur admitted that petitioner was exposed to sufficient amounts of coal mine dust to produce coal worker's pneumoconiosis in a susceptible host; that the inhalation of silica dust as a component of coal mine dust can cause obstructive ventilatory defect, and can aggravate a defect that was caused by some other insult; that exposure to glues in the roof bolting process can cause reactive airway disease; and that petroleum products, diesel exhaust, sprayed on paints containing isocyanates, and adhesives that contain isocyanates can cause chemically induced bronchial reactivity.

The arbitrator relies on the treating records of Dr. Johnson who opined that over the years he has been treating petitioner he has diagnosed petitioner with bronchitis and COPD, and is of the opinion that there is a significant possibility, not probability, that these conditions are related to petitioner's exposures as a coal miner.

Dr. Johnson admitted that shortness of breath is a symptom of atrial fibrillation, but with someone who has chronic lung disease along with atrial fibrillation and congestive heart failure at the same time, each diagnosis could aggravate or compound the other. The arbitrator does not discount the clinical findings of Dr. Tuteur, but notes that his opinions are based on a snapshot in time and not on the totality of petitioner's medical condition over a minimum of 9 years for which medical evidence was admitted.

The arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that the calcified pleural plaque seen on the laboratory data are causally related to his work as a coal miner. The arbitrator bases this opinion on the findings of both Dr. Houser and Dr. Tuteur who opined that these findings are most likely secondary to his prior asbestos exposure while working for a different employer.

E. WAS THE TIMELY NOTICE OF THE DISABLEMENT GIVEN TO RESPONDENT?

Pursuant to section 6 (c) of the Occupational Diseases Act it states "there shall be given notice to the employer of disablement arising from an occupational disease as soon as practicable after the date of the disablement." It further states "if the commission shall find that the failure to give such notice substantially prejudicial as the rights of the employer the commission in its discretion may order that the right of the employee to proceed under this act shall be barred."

Petitioner claims that respondent received notice of this claim when the Application for Adjustment of Claim was filed on 9/13/07. Petitioner's disablement date is 8/20/06. The Act requires that the Application for Adjustment of Claim be filed with the Commission within three years after the date of disablement where no compensation has been paid, or within two years after the date of the last payment of compensation, where any has been paid, whichever shall be later. In the case at bar, the petitioner filed its Application for Adjustment of Claim within 13 months of the disablement date, which clearly meet the requirements of the Act. Therefore the respondent must prove that its' rights were substantially prejudiced by this delay. Having reviewed the credible evidence the arbitrator finds the respondent suffered no substantial prejudice. Petitioner was not alleging any medical treatment be paid by respondent during this period, was not seeking any temporary total disability benefits for this period, and the respondent had the opportunity to have a doctor of its own choosing evaluate the petitioner and issue its findings. As such, the respondent offered no credible evidence to support a claim that respondent was not provided with timely notice, or was substantially prejudiced by any delay in notice.

Based on the above as well as the credible evidence the arbitrator finds the petitioner provided the respondent with timely notice of his claimed disablement.

L. WHAT IS THE NATURE AND EXTENT OF THE DISABLEMENT? 14IWCC0841

Petitioner claims he is entitled to a wage differential pursuant to Section 8(d)(1) of the Act. Petitioner claims that he is partially incapacitated and that prevents him from pursuing his usual and customary line of employment. Although it is true that Dr. Houser and Dr. Johnson have opined that petitioner can no longer safely work in the coal mine, the arbitrator notes that petitioner had retired, of his own free will, on 8/20/06, and not the result of any work restrictions imposed on him.

Petitioner testified that the reason he retired was that his wife had been ill, and he wanted to make sure that he had his pension and health benefits, since there was rumor that the coal mine would be closing in October 2006. Despite the fact that the coal mine did not close until sometime in 2007, petitioner made no effort to try and resume his employment with respondent after he retired and before he was diagnosed in 2007 with pneumoconiosis. Additionally, there is no credible evidence to support of finding that petitioner was, at any time before he retired, unable to perform his usual and customary job. Therefore, the arbitrator finds the petitioner voluntarily left his employment with respondent so that he could receive his retirement benefits. At no time prior to petitioner retiring on 8/20/06, did any doctor find that the petitioner was unable to work as a coal miner.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to a loss of use of the person as a whole pursuant to Section 8(d) 2 of the Act. Petitioner suffers from many ailments, many of which are not related to his work as a coal miner. These ailments include atrial fibrillation, GERD, hypercholesterolemia, hypertension, and obesity. Petitioner also has calcified pleural plaque most likely secondary to a prior asbestos exposure while working for another employer. However petitioner's x-rays show that he has pneumoconiosis 1/0.

Both Dr. Houser and Dr. Tuteur had different clinical findings when petitioner appeared before them a year apart, and Dr. Houser admitted that petitioner's varying ejection fractions was indicative that petitioner's condition was not a deteriorating condition. Dr. Johnson treated petitioner from October 2003 through February 2012, and has diagnosed petitioner with bronchitis and COPD. He admitted that petitioner's feelings of fatigue and general weakness may be components of atrial fibrillation. He also stated that being overweight was always an issue for petitioner, and being overweight can cause someone to feel short of breath with activities. He also stated that feeling short of breath is a symptom of atrial fibrillation. Dr. Johnson opined that someone can have chronic lung disease along with atrial fibrillation and congestive heart failure and each one of these could aggravate or compound the other.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 7 1/2% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

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

DUSTIN BOWLES,

Petitioner,

14IWCC0042

vs.

NO: 10 WC 47852

PICKNEYVILLE CORRECTIONAL,

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, causal connection, prospective medical and notice, and being advised of the facts and applicable law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that the evidence depositions of Melanie Welch, Jason Thompson, Robert Schuchert, Jimmy Phillips, Donna Jones, and Jaelene Bryan were all taken for and tendered for use in other cases. The depositions of Jason Thompson, Robert Schuchert, Jimmy Phillips, Donna Jones, and Jaelene Bryan were taken in the case of Jimmy Phillips, a/k/a "Correctional Officer," et.al. v. SCI/Pickneyville C.C., 10 WC 23567. The deposition of Melanie Welch was taken in the case of Donna Jones a/k/a "Correctional Officer," et.al. v. State of Illinois, Department of Corrections, Pinckneyville Correctional Center, 2010 WC 38807, et. al.

The Commission finds that the deposition testimony is inadmissible hearsay as it relates to the case at bar. The exhibits and purported testimony from the depositions is stricken from the record and reference to said is stricken from the Arbitrator's decision. Despite having found the

14IWCC0842

aforesaid testimony inadmissible and striking same from the record, the Commission affirms the Arbitrator's decision, and finds sufficient other evidence of record.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 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.

DATED: OCT 0 6 2014

MJB/tdm
O: 9-29-14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

BOWLES, DUSTIN
Employee/Petitioner

Case# **10WC047852**

SOI/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

14IWCC0842

On 4/4/2014, 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

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

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
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

APR 4 2014

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

14IWCC0842

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)

DUSTIN BOWLES
Employee/Petitioner

v.

STATE OF ILLINOIS/
PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

Case # 10 WC 47852

An *Application for Adjustment 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 **Herrin**, on **January 16, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 6, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,956.00**; the average weekly wage was **$1,076.08**.

On the date of accident, Petitioner was **30** 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 for all medical expenses paid under Section 8(j) of the Act.

ORDER

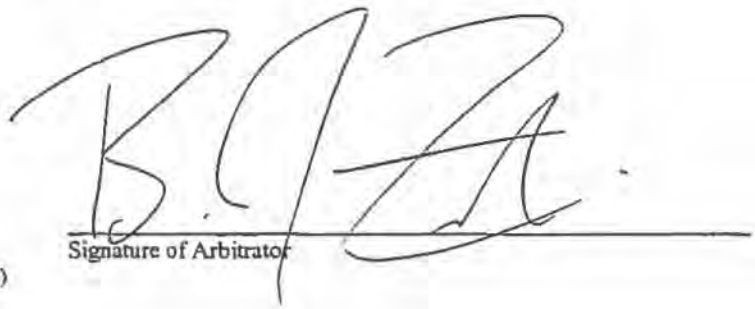
Respondent shall pay reasonable and necessary medical services of $2,563.00, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for the medical treatment recommended by Dr. David Brown, pursuant to 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

03/16/2014
Date

ICArbDec19(b)

APR 4- 2014

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

14IWCC0842

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DUSTIN BOWLES
Employee/Petitioner

v. Case # 10 WC 47852

STATE OF ILLINOIS/
PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner's Testimony

At the time of his alleged manifestation date, Petitioner was a 30-year-old correctional officer for Respondent at its Pinckneyville Correctional Center. Petitioner testified to no comorbid risk factors such as diabetes, gout, hypothyroidism or rheumatoid arthritis; he weighs approximately 180 pounds. He has worked at Pinckneyville Correctional Center for 12-and-a-half years. He began his employment with Respondent in 2001 and submitted a Work History Timeline/Job Description into evidence detailing the job duties and correctional officer assignments held throughout his career. (Petitioner's Exhibit (PX) 7).

Petitioner worked at Joliet Correctional Center, a maximum security facility, from 2001-2002. (PX 7). Petitioner testified that the doors at Joliet Correctional Center were very old (heavy sliding bar cell doors), as the facility was built in the 1850s, and did not open very easily. He testified that all the doors in the facility were this heavy-type cell door, which used the heavy brass Folger Adams key. He testified that it required the forceful use of two hands to open the doors. He stated that the force used to turn the key had to be maintained in order to keep the door latch back while he pulled the door open. Since the latches and locks failed often, a locksmith was kept on duty. Petitioner testified that he performed bar rapping, cuffed and uncuffed inmates, and restrained inmates. Petitioner also opened and closed chuckholes. When that facility closed, Petitioner was moved to Stateville Correctional Center, another maximum security facility. Petitioner testified that he performed these same activities at Stateville Correctional Center, and that they were just as difficult at Stateville as they were at Joliet Correctional Center.

At Pinckneyville Correctional Center, Petitioner rotated positions, but spent the majority of his time in the R5 segregation unit. Petitioner split his time "50/50" between day and second shift. Petitioner reviewed the videos prepared by Respondent concerning his job duties and stated that did not accurately depict the pace at which he worked or the frequency of the activities he performed. He stated that the videos also failed to depict

any of the difficulties which he encountered in the performance of his job duties, and did not even show the R5 unit in which he spent a considerable portion of his time.

Petitioner testified that he bar raps the bars in the receiving area with a mallet and experiences the same sensation in his hands and arms that he did when he bar rapped at Joliet and Stateville. Petitioner testified that the chuckholes in segregation utilized Folger Adams keys and that they also stuck quite a bit due to the wear and tear, dried food and body waste that has been spilled or thrown in them. He has to slam these chuckholes shut with both hands and has done so thousands of times. He testified that there is also a locksmith on duty at Pinckneyville. Petitioner testified that the locks stick in the R5 unit and that he has to do whatever he can to get the locks open, including hitting them with his hand, kicking them, or jimmying them. Petitioner testified that jimmying the locks is strenuous and requires force and the use of both hands. He testified that this occurs more frequently in the segregation unit. Petitioner also performs wing checks every 30 minutes, where he forcefully pulls on cell doors to make sure they are closed. He testified that he uses both hands for this activity.

Petitioner also performs shakedowns, which involves searching through inmate property and lifting property boxes that weigh an average of 50 pounds. He looks behind lights, checks sockets, and lifts mattresses as well. He further testified that the facilities go on lockdown, which eliminates inmate movement, and that the duties of officers double or triple during that time. When lockdown occurs, there are no inmate workers to carry items up stairs, perform trash duties, or carry food. Correctional officers such as Petitioner must perform these tasks. There is nothing in Respondent's video or analysis depicting the duties of an officer during lockdown. He testified that the facility went on lockdown a number of times in 2010, and that he noticed an increase in his symptoms of numbness and aching during that time. Petitioner also testified that he cuffed and/or uncuffed inmates thousands of times during his career at Pinckneyville. He testified that this requires strength and force because the inmates do not like correctional officers and make things difficult when they can.

When asked to review a job assignment roster by Respondent, Petitioner testified that it contained inaccuracies. He stated the following:

> "Well, to make it clear – and people can vouch for me here – you may show up on a roster or something and never see that spot. I mean, I was one of the ones that was always pulled. I could be shown as this and they could pull me and put me other places, which was always in seg, armory, walk." (Trial Transcript, p. 60).

Other Witness Testimony

Several other employees of Respondent's Pinckneyville facility testified concerning various matters at issue, although their testimony was taken in another matter. Petitioner testified that he reviewed the testimony of his co-workers and agreed with their statements.

Robert Schuchert testified via deposition. Mr. Schuchert was employed at Respondent's Correctional Center as the facility's locksmith. (PX 10, p. 4). He served as a correctional officer, like Petitioner, from 1998 until January 2004. Since 2004, he has been a locksmith at the Pinckneyville facility. (PX 10, p. 6). Mr. Schuchert viewed the videos from Menard Correctional Center and Pinckneyville Correctional Center. (PX 10, p. 7). He also reviewed the Job Site Analysis. (PX 10, pp. 7-8). He testified that while employed as a locksmith at Pinckneyville, he developed bilateral compression neuropathies and filed a workers' compensation claim that was accepted by Respondent. (PX 10, p. 8). The claim was settled. He attributed his injuries to his repetitive work at Menard and Pinckneyville Correctional Centers. (PX 10, pp. 9-10). He acknowledged that all

Correctional/Wing Officers had to key open chuckholes, cell doors, cabinets, and medical cabinets; and diary each item that had to be keyed out, logged out, keyed back in, and logged back in. (PX 10, pp. 11-12). He noted that the locks have gotten worse over the years, and described the current condition of the locks as fair to poor. (PX 10, pp. 12-14). He acknowledged that Respondent's witness, Lieutenant Thompson, was correct in stating that the locks and the chuckholes were very difficult to open. (PX 10, pp. 16-17). The difficulty stemmed not only from the locks, but from the food spilled in them. (PX 10, p. 18).

Jimmy Phillips also testified via deposition. Mr. Phillips was hired by Respondent in 1998. Mr. Phillips testified concerning the job duties of a correctional officer, and said testimony corroborated Petitioner's testimony on the subject. He also testified as to several correctional officer duties that are not depicted on Respondent's video. (PX 11).

Donna Jones also testified via deposition. Ms. Jones has served as a correctional officer at Respondent's Pinckneyville facility since July 1998, and has worked all three shifts. (PX 12, pp. 4-5). There was no part of the facility in which she had not worked. (PX 12, p. 5). She reviewed both the video and the Job Site Analysis prepared by Respondent. (PX 12, pp. 5-6). Ms. Jones noted several duties that were not depicted on Respondent's video. Ms. Jones also testified as to some of the duties of a correctional officer, and said testimony corroborated Petitioner's testimony on the subject. (PX 12).

Jaelene Bryan also testified via deposition. Ms. Bryan has been a correctional officer/wing officer at Pinckneyville Correctional Center for over 13 years. (PX 13, pp. 4-5). She also reviewed both videos and the Job Site Analysis prepared by Respondent. (PX 13, pp. 5-6). She confirmed that the heavy steel doors were very difficult to open, especially in the summer because the doors expand and stick. (PX 13, pp. 6-7). While the video showed cuffing and un-cuffing the inmates, it did not show the degree of difficulty it took to perform this activity. (PX 13, p. 7). Ms. Bryan noted several duties that were not depicted on Respondent's video. Ms. Jones also testified as to the duties of a correctional officer, and said testimony corroborated Petitioner's testimony on the subject. (PX 13).

Lieutenant Jason Thompson testified both via deposition and in person at trial. He testified that keying cells and chuckholes, opening and closing doors, cuffing and un-cuffing inmates, turning difficult keys, opening difficult doors, pulling on bars, checking cell doors, weapons training, working mandated double shifts, performing extra duties on lock down, opening and closing chuckholes, lifting property boxes, carrying trays upstairs, restraining inmates, guiding inmates through lines, and performing various amounts of paperwork were the duties of a correctional officer. He further agreed that there was not a single part of the job that did not involve using one's arms, hands, or elbows. (PX 9, pp. 36-38). In addition, he acknowledged that these activities involved force and stress. (PX 9, p. 40).

Lt. Thompson was called as an adverse witness by Petitioner. He testified that he was employed at Respondent's Pinckneyville facility from 1998 to 2012. He testified that he started as a correctional officer and was eventually promoted to lieutenant. He testified that the key estimation he performed was an estimate, not an exact or accurate count of the key turns performed by correctional officers; it was simply his best estimate. He only conducted this estimation on the 7:00-3:00 shift; however, he stated that R5 was different at the time the estimate was performed and that key usage on the 3:00-11:00 shift was higher. Lt. Thompson testified that he was unaware of all of Petitioner's job assignments, did not know what shift Petitioner currently worked, and could not recall what shift Petitioner worked in 2010 when his injuries manifested. He did testify, however, that he had the opportunity to work alongside Petitioner on occasion, and that Petitioner was a very good employee. He affirmed that he previously testified by deposition in another case that a correctional officer uses his or her

hands anywhere from 5 to 6 hours per day, and that his testimony under oath is current and would remain the same. He also corroborated Petitioner's testimony concerning inaccuracies of the assignment roster presented by Respondent. He explained that the exhibit presented by Respondent was printed pre-time and therefore any changes in assignments would not be reflected on the pre-time print out, but on the daily rosters. He testified that these daily rosters were not present at the hearing. He did not believe there were any inaccuracies or untruths in Petitioner's testimony.

Medical Care and Treatment

Petitioner testified that during the course of his job duties, he began experiencing symptoms of numbness, tingling and aching. Petitioner sought treatment with Dr. David Brown on December 6, 2010. Dr. Brown noted that Petitioner had worked for the Department of Corrections since 2001, and that his job duties entailed opening cell doors, bar rapping, cuffing and uncuffing inmates and opening chuckholes with Folger-Adams keys. Physical examination demonstrated positive direct compression and Tinel's over his carpal tunnels bilaterally. (PX 3, 12/06/10). Dr. Brown recommended an electrodiagnostic evaluation, which confirmed his clinical diagnosis of bilateral carpal tunnel syndrome. (PX 3, 12/06/10; PX 4). Dr. Brown noted that based on Petitioner's job description as a Correctional Officer for Respondent, his work would be an aggravating factor in his condition and treatment. Dr. Brown recommended conservative treatment. (PX 3, 12/06/10).

Petitioner testified that he did not seek treatment for his symptoms prior to December 6, 2010, and did not receive any diagnosis prior to December 6, 2010. Petitioner testified that December 6, 2010 was the first day he was advised that he had a work-related condition. He filled out an incident report with Respondent on December 13, 2010. (RX 2).

When Petitioner returned to Dr. Brown on January 12, 2011, there was no improvement in his symptoms. Since Petitioner failed conservative treatment, Dr. Brown recommended surgery. (PX 3, 01/12/11). Petitioner wishes to undergo the surgery recommended by Dr. Brown.

Respondent had Petitioner's records reviewed by Dr. James Williams, who testified by way of deposition. (RX 13; RX 14). After reviewing the information provided to him by Respondent, including the analyses and job assignment roster, Dr. Williams did not believe that Petitioner's job duties were a contributing or aggravating factor in Petitioner's bilateral carpal tunnel syndrome. (RX 13).

Dr. Williams testified that he did not believe Petitioner's key turning to be an aggravating factor in his condition based upon the fact that there appeared to be adequate rest depicted in Respondent's analysis between the opening of each cell door. (RX 14, p. 19). He also believed that Petitioner's condition should have been worse on his right side given he is right-hand dominant. (RX 14, p. 20). He also relied on the job assignment history provided to him by Respondent. (RX 14, pp. 10, 20).

On cross-examination, Dr. Williams acknowledged that Petitioner lacked any comorbid risk factors associated with the development of carpal tunnel syndrome. (RX 14, p. 28). He was unaware of whether or not Petitioner worked any overtime, although he acknowledged that that would be important information. (RX 14, p. 28). When asked whether or not Petitioner worked in segregation, Dr. Williams indicated that Respondent's job roster did not indicate that Petitioner worked in segregation. (RX 14, p. 29). He acknowledged that bar rapping was an activity that could cause or contribute to the development of bilateral compression neuropathy. (RX 14, p. 30). He also agreed that forceful and repeated gripping can cause pressure within the carpal tunnel, and that forceful pinching is associated with increased risk for carpal tunnel. (RX 14, p. 35). He also

acknowledged that repetitive motion of the fingers and repeated flexing of the flexor tendons can lead to swelling and irritation of the nerve within the carpal tunnel. (RX 14, pp. 35-36). He was unaware of Petitioner's career with Respondent prior to his post at Pinckneyville and never had the opportunity to visit the Stateville or Joliet facilities. (RX 14, pp. 30-31). He testified that he knew nothing of the duties of a correctional officer at Stateville or Joliet. (RX 14, p. 31). Although disagreeing with respect to causation, Dr. Williams agreed with the treatment and surgical intervention recommended by Dr. Brown. (RX 14, pp. 31-32).

Dr. Williams also acknowledged that the difficulties opening doors and chuckholes described by Petitioner were not depicted in the video or evidenced in Respondent's job site analyses. (RX 14, p. 39). He testified, however, that encountering such complications while performing these tasks could contribute to the development of bilateral carpal tunnel syndrome. (RX 14, pp. 39-40). These analyses also do not mention forcefully pulling on doors while performing wing checks. (RX 14, p. 40). Dr. Williams acknowledged that this activity could also be contributory, but he did not have any information as to the frequency with which this activity was performed. (RX 14, pp. 41-42). He similarly lacked information on other duties which could be contributory. (RX 14, pp. 43-44). He acknowledged that an inmate resisting a correctional officer could increase the pressure on the officer's arms and hands. (RX 14, p. 51). He acknowledged that if the information which he received and based his causation opinion on was flawed, his opinion would be flawed and could change. (RX 14, pp. 38-39).

Petitioner's treating physician, Dr. Brown, also testified by way of deposition. (PX 6). Dr. Brown reviewed both of Respondent's job site analyses; the DVDs, the key usage study; Dr. Williams' review of Respondent's Job Site Analysis; Petitioner's post descriptions; the depositions of Lt. Jason Thompson, locksmith Robert Schuchert, Officer Jaelene Bryan, Officer Donna Jones and Officer Jimmy Phillips; and Dr. Williams' records review and testimony. (PX 6, p. 16). He also took a personal history from Petitioner. (PX 6, p. 17). Dr. Brown testified that he has treated other correctional officers from Petitioner's facility, and that he is familiar with the job duties of a Pinckneyville correctional officer. (PX 6, p. 19). He noted the lack of detail and various omissions in Respondent's analyses. (PX 6, pp. 27-30). According to the doctor, Respondent's evidence does not take into consideration the difficulties and malfunctions that correctional officers frequently encounter. (PX 6, pp. 27-30). He also noted that the key estimation study does not account for the increase in keying activities during lockdown, working double shifts, or being assigned to more than one wing. (PX 6, p. 32). He noted that in one instance on one of the DVDs, the camera panned away when an officer began having difficulty locking a door, which corroborated what other correctional officers say commonly occurs. (PX 6, pp. 33-34).

Dr. Brown explained that a latency period is a common concept in medical disease processes, including repetitive trauma, wherein there is a period of time between exposure or accumulation of the injury and the actual development of symptoms. (PX 6, p. 37). He testified that patients can be asymptomatic for years before they reach a threshold where sufficient damage has occurred for them to begin experiencing symptoms. (PX 6, pp. 37-38). Based upon Petitioner's clinical examination, the electrodiagnostic studies and the information he has concerning Petitioner's employment, Dr. Brown believed that Petitioner's employment at Pinckneyville Correctional Center caused, contributed or aggravated the development of his bilateral carpal tunnel syndrome. (PX 6, p. 34). Dr. Brown noted that Petitioner was a healthy 30-year-old man without non-occupational risk factors such as diabetes, hypothyroidism, arthritis or hand-intensive hobbies. (PX 6, pp. 22, 34). He testified that it is unusual for someone like Petitioner to develop carpal tunnel syndrome without a cause. (PX 6, p. 34). Dr. Brown testified that the detail provided in Respondent's evidence concerning Petitioner's job duties, combined with the information which is not provided therein, would constitute activities that at least would be an aggravating factor in Petitioner's condition. (PX 6, pp. 34-35).

Dr. Brown noted that if Dr. Williams' claim that there is sufficient rest between key turns was based on the pace depicted in Respondent's DVD, the time that elapses between key turns would only be the few seconds it takes to move from one cell door to the next, which he stated was an insufficient rest interval to exclude key turning as a factor. (PX 6, pp. 39-40). He also testified that Dr. Williams' belief that Petitioner should have developed greater symptoms in his non-dominant hand was false. (PX 6, p. 41).

CONCLUSIONS OF LAW

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

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

There is no standard threshold which a claimant must meet in order for his or her job to classify as "repetitive" enough to establish causal connection. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 193-194, 825 N.E.2d 773 (2d Dist. 2005). There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. *Id.* When a claimant's work activities are varied, the Court has specifically held that "repetitive" is not defined as performing one or two tasks; rather, "repetitive" refers to the rigorous use of an extremity throughout employment, even though the tasks performed may vary. *City of Springfield v. Ill. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 901 N.E.2d 1066 (4th Dist. 2009). Furthermore, claimant need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Comm'n*, 309 Ill. App. 3d 1037, 1040, 723 N.E.2d 846 (3d Dist. 2000).

The Arbitrator finds that Petitioner has made such a showing. As noted by Dr. Brown, Petitioner is young and has no non-occupational risk factors for the development of his injuries. Dr. Williams acknowledged the same. Petitioner testified to a history of performing hand-intensive duties on a repetitive basis for Respondent, including turning keys (some of which are Folder Adams), cuffing and uncuffing inmates, opening and closing heavy steel doors with locks that malfunction, opening and closing chuckholes that stick, performing shakedowns, and some bar rapping. His testimony is corroborated by that given by other officers by way of deposition, as noted *supra*. Dr. Brown stated his belief that these duties caused or contributed to the development of Petitioner's condition by way of deposition and in his treatment notes. Dr. Brown reviewed the evidence provided by both parties and had the benefit of examining Petitioner and taking a personal history. Based upon the totality of credible evidence, the Arbitrator finds Dr. Brown's opinion to be persuasive and credible.

While Dr. Williams did not believe Petitioner's job duties played a role in Petitioner's repetitive injuries, his opinion was based solely on the information provided to him by Respondent, which does not provide an accurate perception of Petitioner's work activities. Petitioner, Dr. Brown, fellow officers, and even Dr. Williams when presented with more information, all testified that Respondent's analyses do not depict many aspects of a correctional officer's job. Petitioner testified that the videos failed to depict any of the difficulties which he encountered in the performance of his job duties, and did not even show the R5 unit in which he spent a considerable portion of his time.

The Arbitrator also notes that Petitioner was a very credible witness at trial. He appeared to be endeavoring to give the full truth, including on cross-examination. He testified in a confident and respectful manner, and was forthcoming and open in his testimony.

Based on the foregoing, the Arbitrator finds that Petitioner sustained bilateral repetitive trauma injuries to his hands/wrists that arose out of and in the course of his employment as a correctional officer with Respondent. Further, Petitioner's current condition of ill-being is causally related to the injury.

Issue (D): What was the date of the accident?

Petitioner testified that he became aware of the nature of his condition and its relation to work following his visit with Dr. Brown. While Respondent points to various facts that Petitioner at least had suspicion his condition was work related, as the Supreme Court has stated, the "'fact of injury' is not synonymous with 'fact of discovery.'" *Durand v. Industrial Comm'n*, 224 Ill.2d 53, 68, 862 N.E.2d 918, 927 (2007). The Supreme Court also noted that it is common practice to set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand*, 862 N.E.2d at 929. In this case, that date would be the alleged date of December 6, 2010.

Therefore, the Arbitrator finds Petitioner's testimony as to when he became aware of the nature of his condition and became certain that his condition was work-related, namely the date he sought treatment with a physician and was advised of such, to be credible. The Arbitrator finds that Petitioner met his burden of proof regarding manifestation date and sets the date as December 6, 2010.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner alleged and successfully proved a manifestation date of December 6, 2010. Petitioner completed and submitted an Employee's Notice of Injury report on December 13, 2010. (RX 2). The notice requirements have therefore clearly been met.

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?; and

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

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill. App. 3d 705, 691 N.E.2d 13 (2d Dist. 1997). Dr. Williams agreed with the treatment and surgical intervention recommended by Dr. Brown. Based upon the above finding regarding causal connection and the acknowledgement of the reasonableness and necessity of Petitioner's treatment made by Respondent's examiner, Dr. Williams, the Arbitrator awards the following medical expenses, subject to the medical fee schedule, Section 8.2 of the Act:

Dr. David Brown/The Orthopedic Ctr. of Saint Louis	$	493.00
Dr. Phillips & Dr. Peeples/Neurological & Electrodiagnostic Institute	$	2,070.00
TOTAL:	**$**	**2,563.30**

Respondent shall have credit for any amounts paid through its group carrier and shall indemnify and hold Petitioner harmless from any claims made by any healthcare provider for which it is receiving this credit.

Further, given the Arbitrator's findings concerning causation, discussed *supra*, the Arbitrator hereby awards Petitioner the prospective medical treatment recommended by Dr. Brown.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Fabiola Fernandez,

Petitioner,

vs. NO: 13WC 25502

Dart Container,

Respondent,

14IWCC0843

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 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 11, 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.

14IWCC0843

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19, 700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 6 2014
MJB/bm
o-9/29/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FERNANDEZ, FABIOLA
Employee/Petitioner

Case# **13WC025502**

DART CONTAINER
Employer/Respondent

14IWCC0843

On 4/11/2014, 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:

4128 RUBENS AND KRESS
FRANK D KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

1109 GAROFALO SCHREIBER HART ET AL
ANDREW L ROWE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

☐	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

14IWCC0843

FABIOLA FERNANDEZ
Employee/Petitioner

Case #13 WC 25502

v.

DART CONTAINER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on March 28, 2014. 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 March 15, 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.
- 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 $29,055.00; the average weekly wage was $558.75.
- At the time of injury, the petitioner was 63 years of age, married with no children under 18.
- The parties agreed that the respondent paid $745.00 in temporary total disability benefits and 38 weeks at $495.01 per week in permanent partial disability benefits.
- The parties agreed that the petitioner is entitled to temporary total disability benefits for two weeks, from March 16, 2013, through March 24, 2013, and from August 9, 2013, through August 13, 2013.

ORDER:

- The petitioner is entitled to the sum of $495.01/week for 38 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 50% loss of use of her right thumb. The petitioner failed to prove that she is entitled to additional permanent partial disability benefits for her right thumb or right hand.

- The respondent shall pay the petitioner compensation that has accrued from March 15, 2013, through March 28, 2014, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for her right thumb was reasonable and necessary and is awarded. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

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

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

Robert E. Williams

Signature of Arbitrator

April 11, 2014
Date

APR 11 2014

FINDINGS OF FACTS:

The petitioner, a right-handed machine operator, lost the top of her right thumb in a machine accident on March 15, 2013. She was transported by emergency medical service to Advocate Christ Medical Center, where x-rays revealed an amputation at the distal phalanx of her first finger, normal joint alignment and no foreign bodies. Dr. Samir Shah noted that x-rays showed a complete amputation at the mid portion of the distal phalanx and a well-preserved joint. He performed a reconstruction of the amputated right thumb tip with bipedicle neurovascular advancement flap. She reported sensitivity at the tip of her thumb on April 2nd and May 3rd, locking of her ring finger on June 6th, and occasional cramping after a long day's work that improved on July 12th. On August 9th, Dr. Shah excised a remnant nail and residual matrix. At her last follow-up with Dr. Shah on October 8th, the petitioner reported some continued sensitivity at the tip, overall improvement and minimal difficulty with activities of daily living.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for her right thumb was reasonable and necessary and is awarded.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that her current condition of ill-being with her right thumb is causally related to the work injury.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

There is no AMA impairment rating or evidence concerning the impact of the petitioner's injury in regard to her occupation, age or future earning capacity, as delineated in Section 8.1(b)(i) through (iv) of the Act, nor can any effect be inferred from the evidence. Regarding Section 8.1(b)(v), the petitioner complains of hands cramps with overuse, nightly cramps, cramping up into her arms and pain in her wrist and her middle three fingers. The treating medical records do not corroborate her testimony of hand or wrist pain, pain in her middle three fingers, or hand or arm cramps. The petitioner also complains of sensitivity to touch and blows to her thumb and some difficulty holding a wrench, picking up objects and holding knives steady. Those symptoms are probable effects of the injury.

The petitioner is entitled to the sum of $495.01/week for 38 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 50% loss of use of her right thumb. The petitioner failed to prove that she is entitled to additional permanent partial disability benefits for her right thumb or right hand.

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

Gloria Chalacoff,

Petitioner,

vs.

Peabody Coal Co,

Respondent,

14IWCC0844

NO: 09WC 006673

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

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

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

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

14IWCC0844

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

DATED: OCT 0 6 2014
MJB/bm
o-09/30/2014
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHALACOFF, GLORIA WIDOW OF CHALACOFF, GARY
Employee/Petitioner

Case# **09WC006673**

14IWCC0844

PEABODY COAL CO
Employer/Respondent

14IWCC0844

On 5/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

2742 HAZLETT & SHORT PC
KEVIN M HAZZLETT
1167 FORTUNE BLVD
SHILOH, IL 62269

14IWCC0844

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
FATAL

GLORIA CHALACOFF,
WIDOW OF GARY CHALACOFF
Employee/Petitioner

v.

PEABODY COAL CO.
Employer/Respondent

Case # 09 WC 6673

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **March 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Decedent's earnings?

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

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

J. ☐ Who was dependent on Decedent at the time of death?

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

L. ☐ What compensation for permanent disability, if any, is due?

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

N. ☐ Is Respondent due any credit?

O. ☒ Other: Should burial expenses pursuant to Section 7(f) of the Act be awarded?

FINDINGS

On the date of accident (last exposure), **August 2, 1996**, Respondent *was* operating under and subject to the provisions of the Act. On the date of death, **March 5, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of the accident/disease *was* given to Respondent.

Decedent's death ***is*** causally related to the accident/diseases.

In the year preceding the injury, Decedent earned **$31,315.44**; the average weekly wage was **$602.22**.

On the date of death, Decedent was **68** years of age, ***married***, with 0 dependent children.

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

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

The Arbitrator finds that Decedent died on March 5, 2008, leaving one survivor, as provided in Section 7(a) of the Act, including his spouse, Gloria Chalacoff.

ORDER

Respondent shall pay death benefits, commencing March 5, 2008, of $441.93/week to the surviving spouse, Gloria Chalacoff, on her own behalf, until $250,000 has been paid or 20 years, whichever is greater, have been paid, because the injury caused the employee's death, as provided in Section 7 of the Act.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall pay $8,000.00 for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

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

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

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

Signature of Arbitrator

05/06/2013
Date

MAY - 9 2013

STATE OF ILLINOIS)
)SS
COUNTY OF SANGAMON)

14IWCC0844

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
FATAL

GLORIA CHALACOFF,
WIDOW OF GARY CHALACOFF
Employee/Petitioner

v. Case # 09 WC 6673

PEABODY COAL CO.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Gloria Chalacoff, is the widow of Gary Chalacoff (also referred to as "Decedent"), a former employee of Respondent, Peabody Coal Co. On January 5, 2004, the Illinois Workers' Compensation Commission[1] granted Petitioner's husband, Gary Chalacoff, an award for permanent partial disability benefits in the amount of 40% of the person as a whole. That award concluded that Mr. Chalacoff had occupationally-related coal workers' pneumoconiosis (CWP) and chronic bronchitis. (Petitioner's Exhibit (PX) 4). The Commission's decision was affirmed by the Illinois Appellate Court. (PX 5). In Mr. Chalacoff's case, the parties stipulated that Decedent coal mined for 37 years with Respondent, with a last exposure date of August 2, 1996. (PX 4, pp. 1-2). The decision included opinions from Decedent's treating physician, Dr. Stephan Randag, and his examiner, Dr. William Houser. Respondent's examiner was Dr. Peter Tuteur. On March 5, 2008, Mr. Chalacoff died. His death certificate listed the immediate cause of death as pneumonia. (PX 3).

Pulmonologist and Black Lung Clinic head Dr. Houser testified again in this death claim. Dr. Houser reviewed various medical records, along with the depositions from the previous disability claim. Dr. Houser spoke with Petitioner regarding her husband's health. Dr. Houser noted that Decedent had cardiac failure in May 2004 in connection with a hospitalization for pacemaker surgery. Although Decedent was resuscitated, he had a severe brain injury and was left in a persistent vegetative state. Pertinent respiratory events and treatments included hospitalization in the early fall of 2006 for a near total collapse of the left lung with a pleural effusion. On one occasion he had aspiration pneumonia. Nursing notes from two dates in early 2008 indicated Decedent had cough with sputum on an essentially daily basis; other records reported cough with sputum several times per day. Dr. Houser agreed with Dr. Randag that Decedent's CWP, chronic bronchitis and COPD were significant factors contributing to Decedent's respiratory death. (PX 1, Dep. Exh 2, pp. 1-3).

Dr. Houser testified that Decedent's 2006 near total left lung collapse was affected by his lung disease. He blamed Decedent's inability to clear secretions. (PX 1, p. 17). As of October 1, 2007, Decedent took Duoneb nebulizer treatments four times a day and Theophylline three times a day. (PX 1, Dep. Exh. 2, p. 2). Duoneb

[1] The Illinois Workers' Compensation Commission was then known as the Illinois Industrial Commission.

and Theophylline are bronchodilators, and Theophylline also strengthens the diaphragm. Decedent was on one to three liters of oxygen a minute, which meant he had low oxygen and was hypoxic, a condition affecting his heart and all organ systems. (PX 1, pp. 15-17). Dr. Houser felt that chronic bronchitis was the primary reason Decedent's secretions had to be suctioned. (PX 1, pp. 18-19). Dr. Houser explained that chronic bronchitis is a form of COPD, which is the number three cause of death in the United States. (PX 1, pp. 43, 78). Dr. Houser stated Decedent lived much longer than he would have expected from one in a vegetative state, but that could be in part because his wife took such good care of him at home. (PX 1, p. 79). He opined that even if aspiration was a cause of the pneumonia, Decedent's likelihood of surviving or recovering from the pneumonia was dependent on his CWP, COPD, and chronic bronchitis. (PX 1, pp. 82-83).

Dr. Randag was an internal medicine physician at the Springfield Clinic for 36 years. He retired on April 1, 2012. During this time, Dr. Randag had occasion to treat coal miners for lung and heart disease and pneumonia. (PX 2, pp. 4-5). Dr. Randag treated Decedent for 27 years. (PX 2, p. 7). While Decedent was in a vegetative state at home Dr. Randag consulted with Petitioner and his home health care services concerning his care and treatment. Dr. Randag stated that Decedent's terminal event was pneumonia. (PX 2, p. 10). Dr. Randag believed that Decedent's pulmonary condition gradually deteriorated during his vegetative state, and this was due in part to his work-related lung diseases. (PX 2, pp. 12-13)

Dr. Randag discussed the events leading to Decedent's 2004 vegetative state. After the hospitalization surrounding these events, Decedent went home for long term care. (PX 2, pp. 13-14). Decedent required a lot of active care, which included positioning to help drain his lungs, suctioning through his tracheostomy, and nutrition through a tube. He had an impaired ability to cough. Petitioner acted as a constant observer and supervisor and improved the attentiveness of his caregivers. Dr. Randag acted as the physician medical advisor. (PX 2, pp. 15-16).

Dr. Randag explained that Decedent required a tracheal tube because during his hospitalization his respiratory function could not be maintained without suctioning. Repetitive suctioning through the nose would cause substantial nasal or larynx trauma. (PX 2, pp. 20-21). Decedent's lung disease impaired his ability to blow out lung secretions, and his neurological status would increase the length of initiating a good cough. Artificially removing secretions was necessary to sustain life. His secretions were more abundant because of his work-related lung diseases. Dr. Randag explained that suctioning involves the unpleasant process of advancing a catheter as far down each lung bronchus as possible. (PX 2, pp. 21-22).

Dr. Randag stated that Decedent's occupational lung diseases made him more susceptible to pneumonia and impeded his ability to recover from the terminal pneumonia. According to Dr. Randag, Decedent's death was multi-factorial, and his lung diseases contributed to his death. Dr. Randag believed that Decedent's lung diseases were a causative factor in death, and aggravated and contributed to hastening death. (PX 2, pp. 17-19). The doctor had no doubt that the combined effect of Decedent's chronic bronchitis, CWP and COPD placed a burden on his pulmonary system, which made him unable to overcome the terminal event. (PX 2, pp. 23-24). Dr. Randag did not expect Decedent to live more than 3-4 months in a vegetative state and thought his lung diseases would kill him. (PX 2, pp. 19-20).

On cross-examination, Dr. Randag stated he expected Decedent would go to a nursing home and not obtain "one-on-one" care, but he went home and "did not end up in the nursing home due to unusual persistent excellent management by this wife." (PX 2, p. 64). Dr. Randag believed that Decedent had COPD based on his frequent treatment for acute bronchitis and his mining and smoking exposures. He did not diagnose COPD in his records because he never had pulmonary function testing performed on Decedent, which is the standard for

diagnosing COPD. He avoided that term, and instead used the term chronic bronchitis. He was told testing from the black lung exam showed obstruction. (PX 2, pp. 46-49). Dr. Randag never made a clinical diagnosis of CWP, but was told of the diagnosis after Decedent's visit to Indiana (Dr. Houser). (PX 2, pp. 73-75, 77-78). This testimony comports with what Dr. Randag stated in the disability claim. (PX 4, p. 4). He quantified Decedent's chronic bronchitis over the years as mild. (PX 2, pp. 75-76).

Dr. Randag felt that there was a remote possibility that Decedent might have had a poor recovery from pneumonia even if he had never smoked or coal mined. Decedent's pneumonia was caused by his failure to clear secretions and the stagnation of secretions. (PX 2, pp. 62-64). Dr. Randag stated Decedent, like Alzheimer patients, would have still died of pneumonia had he not been exposed to smoking or coal dust, but his pre-existing conditions raised his susceptibility to pneumonia. (PX 2, p. 65). He agreed that Decedent did not require supplemental oxygen until his vegetative state. (PX 2, p. 51). His opinions also were contained in a letter to Petitioner's attorney. (PX 7).

Dr. Tuteur did not testify for Respondent in this claim. Rather, at Respondent's behest, pulmonologist Dr. Jeffrey Selby reviewed medical records supplied by Respondent. Dr. Selby opined that Decedent did not have CWP or any respiratory or pulmonary abnormality caused by coal mine dust inhalation. Dr. Selby agreed that pneumonia was the cause of death. (RX 1, p. 5). Dr. Selby stated that most people in a vegetative state die within months, and the fact that Decedent lived for four years was a testimony to his care and genetics. (RX 1, p. 7). Dr. Selby felt Decedent's pneumonia was caused by his lack of consciousness and being in bed, which makes it hard to keep the lungs free of mucus and debris. (RX 1, p. 8). He also opined that Decedent's smoking caused chronic bronchitis and occasional infection which weakened his respiratory immune system through the years. Dr. Selby explained that the mucus can become stagnant, cause infection, and lead to pneumonia. (RX 1, pp. 8-9). Dr. Selby stated that no ongoing pulmonary condition accelerated Decedent's death; he stated that the death was primarily due to severe heart disease, which put Decedent in the vegetative state where he could not cough, move about, or move mucus, leading to a respiratory death. (RX 1, pp. 10-11). Dr. Selby believed that Decedent did not have CWP and that his chronic bronchitis was not caused or aggravated by mining. (RX 1, p. 12).

Dr. Randag's records indicate that Decedent was released to his home on July 19, 2004, after a prolonged hospital stay from the heart event leading to his vegetative state. He was discharged with several medical devices, including oxygen from an oxygen concentrator and suction equipment. (PX 6, p. 70). On January 19, 2008, Dr. Randag had not seen Decedent in over a year. He filled out a certificate of medical necessity for oxygen. COPD and hypoxia were noted in the assessment. (PX 6, p. 18). At 5 p.m. on February 13, 2008, Decedent had developed a fever and perhaps more cough for the last four to five days. He was given Doxycycline and his case quieted down, but he had not urinated. It seemed like he had ileus. A catheter was placed and IV fluids were authorized, but could not be pre-approved that day. Hospice was suggested as Petitioner did not want to transport him to the emergency room. (PX 6, p. 13). Decedent was noted to have an infection lately manifested by substantial fevers and more coughing. Presumably the source of the infection would have been respiratory in nature. Effectively, Decedent had a collapsed left lung, and his kidneys were not making urine because the fluid was going elsewhere. Petitioner was agreeable to home hospice. (PX 6, p. 15). On February 15, 2008, Decedent appeared to be jaundiced and a liver panel was authorized. (PX 6, p. 16). On February 20, 2008, he was noted to be on Levaquin for his cough, fever, and presumed respiratory infection. Decedent had ileus causing regurgitation and his liver function tests were normal, but he was found ineligible for hospice. (PX 6, p. 11). His fever and increased cough were noted on February 23, 2008. (PX 6, p. 13).

Other relevant entries concerning Decedent's pulmonary status over the years appear on the following pages of Petitioner's Exhibit 6: pages 5, 8, 19, 33, 22, 28, 34-35, 38, 48, 51, 56, 60, 72, 79-87, 90, 94, 100-102, 159, 285-287, 306-308, 318, 321, 338, 352, 355, 358, 363, 372, 378, 407, and 409. Entries from September 21, 2006 discuss Decedent's hospital stay from August 31, 2006 to September 5, 2006 for the collapsed left lung with a large pleural effusion. The final diagnosis was pneumonia of the left lung, left pleural effusion, chronic but worse, left lung collapse, chronic but worse, COPD, and other maladies. (PX 6, pp. 163-164; see also, pp. 166-168, 178-180).

Petitioner also submitted the records of Memorial Home Services, which assessed Decedent's health from October 2007 and until his death. (PX 8, pp. 34-35). These records include pulmonary entries documenting rhonchi, rales, productive coughing, and sputum. (PX 8, pp. 3, 6, 12, 14, 20-21, 47-48, 57, 63, 74, 79-80, 91, 96, and 99). Medications, treatment plans, and Dr. Randag's orders also were included. (See PX 8).

St. John's Hospital Records document Decedent's admission for a blocked feeding tube, and other health issues, such as a nosebleed, feeding tube changes, catheter issues, bleeding from the ears, and pneumonia. (PX 9). Relevant pulmonary entries are found in that exhibit on pages 69, 82, 88, 97-98, 108, 204-205, 253, 263, 312, 319-328, 332-339, 342-346, 350-354, 378, 387, 393, 399, 402, 451-452, 455, 457, 460, 465-466, 469-471, 474-476, 480-482, and 485-488.

Petitioner introduced the clinical progress nursing notes from January 5, 2008 through Decedent's death. The records document ongoing pulmonary care in the nature of nebulizers, suctioning, and adjustment of oxygen intake as needed. Other adjustments to the bed angle, pillows, or the Decedent's position were also made to improve his oxygen levels.On most days, Decedent coughed phlegm. On many days it was in large amounts. (PX 10, pp. 5-7, 9, 11, 22, 24, 31, 38-39, 51, 53, 55, 59, 60, 68, 69, 78, 82-83, 89-90, 99, 101-102, 104, 108, 113-114, 116, 120-121, 126, 129, 135-136, 142-144, 150-156, 159, 161, 165-166, 173-174, 176, 181-183, 195-196, 202-204, 206, 208, 211-214, 217-218, 224-225, 232-233, 237, 253, 256, 268, 270, 272-273, 275, 281-282, 284, 307, 312, 327-328, 330, 337, 341, 354-356, 360, 373, 375, 377, 390-391, 394-395, 403, 413, 419-420, 426, 433, 444, 447, and 449; see also p. 409).

Rhonchi, sometimes course, or course sounds were noted in the initial assessment on most visits. (PX 10, pp. 1, 4, 8, 11, 14, 16, 21, 23, 28, 30, 37, 42, 44, 49, 52, 55, 58, 61, 66, 68, 73, 75, 79, 81, 86, 88, 91, 94, 97, 100, 103, 106, 109, 112, 117, 119, 125, 127, 132, 134, 139, 141, 144, 147, 149, 152, 155, 158, 161, 164, 170, 172, 176, 179, 181, 186, 188, 192, 194, 199, 201, 204, 207, 210, 213, 216, 221, 223, 229, 231, 236, 238, 243, 245, 248, 252, 254, 257, 261, 264, 268, 271, 274, 278, 280, 283, 287, 289, 295, 301,303, 305, 311, 313, 319, 323, 326, 329, 332, 338, 340, 345, 347, 352, 354, 359, 361, 364, 369, 371, 375, 379, 382, 385, 389, 393, 398, 402, 408, 410, 416, 418, 423, 425, 428, 432, 434, 440, 444, 446, 449, 454, 456,and 462). When rhonchi were not noted, congestion and sometimes gurgling were noted. (See PX 10).

On February 20, 2008, Dr. Randag was called due to pneumonia and sugar levels increasing. Gurgling and abdominal breathing were noted. (PX 10, p. 357). On March 3, 2008, during nebulizer treatment, Decedent's oral cavity started to fill with white phlegm. He was suctioned twice and a large amount of phlegm was extracted each time. Decedent was very diaphoretic, his respirations were rapid and labored, and his pulse ox had dropped to 79%. It then rose to 90% after three to four minutes and eventually rose to 97%. (PX 10, p. 457). The next assessment that day described his lungs as full. At 3:00 p.m. Decedent became very distressed during nebulizer treatments and his SpO2 dropped to the low 80's. Treatments were stopped and he was repositioned. At 3:50 p.m. his SpO2 dropped to 71 and his heart rate increased. (PX 10, p. 460). His SpO2 then vacillated from 88 to eventually 98. (PX 10, p. 461). He later coughed up a large amount of thick white foamy

phlegm. He was suctioned as needed. (PX 10, p. 462). His SpO2 then vacillated between 84-98%. (PX 10, p. 463).

The morning before his death, Decedent's pulse ox was going up and down from 80-90%. There was upper airway congestion with gurgling. He was very diaphoretic, but his SpO2 increased to 97%. His abdomen was distended. (PX 10, pp. 464-465). At noon Decedent's pulse ox dropped to 83% but went up again with repositioning. (PX 10, pp. 466-467). He coughed up a small amount of thick mucus in the afternoon after nebulizer treatments. (PX 10, p. 468). At 4:30 p.m. a large amount of mucus was suctioned. His SpO2 rose from 84 to 96%, but at 8:30 p.m. dropped to 82% and was back up to 92% with repositioning. (PX 10, p. 469). Later he coughed up phlegm and was suctioned. His oxygen saturations again vacillated. (PX 10, p. 470).

On the day of his death, Decedent continued on 3.5 liters of oxygen with a SpO2 of 92%. (PX 10, p. 472). In the early morning he coughed a thick amount of white phlegm and his SpO2 eventually increased to 99%. By midmorning his SpO2 was at 88% and he went on 4 liters of oxygen. His SpO2 then increased to 94% and then 99%. Around noon suddenly he stopped breathing and his pulse ox dropped to 16% and he turned purple and blue. He suddenly coughed up a huge amount of yellow phlegm and a large amount was suctioned. He took a huge breath and his pulse ox rose and his color returned. He was very diaphoretic and his SpO2 returned to 100%. (PX 10, p. 473-475). By early afternoon his breathing was non-labored, but there was a blue tint around his lips. (PX 10, p. 476). As stated *supra*, Decedent died on March 5, 2008. (PX 3).

CONCLUSIONS OF LAW

Issue (C): Did an occupational disease exist that arose out of and in the course of Decedent's employment by Respondent?

Under Section 19(j) of the Illinois Workers' Occupational Diseases Act, the prior final decision regarding Decedent's disability claim, "shall be taken as final adjudication of any of the issues which are the same in both proceedings." 820 ILCS 310/19(j). Accordingly, for purposes of this claim, Decedent was disabled by occupationally-related chronic bronchitis and CWP during his lifetime. *See Murphy v. Peabody Coal Co.*, 09 IWCC 857 (Aug. 18, 2009); *Cline v. United Coal Mining Co.*, 06 IWCC 833 (Sept. 27, 2006). Dr. Selby's contrary opinions regarding disease cannot be reconciled with the previous Commission decision and are accordingly given no weight.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner filed her claim on February 17, 2009 (see Arbitrator's Exhibit 2), thereby providing notice to Respondent of this claim. *See Crane Co. v. Industrial Comm'n*, 32 Ill.2d 348, 205 N.E.2d 425, 427 (1965). Respondent has failed to show it was substantially prejudiced by the timing of this notice as required by the Act. 820 ILCS 310/6(c). All parties had the same medical record material available for expert opinions. In addition, the Act requires notice of the disabling disease, not death, which Respondent had by virtue of the prior disability claim. 820 ILCS 310/6(c). Therefore, the Arbitrator finds that adequate notice was given.

Issue (F): Was there a causal connection between Decedent's occupational diseases and his death?

"Death is compensable under the Act so long as the decedent's employment was a causative factor. His employment need not be the sole cause or even the primary cause; it is sufficient if it is a cause." *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 386 Ill. App. 3d 779, 901 N.E.2d 906, 912 (4th Dist.

2008), citing *Sears, Roebuck & Co. v. Industrial Comm'n*, 79 Ill.2d 59, 66, 402 N.E.2d 231, 235 (1980). So long as it was a factor in hastening death, compensation is appropriate. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 308 Ill. App. 3d 578, 720 N.E.2d 309, 315 (5th Dist. 1999). In *Proctor Community Hospital v. Industrial Comm'n*, 41 Ill.2d 537, 244 N.E.2d 155, 158 (1969), the Illinois Supreme Court stated that even though the ultimate outcome of the worker's heart condition likely would have been his death at some future time, and possibly under non-employment related circumstances, it would not invalidate an award where the occupation hastened death.

The evidence discussed herein demonstrates that Decedent's occupational lung diseases hastened death and were causative factors in his pneumonia and the pulmonary problems leading to death. Dr. Selby agreed that pneumonia was the immediate cause of death. (RX 1, p. 5). Dr. Selby's opinion that Decedent did not die from his occupational lung diseases is given no weight. Since he found no occupational lung disease, he could not find an occupational connection. (RX 1, p. 5). Dr. Selby also opined that no ongoing pulmonary condition accelerated Decedent's death, which he blamed on the severe heart disease that put him in the vegetative state where he could not cough, move about or move mucus, leading to a respiratory death. (RX 1, pp. 10-11). Dr. Selby's claim that lung disease had no effect on Decedent's pneumonia, his respiratory battle, or his ability to move mucus is not convincing. The Arbitrator notes that the Commission previously found disablement based on Dr. Randag's records showing chronic bronchitis, and Decedent's testimony regarding his shortness of breath and worsening condition. It credited Dr. Houser's opinion that Decedent had a permanent pulmonary impairment related to his coal dust exposure. (PX 4, p. 8).

In addition, Dr. Selby's records review did not mention the reports of the home health care providers, which are extremely pertinent to Decedent's respiratory condition in the time period prior to his death. (RX 1, p. 4). As noted herein, Dr. Houser and Dr. Randag concluded that Decedent's occupational diseases were significant factors contributing to death, and their opinions are more credible. The records document Decedent's respiratory struggle and his fluctuating oxygen levels and productive coughing, and it is unreasonable to conclude that his occupational lung disease would have played no role in his pneumonia or his ability to battle the pneumonia and clear his lungs.

For the foregoing reasons, the Arbitrator finds a causal connection between Decedent's occupational diseases and his death.

Issue (O): Should burial expenses pursuant to Section 7(f) of the Act be awarded?

Burial expenses in the amount of $8,000.00 are awarded pursuant to Section 7(f) of the Illinois Workers' Compensation Act. 820 ILCS 305/7(f); see also 820 ILCS 310/7.

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

Harriet Holmes,

Petitioner,

vs.

NO: 07 WC 41122

State of Illinois, Illinois Department of Financial and Professional Regulation,

14IWCC0845

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 5, 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.

No bond for State of Illinois cases.

DATED: OCT 06 2014

MB/mam
o:8/7/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOLMES, HARRIET
Employee/Petitioner

Case# **07WC041122**

14IWCC0845

SOI ILLINOIS DEPT OF FINANCIAL AND PROFESSIONAL REGULATION
Employer/Respondent

On 2/5/2014, 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:

0533 ROSS TYRRELL LTD
JIM TYRRELL
111 W WASHINGTON ST SUITE 1150
CHICAGO, IL 60602

5145 ASSISTANT ATTORNEY GENERAL
KATHERINE ARISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

FEB 5 2014

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0845

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

Harriet Holmes
Employee/Petitioner

v.

State of Illinois, Illinois Department of Financial and Professional Regulation
Employer/Respondent

Case # **07** WC **41122**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **October 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. [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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **July 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 as explained *infra*.

Timely notice of this accident ***was*** given to Respondent as explained *infra*.

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

In the year preceding the injury, Petitioner earned **$41,715.96**; the average weekly wage was **$802.33**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **1** dependent child.

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

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

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

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act. *See* AX1.

ORDER

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $481.40/week for 10.75 weeks, because the injuries sustained caused the Petitioner 5% loss of use 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.

Signature of Arbitrator

February 4, 2014
Date

FEB 5 - 2014

14IWCC0845

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Harriet Holmes
Employee/Petitioner

v.

State of Illinois, Illinois Department of Financial and Professional Regulation
Employer/Respondent

Case # **07** WC **41122**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing are accident, notice, causal connection, 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 she is not presently employed and was last employed on May 26, 2013. At that time, she worked for Respondent, and agency that administers the licensing and discipline of doctors, nurses, electricians, and other professionals in the state. Petitioner testified that she was employed as an administrative assistant for the chief of the medical and health department at the time of her injury. Her duties were mostly clerical, sedentary work including filing, typing, answering phone calls and assisting the public. Petitioner is also a veteran.

Petitioner testified that Respondent occupies the entire ninth floor of the building. She worked from 8 a.m. to 5 p.m. and used an elevator to get from the ground level of the building to her floor. There are six elevators in the elevator bank that Petitioner could use, and that she did use to get to and from work, to take lunch, and to take her two breaks per day. Petitioner testified that she could take part of the way down from the ninth floor, but the stairs only go to the third floor and then she has to take the elevators.

July 18, 2007

Petitioner testified that she was in good health on this date, although she does have Graves disease which affects her thyroid and for which she is treated with medication. Petitioner testified that this condition has not affected her ability to walk or balance, or caused dizziness, fainting or black outs. Petitioner also testified that when she started work on July 18, 2007, her left knee was good and had never been injured before. She testified that she had no significant medical attention before the date of injury, difficulty walking, problems with dizziness, fainting or balance, and no problem with her right knee, either ankle or foot.

Petitioner testified that she was at work on July 18, 2007 and took her usual lunch break, which brought her to a McDonald's restaurant on LaSalle Street. It was a warm and sunny day, and Petitioner did not recall stepping in any water, oil or other liquid on her trip back to Respondent's building. She described wearing black slacks cuffed at her ankles and leather-soled sandals with an open toe with a "T" strap that fit her comfortably. She had worn the sandals before this date without incident.

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[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.

14IWCC0845

After her lunch, Petitioner proceeded to the elevator banks and met up with a woman named Monica McCloud ("Ms. McCloud") that she knew from the building. Petitioner and Ms. McCloud entered the middle elevator of the bank of elevators which ran "express" from the ground floor to the ninth floor. They were the only occupants of the elevator. Petitioner testified that there was nothing on the elevator floor, and she was carrying her purse and a leftover bag from lunch.

Petitioner testified that when the elevator reached the ninth floor she said goodbye to Ms. McCloud and took 3-4 steps within the elevator to exit and walked straight across the elevator threshold. She stepped out with her left foot and while passing the threshold she felt her left big toe hit something after which she started stumbling. Petitioner described a feeling that she hit something hard, but she did not see what she hit at that time and she started stumbling. Petitioner then testified that she later saw that the elevator floor was misaligned with the floor of the elevator bank on the ninth floor. After stumbling, Petitioner testified that she fell on both hands and knees outside of the elevator onto the carpeted floor.

Petitioner felt a burning sensation on both hands and knees, turned around and sat on her butt. A security guard named Lily came to her and asked her if she was ok and Ms. McCloud opened door and asked her if she was ok to which she replied that she was and Ms. McCloud went up in the elevator. Petitioner testified that the security guard asked her if she wanted an ambulance and also told her to report the accident to building security on the second floor. Petitioner testified that she went to the bathroom and noticed that her left toenail, which was fine when she had seen it earlier in the day, was now broken.

Petitioner testified that she worked the rest of her shift and noticed that her pains had not subsided by the end of the day. After the following weekend, her left knee pain had worsened although the pain in her hands and right knee had subsided. She described the left knee pain as aching and throbbing, with a "crunchy" sensation. Her pain continued and she sought medical attention with her internist, Dr. Robert Stavinga, beginning on July 24, 2007.

Petitioner also testified that she told her supervisor, Sadzi Olivia ("Ms. Olivia"), that she fell off the elevator. Later that day, Petitioner testified that Ms. Olivia gave her a form to fill out. *See* RX1. Petitioner testified that she filled this form out on July 30, 2007.

Medical Treatment

The medical records reflect that Dr. Stavinga noted that Petitioner had fallen "coming out of elevator" and had landed on her knees. PXl pp. 8-10. Petitioner provided a handwritten description of the accident that "I stepped off the 9th flor elevator and tripped and fell, and landed on both knees." *Id.* Dr. Stavinga diagnosed her with a left knee injury after her fall at work with pain and prescribed medications. *Id.* Petitioner underwent a left knee x-ray on August 11, 2007 for trauma to the knee which showed mild degenerative changes, normal joint spaces and no evidence of a fracture or bony destruction. PX1 p. 13; PX2 p. 9. Petitioner remained under Dr. Stavinga's care and testified that she missed only a few days of work.

By October 10, 2007, Petitioner's left knee pain had not improved and she reported continuing to favor her left leg if she was standing for a long time. PX1 pp. 16-17. Dr. Stavinga referred her to Dr. Mihaela Mihailescu, a rheumatologist. *Id.*; PX2.

Dr. Mihailescu initially examined Petitioner on October 12, 2007 noting that she "Fell ~8 weeks on her knees. The left knee swelled up later during that day." PX2 pp. 5-9. Dr. Mihailescu diagnosed Petitioner with left knee pain noting very minimal osteophites on x-ray with maintained joint space, but given the nature of the trauma and swelling that it was possible that Petitioner had minimal meniscal or ligament injury. *Id.* He prescribed medications and eight weeks of physical therapy three times per week. *Id.*; PX1 p. 18. Petitioner underwent the recommended physical therapy at Christ Hospital, which gave her some relief. *Id.*

Petitioner testified that she continued to follow up with Dr. Stavinga and Dr. Mihailescu who later recommended home exercises. *See* PX1 pp. 19-24; PX2 pp. 10-11. She testified that she continued to follow up with her physicians through Spring 2008, but her condition had not improved and her pain was as severe as it was before.

A left knee MRI was ordered on April 16, 2008 which Petitioner underwent on April 21, 2008 and revealed degenerative-type tear involving the anterior horn of the lateral meniscus with instrasubstance or myxoid degeneration suspected in the posterior horn of the medial meniscus, and small to moderate joint effusion and early medial arthrosis. PX1 pp. 25-27; PX2 p. 12.

Petitioner was then referred to Dr. Baylis on May 12, 2008. PX1 p. 29. She saw him for the first time on June 6, 2008. PX3 p. 3. Dr. Baylis noted Petitioner's "left knee discomfort for about ten months after a fall." *Id.* After examining her, Dr. Baylis recorded minimal joint line tenderness and patello femoral crepitus. *Id.* He diagnosed Petitioner with left patellofemoral syndrome with questionable small tear medial meniscus and degenerative changes medially, and he administered an injection to her left knee and provided a knee sleeve. *Id.*

On September 2, 2008, Petitioner reported to Dr. Baylis that the injection helped and that most of her pain was going up and down stairs. PX3 p. 4. On examination, he noted full motion, patellofemoral crepitus, no effusion, and mild tenderness to direct pressure. *Id.* Dr. Baylis ordered voltaren gel, that she try to wean off use of the knee sleeve, and home exercise. *Id.* He indicated that she should return as needed. *Id.* Petitioner testified that Dr. Baylis did not recommend surgery.

Petitioner thereafter continued with Dr. Stavinga for the next few years for her left knee injury as well as unrelated issues, and that she did not miss time from work. PX1. She also underwent additional left knee physical therapy at Christ Hospital in late 2009 and the early part of 2010. *Id.* Petitioner testified that the physical therapy helped.

Independent Medical Evaluation

At Petitioner's counsel's request, Petitioner was evaluated by Dr. Thomas Cronin on July 12, 2010. PX4. Dr. Cronin diagnosed Petitioner with left knee chronic patellofemoral syndrome, mild arthritic changes in the left knee, and degenerative changes to the lateral and medial menisci. *Id.* He opined that Petitioner's July 18, 2007 accident aggravated Petitioner's pre-existing degenerative conditions causing continuing low grade pain. *Id.*

Nick Kanellopoulos

Respondent called Nick Kanellopoulos ("Mr. Kanellopoulos") as a witness. He testified that he is the Deputy Director of the state's central management services (CMS) and has been so employed for five years. His job duties include managing facilities for state agencies, one of which is the Thompson Center building in which Respondent's agency is located. Mr. Kanellopoulos testified that he works with Respondent and is a member of

their athletic board in an unpaid position that meets a handful of times per year and regulates combat sports. He testified that he does not believe that this affects his ability to testify truthfully.

Mr. Kanellopoulos testified that he is familiar with the building rules. He testified that the building is accessible for the general public on weekdays and that there is an administrative rule regarding business hours and public access. See RX4. He added that Respondent's floor is one of the busiest floors for the public because Respondent deals with 1-1.5M licensees.

On cross examination, Mr. Kanellopoulos acknowledged that he does not monitor elevators.

Additional Information

Regarding her current condition, Petitioner testified that she has experienced persistent left knee pain since the July 18, 2007 accident. She experiences left knee pain and locking if she is on her feet for more than 45 minutes and finds that her knee also locks if she sits for an extended period of time. When her knee locks, she must bend down and manipulate the knee until she is again comfortable. She also testified that she has good days and bad days, and as the day goes on she may feel some throbbing pain depending on what she does during the day. Petitioner testified that she still has pain in middle of her left knee at the end of the day and that she sometimes wakes up in the middle of the night to adjust sleeping positions. Petitioner also testified that the strength in her left leg is much weaker than compared to the right leg and that when she kneels and squats, she experiences "crunching" and pain in the middle of her left knee.

Petitioner also described walking up and down stairs differently than she did before her accident; now she does so one foot at a time and she cannot climb more than one step at a time. Petitioner testified that her pain level changes such that sometimes she is pain-free and sometimes her pain reaches a level of 5-6/10. She testified that she had none of these symptoms before her accident, that she has not re-injured her left knee and that she no longer participates in activities in which she engaged before the accident such as dancing, running and walking long distances.

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 Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

"An employee's injury is compensable under the Act only if it arises out of and in the course of the employment." *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011).

Where an "employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of his employment." *Id.* That is, a claimant must demonstrate that the risk of injury was peculiar to or increased by his work duties and the "increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1014 (*citations* omitted). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that his injury is compensable. *University of Illinois*, 365 Ill. App. 3d at 910.

After careful observation of Petitioner and in consideration of all the evidence submitted at trial, the Arbitrator finds Petitioner's testimony to be credible. The record reflects that Petitioner was exiting an express elevator returning to work from lunch, which she regularly used to arrive and depart from work and to take lunch and other breaks every day. No evidence was offered in contravention of Petitioner's testimony about the details of her accident or that she tripped on or between the uneven elevator and elevator bank floors. To the contrary, Petitioner's testimony about her injury is buttressed by the written report of injury and the medical records about which she testified at trial.

Moreover, the Arbitrator finds that Petitioner's risk of injury in the lobby, which was undeniably open to members of the public, was increased as a result of her employment. She walked through the elevators and that particular elevator back repeatedly throughout her workday taking the usual and most direct route to enter and exit the building. Indeed, Petitioner was required to walk through this particular lobby more often than any member of the public placing her at a greater risk than members of the general public.

Based on all of the foregoing, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent on July 18, 2007 as claimed.

In support of the Arbitrator's decision relating to Issue (E), whether timely notice of the accident given to Respondent, the Arbitrator finds the following:

Notice of an accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing, but not later than 45 days after the accident with some very limited exceptions. 820 ILCS 305/6(c). The purpose of the notice requirement is to enable an employer to investigate an alleged accident. *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95 (1980). A claimant's compliance with the notice requirement is established by placing the employer in possession of the known facts related to the accident within the statutory period. *Seiber*, 82 Ill. 2d at 95. "Because the legislature has mandated a liberal construction on the issue of notice [citation] if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced." *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96 (4th Dist. 1994). A claim is barred only if no notice whatsoever has been given. *Id.*

In this case, Petitioner testified that she verbally reported her injury the day following her accident to Ms. Olivia. The record also reflects that Petitioner completed a report of injury dated July 30, 2007 within two weeks of her accident at Ms. Olivia's request corroborating her testimony. Based on the foregoing, the Arbitrator finds that Petitioner has established that she provided proper and timely notice of her alleged accident at work to Respondent.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

As explained above, the Arbitrator finds that Petitioner sustained a compensable injury as claimed. Again, the Arbitrator finds that Petitioner's testimony at trial was credible and is corroborated by the medical records. Thus, the Arbitrator finds that Petitioner has established a causal connection between her current condition of ill being in the left knee and her accident at work.

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 conservative medical treatment to the left knee including two courses of physical therapy and an injection for left knee patellofemoral syndrome that was asymptomatic before her injury at work which aggravated her mild underlying degenerative condition and that causes some mild continued symptomatology, but caused no compensable lost time from work or medical restrictions—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 5% loss of use of the left leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TUMIKA JACKSON,
Petitioner,

vs.

MARIONJOY REHABILITATION HOSPITAL,
Respondent,

NO: 10 WC 28805

14IWCC0846

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, permanent partial disability, medical expenses, prospective medical expenses, 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 February 20, 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.

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

DATED: OCT 06 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:8/7/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JACKSON, TUMIKA
Employee/Petitioner

Case# **10WC028805**

14IWCC0846

MARIONJOY REHABILITATION HOSPITAL
Employer/Respondent

On 2/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0579 FRIEDMAN & SOLMOR LTD
GARY B FRIEDMAN
200 N LASALLE ST SUITE 2750
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
BROOKE TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC0846

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

TUMIKA JACKSON,
Employee/Petitioner

v.

MARIONJOY REHABILITATION HOSPITAL,
Employer/Respondent

Case # **10** WC **28805**

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 **11/13/13**. 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 _____

14IWCC0846

FINDINGS

On **12/2/09**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$25,928.24**; the average weekly wage was **$498.62**.

On the date of accident, Petitioner was **31** years of age, ***single*** 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 **$1,662.05** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$1,662.05**.

Respondent is entitled to a credit of **$11,822.04** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $299.17 per week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner penalties of **$0.00**, as provided in Section 16 of the Act; **$0.00**, as provided in Section 19(k) of the Act; and **$0.00**, 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

2/13/14
Date

FEB 20 2014

STATEMENT OF FACTS:

Petitioner, a 36 year-old certified nursing assistant, testified that she had worked for Respondent since February 14, 2008. She indicated that her job entailed bathing, cleaning and feeding patients and taking vitals. She conceded that she had been involved in a motor vehicle accident and had filed a prior workers' compensation claim but had recovered from both injuries and was feeling fine before the accident in question.

Petitioner testified that on December 2, 2009 she was working in the brain injury unit and was helping a patient back to a chair when the patient starting going down to the ground. She noted that the patient was about 6'4" and weighed 300 pounds. She stated that she had her arm in the patient's arm and that she was jerked and pulled down, after which she noticed a pull and pop in her lower back as well as severe pain. The accident is not disputed. (Arb.Ex.#1).

Petitioner subsequently presented to Central DuPage Business Health on December 3, 2009, reporting pain in the upper, middle, and lower back. She was diagnosed with a thoracolumbar strain and placed on light duty restrictions. (PX1). She continued to treat at Central DuPage Business Health without improvement through February 17, 2010. (PX1). During that period she was prescribed physical therapy as well as a Medrol Dose-Pak. (PX1). Central DuPage Business Health records indicate that Petitioner had been to only one physical therapy session as of January 6, 2010. (PX1). These records also show that Petitioner denied radiation of pain as well as numbness and tingling throughout the term of her treatment at this facility. (PX1). She continued to work light duty during this period.

An MRI of the lumbar spine performed on February 11, 2010 was interpreted as evidencing a "small disc herniation with annular tear at L4-L5." (PX1).

Petitioner eventually presented to Dr. Beth Froese at OAD Orthopaedics on February 23, 2010. (PX2). Dr. Froese recorded a history of accident on December 3, 2010 when a patient pulled Petitioner down and she felt a pop in her lower back area. (PX2). Dr. Froese also noted prior episodes of low back pain, including a work injury in August 2008 that responded favorably to rehabilitation, a motor vehicle accident in 2008 as well as a lumbar strain in the 1990's which "healed uneventfully." (PX2). Dr. Froese performed a physical examination which failed to reveal any abnormal findings with respect to the back. Dr. Froese also reviewed Petitioner's February 11, 2010 MRI scans, noting the thoracic MRI was a "normal study" and that the MRI of the lumbar spine "reveals mild desiccation at the level of L4-5 with left paracentral disc protrusion and annular tear seen." (PX2). Dr. Froese summed up these MRI findings as being "very mild." (PX2). Dr. Froese felt that Petitioner "will do well with therapy alone" and recommended four more weeks of physical therapy followed by a return to full duty work. (PX2). In the meantime, Petitioner was to return to light duty work with a 20 pound lifting restriction and was to return in follow up in four weeks. (PX2). Petitioner, for her part, testified that Dr. Froese told her she did not have to return for re-evaluation after her first and only visit on February 23, 2010. (T.22).

Petitioner underwent four additional sessions of physical therapy at AthletiCo. (PX4). In an AthletiCo "Therapy Discharge Report" dated May 4, 2010, it was noted Petitioner had been discharged given that "[p]atient did not return to physical therapy and did not return clinic phone calls regarding continued care." (PX4). Prior to that, on March 1, 2010, it was noted that she had no presence of neurological symptoms such as paresthesia, numbness, or lower extremity pain. (PX4). On March 3, 2010, Petitioner complained of nausea and refused further treatment. On March 17, 2010, Petitioner complained of symptoms going into her left lower extremity. (PX4). At the time of her last therapy session, on March 20, 2010, it was noted that Petitioner reported that her symptoms were improving with regards to her left leg soreness. (PX4).

Petitioner did not return to full duty work or follow up with Dr. Froese thereafter. Instead, she sought treatment on her own with Dr. Marie Kirincic at Hinsdale Orthopaedics on March 23, 2010. (PX3). Dr. Kirincic noted that Petitioner "... reports that her orthopedist in OAD told her there is not much more to offer. The patient was returned to her regular duty that was supposed to start today. The patient comes for a second opinion as she feels her pain has been the same as after the injury and she can hardly walk, does not feel she can perform her regular duty that she has been returned to. The patient reports her pain is aching, up to 8/10 on the VAS scale, radiating up and down her lumbosacral area ..." (PX3). X-rays performed on that date revealed a slight cervicothoracic curvature with pelvic and shoulder obliquity. (PX3). Dr. Kirinicic performed a physical examination which revealed a negative straight leg raise, symmetric muscle strength, sensation and reflexes, decreased lumbar range of motion, and poor posture. (PX3). Dr. Kirincic's impression was "[p]ossible discogenic pain, annular tear, small disk herniation L4-L5 on one of multiple MRIs noticed, also obesity and deconditioning, poor progress in physical therapy ..." (PX3). Dr. Kirincic released Petitioner to light duty and restricted her to lifting no more than 25 pounds as well as no prolonged bending or twisting. (PX3). Dr. Kirincic also indicated that a discogram could be helpful in determining a possible discogenic source of her pain, but stated Petitioner should otherwise focus on postural retraining and weight loss. (PX3). Finally, Dr. Kirinicic indicated that Petitioner "will follow up after discogram or p.r.n." (PX3). Petitioner testified that the discogram was not approved by the workers' compensation carrier.

Petitioner testified that following therapy, and after having seen Dr. Kirinicic, she was still having severe pain in her back. However, the records show that she did not seek treatment again until May 1, 2010 when she presented to Dr. John Wilson at Neurology, Clinical Neurophysiology & Sleep Medicine. (PX5). At that time Dr. Wilson recorded a history of low back pain since lifting a patient in December of 2009. (PX5). Dr. Wilson also recorded that Petitioner "first had pain in the back and then about a week or two later she noticed some pain radiating into the sacrum and down into the legs. She reports that occasional urinary urgency but now she is ok. She had an MRI that showed a herniated disk." (PX5). It would appear, however, that Dr. Wilson did not review the MRI films. Furthermore, his only relevant physical examination finding with respect to the back was "paraspinal muscle tightness." (PX5). Dr. Wilson recommended a short course of steroids followed by Lodine, and noted that he believed Petitioner "needs more intensive therapy." (PX5). Petitioner was instructed to return in 6 weeks in follow up. (PX5). In a separate prescription slip, Dr. Wilson recommended that Petitioner "continue light duty until 05/31/10. Dx: lumbar disc disease." (PX5).

Petitioner returned to Dr. Wilson on May 6, 2010 at which time he noted that "[t]he patient has been having side effects to the steroids. She feels like her chest is full and she feels bloated. She has not had dizziness. I performed an EMG and there is no significant denervation. She has not had weakness." (PX5). No objective findings were noted by Dr. Wilson upon physical examination. (PX5). Once again, Dr. Wilson indicated that he would try Lodine and physical therapy, and would consider Robaxin as well, and that Petitioner was to return in 6 weeks. (PX5). In a separate prescription slip, Dr. Wilson ordered physical therapy 2-3 times a week for 6 weeks as well as hot packs. (PX5). The diagnosis was "lumb radic." (PX5). Petitioner was not taken off work at that time. (PX5).

Petitioner returned to Dr. Wilson on June 14, 2010 at which time it was noted that Ms. Jackson was "doing better in therapy, but she reports the spasm has been worsening in the last week. She reports that some of the e-stim made it feel worse. She doesn't have new bowel symptoms. She has more tightness..." (PX5). Dr. Wilson noted no objective findings upon physical examination, including of the spine. (PX5). Under "assessment", Dr. Wilson noted that he "will try diclofenac and flexeril. Cont[.] PT. Try back brace." (PX5). Petitioner was to return in 6 weeks for follow up. (PX6). In a separate slip, Dr. Wilson prescribed continued physical therapy (2-3 times a week for 6 weeks and hot packs, and took Petitioner "off work through July 19." (PX5).

At the request of Respondent, Petitioner was examined by Dr. Avi Bernstein, a board certified orthopedic surgeon who specializes in spine surgery, on June 21, 2010 for purposes of a §12 examination. (RX10). Dr. Bernstein reviewed all of Petitioner's medical records in anticipation of his examination. (RX10, p.21-22). Regarding his examination, he noted that Petitioner was able to forward flex fully, which he stated would be uncommon for someone with a discogenic injury. (RX10, p.11). In addition, Dr. Bernstein stated that Petitioner did not exhibit pain behaviors consistent with someone with a disc injury and that her neurologic exam was completely normal. (RX10, pp.12-13). Dr. Bernstein reviewed the February 11, 2010 MRI films, noting the lumbar MRI was age-appropriate with no evidence of disc herniation or nerve root compression. (RX10, p.13). He stated that he did not feel there was anything structurally wrong with Petitioner's spine, but her deconditioning and weight could be contributing factors to her subjective complaints. (RX10, p.13). Dr. Bernstein placed Petitioner at MMI. (RX10, p.15). He felt she suffered a strain at most, and would have reached MMI post 6 to 12 weeks from the accident. (RX10, p. 15). He opined she could work full duty as a certified nursing assistant. (RX10, p.16).

Petitioner returned to Dr. Wilson on July 19, 2010 at which time it was recorded that "[t]he patient reports that sitting and laying down makes it worse." (PX5). Upon physical examination, Dr. Wilson noted only "lumbar diffuse spasm." (PX5). Dr. Wilson's assessment was "[t]his needs to be restarted. Try voltaren and flexeril. T#3 prn." (PX5). Petitioner was to return in 6 weeks for follow up. (PX5). Dr. Wilson's records do not contain a separate prescription slip for this date, nor is there any other reference at that time to any work restrictions. (PX5).

Petitioner returned to Dr. Wilson on September 7, 2010 at which time it was recorded that "[t]he patient is still having back pain. She has not had therapy, not approved. IME said she can work. I believe light duty is appropriate." (PX5). There is no indication that Petitioner attempted to return to work in a light duty capacity at that time. Upon examination, Dr. Wilson noted no objective findings, particularly with respect to the lumbar spine. (PX5). Dr. Wilson's assessment was "[s]he definitely needs PT to be able to get better. She has been having some improvement with medicines alone but this is not enough." (PX5). Petitioner was to return in 6 weeks in follow up. (PX5).

Petitioner returned to Dr. Wilson on October 19, 2010 at which time it was noted that "[t]he patient has been improving slowly. She has not had any new weakness. She continues to have lumbar pain to percussion. She has no focal weakness but she has some pain radiating into the left leg at times." (PX5). Upon examination, Dr. Wilson noted only that Petitioner had "... PS tightness in the lumbar region." (PX5). Dr. Wilson's assessment was "[c]ontinue PT, soft back brace. Off work." (PX5).

Petitioner returned to Dr. Wilson on November 16, 2010 at which time he noted that Ms. Jackson was on a diet and had lost 5 pounds so far. (PX5). Dr. Wilson also noted that "[s]he still has a sharp pain in the left lumbar region. It goes to the foot sometimes. She sometimes gets tingling in the left foot. She is not taking as much of the medicines." (PX5). Upon examination, Dr. Wilson noted no abnormal objective findings, including with respect to the spine. (PX5). Dr. Wilson's assessment was "I will check PSG. Continue PT. I believe if she continues to improve she can be on light duty." (PX5). A separate prescription slip on that date instructed Petitioner to "continue light duty, same restrictions until 12/16/10." (PX5).

In a Wheaton Franciscan Healthcare "Healthcare Practitioner's Return to Work Recommendations" dated December 9, 2010, Dr. Wilson noted that he had last treated the patient on November 16, 2010 and that Petitioner could return to work on December 13, 2010 with the following temporary restrictions: may work 8 hours a day; may frequently lift up to 10 pounds and occasionally lift up to 10 pounds; may stand up to 3 hours per work day; may sit up to 8 hours per work day; no twisting, bending, climbing, squatting, overhead work,

reaching or pushing/pulling over 20 pounds. (PX5). Dr. Wilson also noted that these limitations would be in effect until the patient was reevaluated on January 20, 2011. (PX5).

Petitioner returned to Dr. Wilson on December 16, 2010 at which time it was noted that "[t]he patient has been doing a bit better with therapy. I recommend sedentary duty. She has not had the sleep study yet. I also gave her recommendations regarding weight loss." (PX5). Once again, Petitioner's objective findings upon physical examination were normal. (PX5). Dr. Wilson's assessment was "I will start her on light duty. Advance as tolerated." (PX5).

Petitioner returned to Dr. Wilson on January 13, 2011 at which time it was recorded that "[s]he is still doing the exercises. She has stopped the meds. She has been improving slowly. I will increase weight restriction." (PX5). Upon examination, Dr. Wilson noted no abnormal objective findings, including with respect to the spine. (PX5). Dr. Wilson recommended continued therapy and advised Petitioner to return in 3 months for follow up. (PX5). In a separate prescription slip on that date, Dr. Wilson indicated that "Ms. Jackson may stand up to 4 hrs a day, may lift up to 20#, may push or pull 40#. Other restrictions unchanged. Pt. to be reevaluated on 3/13/11." (PX5).

Petitioner returned to Dr. Wilson on March 17, 2011 at which time it was noted that Ms. Jackson was still having some pain in the back and that it was often worse when she tried to get to sleep. (PX5). Dr. Wilson once again noted no abnormal, objective findings with respect to the spine upon examination. (PX5). Dr. Wilson's recommendation at that time was that Petitioner continue her current medications and to try water aerobics. (PX3). Petitioner was instructed to return in 3 months for follow up. (PX5).

Petitioner returned to Dr. Wilson on May 19, 2011 at which time it was recorded that Ms. Jackson had been exercising, using a treadmill and exercise bike, and that "... she has been feeling a bit better. She feels less tight and she is moving better. She has not had any pain into the legs. The pain stays in the back. I will increase the duties, 40# push/pull, 20# lift, 6 hours standing." (PX5). Once again, upon examination, Dr. Wilson noted no abnormal, objective findings, particularly with respect to the spine. (PX5). Petitioner was instructed to return in 3 months for follow up. (PX5).

Petitioner returned to Dr. Wilson on July 7, 2011 at which time it was noted that she was "[d]oing reasonably well. She is sleeping better. She still has some LBP, but generally the same, perhaps slightly better. She has been staying active. She has not ahd [sic] any new weakness or numbness." (PX5). Upon examination, no abnormal objective findings were made with respect to the spine. (PX5). Petitioner was instructed to follow up in 3 months. (PX5).

Petitioner returned to Dr. Wilson on December 20, 2011 at which time it was recorded that "[t]he patient has been going to the gym and doing the treadmill ad she has been doing stretches. She continues to have pain in the low back." (PX5). Once again, no abnormal, objective findings were noted on physical examination, particularly with respect to the spine. (PX5). Petitioner was instructed to try indocin SR, omeprazole and continue current restrictions. (PX5). Petitioner was also told to return for follow up in 3 months. (PX5).

Petitioner last saw Dr. Wilson on May 4, 2012 at which time it was noted that "[t]he pain is still in the lower back and in the left leg. She still has pain when she bends or twists..." (PX5). This time, however, Dr. Wilson noted paraspinal lumbar spasm upon physical examination. (PX5). Dr. Wilson's assessment was "[h]erniated disk. I will switch diclofenac to etodolac 400 mg bid." (PX5). Petitioner was also instructed to return in 6 weeks or if problems develop or worsen. (PX5). Petitioner testified that she has not been back to see Dr.

Wilson since that time because she cannot get an appointment without insurance, and that she would not be able to pay the bill if she went.

Petitioner acknowledged receiving a letter from Respondent dated July 14, 2010 advising her to contact her employer about returning to work. Petitioner testified that she contacted her employer, but that she did not return to work at that time. Instead, she noted that she went on leave for six (6) months and her employment was eventually terminated by Respondent on December 28, 2010.

Currently, Petitioner notices that she still has issues, that she sometimes can't sleep and that she has severe back pain. She indicated that the pain periodically moves down her leg, but that the majority of the time the pain is in her lower back. She stated that she uses heat and ice for the pain and sometimes takes medication. However, given her present job as a school bus driver, she noted that taking medication is a big issue. Petitioner indicated that no physician had released her to full duty since her termination. She also claimed not to have suffered any other accidents since the one on December 2, 2009.

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 evidence shows that Petitioner suffered an undisputed accident on December 2, 2009 when she felt a pop in her back while assisting a patient back to a chair. She testified that following the incident she felt severe pain in her lower back. She sought treatment the following day, December 3, 2009, at Central DuPage Business Health where she was diagnosed with a thoracolumbar strain and given light duty restrictions. (PX1). She continued to treat at Central DuPage Business Health without apparent improvement through February 17, 2010. (PX1). During that period she was prescribed physical therapy as well as a Medrol Dose-Pak. (PX1). Central DuPage Business Health records indicate that Petitioner had been to only one physical therapy session as of January 6, 2010. (PX1). These records also show that Petitioner denied radiation of pain as well as numbness and tingling throughout the term of her treatment at this facility. (PX1). She continued to work light duty during this period.

An MRI of the lumbar spine performed on February 11, 2010 was interpreted as evidencing a "small disc herniation with annular tear at L4-L5." (PX1).

Petitioner eventually presented to Dr. Froese at OAD Orthopaedics on February 23, 2010. (PX2). Dr. Froese recorded a history of accident on December 3, 2010 in addition to prior episodes of low back pain, including a work injury in August 2008 that responded favorably to rehabilitation, a motor vehicle accident in 2008 as well as a lumbar strain in the 1990's which "healed uneventfully." (PX2). Dr. Froese performed a physical examination which failed to reveal any abnormal findings with respect to the back. Dr. Froese also reviewed Petitioner's February 11, 2010 MRI scans, noting the thoracic MRI was a "normal study" and that the MRI of the lumbar spine "reveals mild desiccation at the level of L4-5 with left paracentral disc protrusion and annular tear seen." (PX2). Dr. Froese summed up these MRI findings as being "very mild." (PX2). Dr. Froese felt that Petitioner "will do well with therapy alone" and recommended four more weeks of physical therapy followed by a return to full duty work. (PX2). In the meantime, Petitioner was to return to light duty work with a 20 pound lifting restriction and was to return in follow up in four weeks. (PX2). Petitioner, for her part, testified that Dr. Froese told her she did not have to return for re-evaluation after her first and only visit on February 23, 2010. (T.22).

Petitioner underwent four additional sessions of physical therapy at AthletiCo. (PX4). In an AthletiCo "Therapy Discharge Report" dated May 4, 2010, it was noted Petitioner had been discharged given that "[p]atient did not return to physical therapy and did not return clinic phone calls regarding continued care." (PX4). Prior to that,

on March 1, 2010, it was noted that she had no presence of neurological symptoms such as paresthesia, numbness, or lower extremity pain. (PX4). On March 3, 2010, Petitioner complained of nausea and refused further treatment. On March 17, 2010, Petitioner complained of symptoms going into her left lower extremity. (PX4). At the time of her last therapy session, on March 20, 2010, it was noted that Petitioner reported that her symptoms were improving with regards to her left leg soreness. (PX4).

Petitioner did not return to full duty work or follow up with Dr. Froese thereafter. Instead, she sought treatment on her own with Dr. Kirincic at Hinsdale Orthopaedics on March 23, 2010. (PX3). Dr. Kirincic noted that Petitioner "... reports that her orthopedist in OAD told her there is not much more to offer. The patient was returned to her regular duty that was supposed to start today. The patient comes for a second opinion as she feels her pain has been the same as after the injury and she can hardly walk, does not feel she can perform her regular duty that she has been returned to. The patient reports her pain is aching, up to 8/10 on the VAS scale, radiating up and down her lumbosacral area ..." (PX3). X-rays performed on that date revealed a slight cervicothoracic curvature with pelvic and shoulder obliquity. (PX3). Dr. Kirinicic performed a physical examination which revealed a negative straight leg raise, symmetric muscle strength, sensation and reflexes, decreased lumbar range of motion, and poor posture. (PX3). Dr. Kirincic's impression was "[p]ossible discogenic pain, annular tear, small disk herniation L4-L5 on one of multiple MRIs noticed, also obesity and deconditioning, poor progress in physical therapy ..." (PX3). Dr. Kirincic released Petitioner to light duty and restricted her to lifting no more than 25 pounds as well as no prolonged bending or twisting. (PX3). Dr. Kirincic also indicated that a discogram could be helpful in determining a possible discogenic source of her pain, but stated Petitioner should otherwise focus on postural retraining and weight loss. (PX3). Finally, Dr. Kirinicic indicated that Petitioner "will follow up after discogram or p.r.n." (PX3). Petitioner testified that the discogram was not approved by the workers' compensation carrier.

Petitioner testified that following therapy, and after having seen Dr. Kirinicic, she was still having severe pain in her back. The records show that she did not seek treatment again until May 1, 2010 when she presented to Dr. Wilson at Neurology, Clinical Neurophysiology & Sleep Medicine. (PX5). At that time Dr. Wilson recorded a history of low back pain since lifting a patient in December of 2009. (PX5). Dr. Wilson also recorded that Petitioner "first had pain in the back and then about a week or two later she noticed some pain radiating into the sacrum and down into the legs. She reports that occasional urinary urgency but now she is ok. She had an MRI that showed a herniated disk." (PX5). It does not appear that Dr. Wilson reviewed the actual MRI films themselves, but instead simply relied on the report itself. Furthermore, his only relevant physical examination finding with respect to the back was "paraspinal muscle tightness." (PX5). Dr. Wilson's diagnosis at that time, found in a separate prescription slip dated May 1, 2010 was "lumbar disc disease." (PX5).

Petitioner would continue to visit Dr. Wilson on an intermittent basis through May of 2012. Throughout that entire period, as previously noted, his records are significant only for the consistent lack of objective findings noted on examination with respect to Petitioner's spine, other than the occasional reference to "paraspinal muscle tightness." (PX5).

In the interim, Petitioner was examined by board certified orthopedic surgeon Dr. Avi Bernstein at the request of the Respondent on June 21, 2010. (RX10). Upon examination, Dr. Bernstein noted that Petitioner was able to forward flex fully, which he stated would be uncommon for someone with a discogenic injury. (RX10, p.11). In addition, Dr. Bernstein stated that Petitioner did not exhibit pain behaviors consistent with someone with a disc injury and that her neurologic exam was completely normal. (RX10, pp.12-13). In addition, Dr. Bernstein had the opportunity to review the actual MRI films and opined that the lumbar MRI was age-appropriate with no evidence of disc herniation or nerve root compression. (RX10, p.13). As a result, Dr. Bernstein stated that he did not feel there was anything structurally wrong with Petitioner's spine, but her deconditioning and weight

could be contributing factors to her subjective complaints. (RX10, p.13). Dr. Bernstein felt that Petitioner suffered a strain at most, and would have reached MMI post 6 to 12 weeks from the accident. (RX10, p.15). Furthermore, he believed that Petitioner could work full duty as a certified nursing assistant. (RX10, p.16).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered a lumbar strain as a result of the accident of December 2, 2009 and that she had reached maximum medical improvement as of the date of Dr. Bernstein's evaluation on June 21, 2010. In support of this finding, the Arbitrator relies on the opinion of Dr. Bernstein as well as that of one-time treater Dr. Froese who examined Petitioner on February 23, 2010, or immediately after the MRI, and determined that the MRI findings were "very mild" and that Petitioner would be able to return to full duty work with four more weeks of physical therapy alone. In contrast, the Arbitrator finds the records of Dr. Wilson woefully insufficient evidence to support a finding that Petitioner was in need of ongoing treatment for the accidental injuries she sustained on December 2, 2009, particularly in light of the total absence of objective physical findings on examination as well as the noticeable lack of even a viable diagnosis, other than Petitioner's subjective complaints of back pain, during the entire two (2) year period that he continued to see Ms. Jackson. Therefore, for the reasons stated above, the Arbitrator finds that Petitioner failed to prove that her current condition of ill-being is causally related to the accident on December 2, 2009.

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 submitted into evidence medical expenses relating to services offered by Dr. Wilson. (PX6). The parties submitted into evidence an agreed stipulation indicating that in the event this matter was found to be compensable Petitioner would be entitled to $1,965.00 in reasonable and necessary medical expenses pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act, with Respondent maintaining any and all objections to liability as well as reasonableness and necessity. (Arb.Ex.#2).

Based on the above, and the record taken as a whole, as well as the Arbitrator's determination that Petitioner had reached MMI as of June 21, 2010, the Arbitrator finds that Petitioner failed to prove her entitlement to medical expenses incurred thereafter. The record shows, however, that Petitioner visited Dr. Wilson on three (3) occasions leading up to that date -- on May, 1, 2010, May 6, 2010 and June 14, 2010. (PX5). However, based on the Arbitrator's finding that Petitioner suffered a lumbar strain, as well as the lack of objective physical findings in Dr. Wilson's records supporting ongoing disability, or even a diagnosis, the Arbitrator finds the treatment offered by Dr. Wilson to be unreasonable and unnecessary under the circumstances. As a result, the Arbitrator finds that Petitioner failed to prove her entitlement to medical expenses incurred as a result of services provided by Dr. Wilson, and Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner is claiming temporary total disability from June 17, 2010 through May 4, 2012. (Arb.Ex.#1).

Based on the above, and the record taken as a whole, as well as the Arbitrator's determination that Dr. Wilson's treatment was unreasonable and unnecessary and that Petitioner had reached MMI as of June 21, 2010, the Arbitrator finds that Petitioner failed to prove her entitlement to temporary total disability benefits during the period claimed. This finding is supported not only by the opinion of Dr. Bernstein but also by that of Dr. Froese

who likewise interpreted the MRI findings as mild and was off the impression that Petitioner would be able to return to full duty work following physical therapy alone.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner's injury is consistent with a lumbar sprain/strain. In this regard, the Arbitrator relies on the diagnoses rendered by Dr. Froese and Dr. Bernstein. Each of these doctors had occasion to perform a detailed examination of Petitioner's spine and review her MRI films. Dr. Froese diagnosed a lumbar strain and lumbar disc degeneration. (PX2). Dr. Bernstein likewise was of the opinion that Petitioner had suffered a sprain/strain at most. (RX10, p.15).

The Arbitrator specifically declines to assess permanency on the basis of the MRI report, which references a small disc herniation. (PX7). The MRI was read by Dr. Gregory Zweig. No evidence has been presented which would support a finding that Dr. Zweig's interpretation of the MRI was more credible that the two orthopedic doctors who reviewed the MRI films, examined petitioner personally, and took a history from petitioner.

The Arbitrator notes that the MRI report, and not the actual films, served as the basis for Dr. Kirincic's diagnosis of a herniated disc. In fact, both orthopedic doctors who actually reviewed the MRI films noted that the findings were minimal, and neither referenced a disc herniation. In fact, Dr. Froese stated that Petitioner's lumbar MRI findings were "very mild." (PX2). Dr. Bernstein also noted that the lumbar MRI was "basically age-appropriate, with no evidence of disc herniation or nerve root compression." (RX10, p.13). Furthermore, the results of the May 6, 2010 EMG would appear to support Dr. Bernstein's characterization of the MRI findings as the EMG failed to suggest any evidence of nerve injury. (PX5).

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 5% person-as-a-whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Respondent's conduct in the defense of this claim, including it's reliance on the report of Dr. Bernstein, was neither unreasonable nor vexatious under the circumstances so as to warrant the imposition of penalties. Accordingly, Petitioner's request for additional compensation pursuant to §19(k) and §19(l) as well as attorneys' fees pursuant to §16 of the Act is hereby denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dave Dyer,
Petitioner,

vs.

NO: 11 WC 34166

Bridgestone Firestone,
Respondent.

14IWCC0847

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Fratianni finding that Petitioner sustained an accidental injury arising out of and in the course of his employment on June 21, 2011. As a result Petitioner was temporarily totally disabled from June 22, 2011 through August 9, 2011 for 7 weeks under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to $976.10 in medical expenses under Section 8(a) of the Act and permanently lost 25% 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 that arose out of his employment on June 21, 2011 and whether notice of the alleged June 21, 2011 accident was timely given to Respondent. After reviewing the entire record, the Commission reverses the Arbitrator's decision and finds Petitioner failed to prove he sustained an accidental injury that arose out of his employment on June 21, 2011 and failed to prove notice of the alleged June 21, 2011 accident was timely given to Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1.Petitioner, a 58 year old operator, testified that on June 21, 2011 it was raining when he got off of work at 7:00 p.m. Vernon Myers, a co-worker, was at the door waiting just like he was to see if the rain would let up. It seemed that the rain let up so they started walking toward their cars.

Petitioner testified that they were walking at a normal pace and once the rain picked up a little bit they quickened their pace. They were walking fast on the sidewalk. He marked an "x" on Petitioner's PX4 where he slipped. Petitioner said his foot hit the ground. He slid and hyper-extended his left knee when he went down. Mr. Myers was on his left when he slipped. Mr. Myers asked if he was okay and he said no. He thought he blew out his knee. The place where he fell is well before the guard shack. The corner of the drive contains white gravel. There were times where he noticed white gravel on the asphalt. Petitioner testified that at the time he slipped, he did not notice anything at all. He just knew he slipped. It could have been because of a rock, a stick or anything. The area that he slipped is not a common traffic area. He has only seen delivery drivers there and not other members of the general public or visitors to the plant. Petitioner testified that he marked DD in the parking lot where his car was parked that day. It is a fenced in employee parking lot that is not open to the public and that requires a swipe card to access. He labeled visitors parking on the exhibit.

Petitioner testified that the next morning he went to the company nurse. He did not report to the nurse that his injury was work-related. He told the nurse that he slipped going out to his car. He did not specifically mention to her that it happened in the parking lot, but it was from leaving work and going to his car. She called Dr. Lawrence Nord and made him an appointment. He disagrees with Dr. Lawrence Nord's history contained in Petitioner's PX1 that he was running to his car in the parking lot after he finished work and slipped on some wet pavement and twisted his knee. He never asked Dr. Nord to correct the history. Petitioner was asked by his attorney if on one of those forms you marked that it was not work related can you explain why you marked it that way and Petitioner answered it happened in the parking lot and he did not think it was covered. Other than the nurse, he never gave notice to anyone else at work. On cross-examination, Petitioner agreed that he completed Respondent's RX2, an accident and sickness benefits form (A & S form) on June 22, 2011 in which he indicated that the accident was not related to his employment. He marked it that way because he did not believe that his accident was compensable. It was not until he spoke with a co-worker that said that if it is company property Respondent may be liable that he believed his injury was work related. This conversation took place sometime after he returned to work on August 10, 2011. He also did not mark on the A & S form that there was a witness to the accident. He stated on the A & S form that he hyper-extended the knee while jogging to his vehicle, but he testified that he was actually walking to the vehicle. He is not sure why he put down jogging other than it was raining and he was hurrying.

2. Vernon Myers testified he is one of Petitioner's co-workers. He was subpoenaed to testify. Mr. Myers testified that at the end of the shift on June 21, 2011 they were getting ready to leave. At that time it was raining pretty hard. So they hung out at the door. Petitioner stopped there and they chatted. Petitioner testified that he never socialized with Mr. Myers outside of work and Mr. Myers also testified that they are not friends outside of work. After approximately five minutes, the rain slowed down and they started walking out on the sidewalk. They were doing a quick walk. It was not a run or a jog. It was a fast paced walk. Petitioner was on his right side. He saw Petitioner stumble and heard him curse a little bit. Petitioner did not fall down. Petitioner was

kneeling down. He asked Petitioner if he was okay and Petitioner said he thought he blew out his knee. He identified the "x" on Petitioner's PX4, which is an aerial map, as the place where Petitioner stumble. Mr. Myers testified that Petitioner stumbled before the guard shack.

Beyond the guard shack is the area where he usually parks his car. It is an employee parking lot, which is not open to the public and it is where employees are instructed to park. There are two parking lots the employees are allowed to park their vehicles. He has to use a pass key to get into the lot. He marked VM on Petitioner's PX4, which represents where he parked. The corner on the parking lot was opened up for the trucks to make their turn. It contains marble size white rock. Sometimes the rocks get out onto the street. Once he drove his car over a chunk of concrete out of the street which punctured his tire. He did not pay attention as to whether there were any rocks or asphalt where Petitioner was when the event occurred. He knows the asphalt was wet. He does not know what caused Petitioner to stumble.

3. Sheril Donahue testified she is the company nurse for Respondent. She refers employees to doctors for both workers' compensation injuries and non-workers compensation injuries. The top half of the accident and sickness benefits form (A & S form) is completed by the employee and the lower half is completed by the doctor. On June 22nd Petitioner completed an A and S form. Petitioner reported that he had a problem with his knee. He said he was jogging to his car in the rain trying to hurry and he hyper-extended his knee. When the employees complete the form, she tells them to write exactly what happened. Petitioner did not report that the injury occurred on Respondent's premises. He indicated that it was not related to his employment. On examination, Petitioner did have swelling and he was limping. Petitioner confirmed on the A & S form that his injury was not related to work. Petitioner did not say that the accident occurred in the parking lot.

4. Emily Nolan testified she is the safety & health coordinator for Respondent. A large portion of her duties revolve around workers' compensation. She testified that if an employee is injured at work he/she is to report the injury to his/her supervisor, who would request that they fill out an injury report. The report would then be turned over to the safety and medical departments. A Form 45 is generated if they needed outside medical treatment or if Respondent received an Application for Adjustment of Claim (AAC). Respondent received notice of Petitioner's workers' compensation claim in September of 2011. They received an AAC in the mail. After they received the AAC, a Form 45 was generated on September 27, 2011 by Ross Boeker, the safety manager, who is no longer working for Respondent.

Ms. Nolan testified that there are two parking lots available for the employees to park their vehicles, which are an upper and lower parking lot. The employees can park in either lot. The premises are secured by a fence and guard shack where one would have to check in prior to entering the fenced area using an employee's or visitor's badge. There is a designated visitor's area. If the visitor's area is full the visitors can park in the employee lot. She identified four photos she took of the parking lots and the surrounding area. The first photo shows that the upper lot, in June of 2011, was paved. The second photo shows that the lower parking lot, in June of 2011, was paved. The third photo is of the employees' entrance/exit to the building. She agreed

that the corner of the drive contains gravel. With the exception of snow removal, Respondent maintains the property.

5. On June 22, 2011, Petitioner was seen by Dr. Lawrence Nord. The Petitioner reported he was running to his car in the parking lot after he finished work and he slipped on some wet pavement and twisted his left knee. Petitioner was diagnosed with internal derangement syndrome of the left knee. An MRI was ordered.

6. The June 23, 2011 left knee MRI showed a low-grade sprain of the tibial and fibular collateral ligaments. There was a low-grade soft tissue injury/strain margin of the posterior popliteus and anterior lateral head gastrocnemius. There was a broad vertical tear posterior horn medial meniscus extends towards the root without root avulsion. Additional medial and lateral non-communicating intrameniscal signal did not confirm a tear existed. There were chondromalacia medial and patellofemoral joint spaces with a minor subcortical signal change of the inferior trochlea. There was also patellar tendinosis and peritendinitis. Lastly, there were mild IT band, a deep infrapatellar and pes anserine bursitis.

7. The June 27, 2011 A & S form showed Petitioner reported hyper-extended his knee while jogging to his vehicle. The space for witnesses was left blank on the form and the question of whether the injury was due to employment was marked no.

8. On June 23, 2011, Dr. Lawrence Nord followed up with the Petitioner. Dr. Nord diagnosed a left knee tear of the medial meniscus, chondromalacia and he recommended surgery. On June 29, 2011, surgery was performed. The post operative diagnosis was R (sic-L) knee medial meniscus and lateral meniscus tears along with particular degenerative joint disease.

9. On Petitioner's June 30, 2011 post surgical physical therapy evaluation, Petitioner's history indicates he was going to his vehicle after work in the rain when his knee "locked up". Petitioner was discharged from physical therapy on August 3, 2011. At that time it was note that Petitioner still had a mild weakness in his knee while descending steps. He also complained that it would catch on occasion. He reported that he was able to return to playing golf.

10. On August 9, 2011, Dr. Nord issued a return to work slip in which he said Petitioner could return to work without restrictions.

11. On August 23, 2011, Dr. Nord noted that Petitioner has had improvements following the surgery but he still has low-grade discomfort and is requesting steroid injections at this time. An injection was given and Petitioner was instructed to continue with his home exercises, Mobic and he was told to avoid activities that aggravate his discomfort.

12. The September 6, 2011 AAC indicates Petitioner slipped and fell on wet gravel.

13. Petitioner testified he has not gone back to the doctor since August of 2011. On occasion his left knee does not work. He will take a step and the knee will give way on him and he will lurch, catch himself and keep going. He has an occasional limp and his left knee swells. He used to golf 40-50 times a season. Since he injured his left knee he has golfed only four times. When he golfed on those four occasions his left knee got tired. He cannot play like he used to be able to play. He cannot say whether it is due to his knee, his unrelated back problem or a combination thereof. He has continued to work full duty for Respondent since he returned to work in August of 2011. After his twelve hour work shift, his left knee aches and he takes Advil for pain.

14. Dr. Paul Nord, who is board certified in family practice, occupational medicine, quality assurance and utilization review, was deposed on June 17, 2013. He evaluated Petitioner on February 19, 2013 and obtained Petitioner's history. He noted that Petitioner reported that he was leaving work after it had rained. He was walking across a patch of wet gravel when he twisted his left knee. His foot slipped out in front of him and he started to fall. Petitioner said he was told that he tore the meniscal area and surgery was performed a few days later. The medical records show that Petitioner performed post-operative physical therapy. He was off of work 5-6 week. After that he returned to work and he reported doing the same amount of work that he had done prior to the incident. At the time he saw Petitioner, the Petitioner reported experiencing continued aching on the inside of his left knee and he reported that it felt swollen in the upper part of the knee. Petitioner reported that he did not have any more appointments with treating doctors. He said when he works on concrete floors he has more discomfort. He said that occasionally it feels like his knee is going to buckle. However, it has not buckled at this time. He said the more he is up, the worse it is. He is able to perform his work activities although he has some discomfort. He diagnosed Petitioner as having an internal derangement of the left knee with tears of the medial and lateral meniscus areas. Dr. Nord opined that the surgery was necessary. He opined that he expects that the complaints that Petitioner made on the day of the evaluation may well have stabilized. He may intermittently need to have some medication for inflammation within the knee joint area. Dr. Nord opined that Petitioner's complaints are permanent and that Petitioner has reached maximum medical improvement. Dr. Nord opined that Petitioner is, more likely than not, going to have permanent discomfort within his left knee off and on. Dr. Nord further opined that the current problems Petitioner is having are related to the injury he had followed by the surgery he underwent. The Petitioner said he was in a parking lot and that there was some gravel in the area. He did not say he was running at that time.

The Commission finds that Petitioner failed to prove proper notice of the alleged June 21, 2011 accident was timely given to Respondent. Specifically, Petitioner testified twice in regard to the issue of notice. First, Petitioner testified that he told the company nurse that he slipped going out to his car. He did not specifically mention to her that it happened on Respondent's premises. Secondly, Petitioner said he did not report to the nurse that his injury was work-related. The nurse agreed that Petitioner did not report that the injury occurred on Respondent's premises. Furthermore, even though she instructed him to write down exactly what happened, Petitioner did not say it was work related. Rather, he confirmed on the A & S form that it was not

related to his employment. When Petitioner was asked why he marked on the A & S form that it was not work related he said, "I didn't think it was covered". Petitioner then stated that he did not think it was work related until after he spoke with a co-worker sometime after he returned to work on August 10, 2011.

Based on the above, it appears that the earliest period that Petitioner believed his alleged injury was related to work was on or about August 10, 2011, which is approximately 51 days after the alleged accident. The AAC which was received by the mail room on August 30, 2011, filed at the Commission on September 6, 2011 and Respondent received later that month, is dated approximately 70+ days later. Section 6(c) of the Act requires notice to be given to a supervisor within 45 days of the date of the accident. While the Act is to be liberally construed and defective notice is sufficient at times, the issue of notice is also a jurisdictional and as such must comply with the requirements of the Act in order for an injury to be compensable. As such, the Commission finds that the evidence supports the fact that notice was neither timely given nor given to the proper party. While the Arbitrator based her finding of notice on Petitioner's testimony, the record contains contrary evidence from the nurse as well as the A & S report to show that proper notice was not provided to the Respondent. Even if the Commission were to view Petitioner's testimony in isolation, it appears that his own testimony does not support the fact that he told the nurse that his injury was work related. For the above reasons, the Commission reverses the Arbitrator's finding of notice and finds Petitioner failed to provide proper and timely notice to the Respondent pursuant to Section 6 (c) of the Act.

The Commission finds that while Petitioner's attorney cites to parking lot cases to support his position that Petitioner's injury is compensable, the Commission notes that the alleged accident did not occur in a parking lot. Rather, it occurred in a driveway as indicated on the aerial pictures placed into evidence by the Petitioner. Both Petitioner and Vernon Meyers testified that Petitioner's placement of the "X" marks the spot of the incident. Additionally, while there is testimony in regard to there being gravel and/or other substances being at the corner of the driveway and/or the gravel migrating onto the driveway at other times in the past, while Petitioner stated on his AAC that he slipped on wet gravel and while Petitioner told Dr. Paul Nord that he walked across a patch of wet gravel during his February 19, 2013 evaluation, Petitioner testified he did not notice anything at all being on the surface where he slipped and fell. Rather, Petitioner testified that he just knew he slipped and that it could have been because of a rock, a stick or anything. Consistent with this testimony, Vernon Meyers testified he did not know what caused Petitioner to stumble and Dr. Lawrence Nord noted that Petitioner slipped on some wet pavement without any mention of there being gravel. As such, the Commission does not believe that Petitioner can claim that he slipped on gravel and/or that there was a defect in the driveway. Moreover, it is clear that at the time of the incident it had been raining and that the rain picked up again after they had left the building and prior to them getting to their car. The Commission finds that this is the same rain that any member of the general public would have been subjected to if they had walked outside and as such rain should not be viewed as an increased risk caused by Respondent. Lastly, while both Petitioner and Vernon Myers said they were walking at a fast pace, there is evidence that Petitioner told the company nurse that he was

14IWCC0847

jogging. Petitioner reported that he was jogging in the A & S form and he reported to Dr. Lawrence Nord that he was running to his car. While the action of jogging/running to a car is comparable to an action that a member of the general public would have taken, it does not indicate that Respondent created an increased risk of injury for the Petitioner. Rather, the Commission finds that it was Petitioner's personal action of jogging/running that increased his risk of injury. The Commission notes that in the end it is not enough for Petitioner to be in the course of his employment. He must also be able to prove that his injury arose out of his employment by virtue of Petitioner proving up that there is a defect on Respondent's property and/or that employer created an increase risk of injury. Given this standard and based on all of the evidence noted above, the Commission finds that Petitioner failed to prove he sustained an accident arising out of his employment on June 21, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental injuries arising out of his employment on June 21, 2011, his claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $2,700.00 for the payment of workers compensation benefits and $8,842.28 paid 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.

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 Circuit Court.

DATED: OCT 06 2014

O: 8/28/14

MB/jm

43

Mario Basurto

David L. Gore

Stephen Mathis

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

Enrique Martinez,

Petitioner,

14IWCC0848

vs.

NO: 09 WC 51956

Central Grocers Co-op, Inc.,

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, 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 January 8, 2014 is hereby affirmed and adopted.

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

14IWCC0848

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 $39,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 6 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 10/2/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0848

MARTINEZ, ENRIQUE
Employee/Petitioner

Case# **09WC051956**

CENTRAL GROCERS CO-OP INC
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:

1042 LAW OFFICE OF OSVALDO RODRIGUEZ PC
1010 LAKE ST
SUITE 424
OAK PARK, IL 60301

3998 ROSARIO CIBELLA LTD
116 N CHICAGO ST
SUITE 600
JOLIET, IL 60432

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)

14IWCC0848

Enrique Maritnez
Employee/Petitioner

v.

Central Grocers Co-op, Inc
Employer/Respondent

Case # 09 WC 51956

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **New Lenox**, on **10/18/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/11/2009**, 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 $39,128.44; the average weekly wage was $752.47.

On the date of accident, Petitioner was **35** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of **$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 $501.65/week for 38 2/7 weeks, commencing 1/24/2013 through 10/18/2013, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $20,083.16, as provided in Sections 8(a) and 8.2 of the Act.

Respondent is ordered to provide written authorization for the surgery along with all pre and post ancillary care and tests as ordered per his records by the Petitioners' treating doctor at Illinois Bone and Joint Institute.

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

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

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

01 George J Andros

Signature of Arbitrator

December 27, 2013

Date

ICArbDec19(b)

JAN 8 - 2014

Enrique Martinez v. Central Grocers Co-op, Inc. 09 WC 51956

The parties have stipulated that the accident occurred on November 11, 2009. Petitioner was lifting a heavy case of ham and felt and heard a pop in his lower back (PX #1, p. 3). The Petitioner stated that he felt sharp pain in his lower back and pain to his right lower extremity (PX#4, p. 123). Petitioner complained of severe lower back pain and weakness in his legs to the Silver Cross ER. The Petitioner was diagnosed with acute low back pain and muscle spasm then instructed to follow up with Silver Cross MedWorks Occupational Health (PX #1, p. 3, 6).

On November 12, the Petitioner presented to Silver Cross MedWorks Occupational Health with complaints of lower back pain. At the Occupational Clinic he was diagnosed with a lumbar strain. The Petitioner was given restrictions of no lifting more than five pounds and no heavy exertion and remain off work until November 16, 2009 (PX #2, p.15-16). He was treated about 5 more times before an MRI>

On 11/16 The Petitioner was prescribed Naproxen 220 mg. The Petitioner was to remain off work since there was no light duty work available at the Respondent and he was unable to lift anything or bend (PX #2, p. 11).

On the November 30, 2009 Petitioner was instructed to continue physical therapy and to remain off work until the next follow up (PX #2, p. 9).

On the December 7, 2009 The Petitioner was diagnosed with sacroiliac bursitis on the right side and lumbar strain. The Petitioner was given restrictions of no lifting, pushing, pulling greater than ten pounds and he was instructed to alternate sitting, standing and walking, no twisting or climbing, at all, with occasional bending, squatting or kneeling. The Petitioner was able to return to work with those limitations. . The Petitioner was to continue physical therapy, three times per week, for three additional weeks (PX #2, pp.5-6).

On the December 9, 2009 follow up visit, the Petitioner stated that he has undergone therapy with some improvement. After therapy, his back feels sore, but afterwards he feels better. He was to continue physical therapy, for at least two additional weeks The Petitioner was given a light duty restriction with no lifting more than twenty pounds and no bending (PX #2, p.1). On December 15, 2009 x-ray revealed a degenerative disc disease of the lumbar spine .5).

The December 18, 2009 MRI report stated that at the L3-4 and L4-5 levels, 2 to 3 to 4mm subligamentous posterior disc protrusions/herniations , elevating the posterior longitudinal ligaments and indenting the ventral surfaces of the thecal sac, without significant spinal stenosis, as well as mild left lateral recess narrowing seen at the L4-5 level (PX #3, p. 14 & PX #10, p. 1).

On December 24, the Petitioner presented for a pain management consultation with Medicos Pain & Surgical Specialists, S.C. After review of the L-spine MRI (December 18, 2009), the Petitioner was diagnosed with a L3-4 and L4-5 disc herniation with bilateral radiculitis and lumbago. It was recommended that the Petitioner undergo spine steroid injections and continue physical therapy. The Petitioner was prescribed Mobic 50mg , should discontinue Advil and start Omeprazole 1 mg (PX #3, pp. 52-53). On January 8, 2010, the Petitioner underwent an EMG, which revealed electrophysiologic evidence of acute denervation of the right L5-S1 nerve roots (PX#3, p. 16). On January 11, 2010, the Petitioner underwent an L3- L4 right transforaminal epidural steroid injection (PX #3, p. 64).

On the January 21, 2010 it was noted that the Petitioner had undergone an EMG in January 2010, which revealed a right L5-S1 an acute denervation of the nerve root. The Petitioner was recommended to undergo a second injection, a right transforaminal epidural steroid injection of the L4-L5. The Petitioner was to remain off work as to not exacerbate his condition. The Petitioner was to continue with physical therapy (PX #3, pp. 49-50).

On January 29, 2010, the Petitioner was evaluated by Dr. Charles Slack from Illinois Bone and Joint Institute, LLC. The Petitioner presented with complaints of persistent pain to his lower back and legs. Dr. Slack opined that the Petitioner was temporary total disabled, should undergo a second injection (LBPI) and start physical therapy (PX #4, p. 146).

On February 10, 2010, the Petitioner presented for an initial physical therapy evaluation at Total Rehab, PC. The Petitioner complained of lower back pain, muscle spasms, difficulty bending and turning, sleeping and walking (PX #7, p. 20). The Petitioner underwent PT at Total Rehab, PC from February 10, 2010 through April 5, 2010 (PX #7).

Dr. Slack noted 3/1/10 that the Petitioner had undergone a second injection on February 8, 2010. Dr. Slack opined that the Petitioner was temporary total disabled and prescribed Flector patches for pain. The Petitioner was to continue physical therapy (PX #4, p. 143-144).

On the April 12, 2010 The Petitioner stated that he experienced persistent lower back pain with no PT progress. Dr. Slack opined that the Petitioner was temporary totally disabled and was ordered to attend work conditioning for a four week period (PX #4, pp. 139-140).

On April 16, 2010, the Petitioner presented for an initial evaluation at Premier Physical Therapy. The Petitioner complained of lower back pain that gets worse by activities and that pain radiates down to his right leg and foot (PX #4, p. 137). The Petitioner presented for physical therapy sessions from April 20, 2010 through June 7, 2010 (PX #6). On the May 20, 2010 follow up visit, the Petitioner presented with persistent lower back pain and was prescribed Flector & Lidoderm patches and Robaxin. Dr. Slack opined that the Petitioner was temporary totally disabled and should continue work conditioning (PX #4, pp. 133-134).

On the June 30, 2010 Dr. Slack opined that the Petitioner had persistent lower back derangement with herniated lumbar disk at L3-4 and L4-5. The Petitioner was to return to work with permanent restrictions of lifting from floor to waist and shoulder to overhead thirty pounds, carry thirty five pounds, and change position frequently. Dr. Slack opined that the Petitioner had reached maximum medical improvement (PX #4, p. 131, p.118).

On September 1, 2010, Dr. Slack referred the Petitioner for an FCE (PX #4, p. 128). On September 20, 2010 the summary of an FCE was based on the Petitioner's description of his previous job and a manual laborer being required to lift up to ninety pounds, he was found to be unable to return to this job since he is able able to lift up to twenty-nine pounds, carry up to thirty-nine pounds and push and pull up to forty-one pounds. The FCE evaluator opined that the prognosis for the Petitioner to return to a heavy level job was poor and that if there was no work at the Respondent based on the Petitioner's current work level, vocational rehabilitation was recommended. Also, the evaluator opined that the Petitioner seemed to have symptoms congruent with depression due to the change in his physical state and recommended an evaluation by a psychologist (PX #9, p. 4).

On September 21, 2010, Dr. Slack reviewed the FCE and noted that the Petitioner was able to perform, at work, in the medium level of lifting abilities with the restrictions of lifting floor to waist twenty nine pounds occasionally and waist to eye level twenty nine pounds occasionally and able to do a two hand carry of thirty nine pounds occasionally. Dr. Slack opined that these restrictions would be permanent work restrictions and the Petitioner was at maximum medical improvement (PX #4, pp. 120-121).

On the October 28, 2010 follow up visit, the Petitioner stated that he returned to work in a position with a stand-up forklift after he had received the results of FCE. The Petitioner stated that he was generally tolerating that position. However, the Petitioner stated that when he had tried to do lifting he did have increased back pain. The Petitioner stated that he was taking Tylenol for back pain. Dr. Slack opined that since the Petitioner is tolerating return to work with modifications, he would not recommend any other treatment. Dr. Slack opined that the Petitioner had reached maximum medical improvement (PX #4, pp.114-115).

On the July 21, Dr. Slack opined that the Petitioner had a persistent low back derangement with radiculopathy, especially on the right and with a two-level disk herniation L3-4 and L4-5. The Petitioner was referred for an MRI to compare to prior study to see if there had been any progressive worsening of disk herniations (PX #4, pp. 109-110).

On August 6, 2011, the Petitioner underwent an MRI of the lumbar spine at MRI of River North, which revealed the following: a congenitally somewhat narrow bony spinal canal in the mid and lower lumbar segment due to developmentally short pedicles, degenerative changes in the L3-4 and L4-5 intervertebral disks with a small anterior midline L3-4 annular tear with slight bulging of the disk, a tiny posterior midline L4-5 annular tear with mild bulging of the disk, mild canal narrowing and left neural foraminal narrowing at L4-5, and at L5-S1, there is a shallow broad based right posterolateral disk bulge which is contacting the right S1 nerve root and may be impinging on the right S1 nerve root causing right radiculopathy (PX # 4, p. 107 & PX #11, pp. 3-4).

On the August 24, 2011 Dr. Slack reviewed the MRI, which indicated an annual tearing in the midline, at L4-5 level degenerative facet joint changes were noted with a diffuse disk protrusion with mild disk desiccation changes and small posterior midline annual tear with the protrusion being slightly more left sided. Also, the L5-S1 indicated degenerative facet joint changes with a right sided small disk protrusion. Dr. Slack recommended a medial branch lumbar facet nerve block to determine pain control. If the pain was controlled, Dr. Slack opined that the Petitioner would be a candidate for radiofrequency nerve ablation procedure and Robaxin and Vimovo (PX #4, pp. 103-104). On September 26, 2011, the Petitioner underwent medial branch nerve block and bilaterally L4-5, L5-S1 at Saint Joseph Hospital (PX #4, p. 101).

On the October 3, 2011 Dr. Slack recommended a medial branch lumbar facet nerve block with local anesthetic, especially on the right side to determine if that would decrease pain. If so, Dr. Slack stated that he would recommend radiofrequency lesioning of the facet nerve (PX #4, pp. 98-99). On the November 7, 2011 he underwent a right L4-5, L5-S1 facet joint injection at Saint Joseph Hospital (PX #4, p. 95).On the November 16 he had minimal improvement.

The Petitioner stated that he was working in the dairy section of the cooler. The Petitioner stated that the coldness of the cooler and the fact that he has to do more twisting and turning have caused him increased pain. Dr. Slack opined that the Petitioner was at MMI and should work on a stand-up forklift with a thirty pound work restriction (PX# 4, p. 93).

On the April 9, 2012 follow up visit, the Petitioner stated that the cold temperature in the cooler increased pain and numbness to his right leg. The Petitioner stated that he was taking Tylenol and trying to avoid the Robaxin and Vicodin. Dr. Slack opined that the Petitioner had a persistent right lumbar radiculopathy with prior notation of right-sided L5-S1 disk herniation. Dr. Slack ordered a new MRI to evaluate for progressive worsening of the herniation at the L5-S1 level on the right. The Petitioner was to continue working on a stand-up forklift with a thirty pound work restriction and avoid extremes of cold temperature during his work day (PX #4, pp. 88-89).

The 5/8/12 MRI revealed, when compared to the MRI of August 6, 2011, the broadbased, small right medial foraminal disk protrusion at L5-S1 to have decreased in size and a right subarticular stenosis with mass effect on the descending right S1 nerve root has improved. There was also a stable appearance of a disk bulge with posterior midline annular fissure and shallow central disk protrusion at L4-5 resulting in mild central canal and left foraminal narrowing and a mild degree of congenital canal stenosis in the lower lumbar spine was redemonstrated (PX #4, p. 81 & PX #11, p. 1)

On the June 27, 2012 follow up visit, the Petitioner stated that he had been off work since March as the Respondent did not have work within his restrictions. The Petitioner stated that even though he had been off work he still had episodes of radiating right leg symptoms with activity. The Petitioner stated that he was taking Tylenol and Robaxin at times for back spasms. . Dr. Slack prescribed him Medrol Dosepack & restart Vimovo and keep Robaxin .(pp. 79-80).

On the July 16, 2012 follow up visit, the Petitioner stated that he returned to work in a janitorial position requiring repetitive bending, twisting, and lifting and sweeping and mopping. The Petitioner stated that due to his work he has experienced a severe flare-up of pain in his back and right leg. The Petitioner stated that he basically lasted working about a day and a half and he had been off work since then. The Petitioner stated that he was experiencing persistent radiating right leg pain and that he did not get relief with Medrol Dosepak. Dr. Slack gave the Petitioner modified duty restriction of occasionally lifting of thirty pounds and no sweeping, mopping and no repetitive bending, twisting and no work in temperature extremes. If he continued to have symptoms even after the modified duty, Dr. Slack opined that that Petitioner should consider a lumbar epidural steroid injection (PX #4, pp. 65-66).

On the September 17, 2012 follow up visit, Petitioner was ordered to return to work with thirty pounds lifting restrictions and was to avoid extreme cold temperatures (PX #4, p. 60).

On the October 29, 2012 follow up visit, the Petitioner stated that he had returned to work and complained of pain in his right lower back radiating into his right leg with a feeling of weakness to that leg when ambulating. r. Slack recommended a lumbar epidural steroid injection and that the Petitioner should continue with his work restrictions and taking his meds.(pp. 53)

On November 2, 2012, the Petitioner was seen for a consultation by Jay Kiokemeister, D.O. from Health Benefits Pain Management. Dr. Kiokemeister noted that the Petitioner had been to see him approximately a year before for injections. The Petitioner stated that he had slight improvement following the injections but Dr. Kiokemeister noted he had never studied the Petitioner for follow up visits. Dr. Kiokemeister opined that the Petitioner should undergo a course of L5-S1 laminar lumbar epidural steroid injections (PX #5, p 7). On November 5, 2012, the Petitioner underwent a lumbar epidural steroid injection by Dr. Kiokemeister (PX #5, p. 4). On the November 19, 2012 Dr. Kiokemeister recommended that the Petitioner was to return to Dr. Slack for surgical evaluation. PX #5, p. 2).

On the December 12, 2012 follow up visit with Dr. Slack, it was noted that even though the Petitioner underwent an epidural steroid injection in November 2012, he continued to have ongoing lower back and right leg pain with the feeling of weakness and numbness in his leg, especially while working. The Petitioner stated that he experiences lower back pain more than leg pain, some days it is difficult for him to even walk any distances, & he has continued Vimovo but the pain has been persistent. The Petitioner stated that he has not felt improvement in spite of all the treatment he has received since his injury in 2009. The Petitioner was referred for an evaluation with Dr. Fisher for a lumbar decompression and instrumented fusion. He was instructed to continue his medication and follow the thirty pound lifting restriction (pp. 45-46).

On January 11, 2013, the Petitioner was evaluated by Dr. Theodore Fisher. He diagnosed the Petitioner with L4-5 and L5-S1 herniated nucleus pulposus, lumbago and recurrent right sciatica. Dr. Fisher prescribed L4 to S1 decompression and fusion (PX #4, pp. 41-42).

On January 30, 2013, the Petitioner stated that he experiences severe pain when he is working. The Petitioner complained of increased back pain and lower extremity numbness down the posterior thigh, posterolateral leg and sole of the foot with work. The Petitioner reported dragging his foot by end of the work day. Dr. Fisher ordered off work, as light duty was not available for him, and await surgery (PX #4, pp. 35-36).

Dr. Fisher's note of April 3, 2013, discusses the confusion regarding the timing of the L5-S1 disk herniation. The radiologist mistakenly did not report the L5-S1 disc herniation on the initial December 18, 2009 MRI scan report. (emphasis added) Dr. Fisher opined that the films themselves reveal an obvious L5-S1 right paracentral disk herniation displacing the right S1 nerve root. The subsequent MRI scan films dated May 8, 2012 and August 6, 2011, also reveal the L5-S1 right posterolateral disk herniation. Dr. Fisher opined that the right L5-S1 disc herniation was consistent with the Petitioner's complaints, physical exam, MRI findings and EMG results, which indicated acute denervation on the right at the L5-S1 level (PX #4, p. 31).

On the April 12, 2013 doctor awaited surgery approval & diagnosed the Petitioner with L4-5 and L5-S1 herniated nucleus pulposus, lumbago and recurrent right sciatica and disk desiccation at L3 through S1. Dr. Fisher recommended that the Petitioner was to continue with home exercise program. The Petitioner was to remain off work (PX #4, pp. 29-30).

On the May 24, 2013 follow up visit he still was awaiting surgery approval. Petitioner was to remain off work (PX #4, pp. 26-27).

On May 31, 2013, the Petitioner presented for an independent medical evaluation with Ryon M. Hennessy, M.D. Dr. Hennessy's original opinion was that the Petitioner sustained only a lumbar strain and that the degenerative disc disease of his lumbar spine was not exacerbated or accelerated by the alleged accident on November 11, 2009. However, Dr. Hennessy stated that given the fact that the MRI was misread by the radiologist, as well as correlating with the EMG, it is likely the Petitioner sustained at least an exacerbation of the right L5-S1 disc herniation and degenerative disc disease and facet arthropathy. Dr. Hennessy opined that the Petitioner was treated appropriately with injection therapy, physical therapy, activity modification, medications and released at MMI with permanent restrictions of twenty-nine pounds for that exacerbation. Dr. Hennessy stated that there was no new injury and that the medical records do not suggest there was a new injury either. Dr. Hennessy opined that the Petitioner's complaints, as they progressed in 2011 and 2012, were from the natural progression of his pre-existing degenerative disc disease, as well as facet arthropathy, which clearly pre-dated the accident on November 11, 2009. Dr. Hennessy stated that he agreed with the treatment recommendation of L4-S1 laminectomy and fusion since the Petitioner has exhausted all non operative treatment (PX #4, pp. 20-21).

On the June 21, 2013 follow up visit with Dr. Fisher, the Petitioner complained of severe back pain and recurrent lower extremity radicular symptoms, which have worsened. Dr. Fisher noted that he had not received a copy of an IME report. The Petitioner stated that activity increases his pain, while nothing alleviates it and he would like to proceed with surgical intervention. The Petitioner was to remain off work (PX #4, p. 9).

Causation: On the June 28, 2013 follow up visit, the Petitioner complained of severe low back pain and right lower extremity radicular symptoms. Dr. Fisher discussed IME report with the Petitioner and stated that he continued to recommend surgery, as the Petitioner's symptoms have progressively worsened over time. Dr. Fisher stated that he agreed with Dr. Hennessy when he opined that the Petitioner most likely had preexisting degenerative changes in the lumbar spine that were exacerbated at the time of the work injury. Dr. Fisher opined that given the fact that the Petitioner has never returned to his pre-injury state since the November 11, 2009 incident, the need for surgical intervention in the form of an L4 to S1 PLIF procedure is directly related to the work injury. The Petitioner was to remain off work (PX #4, pp. 4-5). The Arbitrator adopts this opinion as a special finding of fact. This opinion along with the totality of evidence is the basis for the conclusion of law below that the current condition of ill being requiring surgery is causally connected to the accident in the case at bar.

Dr. Hennessy and Dr. Fisher agreed that the Petitioner had most likely preexisting degenerative changes in the lumbar spine that were exacerbated at the time of the work injury on November 11, 2009. Dr. Hennessy opined that the Petitioner was treated appropriately with injection therapy, physical therapy, activity modification, medications and released at MMI, with permanent restrictions of twenty-nine pounds for that exacerbation. Dr. Hennessy stated that he agreed with the treatment recommendation Dr. Fisher had given the Petitioner of L4-S1 laminectomy and fusion since the Petitioner has exhausted all non operative treatment.

Dr. Ryon Hennessy testified Petitioner needs the surgery recommended by Dr. Theodore Fisher but opines that the necessity for the surgery is due to the progression of the disease. Throughout all of those reports, there was never any documentation of the Petitioner malingering or symptom magnification. He found no evidence of any symptom magnification or malingering. He testified that he did not believe that these herniations became symptomatic after November 11, 2009 because it is the whole degenerative process as the spine is more than just a disk pushing on a nerve. Dr. Hennessy testified that the Petitioner was found to have facet arthritis and the disks themselves were degenerative, so it was not a herniation that became symptomatic. Moreover, the whole degenerative levels became symptomatic. He testified that the right radiculopathy was very spotty. Dr. Hennessy testified that the right radiculopathy—if any—was very spotty and noted for six weeks after the accident of November 2009. He reported that the Petitioner's chief complaint was back pain, and even after December 2009, Dr. Slack noted mostly back pain, not radiculopathy (Hennessy Depo, p. 60). Dr. Hennessy opined that the Petitioner exacerbated the degenerative conditions, and it wasn't that he had an acute disk herniation with a right S1 radiculopathy as his chief complaint.

Dr. Hennessy testified that radiculopathy was really noted mostly in December, at six weeks later, and that it could be construed that the Petitioner began to complain after November 11, 2009 . He believed that the Petitioner had been treated appropriately. Dr. Hennessy agreed with Dr. Fisher that three films showed pathology at L5-S1, which was present since the first MRI was taken. Films correlated with the EMG that demonstrated L5-S1 radiculopathy. He testified that EMGs are another tool that doctors use in their field to confirm a diagnosis. Dr. Hennessy reported that the EMG's were used in an attempt to get more information. The MRI reports or MRI films showed no progression of disease at any level. Dr. Hennessy reported that reports showed a slight improvement of the L5-S1 herniation. In the last examination the

Dr. Hennessy testified that as of that date, he agreed with Dr. Fisher that the Petitioner needed an L4-S1 laminectomy and fusion. Dr. Hennessy testified that the Petitioner has not been able to go back to this pre-injury level of activity. The Petitioner had only returned to medium duty at a permanent restriction of no lifting more than thirty pounds. Dr. Hennessy testified that the Petitioner would never be able to go back to heavy work because the pain that was left with the Petitioner in 2010 after appropriate treatment showed that if he went higher it would exacerbate his symptoms further. Dr. Hennessy agreed that the Petitioner could not go back to his pre-injury job of lifting over fifty pounds on a frequent basis. Dr. Hennessy reported that based on Dr. Slack's notes, the freezer temperature caused some problems. He testified that the temperature and also the activities caused the Petitioner some problems. Dr. Hennessy reported that other than that, no new injuries were reported .

Dr. Hennessy reported that he had his definition of MMI and that he supposed it could vary from doctor to doctor. He testified that it was fair to state that the Petitioner continued to treat since early 2010 until August of 2013 with Dr. Slack and Dr. Fisher. Dr. Hennessy reported that the Petitioner had only been treating for his low back and right radiculopathy. Petitioner had been told that he would only be seen as necessarily in the future when he was sent back to work at MMI. Dr. Hennessy reported that is what he did in his practice and he testified that it does not necessarily mean that the pain has gone away for the individual (Dr. Hennessy Depo, p. 75-76).

Dr. Fisher testified that he is a board certified orthopaedic surgeon and did Orthopaedic Spine Fellowship at Sinai Hospital of Baltimore. He reported that the first time he saw the Petitioner was on January 11, 2013. He testified that the Petitioner had been seen by Dr. Fisher's practice, Illinois Bone and Joint Institute, and prior to that time by Dr. Charles Slack. Dr. Fisher reported that the Petitioner reported that while working in a warehouse on November 11, 2009, he was lifting a heavy box when he felt immediate low-back pain and recurrent right lower extremity numbness (Fisher Depo, p. 8).

Dr. Fisher reported that he had three assessments: the first was L4-5 and L5/S1 herniated nucleus pulposus, otherwise known as a disc herniation; two, lumbago, which he described as a word for back pain in the lower back; three, recurrent right sciatica, that's the recurrent numbness and pain he had down the back of the thigh and the leg on the right

After reviewing all of the three MRI scans, the Petitioner was found to have a disc herniation at the L5-S1 level, the L4-5 level and a much smaller disc herniation at the L3-4 level. He reported that the last of the MRI scans showed that the disc herniation at the L5-S1 level was still there but was slightly smaller than the initial two examinations. Dr. Fisher testified that there was no significant change in any of the films that he saw. At the time, Dr. Fisher reported that his diagnosis of the Petitioner was unchanged from his initial assessment with L4-5 and L5-S1 disc herniations along with recurrent right lower extremity radiculopathy and lumbago (Fisher Depo, p. 11).

Dr. Fisher testified that although he did not see the Petitioner on January 25, 2013, he took him off work because the Petitioner was having extreme pain with activities such as lifting, bending, twisting, which were duties that his job required. Dr. Fisher testified that he saw the Petitioner a few days later and kept him off of work pending surgery. Dr. Fisher said that at the time, he recommended an L4-5 and an L5-S1 fusion procedure and to continue, in the meantime, with a home exercise program, SHEP, which is the exercise limit therapy with his medications (Fisher Depo, p. 15). Dr. Fisher reported that based upon a reasonable degree of medical and surgical certainty in his field, the recommendation for the surgery was causally related to the Petitioner's work injury of November 11, 2009. Dr. Fisher testified that this was based on the Petitioner's acute onset of symptoms at that time, his persistent symptoms, his lack of symptoms prior to that time, and the fact that the imaging studies, such as MRI and X-rays revealed problems with the L4, L5, S1 levels that were consistent with the Petitioner's job injury description and also correlated to his symptoms at the time. Dr. Fisher testified that he was aware that the Petitioner returned to work during his treatment with Dr. Slack. He testified that the Petitioner returned to work lifting between 29 and 39 pounds as a standup fork lift driver. Dr. Fisher reported that at the time, he evaluated the Petitioner, he was working as a standup fork lift driver with lifting restrictions, but he still had to lift boxes (Fisher Depo, p. 16).

Dr. Fisher reported that he did not believe that the Petitioner could be an order picker and lift over 50 pounds frequently. Dr. Fisher reported that his opinion was based on the Petitioner's symptoms of pain and radiculopathy with activity and the fact that he had continued and exacerbated pain while working and his pain is exacerbated when he worked. Dr. Fisher testified that the fact that the Petitioner had between a five to nine month gap in treatment or a gap in visits to Dr. Slack did not affect his opinion.

Dr. Fisher testified during the point of time in which the Petitioner was given work restrictions and then returned to see Dr. Slack afterwards with continued pain, the Petitioner was performing the exercise limit therapy and working with restricted duty. Dr. Fisher testified that the Petitioner was on medications and he had no set follow-up as there was no further current plans of treatment until he returned with continued symptoms (Fisher Depo, p. 17). Dr. Fisher reported that this did not affect relating the need for the surgery to the initial date of injury of November 11, 2009. Dr. Fisher testified that during that period, there were no indications that the Petitioner improved, but rather that his symptoms were static or increased. Dr. Fisher testified that at that time, he had seen the Petitioner approximately five times from January 2013 to August 2013 (Fisher Depo, p. 18).

Dr. Fisher testified that he did not see any evidence of any type of symptom magnification or malingering. He reported that the Petitioner's complaints, as exhibited in Dr. Fisher's physical examination, were consistent with the findings of the three MRIs. Dr. Fisher reported that at that time, the Petitioner had not been released to his pre-injury job status of full duty during any point. Dr. Fisher reported that all of the conservative medical treatment has been causally related or necessitated by the work injury of November 11, 2009. He reported that his opinion was based on the Petitioner's being asymptomatic prior to the work injury, was symptomatic afterwards, did not need any treatment modalities prior to the work injury and all the treatment modalities since then had been to treat the Petitioner's symptoms, which began at the time of the work injury (Fisher Depo, p. 19).

Dr. Fisher reported that on the June 28 note, he had the opportunity to review an examination report performed by Dr. Ryon Hennessy. Dr. Fisher agreed that the Petitioner had an exacerbation of the right L5-S1 disc herniation and degenerative disc disease on November 11, 2009, although the disc herniation itself might have been a new onset. Dr. Fisher testified that it was difficult to tell, but that the Petitioner most likely had some form of degenerative change at the time of the work accident—had either an acceleration or exacerbation of that or had a new onset of disc herniation on top of it. Dr. Fisher reported that the only way to know if it was a new herniation or not, was if the Petitioner had symptoms or testing prior to that, but he did not. Therefore, Dr. Fisher reported that it was impossible to tell if it was an exacerbation or new onset. Dr. Fisher reported that at the very least, the Petitioner had an exacerbation of the L5-S1 disc herniation and degenerative disc disease. He reported that if the Petitioner had an MRI or EMG studies prior to November 2009, or symptomatic complaints to a doctor, it would have been helpful to determine if it was a new disc herniation or not. He testified that at the very least, there was an exacerbation of the condition (Fisher Depo, pp. 20-21).

Dr. Fisher testified that any work restrictions that were in place after November 11, 2009, were causally related to the November 2009 incident. He also reported that he agreed with Dr. Hennessy that the Petitioner needed the surgical intervention. Dr. Fisher testified that in the Petitioner's case, if he were to return to work, he would have continued pain that would be severe to the point that he would not be able to do the job at the level of restrictions that they had given him. Dr. Fisher reported that based on his examination of the Petitioner and his history, most physical activities seemed to exacerbate the Petitioner's symptoms and caused problems. He reported that it was not a gross generalization that people with this condition had this. Dr. Fisher reported that the Petitioner was limited with any activities, whether at home or on the job. Dr. Fisher testified that the current condition of ill-being was related to the November 11, 2009

incident. He reported that the Petitioner was asymptomatic prior to the work injury and was able to work full duty. Dr. Fisher testified that as far as he could tell, the Petitioner had no complaints at that time of back pain or radiculopathy. He reported that after the date of injury, the Petitioner had continued pain and symptoms and was never able to return to work full duty. Dr. Fisher reported that the Petitioner was assigned permanent restrictions which were agreed upon by both his treating physician and independent medical examiner where his pain increased where he could no longer work (Fisher Depo, pp. 22-23).

According to Dr. Fisher's testimony, facet arthropathy is a problem with the facet joints. He described facet joints as small joints in the back of the spine, and explained that in the Petitioner's case, it had to do with the facet joints wearing out or degenerating. Dr. Fisher reported that facet arthropathy can be diagnosed on X-ray, MRI, or CT scan and possibly ultrasound (Fisher Depo, p. 24).

Dr. Fisher testified that the Petitioner was released at maximum medical improvement on November 16, 2011. He defined the significance of MMI as no significant changes in function over the next 12 months (Fisher Depo, p. 26).

Dr. Fisher reported that all three MRI scans showed similar findings, which included significant disc herniations at the L4-5 and L5-S1 level. He stated that the L5-S1 level on the right side was impinging on the nerve root, which the most recent MRI scan—the third one—showed it was impinging but slightly less than the previous ones (Fisher Depo, p. 30).

Dr. Fisher testified that he did not know if the Petitioner needed any treatment during the nine months between November of 2011 and his resumption of treatment in 2012. Dr. Fisher reported that he did not know that the Petitioner did not see Dr. Slack, but did know that the Petitioner was on medication, on work restrictions, and was instructed to do a home exercise program consisting of exercises that he was taught in physical therapy. Dr. Fisher quoted Dr. Slack's plan from November 16, 2011, "At this point in time, I did not recommend any other treatments other than the patient continuing his home exercise program and using his Robaxin and Vicodin as necessary. At this point, the Patient is at maximum medical improvement. He should continue his work with standup forklift with a 30-pound work restriction" (Dr. Fisher Depo, pp. 33-34).

Dr. Fisher reported that the next note from Dr. Slack was from April 9, 2012, where Dr. Slack indicated that the Petitioner had been taking plain Tylenol and trying to avoid Robaxin and the Vicodin he had taken in the past. According to Dr. Fisher's testimony, Dr. Slack also indicated that the Petitioner was frustrated and was trying to do modified duty but still had radiating right leg pain. Dr. Fisher testified that according to Dr. Slack's notes, the Petitioner was prescribed medications and when he went back, he was trying to decrease medications, but was still taking them. Dr. Fisher reported that on April 2012, the Petitioner was trying to avoid taking the medication, so he assumed that the Petitioner still had them (Dr. Fisher Depo, p. 35). Dr. Fisher testified that he was aware that, at the time, the Petitioner was given additional restrictions that were different from his initial job description (Fisher Depo, p. 36).

Dr. Fisher testified that he did not believe there was a gap in treatment. He reported that the Petitioner was sent home to do the exercises that he learned in physical therapy and was told to take his medications and had work restrictions. Dr. Fisher reported that the Petitioner was

seen by Dr. Slack during that time period. Dr. Fisher testified that while MMI may be finite in the lawyer world, it isn't in the doctor world. He reported that their patients aren't thrown out at the point of MMI. He defined MMI as doctors not being able to foresee any significant improvement in function over the next 12 months (Fisher Depo. p. 41-42). Dr. Fisher reported that at no time since November of 2009 was the Petitioner able to do his previous pre-injury job that entailed frequent lifting of over fifty pounds (Fisher Depo, p.46).

The Arbitrator adopts the totality of the evidence as highlighted above in support of the following Conclusions of Law:

CONCLUSIONS OF LAW

A. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITONER'S EMPLOYMENT BY THE RESPONDENT?

The Petitioner testified credibly to the accident of November 11, 2009. This testimony was uncontroverted and un-rebutted. Further, the medical records corroborate his testimony. There were no conflicting medical records, reports or testimony entered into evidence.

The Arbitrator finds as a matter of material fact and as a matter of law that the Petitioner has proven by a preponderance of the evidence that the Petitioner sustained an accident in the course and scope of his employment on November 11, 2009.

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

The Petitioner testified credibly that he sustained injuries to his back on November 11, 2009. The Arbitrator finds that the accident of November 11, 2009, either accelerated or exacerbated the Petitioner's preexisting degenerative changes in the lumbar spine. The medical records also document the Petitioner's symptoms after the injury. The Arbitrator concludes that the Petitioner was asymptomatic before the injury and had documented objective and subjective symptoms after the work injury. The Arbitrator finds telling Dr. Fisher of IBJI explaining the meaning of the term "MMI" , not found in any of the modern amendments to the WC Acts.

The Petitioner needs to only show that some act of employment was a causative factor, not the sole or principal cause, of the resulting injury. Teska v. Industrial Comm'n, 266 Ill.App.3d 740, 742, 640 N.E.2d 13 (1994). The claimant must show, *inter alia*, that some aspect of his employment was *a causal factor* that resulted in the complained of injury. Teska at 742. The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. County of Cook v. Industrial Comm'n, 69 Ill.2d 10, 17, 370 N.E.2d 520, 523 (1977). Proof of the state of health of an employee prior to and down to the time of the injury, and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. Kress Corp. V. Industrial Commission, 190 Ill. App. 3d 72, 82 (1989) p. 14.

In the instant case, the Petitioner's back injury would not have progressed to the point it has, but for his work injury of November 11, 2009. The medical records, and the testimony of both Dr. Fisher and Dr. Hennessy, confirm that the Petitioner's back was asymptomatic prior to

November 11, 2009. It is undisputed that he was working a heavy to very heavy duty job without complaints prior to November 11, 2009. The Petitioner has not been pain-free, has not been able to return to his pre-injury work level, and has been under the continuous care of his orthopedic doctors, Dr. Slack and Dr. Fisher. Absent the injury of November 11, 2009, the Petitioner would not be in his current condition of ill being. All three MRI films document the Petitioner's spine condition. Dr. Fisher and Dr. Hennessy agree that there has been no "progression" of the disease on the films. The Petitioner testified credibly and the medical records corroborate his testimony. The EMG and the MRI films also corroborate the Petitioner's testimony. Both doctors agree that the Petitioner requires a L4 to S1 laminectomy and fusion. Both doctors agree that because of the work injury the Petitioner cannot return to work at his pre-injury job. There have been no new injuries to the Petitioner. Both doctors confirm that there are no signs of symptom magnification or malingering.

The Arbitrator finds the opinions and testimony of Dr. Theodore Fisher of the Illinois Bone and Joint Institute to be more persuasive than that of a Dr. Ryon Hennessy. Dr. Theodore Fisher is a board-certified, fellowship-trained orthopedic back surgeon who devotes all of his practice to the treatment of spine injuries. Dr. Ryon Hennessy does not dedicate all of his practice to treating spine patients. Dr. Hennessy's reports and testimony originally opine that the accident exacerbated the Petitioner's disk disease and then he opines that the Petitioner's condition is due to the natural progression of the disk disease. Legally it cannot be both. Under Illinois law, the Petitioner needs to only show that some act or phase of the employment was a causative factor. The Arbitrator finds the opinions of Dr. Hennessy to be strained and equivocal. As a matter of law, the Arbitrator finds that the workplace injury was a causative factor of the Petitioner's current condition of ill-being. Based on the totality of the evidence record, the Arbitrator concludes that the Petitioner has established that his present condition of ill-being is causally related to his accident of November 11, 2009.

The Illinois Workers' Compensation Act is a humane law of a remedial nature, and wherever construction is permissible, its language is to be liberally construed to effect the purpose of the Act. Shell Oil Co.. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E.2d 224 (1954), *citing* City of West Frankfort v. Industrial Commission, 406 Ill. 452, 94 N.E.2d 413 (1950) ; Lambert v. Industrial Commission, 411 Ill. 593, 104 N.E.2d 783 (1952). "Every injury sustained in the course of the employee's employment, which causes a loss to the employee, should be compensable." Id. at 596 , citing Petrazelli v. Propper, 409 Ill. 365, 99 N.E.2d 140 (1951); Lambert v. Industrial Commission, 411 Ill. 593, 104 N.E.2d 783 (1952).

C. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY?

The Arbitrator adopts his previous findings for disputed issues (C) and (F). The Petitioner submitted into evidence, the following outstanding medical bills, at the Medical Fee Schedule:

Summit Pharmacy	**$ 745.28**
Health Benefits	**$ 1,516.99**
Illinois Bone & Joint Institute, LLC	**$ 725.12**
MRI of River North	**$ 3,341.15**

Premier Physical Therapy	**$ 9,245.33**
Total Rehab, PC	**$ 153.00**
Medicos Pain & Surgical Specialists	**$ 4,243.92**
Walgreens (PX #13)	**$ 112.37**
Total:	**$ 20,083.16**

The Arbitrator concludes, after reviewing the medical records introduced into evidence, that the medical bills submitted by the Petitioner for payment are as a matter of fact and law reasonable and necessary under 8(a). Since the Arbitrator has concluded that the Petitioner did sustain a compensable accident, and that his present condition is casually related to that injury, the Respondent is hereby found to be liable for those bills under the Act. The Arbitrator, therefore, orders the Respondent to pay to the Petitoner and his attorney $19,970.79, for medical services as provided in Section 8 of the Act.

D. WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY?

The Petitioner was authorized off work, or on work restrictions, for the time period from January 24, 2013 through October 18, 2013.

The Arbitrator concludes, after considering the totality of the evidence , that as a matter of law, the Respondent is liable for the TTD, and, orders the Respondent to pay the Petitioner and his attorney temporary total disability benefits of $501.65 a week for 38 2/7 weeks, as provided in Section 8(b) of the Act.

Temporary total disability is the temporary period following an accident during which the employee is totally incapacitated by reason of the injury and it is considered temporary in the sense that the disabling condition exists until the employee is as far restored as the injury's permanent character will permit. Mount Olive Coal Co. v. Industrial Commission, 295 Ill. 429, 129 N.E.103 (1920). In order to recover temporary total disability benefits, a claimant must prove by a preponderance of the evidence that the injuries arose out of and in the course of his employment and that the claimant had a resultant incapacity to work. Pemble v. Industrial Comm's, 181 App.3d 409, 536 N.E.2d 1349 (1989). Under Illinois law, the inability to work is found where the employee cannot work without endangering his health. Swindle v. Industrial Comm's, 126 Ill.3d 793,467 N.E.2d 1074 (1984). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement. Freeman United Coal v. Industrial Commission, 318 App.3d 170, 741 N.E.2d 144 (2000). Section (b) of the Act states that weekly compensation shall be paid as long as the total temporary incapacity lasts.

E. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Based on the above discussion, pursuant to Plantation Manufacturing Co. v. Industrial Commission, 294 Ill.App.3d 705, 691 N.E.2d 13 (2d Dist. 1997), and based upon the totality of the evidence the Respondent is ordered to provide written approval of the medical treatment requested by Dr. Slack and Dr. Fisher including all pre and post ancillary care for surgery plus the surgical treatment as prescribed by Dr. Theodore Fisher of Illinois Bone and Joint Institute..

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

Betty Nolan,

Petitioner,

14IWCC0849

vs.

NO: 12 WC 35574

Advocate Healthcare,

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, notice, 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 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.

14IWCC0849

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: OCT 0 6 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 10/2/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NOLAN, BETTY
Employee/Petitioner

Case# **12WC035574**

14IWCC0849

ADVOCATE HEALTHCARE
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:

0465 SCHEELE CORNELIUS & HARRISON
DAVID C HARRISON
7223 S ROUTE 83 PMB 228
WILLOWBROOK, IL 60527

2461 NYHAN BAMBRICK KINZIE & LOWERY PC
CHRISTOPHER GIBBONS
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

14IWCC0849

BETTY NOLAN,
Employee/Petitioner

v.

ADVOCATE HEALTHCARE,
Employer/Respondent

Case # 12 WC 35574

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 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: _____

14IWCC0849

FINDINGS

On **August 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 **$25,941.76**; the average weekly wage was **$498.88**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $ **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 $ **30,293.95** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$332.58**/week **9-4/7** weeks, commencing **September 27, 2012** through **December 2, 2012,** as provided in Section 8(b) of the Act.

Respondent shall further pay Petitioner permanent partial disability benefits of **$299.33**/week for **23.75** weeks, because the injuries sustained caused the **12.5%** loss to the **left hand,** as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$299.33**/week for **23.75** weeks, because the injuries sustained caused the **12.5%** loss to the **right hand,** as provided in Section 8(e) of the Act.

Respondent shall be given a credit for medical benefits paid in the amount of **$30,293.95**, 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.

JOANN M. FRATIANNI
Signature of Arbitrator

December 30, 2013
Date

ICArbDec p. 2

JAN 3 - 2014

14IWCC0849

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 worked for Respondent as a housekeeper. She has worked for Respondent for 12 years. Her job duties included scrubbing, mopping, spraying and wiping. Petitioner would clean 18-22 rooms each working shift. In addition, she would push a cart filled with cleaning supplies that weighed approximately 50 pounds. Petitioner testified she first began to notice numbness and tingling in her wrists in 2011.

Petitioner testified she notified her supervisor, Ms. Amber Lindle, on August 16, 2011, of her symptoms. Ms. Lindle directed her to seek treatment at Employee Health where she saw Dr. Amy Zacharias. Dr. Zacharias following examination prescribed wrist splints for night use. Petitioner testified she attempted to wear the splints while working, but they interfered with her job duties. Petitioner testified the splints helped at first, but as she kept working, her pain worsened.

Petitioner finally sought treatment at Urgent Care at Advocate on August 13, 2012. She was prescribed muscle relaxants, pain medication, and was advised to stop wearing the wrist braces. Petitioner was also referred to see Dr. Oakey.

Petitioner first saw Dr. Oakey on September 14, 2012. Dr. Oakey testified by evidence deposition in this matter. Dr. Oakey prescribed an EMG/NCV study, which was performed on September 19, 2012. When Petitioner returned to see Dr. Oakey on September 19, 2012, he informed her she had bilateral carpal tunnel syndrome. Dr. Oakey prescribed surgery. Dr. Oakey testified that it was his opinion there was a causal connection between her work duties and the diagnosed bilateral carpal tunnel syndrome.

On September 27, 2012, Petitioner underwent surgery with Dr. Oakey for a right carpal tunnel surgical release. On October 23, 2012, she underwent additional surgery with Dr. Oakey for a left carpal tunnel surgical release.

Petitioner saw Dr. Michael Cohen at the request of Respondent. Dr. Cohen also testified by evidence deposition in this matter. Dr. Cohen testified that it was his opinion Petitioner's job duties were not causally connected to the diagnosed bilateral carpal tunnel syndrome. Dr. Cohen felt the symptoms were caused by bilateral rheumatoid wrist arthritis. Dr. Cohen noted that Petitioner did not work with vibratory tools and did not feel the job duties involved repetitive flexion and extension of the wrists with a forceful grip. Dr. Cohn did admit he did not have an idea of how much of Petitioner's time was spent in each activity, such as mopping or wiping. Dr. Cohn also testified that women are generally more prone to the development of carpal tunnel syndrome. Dr. Cohen felt that the performance of different tasks by Petitioner made her less likely to develop carpal tunnel syndrome.

The Arbitrator notes with interest that Petitioner underwent testing for rheumatoid arthritis. Such testing was found to be negative for that condition. (Px9)

Prior to working for Respondent, she did not experience any problems with her wrists or hands. Petitioner testified she did not engage in any repetitive hobbies such as knitting or crocheting.

Based upon the above, the Arbitrator finds that Petitioner sustained accidental injuries through repetitive gripping and trauma that manifested themselves on August 16, 2011, and such manifestation arose out of and in the course of her employment by Respondent at that time.

14IWCC0849

Based further upon the above, the Arbitrator finds the opinions of Dr. Oakey to be more credible than those of Dr. Cohen, and as a result, further finds that the condition of ill-being of bilateral carpal tunnel syndrome is causally related to the work activities Petitioner performed on behalf of Respondent.

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

Petitioner introduced into evidence the following medical charges for treatment that were incurred after this accidental injury:

Oakey Orthopedic	$16,777.95
Center for Orthopedic Medicine	$12,496.00
Empire Anesthesia	$ 1,020.00

These charges total $30,293.95.

In addition to the above charges, Respondent's group health insurance paid all the above charges pertaining to this injury.

See also the findings of this Arbitrator in "C" and "F" above.

Based 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 $30,293.95, in accordance with Section 8(j) of the Act.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above.

Petitioner underwent surgery to her left wrist on September 27, 2012 and her right wrist on October 23, 2012. Following both surgeries she was prescribed physical therapy and to remain off work by Dr. Oakey. Petitioner was released to light duty work on December 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 September 27, 2012 through December 2, 2012.

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

See findings of this Arbitrator in "C" and "F" above.

Petitioner testified she now experiences strength loss to both wrists. She also experiences difficulties lifting weights such as bags of groceries or laundry baskets. Petitioner testified the surgery has relieved the numbness and tingling sensations to both hands and wrists. She no longer experiences such symptoms that used to wake her up at night before surgery.

Based upon the above, the Arbitrator finds the above conditions to be permanent in nature.

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

George Butler,

Petitioner,

vs.

14IWCC0850

NO: 10 WC 06363
10 WC 07595

Swedish Covenant Hospital,

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 February 14, 2014 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.

The party commencing the 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 6 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 10/2/14
45

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

14IWCC0850

BUTLER, GEORGE
Employee/Petitioner

Case# **10WC006363**
10WC007595

SWEDISH COVENANT HOSPITAL
Employer/Respondent

On 2/14/2014, 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 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
DAVID M BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH LLC
ROBERT E MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
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)

14IWCC0850

George Butler
Employee/Petitioner

v.

Swedish Covenant Hospital
Employer/Respondent

Case # 10 WC 006363

Consolidated cases: 10 WC 07595

An *Application for Adjustment 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 September 17, 2013 and December 16, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0850

FINDINGS

On the dates of accident, December 1, 2008 and January 28, 2010, 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 December 1, 2008, Petitioner did sustain an accident that arose out of and in the course of employment; but failed to prove accidental injuries that arose out of and in the course of his employment on January 28, 2010.

Timely notices of these alleged accidents were given to Respondent.

Petitioner's current condition of ill-being is not causally related to the accident of December 1, 2008 or the alleged injury of January 28, 2010.

In the year preceding the injury, Petitioner earned $34,744.84; the average weekly wage was $668.17.

On December 1, 2008, Petitioner was 49 years of age, married with eight (8) dependent children, and on January 28, 2010, was 51 years of age, married with eight (8) dependent children.

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

Respondent shall be given a credit of $52,112.10 for TTD, $ -0- for TPD, $ -0- for maintenance, and $ -0- for other benefits, for a total credit of $52,112.10.

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

ORDER

Petitioner's claim for compensation under 10 WC 07595 for a date of accident of December 1, 2008, is denied based on petitioner's failure to establish causal connection, any residual disability, lost time or need for medical care.

Petitioner's claim for compensation under 10 WC 06363 for a date of accident of January 28, 2010, is denied based upon the petitioner's failure to establish an injury that arose out of and in the course of his employment.

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

2/13/14
Date

ICArbDec19(b)

FEB 14 2014

FINDINGS OF FACT

At trial of these two consolidated matters, the 51 year old Petitioner testified that he began working for Respondent as a security officer in 2002. He had no problems with his low back when he started work for Respondent. Petitioner is a high school graduate who was in a special education program. He attended college for one semester but did not continue or obtain a college degree. Petitioner testified that he played baseball for one month at the college level with a stint in minor league baseball until 1982. Thereafter, he worked for the City of Chicago in Streets and Sanitation and then obtained a security certificate. He has worked in security since that time. His security job for Respondent differed from his prior security jobs because he was required to work on a computer and write detailed reports.

Petitioner's first alleged date of accident is 12/4/08. Petitioner testified that he arrived at work on that day feeling fine. He went to lunch and upon his return he received a call to report to the ER. Petitioner testified that he reached a set of stairs and slipped on the icy stair landing. Petitioner testified that his neck hit the stairs and he landed on his back and left side. The accident was captured on camera and witnessed by co-worker David Sykes. Petitioner's supervisor Todd arrived and Petitioner reported the accident. Petitioner advised that his back hurt. Petitioner testified that "Todd" told him that if he went to the ER he was "on his own" and that Todd refused to write an accident report. As a result, Petitioner called Will Smith, another supervisor, and reported the accident. Mr. Smith told Petitioner to call Dwayne McIntosh after he was checked in the ER.

Petitioner testified that he did not go to the ER on 12/4/08 but rather continued to work in pain. He further testified that later that day he was with a group of co-workers in the monitor room and they watched the video of Petitioner falling on ice. Petitioner testified that he talked to Dwayne McIntosh a few days later, advised him of the fall and that Todd would not write a report. Petitioner testified that Dwayne threatened Petitioner not to report the accident. Petitioner was upset and continued to work.

Petitioner testified that he continued to work with back pain. He used over the counter medication and ice packs to treat pain in the back of his neck, lower back, and left leg. Petitioner testified that he saw his family doctor on one occasion in August 2009 but did not have any additional treatment for his complaints. Dr. Parikh's records from August 10, 2009 document that Petitioner was seen on that date for "chief complaint chest pain right side and right shoulder pain." The notations in the doctor's records were that Petitioner "fell down in winter (icy stairs) at workplace while going down on stair case. Had injury- neck, back of head and left hip. Did not report it to supervisor. Now has off and on pain." Examination revealed only findings to the right shoulder. There was no mention of any on-going back problems or the inability to work. There was no off-work slip. Petitioner was prescribed medication and exercises for his right shoulder only. The petitioner saw no other physician until after the second alleged occurrence of January 28, 2010.

With regard to the second alleged accident on 1/28/10, Petitioner testified that he was at work for Respondent, working with continued pain. On 1/28/10, Petitioner received a call to go to a certain building to perform fire extinguisher checks. Petitioner testified that in order to reach the roof of the building, he climbed a vertical ladder known as a "ship's ladder" while carrying a clip board. The ladder was attached to the wall and Petitioner testified that he had to reach and pull himself up the ladder while carrying the clip board in order to climb the ladder. The ladder was completely vertical and not at any

angle. RX 4. Petitioner testified that he was wearing bulking clothing and utilities while climbing the ladder such as a coat, uniform boots, radio, and a utility belt with handcuffs.

Petitioner testified that when he finished checking the extinguisher, he started down the same ladder still holding the clip board and wearing the same bulky clothing and equipment. Petitioner climbed down the ladder in a backwards fashion. Petitioner testified that on his way down the ladder he felt a sharp pain in the middle of his back. Petitioner testified that he held onto the ladder still holding the clip board until the pain subsided. Petitioner continued down the stairs and called Will Smith. An accident report was completed.

On 1/28/10, Petitioner completed two accident reports. He completed a report for the 1/28/10 incident on the ladder wherein he describes climbing several ladders before reaching the extinguisher and then after checking he retraced his steps using the same ladders. He concludes by stating "When I got to the bottom of the tall narrow ladder I felt a severe pain in my back, and left hip." PX 4, RX 2.

Petitioner also completed an accident report for his accident of "nov or dec 2008" when he slipped and fell on ice. In the report, Petitioner states that he slipped and fell but that he continued to work in pain and did not seek any care other than in August 2009 when he received pain medication from his family doctor. Petitioner explained that he did not seek any care despite his pain as he was afraid to cause a problem at work. Petitioner stated that his pain "never went away" after the 2008 accident and that his 1/28/10 accident was a "re-injury" of his earlier injury in 2008. PX 4. The accident reports in PX 4 are dated 2/12/10.

RX 1 contains a slightly different accident report that is not contained in PX 4. The report in RX 1 is dated 2/3/10 and references the accident of 1/28/10. However, in this report Petitioner references his slip and fall at work but places that date in "jan or feb 2009".

Mr. Will Smith was called by Petitioner and testified that he noticed Petitioner's pain worsened between the 2008 and 2010 accidents. He further testified that the ships ladder stairs were "tricky" and that a person had to bend and twist while climbing the stairs. Carol Yengel, a manager for Respondent, also testified that the ladder was "scary". Ms. Yengel took the photo at RX 4 and testified that the ladder is 25 feet tall, on somewhat of an angle with rungs smaller than rungs found on a normal sized ladder. She testified that the ladder had railings on both side and that the steps were approximately 8 inches wide.

Duane McIntosh testified on behalf of the Hospital. He testified that he was employed there for 18 years and that he was the one who actually hired Mr. Butler, having previously worked with Mr. Butler at Edgewater Medical Center. Mr. McIntosh testified that he was employed at Swedish Covenant Hospital as the Manager of Public Safety. Mr. Mackintosh testified that Petitioner was very dependable and that he had no problems with Petitioner's work. At one point he asked Petitioner to think about taking a supervisor's job but Petitioner did not apply for the position. Mr. McIntosh testified that the requirements are to report injuries immediately and fill out an accident report. He testified that he was not aware of the injury in December of 2008, January or February of 2009. He testified that the petitioner did fill out an accident report for the January, 2010 occurrence on February 12, 2010. He testified to the assignment of checking fire extinguishers and that "you have a schematic of where the fire extinguishers are located and they are on a piece of paper that you attach to a clipboard weighing ounces." He testified that no other

equipment was needed. He testified to the process of going up the ladder identifying it as the one shown in Respondent's Exhibit No. 4. He testified to the rungs actually being stairs, maybe 8 to 10 inches in width. He testified that it is not the type of ladder where you just have a steel bar across. He testified that he has gone up and down the ladders several times, "it's just like you're walking up regular stairs." He testified that there are rails but that he has walked the ladder without holding the rails. He testified that there is a door at the end of the ladder that has a key set and that he has opened the door many times without difficulties. He testified that the step by the door was maybe two feet wide. He testified that when "you are on the top, you're standing and you're feet aren't hanging over."

Petitioner testified that he continued to work in pain on 1/28/10 to keep his job. However, the next day, he could not get out of bed due to pain and called in sick to work. Petitioner testified that he saw his family doctor, Dr. Parikh. Dr. Parikh's records show the petitioner was seen on February 2, 2010, advising the doctor that in January/February of 2009, he had pain his neck, back and lower back and hip. The doctor noted that he came to the clinic in August of 2009 and complained only of shoulder pain. He noted no follow-up appointment for the August, 2009 visit. The history for the new occurrence on January 29, 2010, was that he had to climb stairs at work when he developed severe low back and hip pain. Dr. Parikh tried medication and physical therapy. Dr. Parikh gave him a note indicating that he was unable to work from February 2, 2010 to February 13, 2010, and on March 1, he gave the petitioner a note indicating that he was incapacitated from work January 29 to March 8, 2010, releasing him to regular duty on March 9, 2010. The petitioner testified that he did return to regular duty but continued to have back pain, across his groin and both buttocks, down the leg into the knee. He was off work gain from April 30 through May 22, 2010. He worked light duty for a few days at a desk and was taken off of work again.

Dr. Parikh referred Petitioner to Dr. Charuk, an orthopedist. An MRI was done of the lumbar spine on March 31, 2010 revealing bulging discs at L2/3 and L3/4. An MRI of the left hip was done on April 20, 2010 and was normal. Mr. Butler underwent a bilateral facet joint injection at L4/5 and L5/S1 on June 9, 2010. He saw Dr. Charuk on June 25th and reported 3-4 days of pain relief. He had injections again on September 8, 2010. He saw Dr. Charuk on September 20th and reported little relief. The doctor recommended an epidural steroid injection, advised Mr. Butler to remain off work and referred him to Dr. Miz, a surgeon. Mr. Butler continued using a TNS unit and with therapy.

Respondent set up an exam per Section 12 of the Act with Dr. Bergin on July 29, 2010. Dr. Bergin felt that there was an underlying degenerative disc disease that could have been aggravated in either the fall while getting out of the squad car or the incident with the ladder. He felt that therapy and injections were appropriate. Mr. Butler testified that he discussed surgery with Dr. Bergin but told the doctor that he did not want to have surgery. Dr. Bergin saw Mr. Butler again on December 17, 2010. He opined that the condition could be causally related to the work injuries. He further stated Mr. Butler should remain off of work. Respondent set up a third examination with Dr. Bergin on June 14, 2011. He reviewed a new MRI from April 20, 2011. He felt there was an L3 radiculopathy. He felt that since Mr. Butler did not want surgery a functional capacities evaluation should be performed. He felt that there had been a permanent aggravation of a preexisting condition.

Mr. Butler underwent a functional capacities evaluation on August 23, 2011. That test was not seen as reliable. The examiner had questions about Mr. Butler's effort. Mr. Butler testified that he gave his best effort. He said the examiner asked him to say when he was having pain. When Mr. Butler said he felt pain the examiner stopped the activity despite Mr. Butler's protests that he could do more. Mr. Butler saw Dr. Jeffrey Coe for an evaluation shortly thereafter, September 20, 2011. Dr. Coe opined that there

was a miscommunication between Mr. Butler, who has a learning disability, and the examiner. He felt Mr. Butler could do work with very light lifting, and should have a repeat evaluation with clear instructions. This was never authorized and done. He also opined that Mr. Butler should not climb stairs or ladders. He should not kneel or squat on a regular basis. Dr. Bergin again evaluated Mr. Butler for Respondent on November 10, 2011 and reviewed the Functional Capacities Evaluation. He opined that Mr. Butler could lift 20 lbs occasionally and 10 lbs frequently. He would limit bending and twisting. Dr. He felt that Mr. Butler was credible and he doubted that Mr. Butler was lying.

Respondent hired a vocational consultant, Edward Minnich, to meet Mr. Butler. They met on February 20, 2012. Mr. Minnich took issue with Mr. Butler's use of a cane. He also insisted that Mr. Butler was more capable than indicated by his academic background and ACT test. He felt that based on Mr. Butler's resume, he would work in a supervisory fashion. Dr. Parikh had prescribed the cane on March 17, 2011. They began to work together. Mr. Butler looked for work and met with Mr. Minnich as documented in Mr. Minnich's reports. He dressed in a suit and tie and was prompt. In his reports Mr. Minnich accused Mr. Butler, who appeared at every requested interaction, of subverting the process by using a cane.

Mr. Butler was evaluated by Steven Blumenthal CRC, a vocational consultant, on April 30, 2012 at the direction of Mr. Butler's attorney. Mr. Blumenthal found that vocational testing should be performed to determine issues regarding Mr. Butler's literacy and general aptitude. This would help determine the types of jobs that Mr. Butler should seek. He felt that initiating a job search without the testing would be premature. He felt that given the restrictions by Dr. Coe and the use of the cane as prescribed by Dr. Parikh that Mr. Butler would be at a sedentary rather than light capacity. He opined that if he used Dr. Bergin's restrictions and did not consider the cane there would be a wider pool of jobs but the vocational testing would still need to be performed. Mr. Blumenthal did not believe that Mr. Butler was subverting the vocational effort by using a cane.

Mr. Minnich's services were terminated by Mr. Butler's attorney after Mr. Blumenthal's report was issued. Mr. Butler continued to look for work but vocational testing was not authorized and Mr. Blumenthal was never hired by Respondent.

Respondent obtained an evaluation from Dr. Ghanayem on June 4, 2012. Dr. Ghanayem opined that Mr. Butler could return to regular duty with no restrictions, required no additional medical care and that his condition was not causally related to any work accident. Dr. Ghanayem's deposition was taken on March 27, 2013. Relative to coming down the ladder, he did not see any injury. He didn't see "how anyone could have injured their back simply coming down the ladder as he described to him." In terms of the December, 2008 injury, the slip and fall, at the time of his examination he did not "find any evidence of any on-going residual from that occurrence. He testified that in terms of the January 28, 2010 injury, there was no residual disability found to the spine at the time of his examination. He testified that he reviewed the FCE test and he felt that it was invalid. He testified that on examination, he found non organic physical findings indicating that straight leg raise giving him anterior thigh pain is anatomically impossible. He testified that as to the lumbar spine, he could, based upon a reasonable degree of medical and surgical certainty, return to his regular work activities without restrictions. He testified that the petitioner did not need any additional medical care or treatment and did not need to use a cane. Compensation was terminated after Dr. Ghanayem's report.

Mr. Butler testified that he turned in weekly job search reports to Mr. Minnich and always wore a suit and tie to interviews. This is corroborated by Mr. Minnich's records. He was never offered a job. He testified that he never really worked as a supervisor despite his resume. He testified that Mr. Minnich stood over him as he filled out applications. Once compensation was terminated Mr. Butler saw Dr. Leonard Cerullo. Dr. Cerullo recommended surgery and Mr. Butler declined. He recommended pain management. Mr. Butler followed up with Dr. Brown for pain management. She agreed that a cane was appropriate for Mr. Butler. She felt he should be off work during her period of treatment and could then be tested to see what restrictions he would have. Dr. Brown further testified that in order to determine what the petitioner could do at this time, an FCE would be appropriate. She testified that she had no objection for him to try to work to see how he does. She testified that Petitioner was offered injections and he declined.

Mr. Butler continues to have pain across his low back, buttocks, groin and left leg. He has difficulty with rain and cold weather. He has less pain in hot weather. He takes a cane when he goes outside his home. He has had no new injuries to his low back.

CONCLUSIONS OF LAW

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

ISSUE C: Did an accident occur that arose out of and in the course of the Petitioner's employment by Respondent? **ISSUE E:** Was timely notice of accident given to the Respondent? **ISSUE F:** Is the Petitioner's current condition of ill-being causally related to the injuries in question? **ISSUES J AND K:** 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? Is the petitioner entitled to any prospective medical care? **ISSUE L:** What temporary benefits are in the dispute? **ISSUE O:** Vocational Rehabilitation

With regard to DOA 12/4/08

With regard to Petitioner's first alleged accident on 12/4/08, the Arbitrator finds that Petitioner did sustain an accidental injury when he slipped and fell on ice near the ER on December 4, 2008. The Arbitrator further finds that timely verbal notice of the accident was given by Petitioner to his co-workers and supervisors on the day of the accident.

On the issue of causal connection for Petitioner's current condition of ill-being, the Arbitrator notes Petitioner's testimony that he did not go to the ER or seek any medical attention for his complaints on the day of the accident but rather continued to work full duty with back pain. Petitioner testified that he used over the counter medication and ice packs to treat pain in the back of his neck, lower back, and left leg. The Arbitrator notes that with the exception of one visit to his family doctor in August 2009, 8 months after the occurrence, Petitioner sought no treatment for his complaints while continuing to work full duty. With regard to his one medical visit in 2009, the Arbitrator notes that Dr. Parikh's records from August 10, 2009 document that Petitioner was seen on that date for "chief complaint chest pain right side and right shoulder pain." The notations in the doctor's records were that Petitioner "fell down in winter (icy stairs) at workplace while going down on stair case. Had injury- neck, back of head and left hip. Did not report it to supervisor.

Now has off and on pain." Examination revealed only findings to the right shoulder. There was no mention of any on-going back problems or the inability to work. There was no off-work slip. Petitioner was prescribed medication and exercises for his right shoulder only. Petitioner sought no additional medical care for any complaints between August 2009 and February 2010, a period of 5 months during which Petitioner continued to work full duty.

Based on the foregoing, the Arbitrator finds Petitioner sustained an accident on 12/4/08 and that he provided timely notice. However, the Arbitrator further finds that Petitioner's current condition of ill-being is not related to the 12/4/08 accident based on his failure to seek any medical treatment for 8 months and the fact that the treatment he received for his complaints in August 2009 was for his right shoulder and not for his claimed back pain. Furthermore, the Arbitrator notes that Petitioner is not claiming any lost time from work as a result of the 12/4/08 accident and is not claiming any unpaid medical expenses as a result of the 12/4/08 accident. ARB EX 1. Therefore, the Arbitrator makes no award of TTD or medical expenses as a result of the 12/4/08 in case 10 WC 7595.

With regard to DOA 1/28/10:

With regard to the alleged accident of 1/28/10, the Arbitrator finds that Petitioner provided timely notice of an incident on 1/28/10. However, the Arbitrator further finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment, via acute trauma or aggravation, by merely going down the ladder or set of steps on January 28, 2010. At trial, Petitioner testified that on his way down the ladder he felt a sharp pain in the middle of his back. Petitioner testified that he held onto the ladder still holding the clip board until the pain subsided. He completed a report for the 1/28/10 incident on the ladder wherein he describes climbing several ladders before reaching the extinguisher and then after checking he retraced his steps using the same ladders. He concludes by stating "When I got to the bottom of the tall narrow ladder I felt a severe pain in my back, and left hip." PX 4, RX 2. The Arbitrator notes that there was no testimony that Petitioner slipped, tripped or twisted in an awkward manner or that the equipment that he was wearing or holding in any way contributed to his complaints of pain. Testimony that Petitioner was merely holding a clip board that may have made navigation of the ladder difficult does not provide a sufficient basis for a finding of accident in this matter. Testimony from a co-worker regarding some awkward positioning while using the ladder in general is not a sufficient basis to find that Petitioner sustained accidental injuries in that manner.

Petitioner argues that the stair usage of 1/28/10 caused him to aggravate his pre-existing low back complaints and that the 1/28/10 injury was a "re-injury" of his pain that "never went away" after the 2008 accident and that his 1/28/10 accident was a "re-injury" of his earlier injury in 2008. However, the Arbitrator finds that Petitioner's testimony regarding continued pain and an aggravation of his continued pain on 1/28/10 does not have sufficient support in the record. Specifically, the Arbitrator again notes the lack of medical treatment received after the first injury and Petitioner's ability to continue working full duty for over one year after the 2008 accident in finding Petitioner did not suffer an aggravation of any pre-existing back condition on 1/28/10.

Based on the Arbitrator's finding of no accident on 1/28/10 in case 10 WC 6363, the remaining issues of TTD, medical expenses, prospective medical and vocational rehabilitation are moot.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

George Jones,

Petitioner,

14IWCC0851

vs.

NO: 13 WC 08914

WalMart,

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, 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 hereby adopts the Arbitrator's findings of fact and conclusions of law. 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 April 3, 2014 is hereby affirmed and adopted.

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

14IWCC0851

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

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

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

DATED: OCT 0 6 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 9/25/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0851

JONES, GEORGE
Employee/Petitioner

Case# **13WC008914**

WALMART
Employer/Respondent

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:

0585 POLANSKY CICHON & BATEY CHTD
ADAM CZERWINSKI
180 N STETSON AVE SUITE 5250
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
JASON T STELLMACH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0851

George Jones
Employee/Petitioner

v.

WalMart
Employer/Respondent

Case # 2013 WC 008914

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 **Granada**, Arbitrator of the Commission, in the city of **Ottawa**, on **February 26, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0851

On the date of accident, **December 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 **$96,081.96**; the average weekly wage was **$1,847.73**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

ORDER

Respondent shall pay reasonable and necessary medical services of Dr. Charles Carroll and his subsequent referrals, as provided in Section 8(a)

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

3/26/14
Date

ICArbDec19(b)

APR 3 - 2014

14IWCC0851

FINDINGS OF FACT

Petitioner, a 58 year old truck driver, sustained accidental injury on December 28, 2012. The parties stipulated that Petitioner's accident arose out of and in the course of his employment with Respondent when he attempted to manually crank down the landing gear for Respondent's semi-trailer at one of the Respondent's loading bays. As he attempted to crank down the landing gear, the Petitioner felt a pop in his right shoulder and pain in his upper back and shoulders that ran down both arms into his hands. At the time of said injury, the Petitioner was positioned in such a manner that he pushed the "stiff" crank while his hands were above his shoulder level. Consequently, the Petitioner felt a severe pop in his right shoulder followed by severe pain. Immediately, following said injury, the Petitioner continued working in the hopes that the pain would subside. After three days of pain, the Petitioner notified his employer of his injury. Upon reporting his injury, Respondent had Petitioner describe the portions of his body that had been injured. Px1. In said report, the Petitioner mentioned injuries to his shoulder, upper back, hands, arms, and legs. Px1.

After reporting his injury, the Respondent sent the Petitioner to Illinois Valley Community Hospital where the treating physician's notes reflect that the Petitioner was complaining of a popping noise near his shoulder blades as well as pain in his mid back, as well as spasm and pain radiating down both of his arms to his fingers. Doctors at Illinois Valley ultimately diagnosed the Petitioner with a thoracic back strain and referred him to his private care provider.

Per Illinois Valley's referral, petitioner sought treatment with the Raby Institute, where he had previously treated for unrelated, nutritional reasons. On January 3, 2012, doctors at the Raby Institute reported complaints of pain in the upper back with numbness down both arms radiating into both hands, with more pain indicated on the right hand side. While at the Raby Institute, the Petitioner underwent a series of treatments to his arms, hands, back and shoulders; including but not limited to injections, physical therapy and strength testing. Unfortunately, the doctors at Raby Institute were able to gain improvement to some of the Petitioner's complaint, but not all. The Petitioner's right shoulder did not improve with treatment. PX3. As a result, the Petitioner testified that the Raby Institute and the Respondent agreed that he should be seen by Dr. Charles Carroll at the Northshore Orthopedic Institute.

Prior to seeing Dr. Carroll, the Petitioner underwent an MRI to his right shoulder on March 26, 2013. The diagnostic findings indicated that the Petitioner had severe supraspinatus tendinosis in his right shoulder. PX4

Dr. Carroll then saw the Petitioner on April 5, 2013. During the visit, the Petitioner provided Dr. Carroll with a history and submitted to a physical examination. Based upon the MRI scan, history and examination, Dr. Carroll opined that the Petitioner was suffering from a right shoulder impingement syndrome and possible radiculitis stemming from his December 28, 2012 injury. In order to address these findings, Dr. Carroll recommended that the Petitioner undergo a subacromial injection with the Raby Institute as well as return to the Raby Institute to continue treatment. PX4.

The Petitioner returned to Raby Institute on April 8, 2013, where they continued physical therapy and ultimately performed the subacromial injection on April 29, 2013. PX3. Following the injection, the Petitioner reported feeling only one day of relief on May 2, 2013 and was referred back to Dr. Carroll for re-evaluation. PX3.

On May 24, 2013, the Petitioner returned to see Dr. Carroll. Dr. Carroll examined the Petitioner, took a history from Petitioner, and was told about the results of the subacromial injection. Dr. Carroll then diagnosed the Petitioner with impingement syndrome of the right shoulder as well as pain in the right hand and recommended

that the Petitioner undergo a right shoulder arthoscopy and acromioplasty, subacromial decompression and distal clavicle excision and rotator cuff repair. PX 4.

Petitioner returned to Dr. Carroll on September 18, 2013. At that time, Dr. Carroll confirmed his prior diagnosis and opined that the injury was causally connected to the December 28, 2012 date of injury and recommended surgical intervention. In addition, he reviewed the Respondent's IME doctor's reports and refused to adopt their findings and conclusions. PX4.

The Petitioner has testified that he continues to have pain and weakness in his right shoulder following the December 28, 2012 injury. He further testified that the ongoing problems in his shoulder make it difficult for him to perform his job duties and that he cannot use his right arm to work in the same manner as he would prior to December 28, 2012.

The Respondent submitted five, separate reports from its Independent Medical Examiner, Dr. Theodore Suchy. RX1-5. Each of Dr. Suchy's reports denies the Petitioner's need for additional treatment at the time they were written, despite contemporaneous and continuous treatment, new diagnostic findings and lingering complaints. RX1-5. Dr. Suchy's evidence deposition was also submitted regarding this matter. RX6. In his deposition, Dr. Suchy stated that his concerns with the Petitioner's complaints were: 1) that there were no contemporaneous complaints of right shoulder pain immediately following the incident; and 2) that he believed that the mechanics of the Petitioner's injury were not consistent with causing the impingement syndrome found in the March 26th MRI. RX6 at 27. Dr. Suchy was not presented with the Petitioner's initial claim form when he was formulating his opinions. RX6 at 26-27. When presented with this initial incident report at his deposition, Dr. Suchy refused to reconsider his opinions because he felt that the form's indication of "shoulder" was too general. RX6 at 32. As for mechanism of injury, Dr. Suchy testified that turning a stiff crank with an above-the-shoulder-load could cause the Petitioner's impingement syndrome. RX6 at 36.

As such, Dr. Suchy's opinions are without merit as they contradicted by the Pettioner's testimony as well as the Raby Institute and Dr. Carroll's findings. It should also be noted that Dr. Carroll has reviewed Dr. Suchy's reports and has refused to adopt his opinions and conclusions. PX4.

CONCLUSIONS OF LAW

1. The Arbitrator finds that the Petitioner has sustained his burden of proof regarding the issue of causation. Petitioner's testimony was credible and uncontroverted. The Petitioner testified that he had not previously experienced any problems nor sustained any injuries involving his right shoulder prior to December 28, 2012. The Respondent has not submitted any evidence that the Petitioner ever had any problems with his right shoulder, arm, or hand prior to that date. The Petitioner also denied experiencing any new injuries to that area of his body. Petitioner's claim is supported by the opinions of Dr. Charles Carroll, who reviewed the Petitioner's medical records, diagnostic films as well as the Petitioner's history of complaints and determined that his right shoulder impingement syndrome was the result of the December 28, 2012 injury. The Arbitrator finds Dr. Carroll's opinions persuasive on this matter. Based upon the evidence submitted, the Arbitrator finds that the Petitioner's present condition of ill-being with regard to his right shoulder, right arm and right hand is causally related to his accident of December 28, 2012.

2. With regard to the issue of prospective medical care, the Arbitrator finds that the Petitioner is entitled to the reasonable and necessary prospective medical care recommended by Dr. Charles Carroll, subject to the medical fee schedule provided under section 8.2. The injury to his right shoulder has since been diagnosed as right

shoulder impingement syndrome. The Petitioner's treating physicians at the Raby Institute and Dr. Carroll agree that the Petitioner's right shoulder pathology should be treated, and Dr. Carroll recommends the Petitioner undergo a right shoulder arthoscopy and acromioplasty, subacromial decompression and distal clavicle excision and rotator cuff repair. PX 4. The Arbitrator finds persuasive the opinions of Dr. Carroll on this issue as well.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark D. Cook,

Petitioner,

14IWCC0852

vs.

NO: 13 WC 18170

URS Corporation,

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 April 8, 2014 is hereby affirmed and adopted.

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

14IWCC0852

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 $71,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 6 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 9/24/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0852

COOK, MARK D
Employee/Petitioner

Case# **13WC018170**

URS CORPORATION
Employer/Respondent

On 4/8/2014, 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 0.05% 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:

4707 LAW OFFICE OF CHRIS DOSCOTCH
DAMON YOUNG
2708 N KNOXVILLE AVE
PEORIA, IL 61604

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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)

14IWCC0852

Mark D. Cook
Employee/Petitioner

Case # **13** WC **18170**

v.

URS Corporation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **February 20, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0852

FINDINGS

On the date of accident, **February 4, 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 **$18,729.37**; the average weekly wage was **$618.00**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$50,279.97**, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay the reasonable and necessary medical expenses associated with the arthroscopic shoulder surgery prescribed for the Petitioner by Dr. Garst, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$412.00**/week for **50 4/7** weeks, commencing **March 4, 2013** through **February 20, 2014**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit for payments made by the Respondent's group medical plan or short term disability plan 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.

Arbitrator Anthony C. Erbacci

April 3, 2014
Date

13 WC 18170
ICArbDec19(b)

APR 8 - 2014

FACTS:

On February 4, 2014, the Petitioner the Petitioner was employed with the Respondent as a Material Handler, having been so employed since July 2012. The Petitioner testified that he worked 8 hours per day, 5 days a week, and his job duties included driving a forklift 6 hours per day, driving a shuttle 1.5 hours per day, and about a half hour per day using a computer. The Petitioner testified that while driving the forklift, he had to steer exclusively with his left hand because the hydraulic controls were operated by his right hand. The Petitioner operated two types of forklifts one which was operated in a seated position and one which was operated in a standing position. Both forklifts were steered with the left hand and the right hand was used to operate the hydraulics. The Petitioner testified that while driving the forklifts he had to negotiate the forklifts in and out of the warehouse and in and around isles. The Petitioner testified that this consisted of intensive use of the steering wheel with his left hand.

The Petitioner testified that in October 2012, he began having discomfort in his left elbow, and that by January 31, 2013, the pain in his left elbow had become severe. The Petitioner testified that he had experienced pain in his right arm previously in 1998 and bilateral arm pain in 2006. He testified that he had some physical therapy and an injection to his right elbow in 1998 and he underwent physical therapy for his bilateral complaints in 2006. The Petitioner testified that after being released from medical treatment in 2006, his left arm was symptom free until October 2012. He testified that in October of 2012, he started to experience mild symptoms in his left elbow but he continued to work. The Petitioner testified that on or about February 1, 2013, he had a substantial increase in symptoms and he then sought medical treatment with Dr. Sison on February 4, 2013.

On February 4, 2013 Dr. Sison noted that the Petitioner gave a history of pain and tenderness involving the left elbow that developed 3 days prior. The pain was described as constant moderate aching, burning and throbbing, which were of immediate onset. Dr Sison's assessment was lateral epicondylitis and Dr Sison prescribed the Petitioner off work through February 8, 2013. On February 7, 2013, Dr Sison wrote a return to work slip for February 11, 2013 which indicated that the Petitioner had a left lateral epicondylitis and he had to avoid using his left upper extremity to steer a hand wheel/steering wheel until he was pain free. Dr Sison wrote that "Constant steering of the hand wheel with his left [upper extremity] was the cause of his epicondylitis."

The Petitioner next followed up with Dr. Sison on February 21, 2013. The history notes that the Petitioner was still having pain in his left elbow that developed "months ago" and was of "insidious onset". The pain was noted to be constant and worsened by gripping/grasping. Dr. Sison noted the pain improved with rest and anti inflamatories but recurred when the Petitioner resumed his work activities. Dr. Sison injected the Petitioner's elbow with Kenalog and Lidocaine and returned him to regular work.

On March 4, 2013 the Petitioner returned to Dr. Sison who noted that the Petitioner was pain free and returned to work after the injection ten days prior. Dr. Sison noted that "about two days ago" the Petitioner experienced a recurrence of his left elbow pain. Dr Sison

recommended an orthopedic evaluation and physical therapy and he took the Petitioner off work.

On April 29, 2013 the Petitioner was seen by Dr. Jeffrey Garst, an orthopedic surgeon, at Great Plaines Orthopaedics. Dr. Garst noted the Petitioner's history of left elbow pain and treatment and he diagnosed the Petiutioner as having left lateral epicondylitis. Dr. Garst prescribed an MRI which was done on May 6, 2013 and was reported to reveal a small tear of the common extensor tendon origin with mild edema in the adjacent tissue, small elbow joint effusion, and mild distal insertional biceps tendinosis. Dr. Garst prescribed physical therapy for the Petitioner. On June 17, 2013 Dr. Garst noted that the Petitioner was not getting any better and he recommended surgery and continued the Petitioner off work.

Petitioner ultimately underwent surgery with Dr. Mitzelfelt on October 2, 2013. The Petitioner testified that the surgery was not authorized by the Respondent's Workers' Compensation carrier and Dr. Garst was not a provider in his group health plan, so he had surgery by Dr. Mitzelfelt. Dr. Mitzelfelt performed a left lateral epicondylar release with repair and placement of an Amnio Matrix graft on October 2, 2013.

On November 21, 2013, Petitioner followed up with Dr. Mitzelfelt. It was noted that the Petitioner was still off work and undergoing physical therapy and that the Petitioner was complaining of left shoulder stiffness and medial elbow pain. On December 19, 2013 Petitioner again followed up with Dr. Mitzelfelt and it was noted that the Petitioner was doing well with the lateral aspect of the elbow but was having discomfort coming from the medial aspect of his elbow and his left shoulder. Dr. Mitzelfelt continued physical therapy and restrictions.

The Petitioner followed up with Dr. Mitzelfelt on January 16, 2014 and February 7, 2014, and the Petitioner continued to complain of left shoulder pain. Dr. Mitzelfelt's assessment was impingement syndrome of the left shoulder and a February 3, 2014 MRI of the Petitioner's left shoulder was noted to demonstrate subacromial bursitis as well as a type II SLAP tear. Dr. Mitzelfelt referred the Petitioner to Dr. Garst for a surgical consultation and on February 10, 2014, Dr. Garst recommended a left shoulder arthroscopy.

The January 10, 2014 testimony of Dr. Mitzelfelt was admitted into the record as Petitioner's Exhibit 8. Dr. Mitzelfelt testified he was a board certified orthopedic surgeon and Petitioner's treating physician. Dr. Mitzelfelt testified that after taking a history and performing an examination of the Petitioner, he diagnosed the Petitioner with chronic lateral epicondylitis of the left elbow. Dr. Mitzelfelt testified that after failed conservative treatment he agreed with Dr. Garst's recomendation for a left elbow surgery. Dr. Mitzelfelt testified after the left elbow surgery, the Petitioner started to do well with his left lateral epicondylitis but started to have medial elbow and left shoulder tenderness and inflammation. Dr. Mitzelfelt opined that the Petitioner's left shoulder tenderness and inflammation was related to overuse following the surgery. Dr. Mitzelfelt concluded that after surgery for left lateral epicondylitis you have to protect the lateral elbow by overusing your left shoulder. Dr. Mitzelfelt opined that the Petitioner's left lateral epicondylitis was aggravated by steering a fork lift with his left hand,

14IWCC0852

while working for the Respondent and that the medical treatment he performed on Petitioner was related to the work accident of February 4, 2013.

On January 28, 2014 Dr. Lawrence Li performed a review of the Petitioner's medical records at the request of the Respondent. Dr. Li opined that the Petitioner's condition was pre-existing and that simply he had a manifestation of symptoms during work. Dr. Li noted the history provided to Dr. Sison did not state a specific injury and was unclear as to when the pain actually began.

Jim Tiller, the Respondent's site manager, testified that the Petitioner's testimony regarding his job duties and the operation of the fork trucks was generally accurate but that the force required to turn the steering wheels of the equipment that Petitioner operated was minimal. Mr. Tiller related the effort of the steering wheel on the fork lift to using a car steering wheel or opening a drawer. Mr. Tiller acknowledged that the Petitioner did inform him of his left arm problems which the Petitioner felt were due to using his left hand to steer the forklifts.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner testified that he did receive physical therapy for left arm complaints in 2006 but that he was non-symptomatic following that treatment until the onset of his left elbow pain complaints in October 2012. The Petitioner testified the symptoms were initially mild until on or about January 31, 2013, when he had a substantial increase of symptoms that caused him to seek medical treatment. The Petitioner saw Dr. Sison on February 4, 2013 and Dr. Sison noted a history of pain and tenderness involving the left elbow that developed 3 days prior. Dr Sison's assessment was lateral epicondylitis and Dr. Sison indicated that the Petitioner's constant steering of a hand wheel at work caused the epicondylitis. The Petitioner testified he worked 8 hours a day 5 days a week and his job duties included driving a fork lift 6 hours per day. While driving a fork lift he had to use his left hand to operate the steering wheel and his right hand to operate hydraulics. Based upon this specific history, Dr. Mitzelfelt, the Petitioner's treating orthopedic surgeon, opined that the Petitioner's job duties aggravated his left lateral epicondylitis.

Dr. Lawrence Li performed a review of the Petitioner's medical records at the request of the Respondent. Dr. Li opined that the Petitioner's condition was pre-existing and that simply he had a manifestation of symptoms during work. Dr. Li noted the history provided to Dr. Sison did not state a specific injury and was unclear as to when the pain actually began.

The Arbitrator notes that Dr. Li only had a general job description, he did not perform an examination or take a history from the Petitioner, and he relied on a history of the Petitioner having problems with his left elbow off and on since 1998 after a sports injury although he did not indicate that he reviewed any specific medical treatment records or a history from the Petitioner in this regard. Dr. Li noted that the Petitioner first saw Dr. Sison on February 4, 2013 with a history of an immediate onset of symptoms and then followed up on February 21, 2013 with a history that the Petitioner's symptoms had developed months ago. The Arbitrator notes that the Petitioner testified at trial, that he had mild symptoms until around January 31, 2013 and then had a substantial increase in his symptoms. The Arbitrator finds that Petitioner's medical history from these two visits is not inconsistent in light of the Petitioner's testimony.

Having considered the Petitioner's testimony and the medical records admitted into the record, the Arbitrator finds that opinions of Dr. Mitzelfelt to be more credible, reliable and persuasive than the opinions of Dr. Li. Thus, the Arbitrator finds that the Petitioner did sustain an accidental injury which arose out of and in the course of his employment with the Respondent and which manifested itself on February 4, 2013. The Arbitrator further finds that the current condition of ill-being in the Petitioner's left elbow is causally related to the work accident of February 4, 2013.

With regard to the Petitioner's left shoulder condition, the Petitioner testified at trial that after his left elbow surgery on October 2, 2013 he started to have left shoulder complaints. Dr. Mitzelfelt testified in his deposition that he felt the left shoulder soreness and swelling was due to overuse following the Petitioner's left elbow surgery. No contrary medical opinion was offered into the record. The Petitioner testified that his left shoulder complaints began three to four weeks following his left elbow surgery while he was still undergoing physical therapy and that those complaints continue through the present time. The February 3, 2014 MRI of the Petitioner's left shoulder was noted to demonstrate subacromial bursitis as well as a type II SLAP tear and Dr. Garst has recommended left shoulder arthroscopy for that condition. Based on Dr. Mitzelfelt's causation opinion and the Petitioner's testimony regarding his consistent complaints of shoulder pain following his left elbow surgery, the Arbitrator finds that the Petitioner's left shoulder condition and need for surgery as prescribed by Dr. Garst is causally related to the Petitioner's February 4, 2013 work accident.

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, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to issues of accident and causation are adopted and incorporated herein.

The Petitioner introduced evidence of the following medical expenses incurred as a

result of the Petitioner's February 4, 2013 work accident:

Pekin Pro Health	$ 3,041.00
Great Plains Orthopedics	$ 650.00
Champion Fitness	$19,141.00
Touchstone Imaging	$ 1,425.00
Peoria Tazewell Pathology	$ 251.10
Midwest Anesthesia	$ 2,035.00
Walgreen's Prescriptions	$ 40.52
Pekin Hospital	$23,212.40
Medequip	$ 474.95
TOTAL	$50,279.97

Based on the Arbitrator's findings of accident and causation, the Arbitrator finds that the medical treatment rendered to the Petitioner in regards to his left lateral epicondylitis, and the above noted charges therefore, was reasonable, necessary and causally related to the work accident of February 4, 2013.

The Arbitrator also finds that the prescribed for the Petitioner by Dr. Garst is reasonable, necessary, and causally related medical treatment which the Respondent is required to provide pursuant to Section 8(a) of the Act.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to issues of accident and causation are adopted and incorporated herein.

The medical records demonstrate that the Petitioner was maintained off work completely or was under work restrictions which were not accommodated by the Respondent from March 4, 2013 through the date of hearing, February 20, 2014. The Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from March 4, 2013 through February 20, 2014, a period of 50 4/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH RUSSO,

14IWCC0853

Petitioner,

vs.

NO: 08 WC 34333

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

1. Petitioner works for Respondent as a Cement Finisher. His duties are to form, grade, frame and finish concrete, order concrete materials, supplies, lumber and ordering concrete for particular assignments.

2. On July 21, 2008 Petitioner was replacing handicap corners (sloped ramps towards the walkway at every corner). He was going into the large tool box with his left hand to fill up his nail apron with nails. His right hand was on the ledge of the box and the lid fell down on his right hand. The tool box is seven to eight feet long with wheels. Petitioner noticed a lot of blood, his thumb and three fingers were pointing in the wrong direction, and he had swelling and pain.

3. He presented at MercyWorks, where they took x-rays and sent him to an orthopedic surgeon, Dr. Heller. Dr. Heller took another x-ray and recommended a bandage, splint and physical therapy. Petitioner did not agree with this course of treatment and

sought a second opinion from Dr. Schlenker, another orthopedic surgeon. Dr. Schlenker examined Petitioner and recommended surgery.

4. Petitioner underwent surgery July 25, 2008. He began physical therapy on August 8, 2008. He underwent a second surgery on September 22, 2008 to remove pins from his hand. He resumed therapy through January 15, 2009. At that time he was referred to Dr. Pareja for pain management. However, Respondent never authorized this treatment. Petitioner was still in extreme pain, with swelling and numbness however.

5. Petitioner continued treating with Dr. Schlenker until May 2009. At that time he was referred to Dr. Varakojis for pain management. Petitioner treated with her and was provided medication. Subsequently Petitioner continued treating with Dr. Schlenker and MercyWorks until September 18, 2009, when a Functional Capacity Evaluation (FCE) was recommended.

6. The FCE was performed October 28, 2009 and revealed that Petitioner was unable to return to work as a Cement Finisher. Dr. Schlenker continued treating Petitioner until December 1, 2009, which is the last time Petitioner saw him. Petitioner last treated with MercyWorks on December 2, 2009. He was released with restrictions of lifting up to 15 pounds with his right hand and 27 pounds with both hands.

7. In July 2012 Petitioner received a call from Respondent's payroll and was told that his restrictions could be accommodated. Petitioner was given the position of 311 Surveyor. Petitioner accepted and has this position to date. However, he is still being paid as a Cement Finisher.

8. As a Surveyor, Petitioner uses a digital camera, pen, paper and cell phone.

9. Petitioner testified that his penmanship is terrible now and he has difficulty holding a pen. The shutter button on the camera is on the right side, but Petitioner must prop the camera up in his right hand and use his left hand to navigate the buttons. He uses the same technique to dial out on his cell phone. He also has difficulty buttoning his pants and uses his left hand and right pinky to tie his shoes. He can no longer handle a baseball bat or throw a football with his sons, who are heavily into sports. He also has difficulty driving with his right hand.

10. Petitioner has fluctuating symptoms, but they worsen in weather below 50 degrees. In such weather he uses *Hot Hands* hand warmers.

The Commission affirms the Arbitrator's ruling on the issue of causal connection.

The Commission, however, modifies the Arbitrator's ruling on nature and extent. Based on Petitioner's injuries, it seems appropriate to award permanent partial disability benefits under either §8(e) of the Act or §8(d)(2) of the Act, but not both. Based on Petitioner's injuries, subsequent surgeries and his inability to return to his former

position, it appears that a 60% loss of a hand award is sufficient.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 123 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 60% loss of use of Petitioner's right hand.

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

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

The party commencing the 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 6 2014
O: 7/7/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RUSSO, JOSEPH
Employee/Petitioner

Case# **08WC034333**

14IWCC0853

CITY OF CHICAGO
Employer/Respondent

On 1/9/2014, 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:

0494 JOSEPH J SPINGOLA LTD
47 W POLK ST
SUITE 201
CHICAGO, IL 60605

0010 CITY OF CHICAGO
NANCY J SHEPARD
30 N LASALLE ST SUITE 800
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

14IWCC0853

JOSEPH RUSSO
Employee/Petitioner

Case #08 WC 34333

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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on December 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. ☒ 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 July 21, 2008, 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 $85,739.68; the average weekly wage was $1,648.84.
- At the time of injury, the petitioner was 35 years of age, *single* with two children under 18.
- The parties agreed that the respondent is not liable for any unpaid medical bills.
- The parties agreed that the respondent paid $78,045.33 in temporary total disability benefits and $178,690.83 in maintenance benefits.
- The parties agreed that the petitioner is entitled to temporary total disability benefits of $1,099.63 per week for 71 weeks from July 22, 2008, through November 30, 2009, and maintenance benefits of $1,099.63 per week for 158-3/7 weeks from December 1, 2009, through December 14, 2012, totaling $174,149.38.
- The parties agreed that the respondent paid $78,045.33 in temporary total disability benefits and $178,690.83 in maintenance benefits, resulting in an overpayment of maintenance to the petitioner of $4,541.45.

ORDER: 14IWCC0853

- The respondent shall pay the petitioner the sum of $664.72/week for a further period of 142.25 weeks, as provided in Section 8(e) and 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 45% loss of use of his right hand and 10% of the man as a whole.

- The respondent shall pay the petitioner compensation that has accrued from July 21, 2008, through December 20, 2013, 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.

Robert E. Williams

Signature of Arbitrator

January 9, 2014

Date

JAN 9 - 2014

FINDINGS OF FACTS:

The petitioner, a cement finisher, sustained injuries to his right thumb and first three fingers on July 21, 2008. He received urgent care at MercyWorks Occupational Health, where it was noted that x-rays revealed comminuted fractures of his thumb and index, middle and ring fingers. However, their diagnosis was fractures of the petitioner's right thumb and middle and ring fingers. He started care with Dr. James Schlenker on July 22nd, who performed an open reduction and internal fixation with seven Kirschner wires of an intra-articular comminuted fracture of the distal end of the proximal phalanx (interphalangeal joint) on his right thumb on July 25th. The Kirchner wires were removed on September 2nd and 22nd. The petitioner reported continued thumb swelling and reduced range of motion on October 28th to Dr. Schlenker. The petitioner received occupational therapy and followed up with Dr. Schlenker throughout 2009. An FCE on October 28, 2009, demonstrated ability in the medium physical demand level. At his last visit with Dr. Schlenker on December 1, 2009, the petitioner was given lifting restrictions of 15 pounds for his right hand and 27 pounds for both hands. The doctor noted that x-rays that day revealed a healed fracture of his right thumb. The petitioner elected to be evaluated by Dr. Chimell on March 29, 2010. Dr. Chimell opined that the petitioner sustained a crush injury to his right hand, non-displaced fractures of the right long and ring fingers, a displaced intra-articular fracture of the right thumb and chronic regional pain syndrome of the right hand.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner currently complains of difficulties with holding a pen, daily activities, tying his shoes, buttoning his pants, driving and dressing kids. He has pain in

the winter, daily aching and numbness that comes and goes. He uses his left hand to carry, to use his cell phone, to operate a camera, to drive and to turn his car ignition. He uses a hand warmer daily and his right hand is smaller than his left. The petitioner's restrictions prevented his return to the duties of a cement finisher. On December 15, 2012, the petitioner returned to work for the respondent performing surveying work. The respondent shall pay the petitioner the sum of $664.72/week for a further period of 142.25 weeks, as provided in Section 8(e) and 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 45% loss of use of his right hand and 10% of the man as a whole.

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

Lavonne Broderhausen,

Petitioner,

14IWCC0854

vs.

NO: 11 WC 35663

Wal-Mart Associates, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, 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. The Commission hereby adopts the Arbitrator's findings of fact and conclusions of law.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 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.

14IWCC0854

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,600.00. 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: OCT 0 6 2014

DLG/gaf
O: 9/25/14
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0854

BRODERHAUSEN, LAVONNE Case# **11WC035663**
Employee/Petitioner

WAL-MART ASSOCIATES INC
Employer/Respondent

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

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

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

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

0560 WIEDNER & McAULIFFE LTD
KHRIS DUNARD
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

14IWCC0854

Lavonne Broderhausen
Employee/Petitioner

v.

Wal-Mart Associates, Inc.
Employer/Respondent

Case # **11** WC **35663**

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 N. Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **December 30, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 14IWCC0854

On **8/11/11**, 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 **$20,462.00**; the average weekly wage was **$393.50**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay pursuant to Section 8a of the Act, $17,266.28 for reasonable and necessary medical services as outlined in Petitioner's group exhibit one. Respondent shall have credit for any amounts paid through its group carrier and shall hold Petitioner harmless from any claims made by any healthcare provider for which it is receiving this credit, as provided in §8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $262.33/week for 1 weeks, commencing 10/24/11 through 10/31/11, as provided in §8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $236.10/week for 42.75 weeks, because the injuries sustained caused the 15% loss of the left hand (28.5 weeks) and the 7.5% loss of the right hand (14.25), 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.

Edward Lee
Signature of Arbitrator

1/27/14
Date

JAN 30 2014

FACTS

At the time her injuries manifested, Petitioner was a 54-year-old overnight stocker for Respondent. (T.11; AX1). She has worked for Respondent for over 15 years (13.5 as of manifestation) and has spent 14 years of her career working as a stocker. (T.11-12; PX5, 9/28/11). As an overnight stocker, Petitioner loads and unloads pallets; moves, opens and unloads boxes; pulls pallet jacks and stocks the merchandise unloaded from the boxes opened. (T.13-16, 19-20). Petitioner testified that the pallet jacks she pulls are very heavy, often loaded to the ceiling with 30-40 boxes, and do not have any motion assistance; that the boxes she unloads without assistance weigh from 35 to 60 lbs., and that the glued boxes are difficult to open, requiring forceful gripping and placing strain on her hands and arms. (T.14-17, 19, 30). Since she cannot cut through the glue, Petitioner must open the glued boxes with her hands by gripping the corner of the box, wedging her hands and fingers under the flaps, and pulling back each side of the box. (T.20-21). She testified that she unloads pallets throughout her shift, and that at times she is required to team-lift large items such as furniture and heavy appliances onto shelves using significant grip and strength. (T.17-18). The job description submitted by Respondent supports Petitioner's testimony and describes Petitioner's job duties as follows:

> *Reaches overhead and below the knees, including bending, twisting, pulling, and stooping. Moves, lifts, carries, and places merchandise and supplies weighing less than or equal to 60 pounds without assistance. Moves up and down a ladder. Grasps, turns, and manipulates objects of varying size and weight, requiring fine motor skills and hand-eye coordination.* (RX4).

Respondent times Petitioner's work activities, and Petitioner stated that she opens at least 40 to 50 boxes per hour. (T.19). Although Petitioner works with another coworker at times; this does not diminish her job duties. *Id.* at 20. Petitioner testified that there was no part of her 8-hour shift that did not involve the use of her arms and hands. (T.16-17).

Assistant Manager Earl Emery was present at the hearing on behalf of Respondent, but called by Petitioner. (T.45-47). He began his career with Respondent in 2008, a decade after Petitioner. (T.46). He testified that he has only known Petitioner and been aware of her job duties for two years or less and testified that he had no specific knowledge of Petitioner's job prior to his employment with Respondent in 2008. (T.46-47). He has worked with Petitioner for an estimated total of four months out of the two years. (T.49). He testified that Petitioner is a good employee and that he had no reason whatsoever to dispute her testimony regarding her job duties. (T.48). He testified that her testimony was "pretty accurate as far as the description she's given." (T.48).

During the course of her job duties, Petitioner began developing symptoms of numbness, tingling paraesthesia and pain in her hands and arms. (T.21-22). Petitioner sought treatment with her physician's assistant, who referred her for EMG nerve conduction studies. (T.22; PX3,

7/13/11). These were done by Dr. James Goldring and showed evidence of bilateral carpal tunnel syndrome, greater on the left. (PX4, 8/11/11). On follow-up, Petitioner was referred to Dr. George Paletta. (PX3, 9/9/11).

On September 28, 2011, Dr. Paletta took the history of Petitioner's employment with Respondent and her onset and progression of symptoms, and noted the studies showing electrophysiological evidence of bilateral carpal tunnel syndrome. (PX5, 9/28/11). He also noted Petitioner's conservative treatment consisting of splinting and anti-inflammatory medication. *Id.* Based upon Petitioner's job duties and the correlation between her work and her increased symptoms, Dr. Paletta believed that Petitioner's work activities were an aggravating factor in her current condition, and that her need for ongoing treatment was the result of her work-related condition. *Id.* He recommended surgery, first on the left. *Id.*

On October 25, 2011, Petitioner underwent a left carpal tunnel release. (PX6). Dr. Paletta initiated physical therapy on follow-up and planned to address Petitioner's right side after sufficient recovery of the left. (PX5, 11/14/11).

Respondent had Petitioner examined by Dr. Craig Beyer on December 20, 2011. (RX2, Ex.2). Dr. Beyer believed that if Petitioner's career as a Wal-Mart stocker contributed to her condition, she would not have been asymptomatic for 13 years, and every Wal-Mart stocker would develop carpal tunnel syndrome. *Id.* He stated that "one would expect immediate symptomatology in the patient again if it were related to her job." *Id.* He also believed that current medical literature did not support that repetitive tasks of any kind contribute to the development of carpal tunnel syndrome. *Id.* Although believing Petitioner's condition to be unrelated to work, he recommended a right carpal tunnel release. *Id.*

He testified by way of deposition that 90% of his medical/legal workers' compensation evaluations are done on behalf of employers or insurance companies. (RX2, p.31). He performs four to five independent medical examinations, four depositions and two to three records reviews without examination per month. *Id.* at 39-40. He charges $750 for his examinations, $1,000 per hour for his depositions, and $400 per hour for his records reviews. *Id.* at 39-41. From January to September of that year, he had performed six depositions for the firm representing Respondent. *Id.* at 40. He averages $75,000 per year performing medical examinations and depositions, excluding records reviews. *Id.* at 41-42.

On cross - examination, Dr. Beyer acknowledged that Petitioner reported symptoms prior to the 13 year period of asymptomativity claimed in his report. *Id.* at 42-44. He also testified to the possibility that he omitted Petitioner's complaints of long-standing symptoms for which she took no action until they affected her ability to work. *Id.* at 46. He testified, however, that this did not change his opinion. *Id.* at 64. Although relating Petitioner's condition solely to non - occupational health factors, his report did not contain any details as to the status or duration of these conditions. *Id.* at 47. He further acknowledged on cross-examination that there is a

difference between diabetic and compressive neuropathy, and that the fact that he believed Petitioner has carpal tunnel indicated a compressive neuropathy, which he failed to indicate in his report. *Id.* at 47-48. Petitioner testified that Dr. Beyer did not ask her any questions regarding her diabetic condition, but that she volunteered information regarding same. (T.28-29).

Dr. Beyer testified that there is no printed evidence that occupational stressors accumulate and cause the development of carpal tunnel syndrome. *Id.* at 50. However, in the very articles which he referenced to support his own conclusion, he was directed to references of studies that correlate occupational activities that require forceful gripping, repetitive wrist flexion, exposure to vibration, stressful manual work, repetitive or prolonged hand use in non-ergonomic positions, and activities involving continuous or repetitive wrist extension. *Id.* at 51-54. He also testified that the second article he referenced only considered 117 out of 248 assessments found on the subject of carpal tunnel, while 131 were excluded for "various reasons." *Id.* at 53. In short, his description paints the "update" as an opinionated assessment which criticized studies that the editors did not feel were "well-done." *Id.* at 54-55. He acknowledged that even the report recognized the potential bias in finding higher causal association between biological versus non-occupational factors, due to the fact that biological factors such as age and weight are easier to quantify than the number of repetitions necessary to be at risk for developing carpal tunnel syndrome. *Id.* at 55-57. When asked whether or not there were or not there were physicians and medical literature that continue to endorse a causal relationship between occupational activities and repetitive trauma, he stated that such studies were "not worth the paper they are printed on." *Id.* at 58-59.

Dr. Beyer acknowledged that he has been deemed by the Circuit Court in St. Clair County in a separate litigation matter to be an "undisguised partisan warrior for the cause of the insurance industry, and that he was called adversarial, aggressive, hostile, and rude." *Id.* at 60-61. He did not recall, however, that the Court found him to be culpable of trying to intimidate litigants and remarked, "I didn't have a weapon or anything, so . . ." *Id.* at 61. The Court's Order was offered into evidence by counsel for Petitioner. *Id.* at 61. Petitioner testified that Dr. Beyer was not polite during his examination, which was very short. (T.26-27).

Dr. Beyer did not dispute that Petitioner was appropriately diagnosed with bilateral carpal tunnel syndrome and that her medical treatment was reasonable and necessary for her condition. *Id.* at 62. He agreed that Petitioner also required a right carpal tunnel release. *Id.* at 62-63.

Petitioner's treating physician, Dr. Paletta, also testified by way of deposition. (PX8). Dr. Paletta is a board certified orthopedic surgeon licensed to practice in Illinois, Missouri, New York, and Florida, whose practice is devoted to treating problems of the upper extremity, shoulder, elbow, wrist and knee. (PX8, p.3-4, 6). He sees patients for peripheral neuropathies, carpal and cubital tunnel being the most common, and performs surgical procedures to alleviate these conditions. *Id.* at 8-9. In addition to being a practicing surgeon, he serves as a clinical professor of orthopedic surgery at the University of Missouri and the team physician for the St.

Louis Cardinals for the 16th season. *Id.* at 5-6. He sees patients who are referred by employers and insurance companies, as well as patients who are claimants. *Id.* at 7. He also performs independent medical examinations at the request of employers and insurers. *Id.* at 7-8. He has also given testimony against claimants represented by counsel for Petitioner. *Id.* at 8.

Dr. Paletta testified that there are identified occupational risk factors which have been found to lead to the development of carpal tunnel syndrome. *Id.* at 9. These include repetitive forceful grip, repetitive activities with poor wrist position such as fixed wrist flexion, and the use of vibratory tools. *Id.* at 9. He testified that the medical literature documents these risk factors in texts such as peer-reviewed journal articles, textbooks, and review articles. *Id.* at 10. He also testified to the existence of literature that "try and discount that association." *Id.* at 10. He testified that he regularly reviews these texts in the course of his practice. *Id.* at 10.

Dr. Paletta testified that he reviewed Petitioner's health history and the EMG studies performed by Dr. Goldring before Petitioner as a patient. *Id.* at 11. When he saw Petitioner on September 28, 2011, he took a complete history and performed a clinical examination, during which time Petitioner reported that her symptoms were worse with performing work activities such as using a box cutter and gripping and pulling open boxes. *Id.* at 11-13. Dr. Paletta testified in detail concerning Petitioner's job duties and testified to the positive electrodiagnostic studies and the positive orthopedic tests on clinical examination. *Id.* at 13-16. Based upon this evidence, Dr. Paletta diagnosed chronic bilateral carpal tunnel syndrome, and opined that Petitioner's job duties were an aggravating factor in her condition of ill-being. *Id.* at 16-18.

Dr. Paletta testified that although Petitioner is diabetic, she is not insulin-dependent and only takes oral medication. *Id.* at 18. He testified that this was significant because it meant that Petitioner's condition was controlled and of diminutive in nature. *Id.* at 18-19. He further noted that Petitioner did not display evidence of generalized diabetic neuropathy. *Id.* at 19. He testified that this was evidence that Petitioner's diabetes was not severe or longstanding enough to affect her nerves in a diffuse manner. *Id.* at 19. Petitioner testified during Arbitration that she was diagnosed in February of 2011 and confirmed that her condition is controlled. (T.23).

With regard to the length of time Petitioner's injuries took to manifest, Dr. Paletta explained that there is often a latency period in the development of conditions in patients, or a period of time that passes before symptoms manifest. *Id.* at 19-20. He testified that latency periods are frequently seen in individuals who develop compression neuropathies such as carpal tunnel syndrome, and that it is not unusual for someone, such as Petitioner, to perform a job for 13 years and only begin to experience symptoms after a significant number of those years pass. *Id.* at 20-21. He stated that the threshold for each individual's development of compression neuropathy is different, and that there is no literature which definitively quantifies the term "repetitive." *Id.* at 46-47. Dr. Paletta also testified that it is not uncommon for someone who is right-hand dominant to develop more severe symptoms on the non-dominant side. *Id.* at 43.

Dr. Paletta testified that he reviewed the articles referenced by Respondent's examiner, Dr. Beyer. *Id.* at 23, 26. With regard to the first article, the Orthopedic Knowledge Update, he testified that the article states that there is scientific evidence that direct measurement of hydrostatic pressures within the carpal tunnel are increased with certain wrist positions, and that increased pressure is a contributing factor to the development of carpal tunnel syndrome. *Id.* at 27. He also noted that the source stated that the potential role for repetitive activity in the development of carpal tunnel was an ongoing topic of discussion or debate. *Id.* at 26-27. When asked what he found significant about the article, he stated:

> *That there's clear evidence that wrist flexion positions can increase or do increase the hydrostatic pressure in the carpal tunnel, and that it's well-known that those increases in pressure can contribute to or worsen carpal tunnel syndrome. So that appears to be an un – not really a point of debate. It's very clear. The scientific studies have been done to show that. Id.* at 28-29.

Specifically addressing how this information correlated in the case of Petitioner, he testified:

> *What it does for me in this particular case is confirms that, based on Lavonne's work descriptions and the job – and her descriptions of her wrist position, that she's in a position where there is likely increases in hydrostatic pressure in the carpal tunnel, thus [sic] part of my conclusion that her work activities aggravated or contributed to her carpal tunnel syndrome. Id.* at 29.

Turning to the 2008 Journal of Hand Surgery article, Dr. Paletta testified that this review did not conclude that environmental factors such as work activities played no role in the development of carpal tunnel syndrome. *Id.* at 29-30. He testified that the authors could not definitively conclude that work activities or environmental factors played no role. *Id.* at 29-30. He noted the following:

> *In fact, they stated that the strongest evidence supporting causative association was for activities requiring repetitive hand use, followed thereafter by exposure to vibration, which I've testified to previously, and activities involving continuous or repetitive wrist flexion, high grip force, or stressful manual work defined by repetitive or prolonged hand use in non-ergonomic positions. They stated that that was the strongest – the areas where the evidence was strongest to support some causative association. Id.* at 30-31.

He further noted that 66% of the sources papers relied upon noted a correlation between repetitive hand use and the development or worsening of carpal tunnel symptoms; 76% of the papers demonstrated a correlation between the development of carpal tunnel syndrome and exposure to vibration; and 46% demonstrated a correlation to stressful manual work. *Id.* at 30-31.

He testified that the article supported his causal opinion finding connection in the case of Petitioner. *Id.* at 31.

Dr. Paletta reviewed a third article comparing a group of twins in an attempt to control biological factors, which concluded half of the risk for carpal tunnel in women is genetically determined. *Id.* at 31. While acknowledging that environmental factors were potentially a contributing event or a contributing factor, the authors characterized this contribution as "minor." *Id.* at 32. When asked whether or not he agreed with such a characterization, Dr. Paletta testified that based on his experience and knowledge of most of the literature, environmental factors play more than a minor role. *Id.* at 32. He noted, however, that the article did not refute his causation opinion given regarding Petitioner. *Id.* at 32. Dr. Paletta continued to recommend that Petitioner undergo a right carpal tunnel release. *Id.* at 34.

Petitioner testified that she derived benefit from her left carpal tunnel release. (T.25). She testified that her left side was worse because she places greater strain on her left side by constantly pushing down on the glued boxes with her left hand in order to open them. (T.26). Although she continues to have symptoms of numbness dependent upon her level of activity on her right side, she did not pursue surgical treatment. (T.25, 27).

Despite the improvement from surgery on her left side, she continues to experience symptoms dependent upon her level of activity. (T.25). Petitioner testified that she suffered a loss of grip strength and that she is weaker than she was before her injury. (T.25-26). She is her hand is tired and sore at the end of her shift. (T.26). She takes Tylenol for her symptoms. (T.26).

CONCLUSIONS OF LAW

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

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

Respondent did not dispute notice based on manifestation. In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. "The word 'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens...Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254.

Accidental injury need only be ***a*** causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003) (emphasis added). Even when other

non-occupational factors are present, a "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). 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).

Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Industrial Commission*, 834 N.E.2d 583 (2d Dist. 2005). The same theory applies to cases in which the employee's pre-existing condition or anatomical predisposition is aggravated by the repetitive nature of the employment. Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). Hence, Petitioner's claim will not be denied simply because she possesses non-occupational risk factors for the development of her bilateral carpal tunnel syndrome. Additionally, Dr. Paletta testified that Petitioner's diabetes was controlled, diminutive in nature, and was not longstanding enough to affect her nerves. (PX8, p.18-19).

The Arbitrator finds Petitioner to be a credible witness, who testified to performing arm-and-hand intensive duties for over a decade. Petitioner testified that as an overnight stocker, she spent her entire shift loading and unloading pallets; moving, opening and unloading boxes; pulling pallet jacks and stocking the merchandise unloaded from the boxes opened. (T.13-16, 19-20).

Petitioner testified that the pallet jacks she pulls are very heavy, often loaded to the ceiling with 30-40 boxes, and do not have any motion assistance; that the boxes she unloads without assistance weigh from 35 to 60 lbs., and that the glued boxes are difficult to open, requiring forceful gripping and placing strain on her hands and arms. (T.14-17, 19, 30). Petitioner testified that she must open the glued boxes with her hands, and that she has greater symptoms on her left side as a result of constantly pushing down on the glued boxes with her left hand in order to open them. (T.26). She testified that she unloads pallets throughout her shift, and that at times she is required to team-lift large items such as furniture and heavy appliances onto shelves using significant grip and strength. (T.17-18). The job description created and submitted by Respondent corroborates Petitioner's testimony. (RX4). Petitioner also testified that Respondent times her work activities, and that she opens at least 40 to 50 boxes per hour. (T.19).

Petitioner testified that there was no part of her 8-hour shift that did not involve the use of her arms and hands. (T.16-17). Respondent's witness testified he did not dispute any of Petitioner's testimony and that it was "pretty accurate as far as the description she's given." (T.48).

Based upon Petitioner's description of her job duties, her increase in symptoms associated with work activities, and the described position of her wrist, which creates an increase in pressure at the carpal tunnel, while performing her job duties, Petitioner's treating physician, Dr. Paletta, opined that Petitioner's job duties were causally related to her development of carpal tunnel syndrome. (PX5, 9/28/11; PX8, p.29). Dr. Paletta explained that there is often a latency period in the development of conditions in patients, or a period of time that passes before symptoms manifest, and that it is not unusual for someone, such as Petitioner, to perform a job for 13 years and only begin to experience symptoms after a significant number of those years pass. *Id.* at 19-21. He also stated that the threshold for each individual's development of compression neuropathy is different, and that there is no literature which definitively quantifies the term "repetitive." *Id.* at 46-47. The Arbitrator notes that this is in harmony with the law and the judgment of the Appellate Court in *Edward Hines Precision Components v. Indus. Comm'n*, which holds that there is no standard threshold which a claimant must meet in order for his or her job to classify as "repetitive" enough to establish causal connection. *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App. 2nd Dist. 2005). In fact, an employee is not even required to perform the same activity throughout his or her work day in order to support a finding of repetitive trauma. *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013) (holding the claimant's job duties to be repetitive, although varied in nature, on the principal that claimant's job duties required intensive use of the hands and arms throughout the shift). The Arbitrator thus finds Dr. Paletta's causation opinion to be credible.

The Arbitrator does not find the causation opinion of Dr. Beyer to be persuasive. Dr. Beyer indicated in his report that if Petitioner's career as a Wal-Mart stocker contributed to her condition, she would not have been asymptomatic for 13 years, and every Wal-Mart stocker would develop carpal tunnel syndrome. (RX2, Ex.2). He stated that "one would expect immediate symptomatology in the patient again if it were related to her job." *Id.* The Arbitrator notes, however, that this line of reasoning violates the concept of latency and variant thresholds between claimants, which is general knowledge in both the medical and lay community in regard to repetitive trauma cases. He also stated that the current medical literature did not support that repetitive tasks of any kind contribute to the development of carpal tunnel syndrome. *Id.* However, Dr. Paletta testified that he reviewed the articles referenced by Dr. Beyer, and stated that they in fact supported the concept of occupational contribution in the development of compression neuropathy. (PX8, 23, 26-32). The Arbitrator also notes that the Decisions and Opinions on Review written by the Illinois Workers' Compensation Commission as well as Appellate and Supreme Court Opinions are rife with cases with expert medical testimony from

both treating physicians and independent examiners supporting a causative role of occupational factors in the development of compression neuropathies.

Although Dr. Beyer claims that there is no scientific evidence to support a causal relationship between occupational factors and the development of carpal tunnel syndrome, a review of the documentation which he referenced as well as his cross-examination shows that his opinion carries a significant bias and is flawed. In the very articles which he referenced to support his own conclusion, he was directed to references of studies that correlate occupational activities that require forceful gripping, repetitive wrist flexion, exposure to vibration, stressful manual work, repetitive or prolonged hand use in non- ergonomic positions, and activities involving continuous or repetitive wrist extension. (RX2, p.51-54). Additionally, although there is a difference between diabetic and compressive neuropathy, he omitted the fact that Petitioner's carpal tunnel syndrome was indicative of compressive neuropathy rather than a diabetic neuropathy from his report. *Id.* at 47-48. This coupled with the evidence showing that he carries significant bias toward claimants abolishes his credibility.

The Arbitrator understands that the literature and the studies show that the performance of certain occupational duties does not guarantee the development of carpal tunnel syndrome in all patients and that there is a debate as to what extent occupational factors contribute to the development of compression neuropathy. However, resolution of such a scientific debate is not the matter at hand or the duty of the Commission; Courts have refused to adopt any standard thresholds for repetitive trauma cases to determine causal connection. *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App. 2nd Dist. 2005) (holding that "there is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma" at N.E.2d 780); *see also Darling v. Indus. Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135, 125 Ill.Dec 726 (1st Dist. 1988) (holding that quantitative evidence of exact nature of repetitive work duties is not required to establish repetitive trauma injury). The issue is whether or not the job duties performed by Petitioner were a factor in her development of carpal tunnel syndrome.

The Commission has previously found the duties of a Wal-Mart stocker to cause or contribute to the development of carpal tunnel syndrome. *Dowdy v. Wal-Mart Associates, Inc.*, 13 I.W.C.C. 0066 (201*); *Dwyer v. Wal-Mart Stores, Inc.*, 02 I.I.C. 0982 (2002). In both of these cases, the Commission held that the duties of an overnight stocker qualified as substantial manual repetitive labor sufficient to support a finding of work-related repetitive trauma. *Id.* The evidence presented by Petitioner documenting the repeated performance of hand-intensive work, which was corroborated by Respondent's job description and its witness, likewise supports such a finding that the Petitioner's work **aggravated her development of bilateral carpal tunnel syndrome.** Therefore, the Arbitrator relies on the causation opinion of Dr. Paletta and finds that Petitioner met her burden of proof regarding accident and causal connection.

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

Upon establishing causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n,* 691 N.E.2d 13 (2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Dr. Paletta stated that Petitioner's work activities were an aggravating factor in her current condition, and that her need for ongoing treatment was the result of her work-related condition. (PX5, 9/28/11). Dr. Beyer agreed that Petitioner was appropriately diagnosed with bilateral carpal tunnel syndrome and that her medical treatment was reasonable and necessary for her condition. (RX2, p.62-63). Hence there is no dispute as to the reasonableness and necessity of Petitioner's past and prospective medical care.

Based upon the foregoing, Respondent is hereby ordered to pay the medical expenses in the amount of $17,266.28 as outlined in Petitioner's group exhibit one. Respondent shall have credit for nay amounts paid through its group carrier and shall hold Petitioner harmless from any claims made by any healthcare provider for which it is receiving credit, as provided in §8(j) of the Act.

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

Respondent disputed Petitioner's temporary total disability benefits solely on the basis of liability. (AX1). Based upon the aforementioned findings, the Arbitrator finds that Petitioner is entitled to the one (1) week of temporary total disability benefits claimed on the Request for Hearing form. (AX1; T.42-43).

This award shall in no instance 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.

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

The Arbitrator finds that Petitioner developed bilateral carpal tunnel syndrome, which required surgical intervention on her left side. (PX5; PX6). Although she continues to have

symptoms of numbness dependent upon her level of activity on her right side, she did not pursue surgical treatment. (T.25, 27).

Despite the improvement from surgery on her left side, she continues to experience symptoms dependent upon her level of activity. (T.25). Petitioner testified that she suffered a loss of grip strength and that she is weaker than she was before her injury. (T.25-26). Her hand is tired and sore at the end of her shift. (T.26). She takes Tylenol for her symptoms. (T.26).

Based upon the foregoing, the Arbitrator finds that Petitioner has sustained serious and permanent injuries that resulted in the 15% loss of her left hand and the 7.5% loss of her right hand. Respondent shall therefore pay Petitioner permanent partial disability benefits of $236.10/week for 42.75 weeks, because the injuries sustained caused the 15% loss of the left hand (28.5 weeks) and the 7.5% loss of the right hand (14.25 weeks), as provided in §8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John M. Jannotti,

Petitioner,

14IWCC0855

vs.

NO: 09 WC 46925

Ellman's Music 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 causal connection, medical, temporary total disability and permanent disability and being advised of the facts and law, modifies the decision of the Arbitrator who found the Petitioner is entitled to an award of a permanent total disability.

The Commission finds that the Arbitrator's award of a permanent total disability should be modified and a 20% loss of use of a person as a whole is awarded.

Petitioner was employed by the Respondent as an instrument repair man and sales representative. He had worked for Respondent for approximately 19 years. His job duties included repairing and servicing orchestral instruments. He would do minor repairs and do total reconstruction of string instruments. His outside sales job required him to drive to and from the various school districts to pick up and return various musical instruments. Petitioner testified that his job would require he lift, move and carry various musical instruments including cellos, tubas and double basses. (Transcript Pgs. 12-13)

On January 21, 2008 Petitioner was doing a military style workout when he became lightheaded and short of breath. He felt nauseated and had to quit. He saw Dr. Schouten and had an abnormal ECG. He was taken by ambulance to Central DuPage Hospital. (Petitioner Exhibit 1)

Central DuPage Hospital records a history of Petitioner being symptomatic. His discomfort was vague and he had developed shortness of breath at rest. He had exertional chest pain and dyspnea on exertion. He had exertional chest pain with brisk walking. Petitioner appeared to be moderately ill and in distress during the exam. An ECG showed anterior ST-T wave depression consistent with ischemia. He was referred to Dr. Kinn. (Petitioner Exhibit 3)

Dr. Kinn received a history of Petitioner exercising earlier that day and had to stop because of chest pain and shortness of breath. He went home and the chest pain went away but he felt tired and short of breath and he had nausea and vomiting. Dr. Kinn's impression was of a recent myocardial infarction. It is unclear whether that occurred that morning or a couple of weeks ago. This was evidenced by his abnormal ECG and chest pain. He recommended that Petitioner undergo an emergent heart catherization. (Petitioner Exhibit 3)

On January 22, 2008, Petitioner underwent a coronary bypass grafting on three arteries. He was diagnosed with multivessel coronary artery disease; acute myocardial infarction; ischemic cardiomyopathy with possible left ventricle apicel thrombus. Petitioner was seen in follow up with Dr. Schouten and Dr. Kinn. He last saw Dr. Schouten in regards to this incident on June 18, 2008. (Petitioner Exhibit 1)

On August 13, 2008, Petitioner was loading various instruments from the back of the shop to the staging area. It was about 100 feet from the back of the shop to the staging area. He had made about four trips. One of the instruments he had to carry to the staging area was a tuba which weighed at least 80 pounds. While he was laying down the instruments in the staging area he started developing pain in his chest which radiated up his arm into his jaw. He called a co-worker and told him to "Call up front. I need to go to the hospital." (Transcript Pgs. 14-16)

The emergency room at Central DuPage Hospital has a history of chest pain which started 45 minutes prior to Petitioner's arrival. The pain radiated to his neck and face. The Petitioner exerted himself when the symptoms occurred. (Petitioner Exhibit 3)

On the same date Petitioner consulted with Dr. Chough, who found that Petitioner was in his usual state of health today when he developed some right upper chest discomfort near his shoulder. There was a little bit of radiation to his arm. There was no central chest discomfort and the pain had resolved. The first sets of cardiac enzymes were negative and Petitioner denied shortness of breath, lightheadedness, syncope and palpations. There were no ischemic changes. At that time the Doctor's impression was atypical chest pain, right sided, non-exertional. He ordered a stress thalium test which revealed a normal EKG response to Adenosine. There was no chest pain reported. The Nuclear Perfusion revealed abnormal myocardial perfusion imaging with evidence of ischemia in the anterior apical wall. (Petitioner Exhibit 3)

Following his accident at work on August 13, 2008, the Petitioner underwent seven subsequent angiograms or angioplasties. Dr. Archer, the Petitioner's cardiologist, on June 18, 2009, found that Petitioner no longer has congestive heart failure. He encouraged the Petitioner to start exercising 5 times per week for 30 minutes per day. This would include biking, walking and golfing. He did not want him scuba diving which is a hobby Petitioner wanted to engage in.

On October 9, 2009, Dr. Archer saw the Petitioner in follow up from a successful angioplasty. Petitioner reported that he has had no angina since the procedure in early 2009, was much more active and was able to play golf scoring less than 90. He was angina free and able to exercise. (Petitioner Exhibit 2)

The Petitioner was seen by Dr. Coe for an IME. Dr. Coe is not a cardiologist. Dr. Archer opined that "I believe that his original myocardial infarction which occurred at a time he was carrying a heavy tuba to one of his customers was at least in part related to his work in the sense that he was performing strenuous activity at the time of the event. I do think therefore, that this could reasonable be considered to be a contributory factor in his myocardial infarction." (Petitioner Exhibit 2) Nowhere in the records is there evidence that the Petitioner sustained a myocardial infarction on or after August 13, 2008. Petitioner suffered his infarction in January of 2008. Therefore, Dr. Archer's and Dr. Coe's opinions are not persuasive.

The Commission finds Dr. Fintel, the Respondent's IME Doctor, and a cardiologist, to be more persuasive than Dr. Coe and Dr. Archer. After Dr. Fintel reviewed the Central DuPage Hospital complete records, he opined "In sum, Mr. Jannotti possessed advanced, aggressive coronary artery disease. The initial symptoms of exertional fatigue and dyspnea manifested during an intensive "boot camp" program in January of 2008, not during work with musical instruments." He stated there was no evidence of acute myocardial ischemia or infarction on August 13, 2008 and "I do not believe the work responsibilities of that date caused or contributed to any cardiac event. The need for repeat angiography and intervention was due to the underlying disease and clinical symptoms." The Arbitrator wrote that Dr. Fintel's initial report indicated that the August 13, 2008 incident could have aggravated the Petitioner's pre-existing heart condition. However, this report was prepared before the Doctor was presented with the complete records of Central DuPage Hospital. (Respondent Exhibit 1)

The Commission also finds Dr. Fintel's opinion that the Petitioner was capable of working as of December 7, 2011 to be persuasive. (Respondent Exhibit 1) Even Petitioner's Dr. Archer felt that he could bike, walk and play golf.

The Commission finds that as of October 9, 2008 the Petitioner was no longer in need of any further medical intervention as a result of his work injury on August 13, 2008. The Petitioner appeared at the emergency room of Central DuPage Hospital on October 9, 2008, after a 10-15 minute episode of chest pain while sitting in a car. The ECG showed no acute changes and according to Petitioner the chest pain was different in quality than it was in prior episodes. The pain resolved spontaneously and since a recent stress test was interpreted as "low risk" no further intervention was recommended. (Petitioner Exhibit 3)

Therefore the Commission finds that all medical care rendered for the Petitioner's cardiac condition after October 9, 2008 is not the responsibility of the Respondent and was due to his pre-existing cardiac condition.

The Commission notes that the Respondent stipulated that Petitioner did, in fact, have an accident on August 13, 2008.

14IWCC0855

The Commission therefore finds that Petitioner is entitled to receive 100 weeks of compensation at a rate of $600.00 a week because the injuries sustained caused the loss of use of 20% of the person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $666.67 per week for a period of 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 $600.00 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 loss of use of the person as a whole to the extent of 20%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses as they pertain to his cardiac condition from August 13, 2008 through October 9, 2008 under §8(a) and §8-2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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 6 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

HSF
O: 8/5/14
049

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

Shane Orange,
Petitioner,

vs. NO: 12 WC 20296

State of Illinois/
Big Muddy River Correctional Center,
Respondent.

14IWCC0856

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

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

DATED: OCT 0 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-09/24/14
drd/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ORANGE SHANE
Employee/Petitioner

Case# **12WC020296**

SOI BIG MUDDY RIVER CORRECTION CENTER
Employer/Respondent

14IWCC0856

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:

2295 HUGHES LAW FIRM
RYAN RICE
1317 W MAIN ST
CARBONDALE, IL 62903

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

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

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH 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

DEC 31 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

Shane Orange
Employee/Petitioner

v.

State of Illinois/Big Muddy River Correctional Center
Employer/Respondent

Case # 12 WC 20296

Consolidated cases: _____

14IWCC0856

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on November 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. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On May 19, 2010, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did sustain an accident 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 $55,775.20; the average weekly wage was $1,072.60.

On the date of accident, Petitioner was 39 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.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated TTD benefits were paid in full.

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 6, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner permanent partial disability benefits of $643.56 per week for 51.25 weeks because the injury sustained caused the 12 1/2% loss of use of the right hand and 12 1/2% loss of use of the left hand, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

December 23, 2013
Date

DEC 31 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of May 19, 2010, and that Petitioner sustained repetitive trauma causing injuries to the right and left hands. Respondent disputed liability on the basis of accident, causal relationship and notice.

Petitioner's counsel filed a motion to bar Respondent from disputing its liability for medical expenses and causality on the basis of equitable estoppel (Arbitrator's Exhibit 1). Respondent filed a response to Petitioner's motion (Arbitrator's Exhibit 2). Prior to hearing testimony, the Arbitrator heard oral arguments from counsel in regard to Petitioner's motion. After reviewing Petitioner's motion, Respondent's response thereto and hearing the oral argument, the Arbitrator denied said motion.

Petitioner testified he began working for Respondent as a Correctional Officer in 1992. In 2004 Petitioner became a Fire Safety Officer and, in 2010, he became an Intelligence Officer. Petitioner testified that his duties as an Intelligence Officer required him to work at a keyboard and input computer data four to five hours a day every day that he was at work. This data included various reports, tickets, results of interviews with new inmates, background checks/reports on visitors, investigatory reports of disciplinary issues, etc. Petitioner also testified that his job required him to do key turning. When Petitioner worked as a Fire Safety Officer, he also did a significant amount of computer data entry.

Over a period of time, Petitioner developed bilateral hand symptoms for which he sought treatment from Dr. Jodi Fox, his family physician. Dr. Fox referred Petitioner to Dr. Brent Newell, a physiatrist, who performed nerve conduction studies on May 19, 2010. At that time, Petitioner complained of pain and numbness/tingling in both hands, more so on the right than left, and that he had experienced for several months. The EMG was within normal limits; however, Dr. Newell opined that the nerve conduction studies revealed evidence of moderate bilateral median neuropathy at the wrist (Petitioner's Exhibit 4).

Dr. Fox subsequently referred Petitioner to Dr. Steven Young, an orthopedic surgeon, who saw Petitioner on June 2, 2010. Petitioner informed Dr. Young that his job duties required a significant amount of computer work and key turning. Dr. Young examined Petitioner and reviewed the nerve conduction studies. He opined that Petitioner had bilateral carpal tunnel syndrome and recommended surgery. Dr. Young performed carpal tunnel release surgeries on the right and left hands on July 7, and August 11, 2010, respectively. Subsequent to the surgeries, Petitioner remained under Dr. Young's care, received physical therapy and was released return to work without restrictions (Petitioner's Exhibit 1).

On June 8, 2010, Petitioner reported the repetitive trauma injury to Respondent and an Employee's Notice of Injury and First Report of Injury were prepared at that time. According to the Notice of Injury, Petitioner sustained injuries to the left and right hands as a result of repetitive motion performed as a Correctional Officer (Respondent's Exhibit 1).

Dr. Young was deposed on January 22, 2013, and his deposition testimony was received into evidence at trial. Dr. Young's testimony was consistent with his medical records and he opined that Petitioner's computer use and key turning were an exacerbating/contributing factor to the development of the bilateral carpal tunnel syndrome condition. He also stated that Petitioner did not have the risk factors of obesity, hypothyroidism, alcoholism, rheumatoid arthritis, advanced age or kidney failure. He did agree that he did not have specific data as to the precise amount of computer use and key turning performed by Petitioner and that Petitioner was receiving medication for gout, which can be a potential contributing factor for development of carpal tunnel syndrome.

Respondent did not obtain a Section 12 examination of Petitioner, but had Dr. Anthony Sudekum do a review of Petitioner's medical records. Dr. Sudekum also reviewed a Job Site Analysis of Big Muddy Correctional Center performed in December, 2010, for a Correctional Officer, a staff assignment history of Petitioner and a job site analysis. Dr. Sudekum prepared a report dated August 20, 2013, wherein he opined that Petitioner's bilateral carpal tunnel syndrome was not related to his repetitive work activities, in particular, the keyboarding/computer data entry performed by Petitioner (Respondent's Exhibit 3).

Petitioner testified that following the surgeries on his hands the numbness/tingling had resolved but he still had some occasional pain/discomfort and believed that he may have lost some of the strength in his hands.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury to both hands which arose out of and in the course of his employment for Respondent that manifested itself on May 19, 2010.

In support of this conclusion the Arbitrator notes the following:

Petitioner credibly testified that his job duties required him to perform keyboarding/computer data entry four to five hours per day every workday as well as key turning.

Petitioner was initially diagnosed with bilateral carpal tunnel syndrome on May 19, 2010, when the nerve conduction studies were performed.

Petitioner's treating physician, Dr. Young, opined that Petitioner's repetitive work duties were an exacerbating/contributing factor to the development of carpal tunnel syndrome. Further, Petitioner had no other risk factors for the development of carpal tunnel syndrome other than gout.

The Arbitrator finds the opinion of Dr. Young in regard to causality to be more persuasive than that of Dr. Sudekum.

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

The Arbitrator concludes that Petitioner gave notice to Respondent within the time limit prescribed by the Act.

In support of this conclusion the Arbitrator notes the following:

Petitioner's condition manifested itself on May 19, 2010, and Petitioner gave notice to Respondent on June 8, 2010. Therefore, the Arbitrator concludes Petitioner gave notice to Respondent within the time prescribed by the Act.

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 6, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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 12 1/2% loss of use of the right hand and 12 1/2% loss of use of the left hand.

In support of this conclusion the Arbitrator notes the following:

Subsequent to the surgeries, Petitioner's symptoms of numbness/tingling in his hands resolved; however, Petitioner still has some occasional symptoms of pain/discomfort in his hands as well as a loss of strength.

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven Hand,
Petitioner,

vs.

No. 10 WC 021955
No. 12 WC 005291

Illinois Cement Co.,
Respondent.

14IWCC0857

DECISION AND OPINION ON REMAND

This case appears on Remand from the Circuit Court of LaSalle County in case number 13 MR 374. On April 1, 2013, Arbitrator Andros issued a decision on consolidated claims, 10 WC 021955 and 12 WC 005291, finding that Petitioner proved that he sustained accidental injuries arising out of and in the course of his employment on both May 5, 2009 (10 WC 021955) and October 28, 2009 (12 WC 005291). However, the Arbitrator denied benefits in both claims as Petitioner's current condition of ill-being was found not causally related to either accident, but rather to a pre-existing condition. Arbitrator Andros further found that Petitioner suffered no permanent partial disability as a result of either accident. All benefits were denied. The Commission affirmed and adopted the Arbitrator's Decision, and Petitioner appealed the Commission Decision to the Circuit Court of LaSalle County.

Judge Eugene Daugherity reviewed the parties' briefs, heard oral arguments, and issued his decision on June 25, 2014. The Order stated as follows:

> This matter coming before the Court on Petitioner, Steven Hand's, administrative review of the decision of the Illinois Workers' Compensation Commission, hereby finds that the Commission's decision on causation is against the manifest weight of the evidence, and the matter is remanded back to the Commission for further findings of fact, including Permanent Partial Disability.

14IWCC0857

Findings of Fact

Petitioner, a long-time employee of Respondent, was working as a welder repairman on May 5, 2009, when he struck his right knee on the corner of a channel iron. Petitioner had suffered a torn meniscus from an injury at home in 2004, had undergone surgery with Dr. Perona to repair the damage, and had returned to work for Respondent full duty that same year. Petitioner testified that he had no right knee pain or injuries after his return until he struck his knee at work on May 5, 2009. Petitioner reported his injury to his immediate supervisor that same day and sought treatment from Dr. Perona on the following day. Upon the advice of Respondent's human resources director, Petitioner transferred his care to Dr. Ortinau, the "company doctor" at Rezin Clinic. Dr. Ortinau recommended, and Petitioner began, a course of physical therapy.

While still treating with Dr. Ortinau for the May 5, 2009 injury, Petitioner re-injured his right knee. On October 28, 2009, a co-worker and friend suffered a heart attack at work and fell 30 feet onto a roof. Petitioner heard of the accident on his work radio and ran to see if he could be of assistance, as he had received first aid training. While hurrying to the accident site, Petitioner slipped and twisted his right knee. He testified that he did not notice any knee pain until after he had returned home following his shift and believed that the pain was part of his May 5, 2009 injury. Therefore, he did not immediately report the October accident. He did report the second accident on October 30, 2009 and continued treating with Dr. Ortinau for both injuries, eventually undergoing arthroscopic surgery to repair a right knee medial meniscus tear and lateral meniscus tear and post-operative rehabilitation. Petitioner returned to work for Respondent full duty on February 9, 2010. He testified that he has missed no work and has sought no treatment for his knee since Dr. Ortinau released him, but he does have trouble climbing, kneeling, and walking for long distances, and his knee continues to pop.

Causal Connection

Petitioner's treating physician, Dr. Ortinau, opined that his right knee conditions (other than the severe osteoarthritis) were related to both of his work accidents, and the surgery was necessitated by those conditions. Respondent offered the Section 12 report of Dr. Cohen who believed that Petitioner's complaints were primarily related to his osteoarthritis. On cross-examination during his deposition, Dr. Cohen admitted that he could not tell with any reasonable degree of certainty whether Petitioner's patellofemoral dysplasia and meniscal tears resulted from his pre-existing osteoarthritis or from one or both of his work accidents. Arbitrator Andros concluded as follows:

> Based on the opinions of Dr. Cohen as well as the evidence of pre-existing conditions noted on the petitioner's objective evaluations as opined by Dr. Ortinau, the Arbitrator finds as a matter of law the petitioner's current condition of ill-being is not causally related to either accident of May 5, 2009 or the alleged occurrence of October 28, 2009. . .It is apparent based upon the petitioner's objective studies as well as the testimony of the petitioner that he had pre-existing problem [sic] associated with his knee joint.

Arbitrator Dec., p. 1. The Arbitrator found that Petitioner did sustain accidental injuries arising out of and in the course of his employment on both May 5, 2009 and October 28, 2009, but related his current complaints and his need for the December 15, 2009 surgery to his pre-existing arthritic condition. Although Dr. Cohen did state that he believed Petitioner's meniscal tears were related to his ongoing arthritic condition, he could not state that it was more likely that this was the cause rather than the alleged work accident. He testified that the cause of the tears was 50/50, accident vs. arthritis. Dr. Ortinau recognized that Petitioner suffered from pre-existing severe arthritis, but opined that his patellofemoral dysplasia resulted from his May 5, 2009 direct impact work accident and his meniscal tears resulted from his October 28, 2009 twisting accident. Dr. Ortinau further opined that Petitioner's symptoms were primarily attributable to his work injuries. He noted that, following surgery and rehabilitation, Petitioner was able to return to work full duty.

Although Petitioner admittedly suffered from knee problems before these accidents, and although his arthritis was degenerative and progressive, there was no evidence of any complaints of knee pain prior to the May 5, 2009 accident. Even if Petitioner's dysplasia and meniscal tears were pre-existing, they were apparently asymptomatic. Dr. Cohen opined it was speculative to try to determine the cause of the tears, but even if we cannot determine the cause, we can determine when the complaints began—after the work accidents. If the accidents did not cause the tears and dysplasia, they caused the conditions to become symptomatic. That is sufficient proof of causal connection under the Act, and pursuant to the Circuit Court's order, the Commission finds that Petitioner proved that his current condition is causally related to his May 5, 2009 and November 28, 2009 work accidents.

Medical Expenses

Petitioner stipulated prior to hearing that all of his related medical bills were paid. PX1A provides a summary of providers and payments, documented by attachments. Medical expenses totaling $1,071.88 were paid by Respondent's group health provider, ESIS. Respondent is entitled to credit under Section 8(j) for those payments, 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. According to that exhibit, Petitioner paid $524.60 out of pocket toward his medical expenses. Therefore, the Commission orders Respondent to pay Petitioner $524.60, pursuant to its Section 8(a) obligations.

Temporary Total Disability

Petitioner testified at hearing that he received temporary total disability for all of his lost time resulting from these injuries. The parties stipulated prior to arbitration to 6-6/7 weeks of temporary total inability to work and to Respondent's payment of $5,428.68 toward that period of temporary total disability benefits. Therefore, the Commission finds that Petitioner is entitled to payment of temporary total disability for 6-6/7 weeks, and Respondent is entitled to credit for $5,428.68 for payments made toward that benefit, pursuant to Section 8(b) of the Act.

14IWCC0857

Permanent Partial Disability

The sole remaining issue before the Commission is the nature and extent of Petitioner's permanent partial disability. Petitioner testified that he returned to work full duty following his post-operative rehabilitation program and that he has not sought additional treatment for his right knee or missed any work since his return to work on February 9, 2010. At hearing, he complained of some popping and difficulty climbing and kneeling. In reaching a determination of Petitioner's permanent partial disability, the Commission considered the following, pursuant to Section 8.1b(b):

- AMA ratings. Neither party submitted AMA ratings in this matter.
- Occupation. Petitioner has been employed by Respondent for 33 years in various positions. He is currently employed as a haul trucker and is working full duty. No evidence was presented as to his work duties or the level of work ability required, so the Commission cannot consider this factor in determining nature and extent.
- Age. Petitioner was 56 at the time of his first accident and 57 at the time of the second. Dr. Ortinau testified at deposition the patellofemoral dysplasia and tricompartmental arthritis were degenerative conditions unrelated to his accidents. The doctor opined, however, that Petitioner's accidents may have worsened his degenerative symptoms. His age would indicate that at least part of his knee condition is degenerative. Petitioner is unlikely to work for many more years, so any permanency would be moderately lower, as it would be less likely to affect his work ability over a long period.
- Future earning capacity. Petitioner was released to return to work full duty. At the time of hearing, he had been performing his usual job full duty for over two years and had not sought treatment for his knee during that time, although he continued to have some symptoms with kneeling, climbing and prolonged walking. Dr. Ortinau found that neither accident permanently aggravated Petitioner's patellofemoral symptoms. Therefore, the Commission finds that Petitioner's future earning capacity will most likely not be affected by these injuries.

After considering the above factors and the record as a whole, the Commission finds that Petitioner suffered a 20% loss of use of the right leg as a result of the work injuries on May 5, 2009 and October 28, 2009.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator entered on April 1, 2013 is reversed, pursuant to the order of the Circuit Court.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $791.69 per week for a period of 6-6/7 weeks, that being the period of temporary total incapacity for work under Section 8(b). Respondent is given a credit for $5,428.68 for payments made to Petitioner toward temporary total disability benefits.

14IWCC0857

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to credit for the $1,071.88 paid to medical providers made by group health, pursuant to Section 8(j), 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 $524.60, that being the amount Petitioner paid toward his related medical expenses, as documented by PX1 and pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $664.72 per week for a period of 43 weeks, as provided in Section 8(e)12 of the Act, for the reason that Petitioner has sustained a 20% loss of use of the right leg.

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

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

Bond for 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: OCT 0 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-09/24/14
drd/dk
68

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

Sharon Myers,
Petitioner,

vs. NO: 12 WC 25317

14IWCC0858

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 7, 2014, is hereby affirmed and adopted.

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

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

14IWCC0858

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 $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-09/23/14
drd/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

MYERS, SHARON
Employee/Petitioner

Case# **12WC025317**

WENDY'S
Employer/Respondent

14IWCC0858

On 2/7/2014, 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:

BROWN & BROWN
RICHARD E SALMI
5440 N ILLINOIS ST SUITE 101
FAIRVIEW HTS, IL 62208

0766 HENNESSY & ROACH PC
TAMMY PAQUETTE
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

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)

Sharon Myers
Employee/Petitioner

Case # 12 WC 25317

v.

Consolidated cases: n/a

Wendy's
Employer/Respondent

14IWCC0858

An *Application for Adjustment 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 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 the date of accident, June 6, 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 $n/a; the average weekly wage was $199.61.

On the date of accident, Petitioner was 50 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 $14,771.14 for TTD, $554.68 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $15,325.82. The parties stipulated that TTD benefits and TPD benefits were paid in full at the time of the trial.

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 7 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. Keith Wilkey including, but not limited to, fusion and disc surgery.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

February 3, 2014
Date

FEB 7 - 2014

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on June 6, 2012. According to the Application, Petitioner was lifting a case of tomatoes to an overhead shelf and sustained injuries to the low back/body as a whole. This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. Respondent stipulated that Petitioner sustained a work-related accident; however, Respondent disputed liability on the basis of causal relationship. Petitioner also claimed entitlement to temporary total disability benefits of 76 weeks and temporary partial disability benefits of seven weeks and this was not disputed by Respondent.

Petitioner worked for Respondent as a "team member" and her job duties included working as a cashier, stocking, prep work, filling orders, etc. On June 6, 2012, Petitioner was lifting a case of tomatoes overhead to a shelf and she experienced an onset of pain in her low back and a "jolt" down her right leg.

Petitioner sought medical treatment at the ER of Belleville Memorial Hospital on June 6, 2012. Petitioner was diagnosed as having acute back pain, given medication and discharged. She was directed to seek treatment from her family physician (Petitioner's Exhibit 2). Petitioner did not have a family physician so she took the medication and returned to work.

Petitioner's complaints worsened, on July 1, 2012, she returned to the ER of Belleville Memorial Hospital. At that time, Petitioner complained of low back pain with pain down a leg (the record did not specify whether it was the right or left leg). On clinical examination, straight leg raising was negative bilaterally but muscular spasm was present. Petitioner was diagnosed with a lumbosacral strain, she was given a 10 pound lifting restriction and was told to stop smoking and was once again directed to follow-up with her family physician.

Petitioner sought treatment from Dr. Stephen Woods, a chiropractor. Petitioner saw him for the first time on July 18, 2012. Dr. Woods' record of that date included a history of the work-related accident, and Petitioner complained of low back and right leg pain. On clinical examination, Dr. Woods noted that straight leg raising was positive at 45° on the right side and suspected either radicular pain or a disc lesion. Dr. Woods treated Petitioner with chiropractic manipulation, massage, etc. He ordered that Petitioner have an MRI scan performed (Petitioner's Exhibit 3).

An MRI was performed on August 8, 2012, which, according to the radiologist, revealed a disc bulge at L4-L5 and a small annular rent at L5-S1 (Petitioner's Exhibit 4). Petitioner continued to be treated by Dr. Woods and was seen again at the ER of Belleville Memorial Hospital on September 1, 2012. Dr. Woods referred Petitioner to Dr. Keith Wilkey, an orthopedic surgeon (Petitioner's Exhibits 2 and 3).

Petitioner was initially seen by Dr. Wilkey on October 17, 2012. Petitioner informed Dr. Wilkey that she had injured herself at work and had received chiropractic treatment which had been helpful. Dr. Wilkey examined Petitioner and noted a diminished range of motion of the back and a mildly positive straight leg raising test. He also reviewed the MRI scan and diagnosed

Petitioner as having a herniated disc at L4-L5 and an annular tear at L5-S1. Dr. Wilkey opined that Petitioner's back condition was causally related to the accident. He recommended Petitioner continue with the physical therapy treatment that was being administered by Dr. Woods and that Petitioner have some epidural injections (Petitioner's Exhibit 5).

Dr. Wilkey referred Petitioner to Dr. Gregory Randall, for the epidural injections. Dr. Randall saw Petitioner on October 30, 2012, and gave her an epidural injection at the L5-S1 level. Dr. Randall saw Petitioner again on November 13, and November 27, 2012, and gave her epidural injections on these occasions as well (Petitioner's Exhibit 6).

Petitioner continued to be treated by Dr. Woods and Dr. Wilkey. When Dr. Wilkey saw Petitioner on November 21, 2012, he noted that Petitioner continued to have back pain with right buttock and leg pain. At that time, Dr. Wilkey stated that Petitioner would likely need back surgery. He continued to authorize Petitioner to remain off work. When Dr. Wilkey saw Petitioner on December 5, 2012, Petitioner informed him that she had received the third epidural injection; however, it did not provider her any significant relief of her symptoms. Dr. Wilkey opined that conservative care had failed and that back surgery was the best option to relieve her symptoms (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. R. Peter Mirkin, an orthopedic surgeon, on January 3, 2013. In connection with his examination, Dr. Mirkin reviewed various medical treatment records and the film of the MRI scan. Dr. Mirkin's examination of Petitioner was normal and his review of the MRI revealed degenerative changes at L4-L5 and L5-S1 with slight disc bulging but no severe compression of the nerve roots. Dr. Mirkin opined that Petitioner sustained a lumbar strain and that Petitioner should have three weeks of work conditioning but no surgery. Dr. Mirkin opined that Petitioner could work with a 45 pound lifting restriction (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Wilkey saw Petitioner on January 29, 2013, and he renewed his recommendation that Petitioner have back surgery consisting of a decompression of the nerve. He also opined that it was unsafe for Petitioner to return to work. Dr. Wilkey also indicated that if Petitioner's back pain worsened that fusion surgery, instead of a decompression procedure might be indicated. Dr. Wilkey saw Petitioner again on March 13, 2013, and Petitioner had reduced her smoking to two cigarettes per day. He stated that Petitioner would be scheduled for decompression surgery and that chiropractic treatment would be discontinued. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Dr. Wilkey was deposed on March 22, 2013, and his deposition testimony was received into evidence at trial. Dr. Wilkey's deposition testimony was consistent with his medical records and he reaffirmed his opinion that there was a causal relationship between Petitioner's back condition and the accident of June 6, 2012. Dr. Wilkey noted that the MRI indicated a herniated disc at L4-L5 on the right side and that Petitioner's complaints and findings on examination were consistent with the MRI scan. Further, Dr. Wilkey stated that he did not observe any Waddell's signs on the part of Petitioner. Dr. Wilkey opined that further treatment was appropriate, specifically, surgical removal of the herniated disc and decompression of the nerve. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 1).

Dr. Mirkin was deposed on June 12, 2013, and his deposition testimony was received into evidence at trial. Dr. Mirkin's testimony was consistent with his medical report and he reaffirmed his opinions that Petitioner sustained a lumbar strain, that the MRI revealed degenerative changes and disc bulging but no herniations and that back surgery was not indicated. Dr. Mirkin also stated that Petitioner had positive Waddell signs and symptom magnification. Dr. Mirkin did opine that Petitioner could work with the 45 pound lifting restriction and that she have a period of physical therapy (Respondent's Exhibit 1).

Petitioner was seen by Dr. Wilkey on July 31, 2013, and her symptoms had worsened. Petitioner continued to have low back and right leg pain and Dr. Wilkey recommended that Petitioner have both a surgical fusion and decompression procedure performed; however, he did agree that Petitioner could attempt a six week period of physical therapy. Petitioner received physical therapy from August 6, 2013, through September 13, 2013, but she did not experience any significant improvement in her symptoms (Petitioner's Exhibits 5 and 8).

Petitioner was seen again by Dr. Wilkey on September 16, 2013, and his medical record of that date noted that physical therapy had, in fact, aggravated her back pain. He opined that Petitioner now required a fusion with a complete discectomy procedure. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Again at the direction of Respondent, Petitioner was examined by Dr. Mirkin on November 20, 2013. Dr. Mirkin described a normal clinical examination and he opined that Petitioner had sustained a lumbar strain which had resolved, that she was at MMI, no further treatment was indicated and that she could return to work without restrictions (Respondent's Exhibit 2).

At trial Petitioner testified that she still has persistent low back pain with shooting pain going into her right leg. She has not been able to work and has increased symptoms when she performs household tasks. Petitioner stated that she wants to proceed with the surgery as recommended by Dr. Wilkey.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of June 6, 2012.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner sustained a work-related accident on June 6, 2012, and that she had low back and right leg symptoms shortly thereafter.

Petitioner testified that she sustained low back pain and a "jolt" down her right leg at the time of the accident. Since then, Petitioner has had persistent low back and right leg pain that has been unresponsive to conservative treatment.

Petitioner's primary treating physician, Dr. Wilkey, is an orthopedic surgeon and he has examined Petitioner on multiple occasions. He reviewed the MRI scan and opined that it showed a herniated disc at L4-L5 on the right side and that Petitioner's symptoms and complaints were consistent with that finding. He has most recently recommended that Petitioner have surgery consisting of a fusion and disc surgery. Contrary to Dr. Mirkin, Dr. Wilkey did not find any Waddell signs on the part of the Petitioner.

Dr. Mirkin was Respondent's Section 12 examiner who saw Petitioner on two occasions. In spite of the persistence of Petitioner's symptoms and complaints, Dr. Mirkin described a benign examination, the MRI did not reveal any herniated discs and he further stated that there were positive Waddell signs on the part of Petitioner.

The Arbitrator finds the opinion of Petitioner's treating physician, Dr. Wilkey, to be more persuasive and credible than that of Respondent's Section 12 examiner, Dr. Mirkin.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

Respondent's primary dispute is in regard to the treatment provided by Dr. Woods, the chiropractor, following the first examination by Dr. Mirkin of January 3, 2013.

This ongoing chiropractic treatment was recommended by Dr. Wilkey until he determined that it was no longer effective for the Petitioner when he saw her on March 13, 2013.

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 fusion and disc surgery recommended by Dr. Wilkey.

In support of this conclusion the Arbitrator notes the following:

As aforestated, the Arbitrator found the opinion of Dr. Wilkey to be more persuasive and credible than that of Dr. Mirkin.

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rhonda Fogle,
Petitioner,

vs.

No. 11 WC 04677

14IWCC0859

State of Illinois,
Illinois Veteran's Home-LaSalle
Respondent.

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, temporary disability, and permanent disability, and being advised of the facts and law, modifies the April 30, 2013 decision of Arbitrator Falcioni, as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner was hired as a part-time housekeeper for Respondent in June 2009. She started working the same position on a full-time basis in March 2010. In her role as a housekeeper for Respondent, Petitioner testified she would clean the entire veteran's home facility, including scrubbing the walls and floors, hauling linens and doing residents' laundry. Petitioner testified that all of the duties she was assigned were hand and arm intensive. Petitioner worked as a housekeeper for Respondent until September of 2010 when she bid for a job in the kitchen and transferred into a dietary position within the facility.

Petitioner testified that her duties in the dietary department included preparing breakfast and lunch for 180 residents a day. She would dish the portions of fruit, vegetables and dessert, and clean the dishes, trays, glasses, lids, pots, pans, and also the kitchen as a whole. Most of the larger pots and pans had to be scrubbed by hand. She would also put the prepared meals on carts to take to the residents, collect the trays after meals, and strip and clean the carts. Petitioner also testified that the garbage disposal was always on and would vibrate the whole counter. Petitioner testified she had to work at an extremely fast pace as they were short staffed in the kitchen most days; requiring her to frequently work a 16 hour double shift.

Petitioner testified that beginning in June 2010 she started noticing pain in her wrists at night, more pronounced on the right. The pain gradually migrated to her right elbow. A couple of months after Petitioner began working in the dietary department she testified symptoms began in her left hand. Her bilateral hand complaints worsened as she worked in the kitchen.

Petitioner completed a notice of injury on December 28, 2010, noting her symptoms began in June 2010 when performing duties in housekeeping, such as moving furniture and repetitive scrubbing, and her symptoms continued when she transferred to dietary, which also involved repetitive motions and scrubbing. (RX1). Petitioner treated at St. Margaret's Occupational Health on December 30, 2010 with a consistent history of injury and complaints of bilateral hand pain and numbness into the arms. Petitioner was prescribed a Medrol dose pak, an EMG, night splints, and light duty restrictions. Petitioner was seen by orthopedic surgeon, Dr. Rhode, on February 7, 2011 who opined that Petitioner suffered from bilateral carpal tunnel syndrome and right cubital tunnel syndrome. He took Petitioner off work and ordered an EMG.

An EMG/NCV was performed on March 24, 2011. It showed moderately severe bilateral carpal tunnel syndrome and right cubital tunnel syndrome. Dr. Rhode performed right open carpal tunnel release and right cubital tunnel release on May 3, 2011 without complications. Dr. Rhode later performed a left open carpal tunnel release on June 14, 2011. Petitioner was prescribed a post-operative course of physical therapy and was returned to work full duty on August 16, 2011. Petitioner was found to be at maximum medical improvement by Dr. Rhode on September 15, 2011.

Petitioner was examined by Dr. Williams pursuant to Section 12 of the Act on June 29, 2011. Dr. Williams, an orthopedic surgeon, opined that the treatment to Petitioner's bilateral upper extremities was reasonable, but was not related to her work as her duties were neither significantly repetitive nor impactful enough to cause her symptoms. Petitioner's examining physician, Dr. Eilers, a specialist in physical medicine and rehabilitation, opined in his report of October 5, 2011 that her upper extremity complaints, development of bilateral carpal tunnel syndrome and right cubital tunnel syndrome, and related treatment was caused by her work for Respondent. Dr. Eilers detailed the work Petitioner did as a housekeeper and in the dietary department for Respondent. After surgery and return to work, Dr. Eilers noted Petitioner continued to complain of mild residual sensory deficits in the bilateral median nerve distributions, but was improving.

Arbitrator Falcioni found the date of accident to be December 28, 2010, and the Commission agrees. Petitioner had no prior noted complaints or treatment. Petitioner reported her complaints to Respondent on December 28, 2010 and filled out a notice of injury form.

14IWCC0859

Dr. Eilers and Dr. Rhode both opined that the Petitioner's injuries arose out of and in the course of Petitioner's employment with Respondent through the repetitive tasks she performed. Dr. Koogler, Respondent's occupational health physician, also indicated in his notes that Petitioner's condition began with her employment for Respondent and worsened with repetitive activities. The Commission finds the opinions of Dr. Eilers and Dr. Rhode more credible than Dr. Williams' and it adopts their opinions regarding causation. The Commission finds Petitioner proved she sustained injury to her bilateral hands and right arm in an accident that arose out of and in the course of her employment for Respondent on December 28, 2010.

With regard to temporary disability benefits, the Arbitrator ordered Respondent to pay the Petitioner 32 4/7 weeks of TTD benefits. He found Petitioner was on light duty, but was not provided work within her restrictions, from December 30, 2010 through February 7, 2011 and was then taken completely off work from February 7, 2011 through August 16, 2011. The Commission notes that the Request for Hearing form, entered into evidence as Arbitrator's Exhibit 1, shows Petitioner stipulated to a period of temporary total disability of 27 1/7 weeks for the sole period of February 7, 2011 through August 16, 2011. The statements made by parties on the Request for Hearing form are binding stipulations pursuant to *Walker* and Rule 7030.40. As such, the Commission modifies the award of temporary total disability to conform to the stipulated period of February 7, 2011 to August 16, 2011, a period of 27 1/7 weeks, at a rate of $253.00/week.

With regard to permanent partial disability, the Arbitrator found Petitioner sustained a 17.5% loss of use of the right hand, 15% loss of use of the left hand and 20% loss of use of the right arm due to the injuries sustained. The Commission views the evidence differently and finds that Petitioner sustained a 12.5% loss of use of the right hand, 12.5% loss of use of the left hand and 15% loss of use of the right arm. Both Respondent and Petitioner agree that Petitioner had a successful outcome from her bilateral carpal tunnel surgeries and the right cubital tunnel surgery. Petitioner testified that she is currently working full duty for Respondent, has no significant symptoms, does not take any medication, no longer wears any splints and is no longer treating medically.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the April 30, 2013 Decision of the Arbitrator is hereby modified.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 27 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $13,588.89 for medical expenses pursuant to §8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 89.2 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 12.5% loss of the right hand, 12.5% loss of the left hand and 15% loss of the right arm.

14IWCC0859

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 Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

DATED: OCT 0 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-08/05/14
drd/adc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FOGLE, RHONDA
Employee/Petitioner

Case# **11WC004677**

14IWCC0859

ILLINOIS VETERAN'S HOME-LASALLE
Employer/Respondent

On 4/30/2013, 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:

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

5048 ASSISTANT ATTORNEY GENERAL
MEGAN JANICKI
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

APR 30 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

Rhonda Fogle,
Employee/Petitioner

v.

Illinois Veteran's Home - LaSalle,
Employer/Respondent

Case # 11 WC 04677

Consolidated cases: n/a

14IWCC0859

An *Application for Adjustment 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 **Ottawa**, on **March 22, 2013 and in New Lenox on April 4, 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 28, 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 **$17,500.00**; the average weekly wage was **$336.53**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$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 $253.00/week (minimum)for 32 4/7 weeks, commencing December 30, 2010 through August 16, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $5,974.55 to Orland Park Orthopedics / Dr. Rhode, $6,080.32 to The Ambrose Group, $981.92 to William I. Crevier / Dr. Ambrose, Petitioner's out of pocket expenses of $552.10 and reimburse or hold her harmless from the Petitioner's health insurance for payment of bills made related to this claim, as provided in Sections 8(a) and 8.2 of the Act. All amounts hereunder to be paid pursuant to the medical fee schedule, and Respondent to receive credit for any sums previously paid hereunder.

Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week (minimum) for 35.87 weeks, because the injuries sustained caused the 17.5% loss of the Petitioner's right hand, $253.00/week (minimum) for 50.6 weeks because the injuries sustained caused the 20% loss of the Petitioner's right arm and $253.00/week (minimum) for 30.75 weeks because the injuries sustained caused the 15% loss of the Petitioner's left hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

4/18/13
Date

APR 30 2013

FINDINGS OF FACT

On December 28, 2010, the Petitioner, Rhonda Fogle, was employed with the State of Illinois at its Veteran's Home in LaSalle, Illinois. She started working for the Veteran's Home on June 16, 2009, as a part time housekeeper. In March of 2010, she became a full time employee. In both the full and part time positions, the job was the same. Ms. Fogle was required to use both hands and arms to scrub walls, clean and wax floors, do laundry and clean furniture, from the chairs to the beds. Each of these tasks required her to use and vigorously move her hands and arms to clean in an effort to avoid infection and the spread of disease.

The Petitioner explained as a part time employee between June of 2009 and March of 2010, she originally worked eight hours a day for five to six days every two weeks. This eventually increased. In March of 2010, she became a full time employee for the Respondent. After obtaining full time status, Ms. Fogle would occasionally work a double schedule or sixteen hours a day. This occurred one to two times per month.

In September of 2010, the Petitioner was able to change positions in the facility. She began to work in the Dietary department of the Veteran's Home. Ms. Fogle did this because in June of 2010 she began to experience bilateral numbness and tingling in her hands, more so on the right. Her hope was that a change of job would allow her complaints to recede and disappear. However she reported the dietary position was even more repetitive than housekeeping. In this full time job, Ms. Fogle was required to assist in the preparation of both breakfast and lunch for approximately 180 residents each day. The job itself consisted of cleaning and meals preparation tasks.

During her typical workday in the dietary area, she would fill fruit and pudding cups and provide clean trays, glasses, cups, silverware, carts, plates, serving dishes, utensils and the serving tables for residents. After food and drinks were portioned out to the residents, the Petitioner would next scrub pots and pans. These generally had to be washed after first soaking them. Ms. Fogle would then vigorously scrub each by hand to get them ready for the next meal. If possible, taking into account their size, they also would be placed into a tray and passed through a dishwashing machine. Dishes and utensils often also required scrubbing before placement into a dishwasher tray. After all items were rinsed and run through the washer, the Petitioner would take the clean items and properly stack and store them.

There was little or no down time between breakfast and lunch as the Petitioner also had to obtain carts that were previously used to serve the nursing home residents. On return to the dietary area, these carts now contained trays full of dirty items that had to be rinsed by hand, scrubbed if they contained substantial debris and then placed in the dishwasher. After coming out of the dishwasher, these items had to be properly stacked for the next meal. Ms. Fogle reported the amount of work in the dietary area required her and others to work at a fast repetitive pace.

In the dietary area, there were typically four people that would work during the morning shift Ms. Fogle was scheduled for. However, the Petitioner reports that they had "Terrible Tuesday" to deal with on a weekly basis. On that day, only three people worked the morning shift. As a result, the Petitioner worked two positions instead of just the one she usually did. From time to time, a person would also call in sick on "Terrible Tuesday". On these days, she would typically be required to work sixteen hours.

Rhonda Fogle explained that in June of 2010, she started to notice tingling at night in both of her hands. At first, this only happened on days she was working. It did not occur when off. However, as she continued to work full time, she noted worsening symptoms that now included pain. Eventually, the pain went from her right hand through the elbow and to the shoulder. As these symptoms increased, she started to favor her left hand and arm. Eventually, Ms. Fogle began developing pain in that hand as well. Although the right sided symptoms started while she was working as a housekeeper, her left sided issues did not begin until she worked in the kitchen area as a dietary aid. Ms. Fogle explained her pain and discomfort continued to increase in both limbs with her continued work in dietary. Her sleep was also being disrupted due to pain. The Petitioner reported she would regularly wake from her sleep and vigorously shake both hands in an effort to bring life back into them.

Because Petitioner's symptoms worsened, Rhonda Fogle reported her accident and injury to Diane Speigel and FaithAnn DiRosa, Human Resource managers at the LaSalle Veteran's Home. This report occurred in person at the facility on December 28, 2010. Rx 1. At that time, the Petitioner completed a Worker's Compensation Employee's Notice of Injury. Id. This document indicates the Petitioner hoped the symptoms she was experiencing would go away but they did not and, instead, worsened. Id. She explained her symptoms began while she was performing housekeeping duties but grew worse after she moved into the Dietary department where she experienced vigorous repetitive motions needed to perform that work. Id. At the time of the report, Ms. Fogle was experiencing both right and left upper extremity symptoms in both hands and arms. Id. In the Notice of Injury form, the Petitioner explained she felt she was suffering symptoms

due to her repetitive work activities. Id. Ms. Fogle wrote the facility was running short staffed using four housekeepers where six were required and using three dietary technicians instead of four that were needed. Id.

On December 30, 2010, the Petitioner, at the request of the Respondent, reported to the Occupational Health department at St. Margaret's Hospital in Spring Valley, Illinois. Px 4. She was attended to by Dr. Koogler. Id. He reported that in June of 2010, while employed as a housekeeper, the Petitioner began to notice right hand numbness. Id. Over the next month, this numbness extended to the right elbow and was accompanied by pain and discomfort. Id. In another month, the pain continued up the arm to the right shoulder. Id. She then began to favor her left arm and, about three months ago, began to experience numbness in her left hand, accompanied by pain that now extends through the forearm to the elbow. Id. He wrote Ms. Fogle now wakes in the evening with right hand and arm pain. Id. Occasionally, she wakes also with left sided symptoms. Id. These symptoms are primarily in the middle three fingers of the left hand but also affect the whole hand on the right side. Id. Dr. Koogler noted that she tried a night splint from Walgreens for the right wrist but it did not help. Id. He also noted the Petitioner moved from housekeeping to the Dietary department about three months ago but the symptoms have not abated. Id. He found no prior history of carpal tunnel syndrome symptoms or a family history of the same. Id.

During his examination, Dr. Koogler found positive bilateral Tinel and Phalen tests. Id. She had a slight decrease in right sided grip strength compared to the left with her grip strength in the dominant right hand being less than the left. Id. After diagnosing the Petitioner with bilateral carpal tunnel syndrome, he provided her with wrist splints,

ordered her not to lift over ten pounds, avoid griping activities and repetitive use of both hands. Id. An EMG was also prescribed along with a Medrol Dose Pack and Aleve for pain. Id. The Petitioner presented her work restrictions to the Respondent and was told no light duty work was available. She was then off work and not paid TTD.

At her January 13, 2011 follow up appointment with Dr. Koogler, she reported some improvement since her last visit. Id. She completed her Medrol Dose Pack and used the prescribed splints at night. Id. Ms. Fogle testified she felt some improvement and was awaiting EMG/NCV authorization. The Petitioner indicated she continued to have intermittent tingling in both hands that would increase with use. Id. She was also continuing to use her Aleve every 12 hours. Following his examination, Dr. Koogler wrote the Petitioner's carpal tunnel syndrome was improving and that he was still awaiting approval of the EMG/NCV study. Id. He prescribed continued use of the Aleve, suggested a home therapy program and ordered continued light duty. Id.

An Illinois Department of Central Management work injury form was also completed on January 13, 2011 by Dr. Koogler. Rx 1. He indicated in the report that Ms. Fogle had a six month history of right hand numbness and pain with a three month left hand history of numbness and pain. Id. He provided a diagnosis of bilateral carpal tunnel syndrome and ordered an EMG/NCV study which was pending approval. Id. He wrote the Petitioner had a light duty restriction of no lifting over ten pounds and indicated she is to avoid repetitive gripping activities and use of the hands. Id. Although the Respondent disputes notice, this document, an "Initial Worker's Compensation Medical Report" was completed by Dr. Koogler on January 13, 2011 and provided to the LaSalle Veteran's Home. Id.

Dr. Blair Rhode, an orthopedic surgeon, met with the Petitioner on February 7, 2011. Px 2. At that time, Dr. Rhode indicated he was seeing the Petitioner for bilateral wrist, elbow and shoulder pain that was due to her repetitive exposure at the Veteran's Home. Id. He explained her symptoms began in June of 2010 and that she reported the condition in December of 2010 when the symptoms did not improve. Id. Ms. Fogle complained of bilateral wrist pain with radiation to the thumb, index and long finger. Id. She also experienced right medial elbow pain with radiation to the ring and little finger and lateral shoulder pain. Id. Originally, she received treatment at Occupational Health with a Medrol Dose Pack and this provided some relief. Id.

At this appointment, Dr. Rhode explained her job was highly repetitive and included scrubbing, disinfection, moving heavy furniture, bathroom cleaning, dining room chair sanitation and scrubbing of walls among other things. Id. She then changed from her sanitation position and is currently working in the dietary area. Id. The Petitioner reports that she also explained her work duties in the dietary department to Dr. Rhode.

He reported her right wrist examination elicited pain over the radial side and that she had a positive Phalen's test that produced paresthesia in the distribution of the ulnar nerve as well. Id. There was also a positive right Tinel's sign. Id. Both wrists elicited pain on palpation. Id. The Tinel's sign at the left hand was positive for paresthesia. Id. Following this examination, the doctor's working diagnosis was bilateral carpal and right cubital tunnel syndromes. Id. He ordered an EMG to further her treatment and his diagnosis. Id.

On March 24, 2011, Dr. Edward Trudeau performed an EMG/NCV. Px 3. His examination indicated abnormalities including a positive compression test over the median nerves of both wrists and over the ulnar nerve at both elbows with profuse tenderness to palpation over the wrists and anterior right shoulder. Id. The EMG/NCV demonstrated bilateral median neuropathies / carpal tunnel syndrome which was moderately severe on both sides, with the right being worse. Id. He found ulnar neuropathy / cubital tunnel syndrome at the right elbow. Id. He felt the clinical assessment by Dr. Rhode of bilateral carpal and right cubital tunnel syndrome to be correct. Id.

Dr. Rhode had originally seen the Petitioner on February 7, 2011. Px 2. From that date, through her release for work on August 16, 2011, he kept her off work. Id. Prior to him doing so, the Petitioner had been on light duty under the order of the Respondent's Occupational Health physician, Dr. Koogler. Px 4. However, the Respondent failed to provide her with light duty employment. At no time while the Petitioner was on light duty and provided no work, or when she was off work completely, did she receive TTD.

On May 3, 2011, Dr. Rhode performed right open carpal and cubital tunnel releases. Px 2. The Petitioner followed up two days later with Dr. Rhode. Id. No infection was noted at this visit. Id. However, he reported the Petitioner was complaining of increasing left shoulder pain. Id. At her next appointment on May 19, 2011, the Petitioner was seen for another post surgical follow up. Id. Sutures were removed. Id. Dr. Rhode found no abnormalities at the surgical sites but reflected the Petitioner's left carpal tunnel syndrome remained active. Id. He noted the Petitioner was unwilling to live with her

current symptoms and wanted to proceed with the left carpal tunnel release. Id. A left open carpal tunnel release was performed on June 14, 2011. Id.

Following surgery, Dr. Rhode saw the Petitioner on June 30, 2011. Id. At that visit, Dr. Rhode indicated she was two weeks post her left carpal tunnel release and the surgical site appeared to be clean without abnormality. Id. Ms. Fogle did complain of limited motion in her right wrist at that visit. Id. She was ordered to remain off of work by Dr. Rhode and a physical therapy program was instituted for her. Id.

On July 28, 2011, the Petitioner again met with Dr. Rhode. At that visit, he repeated his opinion that Petitioner's surgery was related to her work activity. Id. She was doing well. Id. As such, Dr. Rhode wrote he would advance the patient to full duty beginning August 16, 2011 on a trial basis. Id.

Dr. Rhode had his last visit with the Petitioner on September 15, 2011. Id. At that visit, he noted the Petitioner continued to experience occasional hand numbness. Id. This comes with increased activity. Id. He found her to be at maximum medical improvement and stated she was now performing full duty activities. Id.

At the request of the Respondent, the Petitioner attended a medical evaluation with Dr. James Williams, an orthopedic surgeon, on June 29, 2011. Rx 3. Following this visit, Dr. Williams provided the Petitioner's diagnosis was bilateral carpal and right cubital tunnel syndromes. Id. He indicated the Petitioner's job duties did not involve significant impact or repetition to serve as a cause of her symptoms. Id. He wrote there was sufficient time for recovery between tasks she performed and indicated he did not believe her injuries were job related. Id. However, he did agree that the diagnosis and

treatment to date was reasonable and necessary. Id. He felt no further treatment was necessary. Id.

Rhonda Fogle, at the request of her attorney, also met with Dr. Robert Eilers, a physical medicine and rehabilitation physician. Px 5. He performed an evaluation on October 5, 2011. Id. Dr. Eilers wrote the Petitioner, due to her repetitive work activities with the LaSalle Veteran's Home, developed bilateral carpal tunnel and right cubital tunnel syndromes. Id. He reported she also experienced mild myofascial pain in the right shoulder from her work which appeared to be resolving. Id. He explained Ms. Fogle continues to have mild residual sensory deficits in the medial nerve distribution in her bilateral upper extremities but those were improving. Id. He noted her care had been reasonable and necessary and that the charges incurred were both usual and customary. Id. Dr. Eilers explained her time off of work was reasonable. Id. He explained she will have some permanent residuals in that she developed some swelling in the bilateral hands and due to these injuries she is now at a higher risk for reoccurrence of carpal tunnel as well as cubital tunnel syndromes. Id.

A medical bills exhibit was also entered into evidence and demonstrated gross bills of $81,685.31, prior to the application of the Medical Fee Schedule,(Orland Park Orthopedics: $23,071.54, South Chicago Surgical Solutions: $34,590.80, St. Margaret's Hospital: $371, St. Margaret's Clinics: $223.00, Dr. Trudeau: $3,980.00, Memorial Medical Center: $1,479.00, Dr. Tomas: $86.73, Central Illinois Radiology: $49.00, Ottawa Regional Hospital: $1,020.00, Bob Rady: $5,445.00, IVCH: $4,296.00, The Ambrose Group: $6,080.32 and William I. Crevier / Dr. Ambrose: $981.92). Px 1. Ms. Fogle testified her husband's group insurance paid many of these bills. The medical bill

exhibit demonstrates bills of $39,405.45 have been paid by this group coverage. Id. Insurance discounts of $28,690.97 have been taken with the Petitioner paying out of pocket $552.10. Id. Bills remaining unpaid total $13,036.79 (Orland Park Orthopedics / Dr. Rhode: $5,974.55, The Ambrose Group: $6,080.32 and William I. Crevier / Dr. Ambrose: $981.92). Id.

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

Prior to her employment with the State of Illinois at its Illinois Veteran's Home in LaSalle, the Petitioner worked a variety of jobs. Before working with the State, she was a housewife for over 20 years. At home, she performed a variety of tasks that were often shared by her husband. Once employed, her jobs included working as a bank teller for approximately two years, a department store jewelry counter clerk for one year and work at a kiosk at the Peru Mall in Peru, Illinois. At this job, she was required to keep the kiosk clean and attend to customers making a purchase. This required her to occasionally dust or wipe down the counter. After being laid off from that job due to slow sales, the Petitioner was able to obtain employment with the State of Illinois at its Veteran's Home in LaSalle. There she first worked in a part time housekeeping position. This eventually became a full time job. At no time prior to working for the Respondent did the Petitioner ever complain of pain or numbness in either of her hands or arms.

As a housekeeper for the Respondent, her job consisted of continuous cleaning duties that included everything from mopping, sweeping and vacuuming to the complete tearing down of individual patient rooms. With that task, she was required to completely clean one room from top to bottom on a daily basis. To fully clean the room, she had to remove furniture and place it in the hall. She would clean the walls, floors and furniture thoroughly to avoid the spread of disease and infection in the facility. Ms. Fogle described her work as requiring the use of both hands in a vigorous fashion that included

heavy scrubbing, wiping, movement of furniture, sweeping and vacuuming, among other things.

Ms. Fogle explained that while performing her housekeeping duties that she developed pain and discomfort in June of 2010 that first affected her right hand, elbow and shoulder. She then became more reliant upon her left hand and arm as the pain and discomfort in the right worsened. Over the next three months, she then began to develop pain in the left hand and arm as well. Ms. Fogle hoped that by changing jobs she would be provided relief of these symptoms. As such, in September of 2010, she was able to bid from housekeeping to a full time dietary position in the kitchen. After moving to the dietary position, she found this new job was harder than her original job.

While performing her new work, the pain in both her hands and arms increased. Px 2. It was especially bad in the right upper extremity. Id. The Petitioner hoped that by obtaining braces at the local Walgreens, they would provide her with some nighttime relief. They did not. As the problems continued, she reported her accident on December 28, 2010 to Diane Speigel, a Human Resources manager for the Respondent. Rx 1. Two days later, she was sent by the Respondent to St. Margaret's Occupational Health department. Px 4. At that location, she met with Dr. Koogler who indicated the Petitioner was a housekeeper for the Respondent in June of 2010 when she began to notice right hand numbness. Id. He noted this condition worsened over the next several months. Id. Dr. Koogler explained the Petitioner then began favoring her left upper extremity and began to notice numbness in the left hand that extended to the elbow. Id. The Respondent's occupational health physician indicated she had bilateral carpal tunnel and provided work restrictions. Id.

After an EMG that was ordered by the Respondent's occupational health physician and Dr. Blair Rhode, an orthopedic physician who next treated her for her injuries, demonstrated bilateral carpal and right cubital tunnel syndromes, she underwent right open carpal and cubital tunnel releases on May 3, 2011. Px 2, 3 & 4. She then had a left open carpal tunnel release on June 14, 2011. Px 2.

Dr. Eilers, the Petitioner's IME physician, after his examination, indicated an accident did occur that arose out of and in the course of the Petitioner's employment with the Respondent through the repetitive vigorous tasks she performed. Px 5. This repetitive trauma caused her bilateral carpal tunnel and right cubital tunnel syndromes. Id. Dr. Blair Rhode, the Petitioner's treating physician, provided the same opinion. Px 2. Further, the Respondent's occupational health physician, Dr. Koogler indicated in his history that the Petitioner's condition began with her employment by the Respondent and worsened with her repetitive activities. Px 4. The only contrary opinion is that of the Respondent's IME physician, Dr. Williams, who indicates she did have bilateral carpal and right cubital tunnel syndromes but stated this was not related to her work.

Taking into account the testimony presented and the records in evidence, this Arbitrator finds an accident did occur that arose out of and in the course of the Petitioner's employment by the Respondent. Further, the date of this accident is December 28, 2010, the date the Petitioner reported her symptoms to the Respondent's human resource personnel. Rx 1. Petitoiner clearly testified thatthis was the date on which her symptoms became so bad that she could no longer stand them. On that same date, the Petitioner was required to complete a Central Management Services form entitled "Worker's Compensation Employee's Notice of Injury". Id. Two days later, the

Respondent sent her to the St. Margaret's occupational health department. Px 4. This evidence shows timely notice of her work injuries given to the Respondent.

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

The Petitioner's diagnosed condition is undisputed. Px 2, 3, 5 & Rx 3. Prior to an EMG/NCV, it was thought to be bilateral carpal tunnel by the Respondent's occupational health physician, Dr. Koogler. Px 4. Dr. Koogler requested an EMG but this authority was never given by the Respondent. Id. Ms. Fogle next saw Dr. Rhode. Px 2. This physician felt the Petitioner had carpal tunnel syndrome and cubital tunnel syndrome. Id. He also requested an EMG/NCV. Id. An EMG was obtained by the Petitioner through her own insurance and it confirmed the existence of bilateral carpal tunnel syndrome and right cubital tunnel syndromes. Px 3.

Dr. Rhode, Dr. Trudeau and both IME physicians indicate the same diagnosis, bilateral carpal tunnel and right cubital tunnel syndromes. Px 2, 3, 5 & Rx 3. The Respondent's IME physician, Dr. Williams, disputes the causal relationship between her employment and the injuries, but agrees with the reasonableness and necessity of the open bilateral carpal tunnel and right cubital tunnel releases. Rx 3. There is no dispute between the physicians with the diagnosed condition or the medical care that followed. Px 2, 3, 5 and Rx 3.

Following consideration of the testimony and evidence presented, this Arbitrator finds the Petitioner's current condition of ill-being is causally related to her repetitive work 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?

After the Petitioner reported her injury on December 28, 2010, she was seen in the St. Margaret's Occupational Health department at the request of the Respondent. She was then followed by Dr. Rhode, who ordered, as did Dr. Koogler, an EMG/NCV. Px 2 & 4. After the positive EMG, the Petitioner returned to Dr. Blair Rhode for right cubital and bilateral carpal tunnel surgeries. Px 2 & 3. The Respondent's IME physician, Dr. Williams, and the Petitioner's IME physician, Dr. Eilers, each indicated the medical care and treatment was reasonable and necessary. Px 5 & Rx 3.

Following consideration of the testimony and evidence presented, this Arbitrator finds the medical services that were provided to the Petitioner were reasonable and necessary. It is further found that the Respondent has not paid all appropriate charges for all reasonable and necessary medical services and shall now do so. As reflected in Petitioner's exhibit number 1, the Respondent shall pay Petitoner, or hold her harmless from, the Petitioner's personal insurance for medical services it paid in the amount of $39,405.45 to the extent of the medical fee schedule. It shall further reimburse the Petitioner her out of pocket expense of $552.10 and satisfy, also to the extent of the fee schedule, her unpaid medical expenses in the amount of $13, 036.79 (Orland Park Orthopedics / Dr. Rhode: $5,974.55, The Ambrose Group: $6,080.32 and William I. Crevier / Dr. Ambrose: $981.92). Px 1.

K. What temporary benefits are in dispute? TTD.

The Respondent's occupational health physician, Dr. Koogler at St. Margaret's Hospital, placed the Petitioner on work restrictions at her initial appointment of December 30, 2010. Px 4. She remained on light duty restrictions until visiting with Dr. Rhode on February 7, 2011. Px 4. Dr. Rhode then took her off of work completely for her injuries beginning February 7, 2011. Id. The Petitioner remained off of work until August 16, 2011, when she was returned to work at full duty for her surgeries. Id. As the Petitioner was not permitted to return to work on light duty by the Respondent, she was then effectively off work at the hand of the Respondent's occupational health physician beginning on December 30, 2010. Px 4. She did not return to work until August 11, 2011, a period of 228 days, the equivalent of 32 4/7 weeks. During that time, the Petitioner should have received TTD, at the statutory minimum, in the amount of $253.00 per week.

Following consideration of the testimony and evidence presented, the Respondent shall pay the Petitioner 32 4/7 weeks of temporary total disability benefits.

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

Following her surgeries, the Petitioner has done well. She reports occasional swelling in both hands accompanied by a tired sensation in both hands after a day of work. She continues to take over the counter medication to help relieve occasional pain she experiences while performing her job.

Following consideration of the testimony and evidence presented, this Arbitrator finds the Petitioner suffered a loss of 17 ½% of her right hand (35.87 weeks); 15% loss of a left hand (30.75 weeks); and 20% loss of a right arm (50.60 weeks) (approximately 10% of a man).

M. Should penalties or fees be imposed upon Respondent?

Following the testimony and evidence presented, this Arbitrator finds that penalties are not to be awarded the Petitioner under the circumstances presented.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Ann Le Gore,
Petitioner,

vs. No. 09 WC 02334

Federal Express Corporation,
Respondent.

14IWCC0860

DECISION AND OPINION ON REVIEW

A Petition for Review having been timely filed by Petitioner and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, and nature and extent of the disability, and being advised of the facts and law, reverses the finding of Arbitrator Dollison that Petitioner proved by a preponderance of the evidence that she suffered an accident that arose out of and in the course of her employment with Respondent. The Commission finds that Petitioner failed to prove that she suffered a compensable work accident on October 8, 2008. A copy of the Arbitrator's Decision, which denied all benefits on the basis of Petitioner's failure to prove causal connection, is attached hereto and made a part hereof.

Petitioner, a 45 year old Senior Customer Agent and 20 year employee of Respondent, started each day with a two hour morning sort, organizing packages for delivery. The rest of her day involved lighter duties, working traces on packages and answering phones. Petitioner testified that on October 8, 2008, while performing a morning sort, she bent over to lift a 45-50 pound package and felt pain in her low back and down her right leg, like an electrical shock. She testified that she phoned her immediate supervisor that day and told her she had hurt her back and needed to go home. Petitioner testified that she also advised a senior manager of these facts. She sought treatment from her primary care physician, Dr. Chirlia, on October 10, 2008 and reported bilateral back pain radiating to her right buttock, precipitated by twisting and lifting, present for one month. Petitioner told Dr. Chirlia that she had been attending physical therapy for low back pain, but felt it might be worsening her complaints. Dr. Chirlia diagnosed Petitioner with lumbar sprain, muscle spasm and somatic dysfunction of the pelvic and sacral regions. She ordered physical therapy, medications, and restrictions of no lifting, pushing or pulling.

14IWCC0860

Dr. Chirlia's records indicate that on September 4, 2008, Petitioner had reported right sided low back pain precipitated by lifting and ongoing for a month. She was evaluated on September 10, 2008, and participated in physical therapy on September 24, September 30, October 3, and October 7, 2008, at which time she reported an increase in low back pain. She continued in therapy after an October 10, 2008 visit with the doctor, but neither Dr. Chirlia's nor the therapy records document a work accident. Not until October 23, 2008, did Petitioner mention an October 8, 2008 work accident to her doctor. Dr. Chirlia ordered a lumbar MRI that was performed on October 31, 2008. The MRI revealed a right paramedian focal disc protrusion at L4-5.

Petitioner completed a written statement regarding her alleged October 8, 2008 work accident on November 7, 2008 and confirmed that she had called her supervisor on that date to report the accident. The supervisor testified at hearing and confirmed that Petitioner had called her on October 8, 2008, requesting to go home as she was not feeling well, but denied that Petitioner had advised her of a work accident. The supervisor testified that she would have completed a written report within three days if Petitioner had reported a work accident. The supervisor did complete a report on November 7, 2008.

Respondent referred Petitioner to the Dreyer Medical Clinic after she reported her accident, and she was evaluated on November 10, 2008. Petitioner reported a lifting incident on October 8, 2008 and claimed that she reported the accident to her supervisor that same day. She also denied any previous back complaints. The clinic diagnosed her with lumbar strain, right lower extremity radiculopathy, and L4-5 disc protrusion. Petitioner was advised to continue treating with her primary care physician and to consult with a spine specialist.

On January 22, 2009, Dr. Matagaras performed a bilateral L4-5 laminectomy and discectomy. Petitioner returned to work full duty on March 17, 2009. She testified that she occasionally feels stiff in the morning and sometimes elicits help from co-workers when lifting heavy packages.

Dr. Ross performed a Section 12 exam for Petitioner on February 9, 2012, testifying at deposition that Petitioner's October 8, 2008 lifting injury either caused a disc herniation or caused a pre-existing herniation to become symptomatic. On cross-examination, Dr. Ross admitted that Petitioner's condition might have resulted from the natural progression of a pre-existing herniation.

Dr. Bernstein performed a records review for Respondent on May 2, 2011 and found no causal relationship between Petitioner's lifting incident and her current condition. His opinion was based on the following factors:

- Petitioner failed to provide a history of work accident to Dr. Chirlia on October 10, 2008, only two days after the alleged accident.
- Petitioner was already treating for the same condition which resulted from an August 2008 injury.
- If Petitioner had a pre-existing herniation, the lifting incident and physical therapy might have temporarily aggravated that condition, but would not be the cause.

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Arbitrator Dollison found that Petitioner's unrebutted testimony that she suffered a work accident on October 8, 2008 was sufficient proof of accident. The Commission views the evidence differently and finds that the Arbitrator erred in finding that Petitioner proved by a preponderance of the evidence that an accident occurred on October 8, 2008. The Commission finds Petitioner's failure to report a work accident either to her treating physician two days after the alleged incident or to her physical therapist during ongoing therapy particularly damning. The Commission further notes that Petitioner was already treating for the same symptoms at the time of her alleged accident and finds Dr. Bernstein's causation opinion more persuasive than that of Dr. Ross for the reasons listed above. The Commission finds that Petitioner did experience symptoms of her pre-existing condition while at work on October 8, 2008, but she did not suffer a change in her physical condition as a result of her work activities. Petitioner's pain complaints while performing her work duties do not constitute a work accident under the Act. The Commission finds that Petitioner failed to prove that she suffered an accident that occurred in the course of and arose out of her employment with Respondent on October 8, 2008. All other issues are moot. The Commission denies all benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is reversed. The Commission finds that Petitioner failed to prove by a preponderance of the evidence that she suffered an accident arising out of and in the course of her employment with Respondent on October 8, 2008. The Commission further finds that Petitioner failed to prove that the alleged accident was a cause of her condition of ill-being. All benefits 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 injuries.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $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: OCT 0 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-08/05/14
drd/dak
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LeGORE, MARY A
Employee/Petitioner

Case# **09WC002334**

FEDERAL EXPRESS
Employer/Respondent

14IWCC0860

On 6/4/2013, 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 0.08% 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:

0455 SAFANDA LAW FIRM
CARL F SAFANDA
111 E SIDE DR
GENEVA, IL 60134

2912 HANSON & DONAHUE LLC
KURT E HANSON
900 WARREN AVE SUITE 3W
DOWNERS GROVE, IL 60515

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

Mary A. LeGore
Employee/Petitioner

v.

Federal Express
Employer/Respondent

Case # **09** WC **2334**

14IWCC0860

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 **February 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **10/8/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 **$44,684.64**; the average weekly wage was **$859.32**.

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

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

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

Respondent shall be given a credit 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 **$2,625.43** under Section 8(j) of the Act.

ORDER

Having failed to prove that a causal relationship exists between her current condition of ill-being and the accident sustained, Petitioner's 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

6/2/13
Date

JUN - 4 2013

FINDINGS OF FACT

On October 8, 2008, Petitioner was employed as a Senior Customer Agent for Respondent. She had worked for Respondent for approximately 20 years. Her position started each morning with two hours of a morning sort, which involved the sorting and organizing of packages for delivery. Petitioner spent the rest of the day performing lighter duties, working "traces" on packages and answering phones.

Petitioner testified that on October 8, 2008, while performing a morning sort, she bent over to lift a package weighing 45 to 50 pounds, and when standing and twisting felt pain in her low back down her right leg. She compared the pain to an electrical shock.

Petitioner testified that she informed her immediate supervisor Connie Perdikaris by phone on October 8, 2008 that she was experiencing sharp severe pain in her lower back and needed to go home. Ms. Perdikaris was not at Petitioner's job site on October 8, 2008. Petitioner stated that she also informed Senior Manager Sheila Thompson, who was at the job site, that she was experiencing severe back pain and needed to go home.

Petitioner was seen for medical treatment on October 10, 2008 at the office of Dr. Monica Chirlia. The history indicated complaints of back pain, with pain located at the right and left low back. The pain was radiating to the right buttocks. Also noted was that "The pain was precipitated by twisting and lifting. Has had for 1 month. Pain is worsened by prolonged sitting or lifting...Has been going for PT for low back pain. Feels that it actually worsening the pain, however patient has continued for work, lifting and twisting." Petitioner was diagnosed with lumbar region sprain, somatic dysfunction pelvic region, somatic dysfunction sacral region and lumbar muscle spasm. The doctor ordered continual physical therapy, medication and restrictions of no lifting, pushing or pulling. (PX 7, RX 3)

Medical records of Dr. Chirlia reflect Petitioner was first seen on September 4, 2008 with complaints of low back pain. Dr. Chirlia noted that the "[p]ain was precipitated by lifting. Has had for 1 month. Pain is worsened by bending, twisting, lifting..." An examination reviewed a positive indirect straight leg raise. The doctor diagnosed lumbago and prescribed medication and physical therapy. (PX 7, RX 3)

The records of DuPage Medical Group, Physical and Occupational Therapy, reveal that Petitioner was receiving physical therapy for complaints of low back pain. When first seen for a physical therapy evaluation on September 10, 2008, the pain was recorded as being in Petitioner's right lower back and right buttock and a right S1 piriformis. (Res. Ex. 4) The records reveal that Petitioner was seen for physical therapy on September 24, 2008, September 30, 2008, October 3, 2008 and October 7, 2008, where there appears to be a notation of an increase in back pain. (PX 9, RX 4)

Petitioner continued physical therapy after the October 10, 2008 visit at Dr. Chirlia's office. The records of DuPage Medical Group for that therapy do not document any history of a new accident. (PX 9, RX 4)

Petitioner was seen in follow-up at Dr. Chirlia's office on October 23, 2008, where she complained of severe right lower back pain on October 8, causing her to go home. It was noted that the pain radiated to the buttock and back of the thigh. Petitioner was also seen on that date for smoking cessation. The doctor diagnosed lumbago, lumbosacral neuritis/radiculitis and tobacco use disorder. At that time it was recommended that Petitioner undergo a lumbar spine MRI and continue physical therapy. (PX 7, RX 3)

Petitioner was seen for an MRI of the lumbar spine on October 31, 2008. On that report, there is an indication of a lifting injury on October 8, 2008. That study revealed a right paramedian focal disc protrusion at the L4-L5 level. (PX 7)

Petitioner testified that after reporting her accident she was asked to write a statement regarding her work accident, which she did on November 7, 2008. (PX 1) That statement claimed an injury occurred on October 8, 2008 while lifting a box and twisting, and a confirmation that Petitioner called her supervisor to inform her of the incident.

Connie Perdikiris, Petitioner's direct manager at that time, testified that Petitioner did contact her by telephone on October 8, 2008, indicating that she was not feeling well and wanted to leave work early. Ms. Perdikiris testified that Petitioner did not report a work accident at that time. Ms. Perdikiris further testified that if Petitioner had reported a work accident, she would be required to enter the reported accident into their internal injury system within three days of reporting. Ms. Perdikiris testified that she recalled that Petitioner later reported that she had sustained a work accident on October 8, 2008. In reviewing the Federal Express injury system input form, Ms. Perdikiris indicated that the injury was entered on November 7, 2008, with an indication that she was notified by Petitioner on November 5, 2008 that she was claiming a October 8, 2008 work-related injury. (RX 6) Ms. Perdikiris also testified that Sheila Thompson was a senior manager at that location, and still works for Federal Express, but now works in a California location.

Beatrice Parker, a manager with Respondent, testified that when a work injury is reported, the injury would be entered into their injury system with an injury input form. Any reported injury is to be input within three days. Ms. Carpenter identified the injury system input form for this claim, indicating that the form was completed by Connie Perdikiris on November 7, 2008, indicating that she had been notified of a claimed work accident on November 5, 2008. (RX 6) Ms. Carpenter indicated that after reporting an accident, an employee may be directed to a company clinic for medical treatment.

Petitioner testified that after reporting her accident she was directed to the Dreyer Medical Clinic for treatment. Petitioner was seen at the Dreyer Medical Clinic on November 10, 2008. By history, Petitioner reported that she was lifting a box at work and twisting when she felt a pain in her right greater than left lumbar region. The Petitioner claimed that she reported the injury on that date. She reported that she had resumed work with restrictions and that later physical therapy was ordered for her lower back. She specifically denied any prior low back injuries or problems. She reported that after being informed of the results of her MRI, she reported this to her employer, which then directed her to seek medical attention from that occupational clinic, as it was a work-related injury. Petitioner was diagnosed with lumbar strain with right lower extremity radiculopathy and L4-L5 right disk protrusion status post MRI. Since Petitioner was already under treatment, she was directed to follow-up with her primary care doctor for further medical management. It was also recommended that she see a spine specialist. (RX 2)

Thereafter, Petitioner also completed an Employee's Worker's Compensation Questionnaire from Sedgwick CMS on November 14, 2008. On that report, she indicated that she was lifting a box, turned and felt pain in her right lower back. At that time, she did indicate that she had prior problems with the same body part. (RX 1)

Petitioner was subsequently referred to Dr. Matagaras and was taken to surgery on January 22, 2009. Dr. Matagaras performed an L4-L5 laminectomy and discectomy, bilateral. Post-operative diagnosis was L4-L5 herniated nucleus pulposus. (PX 10)

Petitioner testified that she was released to return to full duty and ultimately returned to work on March 17, 2009. Petitioner testified she has returned to regular, full duty work activities. She indicated that she

sometimes feels stiff in the morning prior to work and she would sometimes have a co-worker assist her with heavier lifting.

Petitioner was seen for an independent medical evaluation with Dr. Matthew Ross on February 9, 2012. Dr. Ross' deposition testimony was taken on May 9, 2012. On the issue of causation, Dr. Ross testified that he believed Petitioner's reported lifting injury of October 8, 2008 caused a disc herniation or caused a pre-existing disc herniation to become symptomatic. (Pet. Ex. 2, p. 10) Dr. Ross testified that while Petitioner reported she had an initial back injury in September of 2008, Petitioner reported that her back condition had gotten better. (Pet. Ex. 2, p. 8)

On cross-examination, Dr. Ross agreed that as he documented the medical records, he failed to document the October 10, 2008 note from Dr. Chirlia which indicated pain for a period of one month. (Pet. Ex. 2, p. 21) Based upon a review of the medical records for the case, indicating first symptoms in Petitioner's lower back and buttock, then complains on October 23, 2008, of pain in the right thigh, and subsequent complaints in December of 2008 of pain in her foot, that Petitioner may have experienced natural progression of a herniated disc. (Pet. Ex. 2, p. 23) Dr. Ross testified that he believed that Petitioner's disc herniation may have completed as a result of the October 8, 2008 injury, but agreed that evidence of pain in the lower buttocks or the piriformis area may be the beginning of a disc herniation evolution. (Pet. Ex. 2, p. 25) Ultimately, Dr. Ross testified that in hindsight that Petitioner's reported initial back strain may have been a disc herniation and evolution. (Pet. Ex. 2, p. 27) Dr. Ross agreed that if Petitioner had a prior disc herniation, that activities such as lifting and twisting may have caused the disc to become symptomatic, but may not be the cause of the herniation. (Pet. Ex. 2, p. 28) He also agreed that if Petitioner had a herniated disc that physical therapy may worsen her condition. (Pet. Ex. 2, p. 28)

Petitioner was seen for an independent medical evaluation at the request of Respondent with Dr. Avi Bernstein on May 2, 2011. Dr. Bernstein is an orthopedic surgeon specializing in surgical issues related to the spine. (Res. Ex. 5, p. 5) Dr. Bernstein testified that he could not find a causal relationship between Petitioner's reported accident of October 8, 2008 and her subsequent identified disc herniation at surgery. (Res. Ex. 5, p. 10) As the basis for that opinion, Dr. Bernstein noted that when Petitioner was first seen for treatment after the alleged injury, there was no history of a work-related accident. (Res. Ex. 5, p. 10) Additionally, he noted that Petitioner was already under medical treatment for this condition for a prior reported accident from August of 2008. (Res. Ex. 5, p. 10) Dr. Bernstein noted that Petitioner's back condition had not resolved prior to October 8, 2008 and that if Petitioner had in fact injured herself on October 8, 2008, as claimed, he would have expected a history of that injury to be included when she was seen for treatment on October 10, 2008. Dr. Bernstein found the history of an ongoing problem for at least one month to be significant. (Res. Ex. 5, p. 12) Dr. Bernstein also indicated that if Petitioner had an ongoing herniated disc problem, that physical activity or physical therapy could aggravate the condition, but would not be the cause of the condition. (Res. Ex. 5, p. 13)

In support of the Arbitrator's decision relating to (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? and (F) Is Petitioner's current condition of ill-being causally related to the injury?, the Arbitrator finds as follows:

Based on Petitioner's unrebutted testimony, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment on October 8, 2008. On said date Petitioner was performing a morning sort, she bent over to lift a package weighing 45 to 50 pounds, and when standing and twisting felt pain in her low back down her right leg. Petitioner testified that she informed her immediate supervisor Connie Perdikaris by phone on October 8, 2008 that she was experiencing sharp severe pain in her lower back and needed to go home. Petitioner stated that she also informed Senior Manager Sheila Thompson that she was experiencing severe back pain and needed to go home. Petitioner's testimony was confirmed by Ms. Perdikaris.

The Arbitrator further finds that the occurrence of October 8, 2008 caused a temporary aggravation of her preexisting low back condition for which she had been treating just prior to the date of accident. The chart note of Dr. Chirlia from October 10, 2008, documents a history of back pain for a period of one month, and Petitioner reported that her condition was worsening due to a prescribed physical therapy that she was obtaining. Petitioner actually received physical therapy for her ongoing low back pain on October 7, 2008, the day before the alleged accident. The treating medical records of Dr. Chirlia and physical therapy records from the DuPage Medical Group reflect initial treatment beginning on September 4, 2008. Medical records of Dr. Chirlia reflect Petitioner was first seen on September 4, 2008 with complaints of low back pain. Dr. Chirlia noted that the "[p]ain was precipitated by lifting. Has had for 1 month. Pain is worsened by bending, twisting, lifting..." An examination revealed a positive indirect straight leg raise. The records of DuPage Medical Group, Physical and Occupational Therapy, reveal that Petitioner was receiving physical therapy for complaints of low back pain. When first seen for a physical therapy evaluation on September 10, 2008, the pain was recorded as being in the Petitioner's right lower back and right buttock and a right S1 piriformis. The records reveal that Petitioner was seen for physical therapy on September 24, 2008, September 30, 2008, October 3, 2008 and October 7, 2008, where there is a notation of an increase in back pain. Petitioner admitted her back pain was worsening prior to October 8, 2008.

Additionally, the Arbitrator finds that the testimony of Dr. Bernstein and Dr. Ross is consistent with a history of a naturally progressing herniated disc that predated Petitioner's alleged accident date of October 8, 2008. The records reflect Petitioner not only had low back pain prior to October 8, 2008, but complaints of pain in the buttocks and a positive straight leg raising test. Petitioner subsequently developed pain in the thigh and later into her foot, consistent with progressing herniated disc.

Based on all the above, the Arbitrator finds that although Petitioner sustained an accidental occurrence arising out of and in the course of her employment by Respondent, she has failed to prove that her condition was causally related to her employment, and as such compensation is hereby denied.

All remaining issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lene Washington,
Petitioner,

vs.

NO: 99 WC 54960

Chicago Board of Education
Respondent.

14IWCC0861

DECISION AND OPINION ON REVIEW UNDER
SECTION 8(a) and 19(h)

This cause comes before the Commission on Petitioner's Petition for various relief. Petitioner filed, pro se, a Notice of Motion and Order on February 25, 2013 including Sections 19(h), 8(a), 19(k), 19(l), 16, 19(b), 19(b)1, 19(g) and 8E. Petitioner, again pro se, filed a document entitled "Amend Part 7090.10 and 7090.20: Diciplining of attorney and agents" on April 7, 2014 and an amended version of this document on May 6, 2014. A hearing on review was heard before Commissioner Donohoo in Chicago, Illinois on December 17, 2013. At hearing, Petitioner proceeded pro se and submitted an amended Petition under Section 19(h) of the Act.

This claim stems from an injury occurring on August 23, 1999. Petitioner alleged she sustained injury to her back and neck over a five day period when moving boxes, tables and supplies to a new classroom. Petitioner underwent a cervical foraminotomy and laminectomy at C3-4 on May 10, 2000. Her condition did not improve and she was eventually diagnosed with fibromyalgia. In April 2005, a hearing was held at arbitration. At that time, Petitioner testified that she had a burning sensation throughout her body, across her shoulders especially, and she also experienced swelling in her extremities. Arbitrator DeVriendt issued a corrected arbitration decision on August 4, 2005 in which he found that Petitioner sustained a 75% loss of the person as a whole under Section 8(d)2 and that her current condition of ill-being was causally related to the August 23, 1999 accident. The arbitration decision was not appealed.

14IWCC0861

Petitioner filed a Petition under Sections 19(h) and 8(a) in April of 2007. A review hearing was held before Commissioner Mason on October 13, 2010 with Decision and Opinion on Review issued on August 11, 2011. The Commission denied Petitioner's 19(h) Petition but granted the Petition under Section 8(a), awarding $32,921.00 in medical and prescription expenses. In its August 11, 2011 Decision, the Commission noted that Dr. Harris testified that he had treated Petitioner since 1999 for persistent cervical spine and radicular pain. Dr. Harris stated that since the 2005 arbitration decision, Petitioner's treatment had consisted of physical therapy and medication, and cervical MRIs obtained since arbitration had remained stable. The Commission found that Petitioner continued to suffer from symptoms related to her cervical spine condition after arbitration but that it was not clear all the treatment Petitioner had undergone was reasonable, necessary and related to the accident. The Commission's award of medical and prescription expenses included Cymbalta, physical therapy, and the office visits with Dr. Harris and Dr. Gulati that were submitted into evidence.

Petitioner, again acting pro se, appealed the Commission's August 11, 2011 Decision and Opinion on Review to the Circuit Court of Cook County seeking, among other things, to discover missing records. Judge Brennan dismissed the appeal for lack of jurisdiction and the failure of Petitioner to appear at hearing on the matter. Petitioner attempted to appeal the Circuit Court's dismissal to the Appellate Court but her claim was dismissed on December 13, 2012 for want of prosecution due to untimely briefs.

Petitioner, acting pro se, filed the current Petition on February 25, 2013. Petitioner's Notice of Motion and Order included request for review under Sections 19(b)1, 19(b), 19(k), 19(l), 16, 8E, 19(g), 19(h), and 8(a). Petitioner also argued for relief under Sections 7090.10 and 7090.20 of the Rules. The Commission addresses each of Petitioner's requests below.

19(b)1

Petitioner filed a Petition for Immediate Hearing under 19(b)1 on February 25, 2013. This was obvious error as the claim has been fully adjudicated. The Commission dismisses Petitioner's Petition under 19(b)1.

19(b)

Petitioner marked Section 19(b) on her Notice of Motion and Order. Petitioner did not file a Petition for Immediate Hearing under Section 19(b). Again, the Commission finds that Petitioner's claim for relief under Section 19(b) was obvious error as the claim has been fully adjudicated and is final. The Commission dismisses Petitioner's Motion under Section 19(b).

8e

Petitioner's Notice of Motion and Order listed request for relief under "Section 8E". No further arguments are made and the Commission is unable to discern the relief Petitioner seeks under Section 8(e) or any relief that would be appropriate at this juncture. The Commission denies Petitioner's request for relief under Section 8(e).

19(g)

Section 19(g) of the Act deals with certified copies for the Circuit Court if Respondent fails or refuses to pay a final award or judgment of the Commission. Petitioner argues in her brief that she was forced to sell her home and buy a new one that better fit her physical needs and that she also had to pay premiums for group health insurance. The Commission finds no evidence in support of an award under this section and denies the same.

7090.10 and 7090.20

Part 7090 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission deals with Disciplining of Attorneys and Agents. Section 7090.10 states "Where a verified, written allegation of improper, unethical or contemptuous conduct is made against an attorney, relating to practice before the Commission, by a party to a pending litigation or any officer of the Commission, the Commission may hold a hearing to determine the truth or falsity of the allegations." Section 7090.20 states "whenever the Commission finds that an insurer, self-insurer, claims service, other association, or their agents, is practicing a policy of unfairness toward the claimant in handling and processing of claims under the Workers' Compensation or Occupational Disease Acts, the Commission may issue a rule to show cause why such a carrier or agent should not be suspended from writing insurance or processing workers' compensation claims within the state."

The Commission notes that the Petitioner does not make any allegations against an insurer pursuant to Section 7090.20 and denies any request of Petitioner under this section. The Commission further notes that the Petitioner's filed document entitled "Part 7090: Disciplining of Attorneys; Agents" states that the attorney for the Board of Education of the City of Chicago should be disciplined for "improper, unethical, contemptuous conduct...displayed in concert with Petitioner's personal lawyers...." Petitioner made statements in this document related to the handling of what appears to be a union grievance claim in 2006 and perceived wrongs. Petitioner also alleged issues with scheduling of hearings and production of documents before the Circuit Court. Petitioner stated that Respondent and its attorney caused Petitioner's severe emotional distress and other ills as "statements made to Petitioner were insults and played on the petitioner's nerve." Petitioner also outlined complaints she made to the ARDC which she notes were denied and no disciplinary proceedings were warranted; the Commission concurs. Petitioner's motion does not allege any specific misconduct that would warrant relief under Rule 7090.10.

19(k)/ 19(l) and 16

Petitioner's Notice of Motion and Order lists request for relief under Sections 19(k), 19(l) and 16 of the Act. Petitioner did not file a Petition for Penalties and Fees under these sections nor did she argue for relief in her Statement of Exceptions and Brief in Support. Petitioner did make some vague statements regarding what she deemed to be "fraudulent acts" by her former attorney, Respondent's counsel and her former union at some point during litigation of her workers' compensation claim in a separate document titled "Part 7090:Diciplining of Attorneys; Agents". The Commission finds there has not been any unreasonable or vexatious delay of payment or intentional underpayment of compensation by Respondent. The Commission further finds that there is no evidence in the record that Petitioner made a written demand for payment of benefits under Section 8(a) or 8(b) to Respondent nor has Respondent, without good and just cause, failed, neglected, refused or caused unreasonable delay in the payment of benefits under Section 8(a) or 8(b). Finally, the Commission finds that Petitioner is acting pro se in this matter and does not have an attorney to award fees to under Section 16 of the Act. For the foregoing reasons, the Commission denies Petitioner's request for relief under Section 19(k), 19(l) and 16 of the Act.

19(h)

Section 19(h) of the Act authorizes a review of the award of the Commission for modification within 30 months after the award becomes final. Any modification of a prior award must be based on a material change in the employee's physical or mental condition. The statutory 30 month time limitation for filing a 19(h) Petition is jurisdictional and cannot be waived by the

parties. While the initial 30 month time limitation is jurisdictional and cannot be waived, a decision awarding compensation starts a new 30 month period in which the award could be further reviewed under Section 19(h) of the Act. However, the denial of a Section 19(h) petition does not have the same effect and does not toll the 30 month limitations requirement. *Behe v. Industrial Commission*, 365 Ill.App.3d 463, 848 N.E.2d 611, 302 Ill.Dec. 312 (2nd Dist. 2006); *Hardin Sign Co. v. Industrial Commission*, 154 Ill.App.3d 386, 506 N.E.2d 1066, 1069, 107 Ill.Dec. 175 (3d Dist. 1987).

Arbitrator DeVriendt issued a decision in this case on July 1, 2005 and an amended decision, with correction of calculation of TTD due, on August 4, 2005. Petitioner filed a Petition under Sections 19(h) and 8(a) of the Act in April 2007. A review hearing was held before Commissioner Mason and a decision was issued on August 11, 2011 denying the Section 19(h) Petition. The decision was not appealed and became final. Petitioner filed the instant Petition under Section 19(h) on February 25, 2013. Petitioner's Petition for Review under Section 19(h) of the Act is outside the statutory filing limitation and is therefore denied by the Commission.

8(a)

Section 8(a) of the Act allows for reimbursement of reasonable and related medical expenses. There is no time limitation for award of medical care necessary to cure or relieve from the effects of the work injury. In the Commission decision under Section 8(a) issued August 11, 2011, medical expenses in the amount of $32,921.00 were awarded for physical therapy, prescription medication and office visits with Dr. Harris and Dr. Gulati post arbitration. The Commission awarded reimbursement for Cymbalta, as that was the only drug that had relevant medical records and the corresponding bills in evidence.

In Petitioner's Statement of Exceptions and Brief in Support of the current petition, she argues that she underwent a cervical surgery at C4-5 related to the accident and that it is reasonable for her to follow up with Dr. Harris once every 6 months and also to take prescription medication to relieve her complaints, namely, Cymbalta, Gabapentine, Ibuprofen and/or Meloxicam for chronic neck pain. Petitioner also argued that it is necessary for her to undergo a cervical MRI every few years to check for disease in adjacent levels of the spine. Petitioner admits that many of the bills in the record, submitted as Petitioner's Exhibits 2 and 3, are for medications and treatment unrelated to the present claim.

Respondent argues that medical bills submitted in evidence by Petitioner include treatment unrelated to the work injury, namely physical therapy, medications for cholesterol, hypertension, muscle relaxants, narcotics, thoracic and lumbar MRIs, EMGs, labs, bone density testing, EKG's and emergency room visits for pulmonary complaints. Petitioner also seeks payment for costs associated with a new home and remodeling in excess of $100,000.00 which respondent argues is not reasonable or related to the claim.

Dr. Harris provided an opinion report on behalf of Petitioner dated February 11, 2013. Dr. Harris stated that he has treated Petitioner since August of 1999 for a work related injury that occurred on August 23, 1999. Dr. Harris noted that Petitioner suffers from constantly swollen wrists and feet, as well as headaches. She also has severe chronic pain throughout her entire body supported by EMG and MRI findings. Petitioner was diagnosed with fibromyalgia in November of 2001 and Dr. Harris has continued to write prescriptions, including Vicodin, for her medical needs. Dr. Harris opined that Petitioner's fibromyalgia may have been precipitated by her cervical and lumbar spondylosis and cervical radiculopathy. Dr. Harris noted that Petitioner was referred to Dr.

Gulati who diagnosed Petitioner with depression, anxiety, insomnia, cervical radiculopathy, and lumbar problems at L4-S1. Dr. Gulati prescribed Cymbalta, neurotin, Lyrica, amitriptyline and also referred Petitioner to a psychiatrist, Dr. Chau. Dr. Harris opined that Petitioner was permanently and totally disabled due to cervical and lumbar spinal disorder from a work related injury on August 23, 1999, and she has additional disability from fibromyalgia, which is a syndrome associated with stress and trauma.

Dr. Wehner provided a Section 12 record review with report dated September 25, 2013. In summary, Dr. Wehner opined that the following medical care was reasonable and related to the 1999 work injury:

1. Follow-up visits with a primary care physician every six months for ongoing symptoms;
2. Use of Cymbalta, gabapentin and ibuprofen or meloxicam would be reasonable for chronic neck pain, although they can also be used for other symptoms Petitioner exhibits which are not work related; and
3. Cervical MRI every few years to check for adjacent level disease. If the findings are normal, no further care is warranted.

Dr. Wehner, a board certified orthopedic surgeon, testified live at hearing on December 17, 2013. She testified in line with her opinions as outlined in her September 25, 2013 record review report. Dr. Wehner testified that medications in evidence including Crestor, simavastain for high cholesterol, Diovan/valsartan for hypetertension, lansoprazole for stomach acid, Q-Tussin for cough and the antibiotic azithromycin are unrelated to the work injury of 1999. Further, Tizanidine is a muscle relaxer and is not appropriate for long term use after a surgery occuring 10 years prior. She further opined that hydrocodone, prescribed by Dr. Harris for pain, is a narcotic and is not medically indicated for long term use after Petitioner's cervical work injury, but may be indicated for treatment of fibromyalgia.

Dr. Wehner opined that there were several bills for medical services in evidence that are clearly unrelated to the work injury. These include metabolic labs, a glucose lab, emergency room treatment for respiratory distress and pulmonary function, and an osteoporosis dexa scan. Dr. Wehner opined that a cervical MRI on October 16, 2012 that is in evidence would be reasonable treatment for follow-up study every few years. The MRI on that date showed normal post-op findings that did not warrant any further treatment. Thoracic and lumbar MRIs as well as EMG/NCV and EKG were unrelated to the work injury to the cervical spine. Regarding bills from Dr. Gulati for treatment in 2010 and 2011, there are no medical records to support these charges and further, Dr. Wehner opined neurological exam 10 years post surgery is not reasonable and necessary treatment as chronic care is best provided by a primary care physician.

With regard to physical therapy and occupational therapy in 2010 through 2013, Dr. Wehner opined that there was no indication for "maintenance therapy" based on medical guidelines. Dr. Wehner opined that therapy is not medically necessary for a cervical fusion performed in 2003 and the records note a chronic condition for which Petitioner did not have significant improvement with prior therapy. With regard to medical bills from Dr. Chau, a psychiatrist, Dr. Wehner testified it was her opinion that any treatment with Dr. Chau for depression was unrelated to the 1999 work injury. Any depression that might be related to the work injury should be handled by Petitioner's primary care physician. Dr. Wehner also testified that Flexeril is a muscle relaxant and is used for acute problems but is not indicated for chronic neck pain.

The Commission notes that Dr. Gulati, Petitioner's treating neurologist, penned a summary report on May 3, 2013 of approximately four years of office visits which stated Petitioner had been diagnosed with hypertension, depression, insomnia, fibromyalgia and chronic cervical and back pain, but he did not provide a causation opinion for any of these diagnoses. Dr. Gulati did note that his exam of Petitioner on May 3, 2013 was "essentially unremarkable" except for mild paravertebral muscle spasm or tenderness in the cervical region. Dr. Gulati went on to note that Petitioner continued to express complaints of symptoms but appeared to be a relatively active woman, able to ambulate without much difficulty.

Only a handful of Dr. Harris' medical notes are in the record with the majority of the treatment dates only containing the nurses' intake sheets. The records of Dr. Harris that are in evidence show a Petitioner who complained of constant 10/10 or 9/10 pain for over a decade and pain over her entire body with no real discernable distribution.

The Petitioner bears the burden of proof by a preponderance of the evidence that she is entitled to an award of medical care under Section 8(a) of the Act. Based on the evidence contained in the record, the Commission finds the opinions of Dr. Wehner more credible then those of Dr. Harris. The Commission awards follow-up visits with Petitioner's primary care physician once every six months for ongoing complaints related to her cervical injury in 1999. In addition, the Commission awards bi-yearly cervical MRI studies to check for adjacent cervical disc level disease. Dr. Wehner also opined that the prescriptions Cymbalta, gabapentin, ibuprofen and or meloxicam are appropriate medications for treatment of chronic neck pain, and the Commission awards the costs associated with these medications pursuant to the Act.

With regard to medical expenses incurred and supported by the record and the opinions of Dr. Wehner, the Commission awards the following medical expenses totaling $10,051.59 pursuant to Section 8(a) of the Act:

- October 16, 2012, Chicago Imaging, Ltd., MRI of Cervical Spine. $270.00;
- January 12, 2012 – May 18, 2013, Walgreens, Gabapentine. $83.27;
- January 2, 2012 – May 18, 2013, Walgreens, Meloxicam. $97.79;
- January 22, 2012 – November 18, 2013, Walgreens, Cymbalta. $9,578.63;
- January 12, 2012 – April 19, 2013, Walgreens, Ibuprofen. $21.90.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under Section 8(a) is hereby granted in part. Petitioner's Petitions under Sections 19(b)1, 19(b), 19(k), 19(l), 16, 8e, 19(g) and 19(h) are denied. Petitioner's requests for relief under Rules 7090.10 and 7090.20 are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $10,051.59 for medical expenses under §8(a) of the Act. The Commission further awards future medical treatment, diagnostic studies and prescription medications as detailed in the above findings pursuant to Section 8(a) and 8.2 of the Act.

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

14IWCC0861

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

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

DATED: OCT 0 6 2014

Daniel R. Donohoo

David L. Gore

Ruth W. White

drd/adc
o-08-05-14
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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

MARY THERESE WAGNER,

Petitioner,

vs. NO: 10 WC 37946

MENARD'S INC.,

14IWCC0862

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, maintenance, and nature and extent, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator for the statement of facts, which is made a part hereof with the modifications noted below.

The Commission finds that Petitioner is not credible regarding the issue of accident. Petitioner's shift as a "morning stocker" began at 5 a.m. (T.19). We note that Petitioner did not testify that she had not ingested any alcoholic beverages the night before or prior to starting work. We find it interesting that she was not asked this question and, instead, she merely attempted to explain the breath alcohol test results by claiming to have ingested cold medicine, mouthwash, and breath spray rather than to affirmatively deny having ingested alcoholic beverages. Petitioner also testified that before she went to work, she took a nighttime cold medicine that contained alcohol. (T.21). We find it suspicious that she would take a *nighttime* medicine in the morning shortly *before* starting work. We further find that Petitioner's use of Listerine breath spray immediately prior to her alcohol breath test was an attempt to tamper with and affect the results and reliability of the test. Petitioner's breath alcohol test results at the hospital were .076 at 6:02a.m. and .065 at 6:21a.m. We find the testimony of Dr. Leikin to be persuasive that, based on those results, Petitioner's alcohol level at the time of the alleged accident was between .086 and .106. Based on all of the above, we find that Petitioner's attempted explanation for the breath alcohol test results is not credible.

14IWCC0862

Based on Petitioner's lack of credibility regarding the alcohol issue, we find that she is likewise not credible regarding how the accident occurred. Although Petitioner testified that she had not injured her right hand or arm prior to September 17, 2010, she did not actually testify that she had not injured her wrist prior to the alleged accident on that day. (T.14). In other words, the way the question was asked leaves the possibility open that Petitioner had injured her wrist on that day but outside of her employment. Petitioner testified that the Assistant Store Manager, Nancy Gaytan, opened the door for her when she entered the store (T.26) so there was no opportunity for Ms. Gaytan to notice if Petitioner was avoiding the use of her right arm. Petitioner's sole witness, Susan Shumaker, did not witness the alleged accident nor did she see Petitioner prior to it so she would not know whether Petitioner had any previous problems with her hand. The unwitnessed alleged accident occurred almost immediately upon Petitioner beginning her shift. Then her husband picked her up from work and she was at the emergency room by 5:25a.m. Although it is not impossible for such an accident to occur, we find it suspicious and based on the totality of the circumstances in this case believe that it is more likely than not that Petitioner broke her wrist prior to beginning work that day rather than at work as she claims.

Based on our finding of failure to prove accident, all of the remaining issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator, dated March 25, 2013, is hereby reversed and the awards vacated.

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

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

DATED: OCT 0 6 2014

Daniel R. Donohoo

Ruth W. White

CJD/se
O: 8/6/14
49

DISSENTING OPINION

I must respectfully dissent. I believe the Arbitrator's decision was well-reasoned and applied the law appropriately regarding the alleged alcohol intoxication. I find the Petitioner to be credible that her accident occurred at work and note that she was never asked, by either attorney, whether she had ingested any alcoholic beverages prior to starting work. Petitioner's explanation for her breath alcohol results is reasonable and there is nothing in the record that I would find to diminish her credibility on these issues. I would affirm and adopt the Arbitrator's decision.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WAGNER, MARY THERESA
Employee/Petitioner

Case# **10WC037946**

14IWCC0862

MENARDS INC
Employer/Respondent

On 3/25/2013, 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 0.11% 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:

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

1296 CHILTON YAMBERT & PORTER LLP
DANIEL T CROWE
150 S WACKER DR SUITE 2400
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

14IWCC0862

Mary Therese Wagner,
Employee/Petitioner

v.

Menards, Inc.,
Employer/Respondent

Case # **10** WC **37946**

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 **12/18/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/17/10**, 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 **$16,004.04**; the average weekly wage was **$307.77**.

On the date of accident, Petitioner was **54** 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 **$18,820.31** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$18,820.31**. (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 $253.00 per week for 66-5/7 weeks, commencing 9/18/10 through 12/28/11, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 9/18/10 through 12/19/12, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $7,555.46, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $253.00 per week for 100 weeks, because the injuries sustained caused the loss of use of 20% person-as-a-whole, as provided in §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

3/20/13
Date

STATEMENT OF FACTS:

Petitioner, a 54 year old morning stocker, testified that she had been employed by Respondent since February 2010. She noted that her duties included moving loaded pallets and carts of product into her assigned aisles and stocking those items for purchase by the public. Petitioner was assigned Aisles 1 & 2. She would be called upon to stock anything from items weighing under a pound to items like generators, which could weigh over 100 pounds. Much of her stocking duties required Petitioner to climb ladders to put away stock.

Petitioner noted that prior to the alleged accident in question she had been diagnosed with and had received treatment for chronic regional pain syndrome (CRPS) in her leg which had been caused by a previous work injury in 1983. She admitted to being under the care of her family physician and was prescribed Vicodin and Gabapentin throughout the four years prior to and on the day of the alleged injury. Petitioner testified that the use of these prescribed medications never caused her to have difficulty performing the required activities of her job, including on the date of the claimed work injury. Petitioner further testified that she is right handed and had never experienced any prior pain, soreness or problems with her right arm and hand, including any symptoms of chronic pain associated with her CRPS.

Petitioner testified that during the week and a half preceding her injury she was suffering from a cold. She had been seen for cold symptoms by her family physician, Dr. Joshi, on September 9, 2010. (PX5). Petitioner testified that she had been taking Nighttime Cold Medicine during that week. That medicine was identified by Petitioner. A copy of this product's label was introduced into evidence. (PX12c). The label indicates that the product contains 10% alcohol. (PX12c). Petitioner testified that she had taken a full dose of that medication prior to leaving for work on September 17, 2010 as she had during the prior days that week. She testified that she did not feel any effect upon her equilibrium due to taking this over the counter medicine, nor did it impact her ability to perform the functions of her job. Petitioner also noted that she used a mouth rinse, as was her customary practice given her chronic bad breath, which she would spit out before entering work. A copy of the label for this product was introduced into evidence. (PX12a&b). The label shows that the rinse contains 26.9% alcohol. (PX12b).

Petitioner testified that on September 17, 2010 she began her shift at 5:00 a.m. She noted that as she entered the facility she was greeted by Respondent's assistant manager, Nancy Gaytan, passing within a few feet of Mr. Gaytan and exchanging verbal greetings. Upon entering the facility, Petitioner noted that she then went to the desk where she spoke to several co-workers, including Tana, Dennis and Aria. She indicated that during the course of this conversation she informed her co-workers that she would not be in the following day given that she was to attend her niece's wedding. Petitioner noted that she was 2 to 3 feet away from these co-workers when she spoke to them. Neither Ms. Gaytan nor any of these other co-workers were called to testify at arbitration. Petitioner testified that she did not feel any effects from either the nighttime flu medicine or the mouth rinse, and that she did not feel unsteady or that it impaired her abilities on the date of the injury.

Petitioner testified that on September 17, 2010 she began her work day by going to her assigned area, Aisles 1 & 2, to begin stocking product. She noted that when she went to the aisle there was a green three sided, wheeled cart that was stacked with flimsy boxes of Halloween costumes on the bottom, with approximately four boxes of tarps, weighing approximately 80 pounds stacked on top. The area was dimly lit. The cart was approximately three feet wide and four feet long and approximately three feet high with the long side on Petitioner's right open to the bottom. She indicated that when she began to push the cart from behind the boxes of costumes shifted and the heavy boxes of tarps began to fall out of the open side of the cart to Petitioner's right side. She stated that her reaction was to reach out and push the boxes of tarps back on top of the pile. In doing so, the cart began to shift to the left on its wheels. Petitioner testified that she then lost her balance and fell to the floor with her

right hand outstretched to break her fall. She indicated that she was unable to get up from the floor without the use of her right hand and asked a coworker to get help. Various coworkers then arrived, along with the assistant manager, Nancy Gaytan. Petitioner indicated that she remained on the floor for approximately five minutes before two coworkers, Susan Shumaker and Oscar, helped her to her feet. She noted that Ms. Gaytan asked her to walk to the front of the store and that Ms. Shumaker helper her, staying with her for 5 to 6 minutes. Petitioner indicated that she then stayed at the desk and answered questions by Ms. Gaytan. Petitioner testified that she had no difficulty answering these questions and that she was not asked to repeat herself. She also noted that Ms. Gaytan was 4 to 5 feet away and did not accuse her of having alcohol on her breath at that time.

Susan Shumaker testified that she first met Petitioner in February of 2010. She noted that she did not know Ms. Wagner prior to her employment but that they have remained in contact since the incident. Ms. Shumaker testified that she did not see Petitioner fall. She noted that she came to the scene after Petitioner had fallen and noticed that she in pain and holding her arm. Ms. Shumaker testified that she was about a foot from Petitioner's face at that time, and that she did not smell any alcohol on Ms. Wagner's breath or notice that she was slurring her words from the time she arrived on the scene until she walked her to the front of the store.

Petitioner estimated that she was in the front of the store for about 5 minutes before her husband arrived to take her to the hospital. She noted that she was then taken directly to the St. Alexius Medical Center's emergency room. Petitioner indicated that when she got to the hospital she used some Listerine spray. This product also lists alcohol as an ingredient. (PX12d). Hospital records contain a history wherein Petitioner fractured her wrist while pushing boxes at work, causing her to fall on her outstretched right hand. (PX4). Petitioner testified that hospital personnel that spoke to and examined her at that time were very close – in fact, a matter of feet away -- and that she was there for about two hours total. Upon admittance it was noted that the petitioner was awake, alert and oriented to time, place and person and that she was speaking coherently. She was able to provide her medical history without problem and was cooperative. She was assessed to not be at risk for falls. She was noted to be able to speak in normal sentences and was examined in close enough proximity to determine that her breath sounds were clear. Nowhere in the record does it note that there was the smell of alcohol on her breath. (PX4).

While at the hospital petitioner was required to perform a breathalyzer exam. The initial test performed at 6:02 a.m. noted a reading of 0.076. A second reading taken at 6:21 a.m. indicated a reading of 0.062. Petitioner testified that she informed the tester that she had recently taken a spray of breath freshener. No notation to this effect is contained in the record. A subsequent urine test indicated the presence of opiates. The triage report on the date of this E.R. visit reflects that Petitioner's current medications included Neurontin, Bentyl and Vicodin. (RX4). Petitioner testified that she had been taking Vicodin and Gabapentin (Neurontin) for the past 4 or 5 years for her pre-existing RSD following a work related injury involving her left knee in 1983. She noted that she assumed Respondent was aware of this fact since she underwent drug testing prior to her hiring. However, she conceded that no one spoke to her about this.

Lolita Ramos, the patient care technician who administered the breath alcohol and urine tests in question was called to testify by the Respondent. Ms. Ramos testified that she had worked at St. Alexius Medical Center for ten years and that she was the PCT on duty on the date of Petitioner's testing. She noted that she did not personally calibrate the machine used in this case and that someone else from the hospital performs this task. She also did not know when the machine had last been calibrated, although she did explain that as part of her procedure she set the breathalyzer machine to zero before beginning the test. Ms. Ramos testified that she had an independent recollection of giving this particular test and that Petitioner did not inform her that she was taking any medication or had used any mouthwash prior to the test. Ms. Ramos noted that if she had she would have made a note of it, just as she noted that Petitioner was unable to sign the breath alcohol testing form with

her right hand. Petitioner had previously testified that she was able to sign the urine collection form with her left hand.

At the time of her emergency room visit Petitioner underwent a full examination including x-rays. Petitioner was diagnosed with a right radial Colles fracture. A mold for a splint was made and Petitioner was released with her arm in a sling and instructions to follow-up with Dr. Martin Saltzman.

Petitioner first saw Dr. Saltzman on September 20, 2010. (PX2). Following his examination, Dr. Saltzman determined that Petitioner required open reduction and internal fixation of the fracture. Surgery was immediately scheduled for September 23, 2010. However, prior to surgery, on September 22, 2010, petitioner testified that she received a phone call from Ms. Gaytan who informed her that her Breathalyzer test came back positive. Petitioner was told that she could keep her job if she underwent alcohol treatment. Petitioner indicated that she told Ms. Gaytan that she had taken a nighttime cold medicine and that she did not need alcohol treatment for doing that. Petitioner testified that she had a subsequent conversation with Ms. Gaytan two hours later at which time Ms. Wagner's employment with Respondent was terminated.

Petitioner underwent open reduction of her fracture with nine screws and other instrumentation on September 23, 2010 at Alexian Brothers Medical Center. (PX1). Thereafter, Petitioner remained under the care of Dr. Saltzman. On September 29, 2010 it was noted that although much of Petitioner's pain had resolved she continued to experience discomfort at the wrist. Dr. Saltzman continued to keep her off of work at that time. By October 6, 2010 Dr. Saltzman had removed the Velcro brace to allow Petitioner to increase her motion. He advised physical therapy which was not approved until the end of October 2010. Petitioner thereupon underwent therapy at Midwest Physical and Hand Therapy. (PX3).

Petitioner remained under the care of Dr. Saltzman throughout the end of 2010, returning to him on a monthly basis. The records show that Petitioner suffered from an abscess caused by a stitch that required removal on November 17, 2010. On December 13, 2010 Petitioner reported that she still had quite a bit of discomfort in her right wrist associated with a clicking sensation. X-rays revealed that there was a screw from the internal fixation that had penetrated the joint. Dr. Saltzman advised another procedure (right wrist arthroscopy) to evaluate the articular surface of Petitioner's right wrist.

On January 13, 2011 Petitioner underwent the second surgery at which time Dr. Saltzman debrided the wrist and exchanged the radial styloid screw in the right radial plate. Dr. Saltzman continued to keep Petitioner off work thereafter. By February 28, 2011 Petitioner was able to resume physical therapy.

Dr. Saltzman's records show that the petitioner began to experience more discomfort and pain in her right wrist after resuming physical therapy. (PX2). By March 21, 2011 she was only able to lift 6 pounds on the right and required constant use of a wrist brace. Petitioner was advised to begin work conditioning. Petitioner testified that she began to experience a severe stabbing and burning sensation in her right palm which would then travel half way up her forearm. These episodes would occur numerous times per day and could last one minute or hours. Dr. Saltzman diagnosed petitioner as suffering from Reynaud's Phenomenon, a chronic pain condition similar to CRPS.

Eventually, Petitioner was sent for an FCE on May 25, 2011. The FCE was noted to be valid. It showed that Petitioner was significantly limited in lifting with her right upper extremity. On June 6, 2011 Dr. Saltzman diagnosed Petitioner as suffering from CRPS in the right upper extremity and referred her to Dr. Porter at Alexian Brothers Pain Clinic. On July 15, 2011 Petitioner was seen by Dr. Porter at the Pain Clinic. (PX1). Dr.

Porter initially injected a block into petitioner's right arm. Petitioner testified that it provided only temporary benefit.

Thereafter, from July 27, 2011 through November 9, 2011 Petitioner received an additional eight stellate blocks. Petitioner testified, and the records reflect, that the blocks were of little help. Petitioner continued to remain under the care of Dr. Saltzman. On September 23, 2011 Dr. Saltzman provided Petitioner with a permanent 20 pound lifting restriction. These restrictions were confirmed by a subsequent FCE performed on December 12, 2011at the request of the Respondent. That FCE noted that Petitioner's job duties required her to lift up to 50 pounds. (PX6). On December 28, 2011 Dr. Saltzman provided final restrictions of pushing/pulling limited to 50 pounds, lifting limited to 25 pounds and no crawling or any repetitive wrist activities.

At the request of Respondent, Dr. Jerrold Leikin, a physician and toxicologist, was called to testify. (RX1). Dr. Leikin opined, after reviewing the alcohol screening results, that a level of .076 and .065 would represent "a significant amount of alcohol ingestion … [i]n which neurobehavioral effects would be expected." (RX1, pp.16-17). Dr. Leikin also offered the opinion that taking into account what he called "post absorption", which he noted usually takes 30 to 60 minutes, and sometimes 90 minutes, Petitioner's alcohol level "would be approximately .86 to .106 roughly an hour before" the test in question. (RX1, pp.18-19).

Allen Silbernagel, the general manager at Menard's Hanover Park store, was called to testify at the request of Respondent. Mr. Silbernagel indicated that he was not present at the store on the date of the alleged accident. However, Mr. Silbernagel was asked to review daily punch cards (RX8), noting that this record reflects that Petitioner checked in at 4:59 am on September 17, 2010. Mr. Silbernagel also testified as to the company's drug/alcohol policy (RX7), prohibiting the use of same on the premises, and which was in full force and effect at the time of the incident. In addition, Mr. Silbernagel indicated that Petitioner signed a drug consent form (RX5), explaining the drug free policy, as well as a team member acknowledgment receipt (RX6), which is passed out to employees along with the team member handbook. Mr. Silbernagel stated that alcohol test results over .04 subjects an employee to termination. Mr. Silbernagel indicated that it was his understanding that Ms. Gaytan fired Petitioner after the latter refused to participate in an alcohol rehabilitation program. Mr. Silbernagel also noted that Respondent has a policy regarding accommodating light duty restrictions, and that given Petitioner's light to medium duty restrictions, per the December 12, 2011 FCE, Petitioner would have been able to work as a cashier or else dusting, cleaning, facing and pricing product.

Petitioner testified that she continues to experience pain "24/7" from her palm and down her arm 6 to 8 inches. She noted that the pain is not as severe, but that she still has 2 to 3 episodes per day. She indicated that at night the episodes can last from one to 45 minutes. She testified that she returned to Dr. Saltzman for more pain medication but that she has not gone back to the pain clinic. She noted that the strength in her arm is about the same and that she is very limited in what she can do compared to before the incident. Finally, she stated that she feels pain and hears a pop when she turns the ignition to start her car and that she also experiences pain when washing glasses or lifting a gallon of milk.

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

The Arbitrator notes that the recent amendment of §11 of the Workers' Compensation Act -- setting forth a rebuttable presumption that an employee was intoxicated and that said intoxication was the proximate cause of an employee's injury when a level of 0.08% or more by weight of alcohol is found in the employee's blood, breath or urine -- applies to dates of accident on or after September 1, 2011. Given that the alleged date of

accident in the present case occurred on September 17, 2010, this amendment does not apply under the current set of circumstances.

Petitioner testified that on the date of the alleged accident she was scheduled to work from 5:00 am to 9:00 am. She indicated that she started her work day in aisle 1/2. She noted that the area was not well lit and was rather dim at that time of the morning. She testified that at about 5:05 am she began pushing a green cart containing boxes of costumes to the Halloween section in order to stock merchandise. She described the cart as three-sided, about 4' long by 3' high, with 5" wheels that locked and pivoted. Petitioner noted that on top of the boxes of Halloween costumes were boxes of tarps weighing up to 80 pounds. She indicated that the boxes were stacked about 2 feet high and were made of flimsy recycled cardboard. Petitioner testified that she was pushing the cart when the tarps started to fall out of the open end of the cart to her right. She stated that she was attempting to push the tarp boxes back onto the cart with her right hand when the cart took off to her left and she fell to the ground, landing on her right arm with her full body weight. She noted that she was unable to get up right away due to the pain in her right arm/wrist. She indicated that she stayed on the floor and called for help. Petitioner stated that she believed that "Mike" came right away, but that she did not know if he saw her fall. There would appear to be no witnesses to this incident.

Petitioner was subsequently taken to Alexius Medical Center by her husband. A history recorded at that time refers to the patient presenting "... secondary to fall at work onto outstretched right hand. Patient works at Menards and was pushing boxes and they fell at her and she fell backwards. (PX4; RX4). There does not appear to be any reference in these records to any noticeable sign of alcohol on Petitioner's person at the time of this emergency room visit, either in the form of an alcohol smell, slurred speech or the like. (PX4; RX4). X-rays revealed a comminuted fracture of the distal radius as well as a fracture of the ulnar styloid process. (PX4). Petitioner was placed in a temporary mold cast and discharged with instructions not to use her right arm/hand and to follow up with Dr. Martin Saltzman. (PX4).

At the time of this emergency room visit, Petitioner was also administered a breath alcohol test. The record shows that Petitioner underwent the initial test at 6:02 am, registering .076, and then again roughly 20 minutes later at 6:21 am, registering .065. (RX4). The patient care technician (PCT) who performed these tests, Lolita Ramos, testified that Petitioner did not inform her that she had been taking any medication or used mouthwash prior to undergoing testing. Ms. Ramos also noted that although she did not know how to calibrate the machine and did not know when it was last calibrated she assumed the machine used in this case was correctly calibrated given that it read ".000" and was blank before she conducted the test.

Petitioner for her part testified that she was sick on the date of the incident. Specifically, she indicated that she had had strep throat like symptoms for most of the week leading up to the incident, including a sore throat and coughing, and that she took some nighttime cold medicine on the date of the alleged accident. Petitioner submitted into evidence a copy of the label from this bottle of medicine, a CVS Pharmacy brand Multi-Symptom Nighttime Cold/Flu Relief medicine showing an alcohol content of 10%. (PX12c). Petitioner testified that she did not feel drowsy or hazy after taking this product prior to the incident, and yet it is the taking of this medication that she claims is the reason behind her positive test results.

The Arbitrator finds Petitioner's claim along these lines not to be credible. Quite frankly, the Arbitrator fails to see how the ingestion of this over-the-counter product, with its modest amount of alcohol and presumably taken at its recommended dosage, could result in anywhere near the level reflected in the breath alcohol tests in question. However, the question still remains whether Petitioner was so intoxicated that, as a matter of law, the injury arose out of the drunken condition and not a risk associated with her employment.

Respondent submitted into evidence the testimony of physician and medical toxicologist Dr. Jerrold B. Leikin. (RX1). Dr. Leikin opined, after reviewing the alcohol screening results and over Petitioner counsel's objection, that a level of .076 and .065, respectively, would be "a significant amount of alcohol ingestion ... [i]n which neurobehavioral effects would be expected." (RX1, pp.16-17). Dr. Leikin also went on to offer the opinion, likewise over Petitioner counsel's objection, that taking into account what he called "post absorption", which he noted usually takes 30 to 60 minutes, sometimes 90 minutes, Petitioner's alcohol level "would be approximately .86 to .106 roughly an hour before" the test in question. (RX1, pp.18-19).

The Arbitrator notes that Dr. Leikin's testimony along these lines is admissible, pursuant to the holding in *Paganelis v. Industrial Commission*, 132 Ill.2d 468, ___, 139 Ill.Dec. 477, 482, 548 N.E.2d 1033, 1038 (Ill. 1989). The objection, as pointed out by the *Paganelis* court, goes more to the weight to be given the physician's testimony and not the admissibility of said evidence. *Paganelis*, 548 N.E.2d at 1038.

Along these lines, the Arbitrator finds that Dr. Leikin's opinion is but one factor to consider and is not necessarily dispositive on the issue of impairment and its relation to the accident in question. While Dr. Leikin's medical opinion cannot be entirely discounted, the fact remains that Dr. Leikin was not questioned as to the actual mechanics of the incident involving the cart and likewise was not asked about the presence or effect of nighttime cold/flu relief medicine or mouth rinse on the breathalyzer test results. For these reasons, the Arbitrator finds the opinion of Dr. Leikin of limited value.

Instead, one must examine the evidence with respect to the incident itself. And while the accident was unwitnessed, and occurred shortly after Petitioner began her work day, there would appear to be no evidence to suggest that the incident happened any way other than the way described by Petitioner – namely, that she was pushing a cart loaded down with merchandise, including boxes of tarps weighing up to 80 pounds, stacked on top of flimsy boxes of Halloween costumes, when the boxes of tarps started to slide off, forcing Petitioner to reach out with her right hand to stop the boxes from falling, which in turn caused the wheels of the cart to shift to the left and causing her to fall to the ground, landing on her right hand. If this had been the extent of the evidence before us, without the question of intoxication, accident in all likelihood would not be in dispute. It is the possibility, however, that Petitioner may have been intoxicated at the time that places accident in dispute. However, the fact of the matter is that there is no evidence, other than the breath alcohol test results themselves – which, by the way, were under the current legal standard of .08 with respect to any rebuttable presumption – that Petitioner was so intoxicated at the time that the accident occurred because of said intoxication and not because of the employment. Indeed, Petitioner testified, without refutation, that she was in close proximity to fellow co-workers before and after the incident, specifically within a matter of several feet. Yet there was no testimony from any witness, including hospital personnel, to the effect that there was any noticeable sign of intoxication or inebriation on Petitioner's person, either in the form of an alcohol smell, slurring or incoherent speech, and the like. In fact, Susan Shumaker -- the only witness who was actually asked the question, and who testified that she was about a foot away from Petitioner's face when she and another co-worker helped Ms. Wagner off the floor following the incident – specifically testified that she did not smell any alcohol on Petitioner's breath and that Petitioner was not slurring her words or otherwise seem "out of it" when she brought her to the front desk.

Therefore, while the Arbitrator does not believe Petitioner's claim that the breath alcohol test results were the consequence of her ingestion of nighttime cold relief medicine and/or use of mouth rinse, the evidence taken as a whole shows that the accident was not due necessarily to her level of impairment in this regard. In fact, the evidence strongly suggests that Petitioner was functioning and not exhibiting any signs of intoxication at the time of the injury. As a result, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of her employment on September 17, 2010.

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

In light of the Arbitrator's determination as to accident (issue "C", supra), including the finding that the accident was not caused by Petitioner's possible intoxication but instead arose out of and in the course of her employment, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to said accident on September 17, 2010.

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 submitted into evidence copies of all medical bills incurred in this matter. (PX7). The exhibit further notes that with respect to the amount incurred ($110,742.83) there remains an outstanding balance of $7,555.46 pursuant to the fee schedule. Respondent objected to these bills on the basis of liability.

Based on the above, and the record taken as a whole, as well as the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner is entitled to the following reasonable and necessary medical expenses:

1.	Alexian Brothers Medical Center	$46,664.00	PAID IN FULL BY WC
2.	Elk Grove Radiology	$26.00	PAID IN FULL BY WC
3	Physicians Anesthesia Associates	$6,740.00	$2,094.15
4.	CVS Pharmacy	$209.01	$209.01
5.	ATI Physical Therapy	$2,537.82	PAID IN FULL BY WC
6.	Midwest Physical & Hand Therapy	$40, 521.00	$4,846.15
7.	St. Alexius Medical Center	$3,560.00	PAID IN FULL BY WC
8.	Radiological Consultants of Woodstock	$70.00	PAID IN FULL BY WC
9.	Woodfield Orthopedics & Sports Medicine	$9,965.00	PAID IN FULL BY WC
10.	JRC Medical Clinic (Dr. Joshi/Dr. Chhibber)	$450.00	$406.15
	TOTALS:	$110,742.83	$7,555.46

The parties stipulated that in the event this matter was found to be compensable Respondent would pay these bills directly to the providers subject to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

The parties stipulated, in the Request for Hearing form, that only TTD was being claimed – specifically from 9/18/10 through 11/24/12. (Arb.Ex.#1). The parties also stipulated that Respondent paid $18,820.31 in TTD. (Arb.Ex.#1). Respondent disputed TTD on the basis of liability. (Arb.Ex.#1).

The evidence shows that Petitioner underwent surgery on September 23, 2010 at the hands of Dr. Saltzman. Petitioner testified that the medical bills initially went through the workers' compensation carrier and that TTD benefits were paid by Respondent through March 9, 2012.

Petitioner returned to Dr. Saltzman on October 18, 2010 at which time physical therapy was prescribed and she was ordered to remain off work. Physical therapy was eventually approved and Petitioner subsequently attended therapy sessions twice a week until January of 2011. During this period she continued to follow up with Dr. Saltzman, and at one point was treated for an infected stitch which had turned into an abscess.

Petitioner returned to Dr. Saltzman with ongoing complaints on December 13, 2010. Petitioner eventually underwent a second surgical procedure on January 13, 2011 to replace on impinging screw. Petitioner followed up with Dr. Saltzman who continued to keep her off work thereafter.

Petitioner testified that in May 2011 she noticed that she was having difficulty grasping and holding onto things, such as a gallon of milk. She also noted that her pain was getting worse since the second surgery. Dr. Saltzman suggested an FCE, which was performed on May 25, 2011. Petitioner remained under Dr. Saltzman's care after that.

In a note dated June 6, 2011, Dr. Saltzman stated that he had reviewed the FCE results and that "[s]he is able to return to work in a lite-medium capacity. Her prior employment required medium duty lifting maximum 50 pounds. She continues to have symptoms consistent with Reynaud's phenomenon/complex regional pain syndrome that occur several times a day lasting anywhere from 30 minutes to several hours. Although she has been allowed to return to light duty, her employer has terminated her from her prior position." (PX2).

Petitioner testified that she was referred to Dr. Porter at the pain clinic and was administered injections, the first of which, a nerve block in her armpit, was given in July 2011. Petitioner noted 4 to 5 hours of relief following this shot. She subsequently received stellate blocks to her neck, which she indicated provided barely any benefit other than limiting the episodes of burning pain in her palm and into forearm during the first week. Petitioner testified that by November or December of 2011 she was experiencing 4 to 6 such episodes a week.

In a report dated August 17, 2011, Dr. Saltzman noted that "[i]n my opinion she probably has reached maximum medical improvement. However, I would like to defer this decision for an additional 4-6 weeks to allow her to assess her response to the stellate blocks. Although she has been terminated, a note to return to light/medium duty with lifting less than 20 pounds, no pushing, pulling or overhead lifting on a permanent basis was completed..." (PX2).

In a report dated September 23, 2011, Dr. Saltzman indicated that Petitioner "will complete 1 or 2 more stellate blocks for pain management and schedule a final visit in one month. At that time she will have reached maximum medical improvement (MMI) and will be discharged from the practice. In my opinion she will not be able to return to her prior occupation and will be released with permanent restrictions as previously outlined." (PX2).

Petitioner returned to Dr. Saltzman on November 23, 2011 at which time he recommended another FCE to evaluate any response Ms. Wagner may have had to the stellate blocks. (PX2). Petitioner underwent this second FCE on December 12, 2011.

Petitioner returned to Dr. Saltzman on December 28, 2011 and reviewed the FCE results with Petitioner and her case manager. (PX2). At that time Dr. Saltzman noted that the results of the FCE "... confirm my suspicion that she is not capable of returning to her prior occupation that required medium level work. She was approved for light to medium only. Her complaints continue with generalized discomfort and weakness particularly after she uses her right upper extremity for any length of time." (PX2). Dr. Saltzman went on to state that "[i]n my opinion she has reached maximum medical improvement. Her current complaints or restrictions are permanent

and related to the work injury. The only modifications to the FCE would be pushing and pulling occasionally 50 pounds maximum, frequently 25 maximum. She will not be allowed to crawl and she cannot perform repetitive wrist activities..." (PX2).

Petitioner testified that Respondent never contacted her about retraining or placing her in a new job and that her benefits were eventually terminated on March 9, 2012. Petitioner testified that she had tried to find a job on her own, but without success. Her job search log was admitted into evidence at PX9. It consists of one (1) handwritten page with the names of approximately twenty-one (21) companies. (PX8). This record also contains an undated one (1) page print-out reflecting the submission of two (2) applications – one to Taco Bell on October 9, 2012 and the other to Starbucks on September 28, 2012. (PX8). Petitioner indicated that she received no call backs.

At the request of her attorney Petitioner eventually met with vocational rehabilitation consultant Susan Entenberg on August 20, 2012. Ms. Entenberg's report, dated September 22, 2012, was admitted at PX10. Ms. Entenberg opined that Petitioner was an appropriate candidate for vocational rehabilitation and job placement services. (PX10). Ms. Entenberg also indicated that "[w]ith supportive services the prognosis is fair to guarded given Ms. Wagner's vocational profile and difficulties with her dominant hand" and that "[i]f placed, Ms. Wagner's earning capacity is approximately $8.75-$9.00 per hour." (PX10).

Petitioner testified that she eventually applied for and was granted Social Security Disability benefits on November 24, 2012.

The Arbitrator notes that 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. Furthermore, the claimant must prove not only that [s]he did not work, but that [s]he was unable to work. *Gallentine v. Industrial Commission*, 201 Ill.App.3d 880, 559 N.E.2d 526 (1990).

In the present case, Dr. Saltzman found that Petitioner had reached MMI with permanent restrictions as of December 28, 2011. While it is clear that Petitioner could not return to her prior job of stocker, the FCE determined that she was capable of light to medium work. Petitioner submitted job search logs referencing a little more than 20 employer contacts. The only two contacts that show a date indicate that applications were submitted in September and October of 2012, or 9 to 10 months after Dr. Saltzman's release. The Arbitrator finds this job search to be less than diligent. And while Petitioner's vocational rehabilitation consultant, Susan Entenberg characterized Petitioner's job placement prognosis as "fair to guarded", and despite the fact that formal vocational services were never initiated by Respondent, the fact remains that Petitioner was considered a job placement candidate with potential earnings of $8.75 to $9.00 an hour. Accordingly, the Arbitrator finds that Petitioner failed to prove that no reasonably stable labor market existed for her services within her restrictions, and as such failed to prove her entitlement to ongoing TTD and/or maintenance benefits following her release by Dr. Saltzman on December 28, 2011.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from September 18, 2010 through December 28, 2011, for a period of 66-5/7 weeks.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The evidence shows that Petitioner sustained a comminuted fracture of her right distal radius and ulna on September 17, 2010. She underwent surgery consisting of open reduction of her fracture with nine screws and other instrumentation on September 23, 2010. (PX1). Thereafter, Petitioner remained under the care of Dr. Saltzman and underwent physical therapy. On January 13, 2011 Petitioner underwent a second surgical procedure at which time Dr. Saltzman debrided the wrist and exchanged the radial styloid screw in the right radial plate. Dr. Saltzman continued to keep Petitioner off work thereafter. By February 28, 2011 Petitioner was able to resume physical therapy.

Dr. Saltzman's records show that the petitioner began to experience more discomfort and pain in her right wrist after resuming physical therapy. (PX2). Dr. Saltzman eventually diagnosed Petitioner as suffering from Reynaud's Phenomenon, a chronic pain condition similar to CRPS. (PX2). Petitioner had previously been diagnosed with CRPS in her leg following a work injury in 1983. She admitted to being under the care of her family physician and had been taking Vicodin and Gabapentin throughout the four years leading up to the accident on September 17, 2010.

Petitioner underwent an FCE on May 25, 2011 and a second FCE on December 12, 2011. In a report dated December 28, 2011 Dr. Saltzman noted that the results of the FCE "... confirm my suspicion that she is not capable of returning to her prior occupation that required medium level work. She was approved for light to medium only. Her complaints continue with generalized discomfort and weakness particularly after she uses her right upper extremity for any length of time." (PX2). Dr. Saltzman went on to state that "[i]n my opinion she has reached maximum medical improvement. Her current complaints or restrictions are permanent and related to the work injury. The only modifications to the FCE would be pushing and pulling occasionally 50 pounds maximum, frequently 25 maximum. She will not be allowed to crawl and she cannot perform repetitive wrist activities..." (PX2).

Petitioner testified that she continues to experience pain "24/7" from her palm and down her arm 6 to 8 inches. She noted that the pain is not as severe, but that she still has 2 to 3 episodes per day. She indicated that at night the episodes can last from one to 45 minutes. She testified that she returned to Dr. Saltzman for more pain medication but that she has not gone back to the pain clinic. She noted that the strength in her arm is about the same and that she is very limited in what she can do compared to before the incident. Finally, she stated that she feels pain and hears a pop when she turns the ignition to start her car and that she also experiences pain when washing glasses or lifting a gallon of milk. Petitioner is right handed.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 20% person as a whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRACY VALLEY,

Petitioner,

vs. NO: 07 WC 30829

STATE OF ILLINOIS,
DEPARTMENT OF HUMAN SERVICES,

14IWCC0863

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 re-instatement and being advised of the facts and applicable law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that the Petitioner alleged injury as the result of a work-related accident on October 1, 2004. Petitioner retained KP Law, LLC on July 11, 2007 and an Application for Adjustment of Claim was filed that day. The Petitioner's case has since been dismissed for want of prosecution not once, but twice. The first dismissal occurred on June 19, 2012 and the second on March 20, 2013.

The Commission takes exception with the arguments advanced by Petitioner's counsel. The Commission is asked to accept an argument that fault lies with the Arbitrator, the Commission and its system, the opposing party and even the United States Postal Service (USPS). The Commission makes note of the fact that the plea of the Petitioner's attorney is

essentially: It's not my fault; the Respondent wasn't harmed; and, the arbitrator didn't understand.

The Commission notes that the Petitioner's counsel has exercised a complete lack of diligence in prosecuting this claim, and has offered not one iota of evidence as to why this claim should be re-instated.

This claim was originally dismissed for want of prosecution on June 19, 2012, almost five (5) years after the case was filed and eight (8) years after the alleged injury. By the Petitioner's Statement of Exceptions, Counsel unintentionally missed a hearing date and the case was not ready for trial. The Commission finds it inexcusable that a case would not be ready for trial when the same firm has handled a case for five years. Despite the apparent inaction on Counsel's part, the case was re-instated by the arbitrator.

This case was again dismissed on March 20, 2013. By his pleading, and statements of record, Petitioner's counsel attempts to blame the Commission, the Arbitrator and the USPS for his inability to prosecute this claim.

Fault is alleged to lie with the USPS for the length of delay that it took for the USPS to forward mail to petitioner's counsel's new address. It is further averred that the address on the Commission's website was outdated. No delay would have occurred had counsel followed the Rules of the Illinois Workers' Compensation Commission and updated the firm's address with the Commission.

Counsel's second argument is that the Arbitrator erred in entertaining Respondent's arguments. It is argued that since the attorney for the Respondent was not the attorney listed on the appearance form and was not present at the past hearings, she could not have been aware of what previously transpired. It is also argued that any prior communication is hearsay. It is alleged that: "Counsel for Respondent has offered no explanation as to how she would have been aware of any prior communications between the parties which would have taken place by the prior handling attorneys on each side."

The Commission does not find the above argument persuasive. It is apparent that Petitioner's counsel is not familiar with a known method of recording past events, i.e., note taking.

Section 7020.90 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission, provides, in part, that a Petition to Reinstate shall set forth the reason the cause was dismissed and the grounds relied upon for re-instatement. Counsel is asking the Commission to place the burden on the Respondent despite his own failure to prosecute the claim. The burden rests with the party filing the Petition, not the Respondent in this case.

It is wholly conceivable that a second handling attorney from the same agency/firm would have knowledge of the prior actions. This is exactly what is required under the Illinois Rules of Professional Conduct. Pursuant to Rule 1.3, "a lawyer shall act with reasonable diligence and promptness in representing a client." The lawyer is charged with knowing the facts of his case. In this instance, this is clearly lacking from Petitioner's perspective.

Either party's counsel could have obtained the facts of this case by multiple methods. Among the methods are: reviewing the correspondence/letters sent to opposing counsel; reviewing file notes; speaking to your opponent; reviewing the file of the Commission; or speaking to one's client. After all, pursuant to Rule 1.4 (3), "the attorney is required to keep the client reasonably informed about the status of the matter."

The Commission considers the arguments of Petitioner's counsel to defy common experience. He asks how opposing counsel could be aware of prior communications between the parties, if she was not present at the prior hearings. She likely reviewed the file and/or discussed the case with the prior attorney. While it may be true that the prior handling attorneys are no longer employed with petitioner's firm, that does not excuse counsel from exercising due diligence and investigating the status and facts of the case. If his file was lacking, the option to contact the prior attorney always existed. The argument that the prior communication is hearsay is likewise without merit.

Finally, this Petitioner's counsel offered no evidence as to work that was performed to get this case ready for trial. There is no reference to such activity either in the pleadings or in the exhortations made of record.

None of the excuses constitutes a reason for the re-instatement of the claim. None will be favorably looked upon by any tribunal. None will be favorably looked upon, as the attorney praying for re-instatement never takes ownership of his failure to act.

An attorney is responsible for the preparation of the evidence and its presentation before the tribunal. If the preparation or the presentation is deficient, it is not the client's fault, it is the attorney's. So too, when the attorney fails to act, it is not just the client's fault, it is the attorney's.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 30, 2013 is hereby affirmed and adopted.

DATED: OCT 0 7 2014

MJB/tdm
O: 8-19-14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

STATE OF ILLINOIS)
)
COUNTY OF WILL)

14IWCC0863

ILLINOIS WORKERS' COMPENSATION COMMISSION
ORDER

Tracy Valley
Employee/Petitioner

v.

IL Department of Human Services
Employer/Respondent

Case # **07** WC **30829**

Petitioner filed a Petition to Reinstate on June 12, 2013 , and properly served all parties. The matter came before me on December 10, 2013 in the city of New Lenox . After hearing the parties' arguments and due deliberations, I hereby deny the motion.

A record of the hearing was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Petitioner filed an Application for Adjustment of Claim on July 11, 2007 seeking benefits for injuries she allegedly sustained while working for Respondent on October 1, 2004. On March 20, 2013 the Arbitrator dismissed Petitioner's claim for want of prosecution due to Petitioner's failure to appear at the scheduled trial date either personally or through counsel. The Commission mailed a Notice of Case Dismissal to all attorneys of record on April 3, 2013. Petitioner filed a Petition to Reinstate on June 17, 2013. Respondent objected to the sought after reinstatement of this claim.

The Arbitrator initially notes that this matter was previously dismissed for want of prosecution on June 19, 2012. The case was reinstated on September 19, 2012. Less than one year later the case was once again dismissed for want of prosecution on March 20, 2013. The Arbitrator also notes that there are no other claims consolidated with this matter. The Petition to Reinstate merely stated that the Petition is timely, that the dismissal was the result of a clerical error, and that the claim is meritorious and is ready for trial. Counsel for Petitioner stated that he failed to appear for the trial date on March 20, 2013 due to an internal docketing error. He also stated that although the Commission mailed the Notice of Case Dismissal on April 3, 2013, his office did not receive the Notice until April 25, 2013. This delayed notice was due to counsel's failure to provide an updated address to the Commission. In fact, counsel for Petitioner stated that he believed his law offices have had at least two new addresses since they were located at 19 South LaSalle, Suite 1900, Chicago, IL 60603—the address listed on the Notice. Counsel for Petitioner also stated that he is ready to proceed to trial. Counsel for Respondent stated that despite the advanced age of this claim, there is no evidence that Petitioner has made an effort to seek resolution of this matter. This case has been above the "redline" for several years. Yet, at each trial date the matter has been returned to the call. Likewise, Respondent stated that Petitioner has not contacted Respondent in an effort to settle the claim.

On a Petition to Reinstate, Petitioner bears the burden of alleging and proving facts justifying reinstatement of the claim. The decision whether or not to grant or deny a petition to reinstate is within the discretion of the Arbitrator. Pursuant to Rule 7020.90 of the Act, the Petition must set forth the reason the cause was dismissed and the grounds relied upon for reinstatement. The Arbitrator shall apply standards of fairness and equity in ruling on the Petition and shall consider the grounds relied upon by Petitioner, the objections of Respondent, and precedents set forth in Commission decisions.

In this matter, it is clear that Petitioner has not met her burden of alleging and proving facts justifying the sought after reinstatement. The Petition merely states that the claim is meritorious and is ready for trial. However, counsel for Petitioner provided evidence to show what, if any work, has been done on the claim since its filing date of July 11, 2007. Furthermore, counsel for Petitioner offered no explanation for the lack of any apparent action to conclude this matter in the six years since filing this claim. Counsel for Petitioner provided no evidence of any work done on the claim since this Arbitrator reinstated the claim more than one year ago. Counsel for Petitioner did not attempt in any way to refute counsel for Respondent's assertion that there has been no attempt to engage in settlement negotiations or to proceed to trial. Additionally, the failure of counsel for Petitioner to even provide an updated address to the Commission is further evidence of counsel's lack of diligence in keeping advised of the status of this claim.

Based on the foregoing, the Arbitrator denies Petitioner's Petition to Reinstate this claim.

12/30/13

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

Daniel Brown,

Petitioner,

vs.

NO: 09 WC 40582
(consol. 09 WC 40583)

Navistar,

14IWCC0864

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the briefs provided by the parties and the Arbitrator's Order, hereby reverses and vacates the Arbitrator's Order and remands the matter back for a hearing consistent with this decision.

FACTS AND PROCEEDURAL HISTORY

Arbitration

On September 28, 2009, Petitioner's counsel filed an Application for Adjustment of Claim for 09WC40582 in which Petitioner alleged that he sustained a work-related left foot injury on November 22, 2005.

On October 26, 2009, Respondent's counsel filed a Motion to Consolidate cases 09WC40582 & 09WC40583. The motion was granted by Arbitrator Lammie on November 16, 2009.

On May 21, 2012, Petitioner's counsel filed an Amended Application for Adjustment of Claim on case 09WC40582. Petitioner alleged that he sustained work related right and left shoulder injuries on August 24, 2008.

The parties appeared before Arbitrator Thompson-Smith on December 5, 2013 on case number 09WC40582. The Arbitrator noted that the parties had filed briefs on the following issues: average weekly wage, Petitioner's claim for temporary partial disability benefits, and Petitioner's request for penalties and attorney's fees. The Arbitrator further noted that "[b]y agreement of both parties, a record of the hearing was not made." (Arb.Ord.1)

By his brief, Petitioner's counsel argued that Petitioner returned to work, light duty, on August 12, 2013. He alleged that "[s]ince his return to work, Petitioner has earned substantially less income that (sic) his full capacity earnings before the accident and Respondent had refused to pay TPD benefits to Petitioner since his return to light duty work." (Petitioner's Brief, pg.1) Citing Section 8(a) of the Illinois Workers' Compensation Act (hereinafter "Act"), he argued that the language of the statute is clear, "if the employee is working light duty hours on a part time or full time basis, he is entitled to TPD benefits if he earns less in that capacity than he would if working in the full capacity of his job. There is no exception provided for an employer or plant that is working reduced hours due to economic slowdown." (Petitioner's Brief, pg.2)

Regarding the calculation of temporary partial disability benefits, Petitioner's counsel argued that the Arbitrator should use the average "full capacity" income and not Petitioner's average weekly wage in making such a calculation.

Respondent's counsel argued that Petitioner's wages are dictated by his Union contract. Respondent argued, relying on an affidavit from Respondent's human resources manager, that in 2008 and 2013, Petitioner was a "Grade Level 12" union employee, was paid hourly, and earned between $26.09 and $26.29 per hour in 2007-2008. Petitioner was given a cost of living adjustment in addition to his base pay. In 2013, Petitioner earned between $26.09 and $26.73 per hour also with cost of living increases. Respondent's counsel explained that Petitioner was offered at least 40 hours a week in 2013 and was sometimes afforded the opportunity to leave voluntarily or stay and work. Respondent argued that Petitioner, on occasion, opted to not work. Respondent's counsel also argued that these options had nothing to do with Petitioner's light duty status. Respondent's counsel pointed out that the volume of work has diminished since 2008, yet Petitioner still earns more per hour than he did in 2008. "In the instant case, it is clear that Petitioner is working the 'full capacity' of his job. [cite] This is based on the fact that Petitioner earns as much, if not more, per hour than he did prior to his injury in 2008. Additionally, Petitioner consistently works forty (40) hours plus weeks." (Respondent's Brief, pg.8)

As to average weekly wage, Respondent alleged that while overtime was included in the temporary total disability benefits paid to Petitioner, "Respondent is not conceding that it should have been included." (Respondent's Brief, pg.6) Respondent argued that, if the Arbitrator finds that Petitioner is entitled to temporary partial disability benefits, then Petitioner's average weekly wage should be calculated using Petitioner's straight pay and not include overtime and bonuses. Respondent's counsel also pointed out that Petitioner bears the burden of proving his average weekly wage.

By her Order, issued on December 23, 2013, the Arbitrator found that Petitioner was

"employed in the full capacity of his job and therefore, no TPD benefits are due and owing." (Arb.Dec.2) The Arbitrator further found:

> "In addition, there had been no suggestion that the Petitioner's overtime, in 2008 was regular and mandatory. His shift bonuses would not be included in his AWW. It appears that Respondent has overpaid benefits." (Arb.Dec.2)

Petitioner's counsel filed a timely Petition for Review on January 21, 2014. As no record was made of the hearing, a transcript was not prepared; however, Petitioner's counsel ordered a copy of the transcript by the Petition for Review.

Review

In his Brief in Support of Petition for Review of Arbitration Decision, Petitioner's counsel argues that the Arbitrator erred in finding that Petitioner is not entitled to temporary total disability benefits. Additionally, Petitioner's counsel alleged that the Arbitrator made a finding unrelated to the issues before her, by finding that Respondent overpaid benefits. Petitioner's counsel notes that at the hearing "when Respondent raised issues of overpayment, Petitioner expressed that this was outside the scope of the hearing and he had not had the opportunity to adduce evidence or prepare a brief in response to such arguments. At that time Arbitrator Thompson-Smith stated that the hearing (and consequently, this ruling) would be limited to the issue of TPD." (Petitioner's Brief in Support of Review, pg.1)

Respondent does not address Petitioner's counsel's allegation of what transpired at hearing regarding the issue of overpayment in its Response to Petitioner's Statement of Exceptions and Supporting Brief.

Analysis

The Commission notes that the parties failed to make a record of the proceedings before the Arbitrator as they occurred on December 5, 2013. Furthermore, the parties proceeded to a "hearing" on the issues of average weekly wage and Petitioner's entitlement to temporary partial disability benefits without providing the Arbitrator an Agreed Statement of Facts, or Stipulation of Facts.

The determination of average weekly wage and entitlement to temporary partial disability benefits are questions of fact. Section 8(a) of the Act states, in pertinent part:

> When the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits." 820 ILCS 305/8(a) (2013).

To determine Petitioner's entitlement to temporary partial disability benefits under the Act, the Commission must know what constitutes "full capacity" for the job being performed. Attached to Respondent's response brief as Respondent's Exhibit 3 is a wage statement that shows that while Petitioner worked a minimum of 40 hours a week after returning to work, it also shows periods during which he was laid off. In its response brief, Respondent argues that there was considerably less work available in 2013 than there was in 2008, making layoffs the norm. In his brief, Petitioner claimed that he was working less than he was before the accident.

The Commission notes that **no** evidence was presented regarding Petitioner's employment either before or after his alleged accident. Was he the only person laid off? Why was he laid off? Was he laid off?

The Commission further notes that no evidence was presented explaining what constitutes full capacity when working for Respondent and if layoffs are part of the job when at full capacity. There is no way for the Commission to determine Petitioner's status as an employee, at full capacity or otherwise.

Petitioner's posits an argument regarding average weekly wage. He states that his average weekly wage should include the overtime he worked and his bonuses. Respondent argues that overtime and bonuses should not be included. By *Arcelor Mittal Steel v. IWCC*, 2011 IL App (1st) 102180WC, overtime can be included in the computation of average weekly wage only if the overtime was mandatory. There is no evidence or stipulation of record that allows the Commission to make a determination regarding this issue.

Since the Record is devoid of evidence, the Commission finds the Record insufficient. While the parties may have intended that the Arbitrator rule on these issues as questions of law, the Arbitrator had no basis in law or fact to make such a ruling. To proceed before the Arbitrator the parties must present an Agreed Statement of Facts establishing that there was no material issue of fact remaining. The parties failed to establish same.

By Statute and Rule the Commission has a method of litigating disputes between the parties. When claims are heard by an Arbitrator **all** issues then in dispute are determined. Those issues include: accident; employment; disease; medical; causal connection; temporary total disability; jurisdiction; wages; permanent partial disability and penalties. The Hearing on said issues is conducted pursuant to Rule and Section 19(b) of the Act. Where there is no dispute, the parties enter into stipulations that sufficiently inform the Arbitrator. Here, the parties' failure to abide by the established method has resulted in a waste of the Commission's resources.

As noted by the court in *Honda of Lisle v. Industrial Comm'n*, 269 Ill. App. 3d 412, 415-416 (Ill. App. Ct. 2d Dist. 1995), the parties cannot introduce additional evidence before the Commission. Therefore, the case must be remanded back to the Arbitrator for one of the following to occur:

1. The parties to enter into evidence an Agreed Statement of Facts which will allow the Arbitrator to determine all appropriate issues, including Petitioner's average weekly

wage and his entitlement to temporary total disability benefits; **OR**

2. A hearing, on the record, in which the parties provide all necessary evidence required for the determination of all issues, including Petitioner's average weekly wage and entitlement to temporary total disability benefits.

Additionally, the Commission notes that this case was consolidated with case 09WC40583 on November 16, 2009. The Commission further notes that the file for 09WC40583 has an Application for Adjustment of Claim identical to the one in the case at bar, and an Amended Application for Adjustment of Claim substantially similar to the application for the case at bar, but with the addition of neck, back and "MAW" listed as injuries sustained on August 24, 2008. Petitioner has basically filed two applications for the same injury. Therefore, on remand this consolidation issue should be resolved.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Order of the Arbitrator is reversed and vacated and the matter remanded back to the Arbitrator for a hearing consistent with this decision.

DATED: OCT 0 7 2014
MJB/ell
o-09/08/14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ORDER

Daniel Brown
Employee/Petitioner

Case # 09 WC 40582

v.

14IWCC0864

International Truck/Navistar
Employer/Respondent

FINDINGS OF FACT

Both parties filed briefs on the issues of the petitioner's temporary partial disability benefits ("TPD"), Petitioner's average weekly wage ("AWW"); and Petitioner has additionally requested sanctions against the Respondent. All parties were properly served. The matter came before me on December 5, 2013, in the city of Chicago. After hearing the parties' arguments and due deliberations, I hereby write the following Order. By agreement of both parties, a record of the hearing was not made.

Petitioner states, by way of background, that Daniel Brown ("Petitioner") sustained right shoulder, neck and back injuries on August 24, 2008 in a work-related accident. Petitioner was off work from October 13, 2008 through August 12, 2013, having undergone three surgeries to the right shoulder, including a shoulder replacement procedure; and a cervical fusion. As, Petitioner is still treating, Dr. Goldberg, his treating doctor, has now recommended addition surgeries to the right elbow and left shoulder. His doctor returned him to work, on May 6 2013, in a light duty capacity, with restrictions of no lifting more than one (1) pound, with the right arm. Petitioner is now earning less income in 2013 than he did in 2008 and Respondent had refused to pay Petitioner TPD benefits, since his return to work.

Petitioner argues that this is a pre-amendment case and thus Section 8(a) of the Illinois Workers Compensation Act (the "Act") applies; and that the petitioner's net income should be used in the calculation of TPD as opposed to gross income, as stated in the 2011 amendment language.

Petitioner also argues that Petitioner's correct AWW, for the one-year period prior to the work injury, is $1,518.41; because according to Exhibits B, C and E, presented by the respondent, Petitioner earned $60,736.56, over a forty (40) week period, prior to the date of accident. Petitioner claims that Respondent owes him TPD, in the amount of $8,068.55 because he is entitled to 2/3 of the difference between the average full capacity income of $1,518.41, minus the net weekly income received from part-time light duty work. Petitioner requests sanctions against the respondent for refusing to pay the TPD, which he claims is owed. Petitioner relies on *Interstate Scaffolding, Inc. v. Illinois Workers Compensation Comm'n*, 236 Ill.2d 132 (2010); and *McBride v. State of Illinois-Luderman Development Center*, 06 WC 28019 (2009).

Respondent states, by way of background, that in 2008, Petitioner was a union employee, working the third shift for Navistar/International Truck ("Respondent"), as an assembler, receiving 6% bonuses and working overtime. Today Respondent no longer to offers a third shift, bonuses or overtime and Petitioner presently earns more now, on an hourly basis, than he did in 2008.

Respondent argues that even though Petitioner was paid temporary total disability ("TTD") benefits, based on both the shift bonus and overtime; and overtime was included in its calculation of petitioner's wages, it is not conceding that these additions should have been included. Respondent claims that it has paid Petitioner TTD, at a rate of $845.64; from October 14, 2008 to August 11, 2013, for a total of $184,228.65 (217.857 weeks) of TTD, based on an AWW of $1,268.46. Respondent offers Exhibits 1-6 to support its arguments. Respondent argues that assuming that the Arbitrator states that overtime should be included in the calculation of petitioner's AWW; then that AWW would be $1,189.29; and even if the Arbitrator agrees that the shift bonus and overtime should be included in the calculation of petitioner's AWW, then the AWW should be $1,189.29,which results in an overpayment of TTD.

Respondent also argues that no TPD is due and owing to the petitioner because Petitioner's reduction in earnings is due to economics, i.e., the fact that the plant is no longer producing as it was in 2008; and not to Petitioner working in a light duty capacity. Respondent further argues that the term "full capacity" as referred to in the Act, with regards to payment of TPD, is similar to that language in the Act regarding wage differential awards, i.e., 820 ILCS 305/8 (d)1, which states in relevant part: "If, after the accidental injury has been sustained, the employee, as a result thereof, becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3 of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or able to earn in some suitable employment or business after the accident. Respondent relies on several cases, including but not limited *to Mendoza v. RRC Honey Comb Acquisition*, 2011 Ill. Wrk.Comp. LEXIS 527: 11 IWCC 0442, 06 WC 45022; *Edwards Hines Lumber Co., v. Industrial Comm'n*, 215 Ill. App.3d 659, 575 N.E.2d 1234, 159 Ill. Dec.174 (1990).

CONCLUSIONS OF LAW

Section 8(a) of the Act states, in relevant part: "When the employee is working light duty on a part-time or full-time basis and earns less that he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits". The Arbitrator finds that according to the Act, this petitioner is presently employed in the full capacity of his job and therefore, no TPD benefits are due and owing. In addition, there had been no suggestion that the Petitioner's overtime, in 2008 was regular and mandatory. His shift bonuses would not be included in his AWW. It appears that Respondent has overpaid benefits.

It Is Therefore Ordered:

Respondent has no obligation, to pay Petitioner temporary partial disability benefits, pursuant to Section 8(a) of the Act. Petitioner's average weekly wage with be determined at hearing.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
09WC40582
SIGNATURE PAGE

14IWCC0864

Signature of Arbitrator

December 23, 2013
Date of Decision

DEC 23 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Mytnik,

Petitioner,

vs.

NO: 09 WC 26257

Ford Motor Company,

14IWCC0865

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability benefits, and permanent disability, hereby reverses the Arbitrator's Decision and finds that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment on May 21, 2009.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. And after a complete review of the record, the Commission finds that Petitioner's varied and inconsistent histories of the May 21, 2009 incident undermine his claim that he suffered accidental injuries arising out of and in the course of his employment with Respondent on May 21, 2009.

The Commission notes that at hearing, Petitioner testified that he first noted that his back had started to bother him at 10:00 a.m. on May 21, 2009. (T.22) Petitioner testified that some time later after, he bent down to retrieve a bolt that had fallen to the floor and suddenly felt a "real sharp" pain in his right side. (T.22, 24) Petitioner testified that later that day he sought treatment at Respondent's medical department. (RX6) The records from the medical department

indicate that Petitioner explained that while doing his job his right leg stays on the foot paddle on the assembly line and "as the moon buggy moves it twists my body." (RX6) Petitioner then complained of right hip pain. Following his visit to the medical department, Petitioner completed an accident report in which he stated that he felt pain in his right hip and leg when he was "picking up bolts off the floor twisting his body." (RX7)

On May 26, 2009, Respondent sent Petitioner to Urgent Care for treatment. (PX11) At Urgent Care, Petitioner reported that he developed low back pain with radiation down the right leg while twisting and turning in the "completion of his job assignments." (PX11) The triage nurse at Urgent Care noted that Petitioner reported that he was "using a foot pedal repetitively with his right foot and twisting and turning" when he felt low back pain with radiation down the right leg. (PX11)

When Petitioner saw Dr. Chang on June 4, 2009, he reported that while working on May 21, 2009, he bent down to pick up a bolt that had fallen while holding on to equipment, causing him to "twist forcefully." (PX9) Petitioner reported that after this twist, he felt immediate low back pain that "gradually radiated into the right leg." (PX9)

On June 8, 2009, Petitioner told Dr. Adlaka that he was "bending down to pick up something when he injured his back." (PX12)

On July 20, 2009, Petitioner told Dr. Goldberg that he had "twisted an arm of a machine and developed acute low back and right leg radicular pain." (PX5) Dr. Goldberg later issued an addendum to his report, explaining that Petitioner had "twisted his waist to reach back for the arm of a machine...then developed acute low back right leg radicular pain." (PX5)

On March 8, 2010, Petitioner told Dr. Luken that he developed right-sided low back symptoms "as he engaged in his usual routine involving repetitive bending and light lifting." (PX2)

On June 2, 2010, Petitioner saw Dr. Butler, Respondent's first Section 12 examiner, who took down the following history from Petitioner: "During the course of his occupation he has to pick up stock for assembly and place bolts on an articulating arm. He states that he is required to push a foot pedal during the course of this assembly operation. [Petitioner] stated that there is a twisting motion involved in completion of his job assignment." (RX3-ERX2)

On June 1, 2011, Petitioner saw Dr. Zelby, Respondent's second Section 12 examiner. (RX2-ERX2) Dr. Zelby indicated in his report that Petitioner explained that he "was doing his regular job duties, and did not have any specific incident or injury, and felt pain in the low back, radiating into the right buttock and down the right leg, although he cannot remember the distribution into the leg. He did notice that when he bent to pick up a ball, the pain seemed sharper for a couple of seconds." (RX-ERX2) At his evidence deposition on October 13, 2011, Dr. Zelby testified that Petitioner reported that he bent to pick up a "bolt" not a "ball." (RX2)

On June 16, 2011, Petitioner's Section 12 examiner, Dr. Treister, noted that Petitioner reported that he started to "have sharp low back pains while he was eating his lunch." (PX3-

EPX2)

As explained above, the Commission notes that Petitioner's histories of the May 21, 2009 incident are varied. However, despite all of the histories provided by Petitioner throughout his treatment, Petitioner testified at hearing that his low back pain with radiation down the right lower extremity started when he reached down to retrieve a bolt that had fallen to the floor. Petitioner chose to proceed to trial with this history. Accepting Petitioner's chosen history of the accident, despite the multiple accounts he had provided, the Commission finds that Petitioner has failed to prove that he suffered an injury compensable under the Illinois Workers' Compensation Act (hereinafter "Act").

The Commission notes that Petitioner testified that he had suffered a work injury to his back in 2003. (T.22-23) This was confirmed by the records of Petitioner's primary care physician, Dr. Luebbe, who noted on May 27, 2009 that Petitioner had a history of back pain. (PX13) The lumbar MRI taken on May 26, 2009, was compared to a lumbar MRI taken on December 3, 2003. It showed that Petitioner had "[p]osterocentral and right paracentral disc herniation at L4-L5, which appears to be new since the previous exam. Posterocentral and right paracentral disc herniation at L5-S1, which was described on the previous examination." (PX5) Petitioner clearly had pre-existing low back abnormalities, but the MRI also showed a new herniation at L4-L5.

Despite this diagnostic indication of a new herniation, the Commission finds that Petitioner has failed to establish that his injury arose out of his employment. As explained by the Illinois Supreme Court in *County of Cook v. Indus. Comm'n (Spiegel)*, 69 Ill. 2d 10, 17-18 (Ill. 1977)

> An accidental injury can be found to have occurred, even though the result would not have obtained had the employee been in normal health. (Republic Steel Corp. v. Industrial Com. (1962), 26 Ill. 2d 32, 43-44.) If an employee's existing physical structure gives way under the stress of his usual labor, his death is an accident which arises out of his employment. To come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury. Wirth v. Industrial Com. (1974), 57 Ill. 2d 475, 481....The sole limitation to the above general rule is that where it is shown the employee's health has so deteriorated that any normal daily activity is an overexertion, or where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed, compensation will be denied. (County of Cook v. Industrial Com. (1977), 68 Ill. 2d 24, 32-33; Rock Road Construction Co. v. Industrial Com. (1967), 37 Ill. 2d 123, 127; Illinois Bell Telephone Co. v. Industrial Com. (1966), 35 Ill. 2d 474, 477.) Whether, however, the above factors are present

is a question of fact for the Commission. Okaw Homes, Inc. v. Industrial Com. (1968), 40 Ill. 2d 81, 84.

In the case at bar, Petitioner was not engaged in an activity which presented a greater risk of injury to him than to the general public. Petitioner, by his own testimony, was simply bending down.

The record demonstrates that Petitioner suffered from long standing, pre-existing, lumbar degenerative disc disease. Petitioner testified that he experienced pain while he was bending to retrieve a fallen bolt.

Petitioner's degenerated lumbar discs gave way with the simple act of bending forward. The failure of the Petitioner's spine occurred while he was simply bending over. This demonstrates that his lumbar condition was so deteriorated that any activity of normal life was sufficient to cause Petitioner's spine to break down further.

The Commission notes that both Petitioner and Terrence Purdy, a co-worker, testified that bolts tend to fall often and they would have to pick them up to avoid jams in the machinery. The Commission also notes that when describing their work activities, both men focused on the twisting and turning involved in moving the articulating arm and grabbing bolts from the table or stock area. Their testimony and the evidence presented shows that the job required that they stand for long periods of time and move an articulating arm. The Commission finds that bending down for a fallen bolt is an intermittent act dependent solely on a bolt falling.

The Commission finds that Petitioner was simply performing the everyday activity of bending down. The Commission further finds that Petitioner was not exposed to a greater risk of injury than the general public, due to his work activities. The Commission also finds that Petitioner's pre-existing back condition was so deteriorated that his back simply gave out during a basic daily activity. Based on *County of Cook* and the requirements under the Act, Petitioner failed to establish that his injuries arose out of and in the course of his employment.

Therefore, for the reasons set forth above, the Commission finds that Petitioner has failed to establish that he sustained accidental injuries arising out of and in the course of his employment with Respondent on May 21, 2009. Accordingly, we reverse the Decision of the Arbitrator and deny compensation.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator is reversed as Petitioner failed to prove he sustained an accidental injury arising out of his employment with Respondent, and, therefore, his claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit

14IWCC0865

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: OCT 0 7 2014
MJB/ell
o-08/19/14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MYTNIK, MARK
Employee/Petitioner

Case# **09WC026257**

14IWCC0865

FORD MOTOR COMPANY
Employer/Respondent

On 6/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0905 NEWMAN BOYER & STATHAM LTD
JAMES S HAMMAN
18400 MAPLE CREEK DR SUITE 500
TINLEY PARK, IL 60477

0560 WIEDNER & MCAULIFFE LTD
RANDALL SLADEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC086

14IWCC0865

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

Mark Mytnik,
Employee/Petitioner

v.

Ford Motor Company,
Employer/Respondent

Case # **09** WC **26257**

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 **2/25/13**. 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. [ ] 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 _____

14IWCC0865

FINDINGS

On **5/21/09**, 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 **$58,240.00**; the average weekly wage was **$1,120.00**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$60,094.51** for other benefits, including short term disability ($51,832.26) and PPD advance ($8,262.25), for a total credit of **$60,094.51**. (See 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 $746.67 per week for 79-1/7 weeks, commencing 5/23/09 through 2/28/10 and from 3/3/10 through 11/29/10, as provided in §8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 5/22/09 through 2/25/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical expenses relating to said accident as provided in §8(a) and the fee schedule provisions of §8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72 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.

Respondent shall pay to Petitioner penalties of **$0.00**, as provided in Section 16 of the Act; **$0.00**, as provided in Section 19(k) of the Act; and **$0.00**, 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

5/21/13
Date

ICArbDec p. 2

JUN 14 2013

STATEMENT OF FACTS:

Petitioner, a 41 year old assembly line worker, testified that he had worked for Respondent since October 1994. He indicated that he worked in the rear suspension area, using different types of machines. He noted that on May 21, 2009 he was doing a rear suspension "moon buggy" job. He noted that the job required that he stand on an assembly line up to nine (9) hours per day working on cars, with two (2) breaks, while twisting his body to pull and position an articulating arm tool used to drive bolts into the rear suspension of automobiles. In addition, he was required to lift packages of bolts and other items to be assembled on the vehicles weighing thirty (30) to seventy (70), sometimes lifting two at a time in setting up his work station. He noted that the assembly line ran at a rate of speed that allowed 48-52 seconds to work on each vehicle, or approximately 62 vehicles per hour.

Petitioner testified that on May 21, 2009 he started work at 6:00 am and that around 10:00 am he noticed that his back hurt. On cross examination, he noted that he felt "okay" when he arrived at work and that he had noticed pain throughout the day. He also noted that sometimes bolts would fall out and he would have to reach down and remove it before it jammed the carousel. He testified that he did just that on the date in question and that when he did so he felt sharp pain like needles on the right side. He indicated that he then flagged down a supervisor, Zack Bozanic, and asked to go to medical. Petitioner testified that he told Mr. Bozanic what had happened about ten (10) to fifteen (15) minutes after it occurred. He also noted that he went to the medical department at about noon. He indicated that he told medical department personnel that he had pain in his back and down his leg. On cross he later agreed that he may have told personnel at that time that he had pain in his right hip and that it had begun at about 8:30 am. He also noted that although he had previously hurt his back in 2003 he had not had pain down his right leg before. Petitioner testified that the medical department gave him ibuprofen and iced his back. He noted that he sat around for a couple hours until he was sent back to the line. He indicated that there were a few hours left in the day ad that he did not realize the extent of his condition, and that the group leader helped him out.

Petitioner testified that the following day was "the weekend." The Arbitrator takes judicial notice of the fact that the date of the alleged accident, May 21, 2009, was a Thursday. Petitioner indicated that he could not get up from bed that day and was in excruciating pain.

Petitioner testified that he returned to work after the weekend but was unable to move, bend, twist or even stand. He returned to the medical department and was eventually sent to Ingalls Urgent Care. He indicated that he told the doctor what had happened and how he was doing the moon buggy job, twisting and picking up stock, and how he had to hurry up to pick up a bolt. Petitioner noted that given an injection at that time and sent for an MRI.

The Ingalls medical record for May 26, 2009, indicated that the patient described "twisting motion of the torso in completion of job." (PX11). It also stated: "Injury/accident to right hip and back" and it was also noted in the Work Status Discharge Sheet; "Off Duty (Due to Work Related Conditions)." The record also indicates "right buttock pain radiates to posterior upper leg" and below that it states: "cumulative injury." In the Emergency Record under Doctor Notes, the record for that date also states: "Mechanism of Injury: The pt. states that he was using a foot pedal repetitiously with his right foot and twisting and turning when he began with right lower back pain that radiated down the posterior lateral aspect of his right thigh to his foot." The diagnosis was lumbar radiculopathy. The Ford Motor Company Referral Form included with those records states; "eval for complaint of continued right lower back pain…"

Petitioner testified that following the MRI he was instructed to return to Respondent's medical department, which he did. He noted that he spent about six (6) hours in the medical department. He indicated that during that time he spoke to Michelle Gregory, Respondent's workers' compensation administrator. Petitioner noted that he told Ms. Gregory that his back was bothering him and about the twisting involved in his job. He also indicated that he informed her how he really felt it after picking up a bolt. Petitioner noted that after a few hours Ms. Gregory returned and told him that they had looked at the job and that there was no way he could have gotten hurt. He also noted that he was told to see his own doctor at that time.

Petitioner visited his primary care physician, Dr. William Lubbe on May 27, 2009. He indicated that he informed Dr. Lubbe about his job and the twisting involved. On that date Dr. Lubbe recorded "… radiculopathy-pt had previous report in 2003 with apparently same results however pt. has never been seen in this office for back pain for years-no back complaints in multiple visits in recent years." (PX13). Dr. Lubbe then referred Petitioner to Dr. Mark Chang.

Petitioner was examined by Dr. Chang on June 4, 2009. Petitioner indicated that he told Dr. Chang the same thing with respect to the twisting involved in his job. In a report dated June 4, 2009 Dr. Chang noted that "… the pain started after a work related injury on May 21, 2009, when he was picking up some bolts while working on an assembly line … he had to bend down to pick up a bolt that had dropped… reach down, he had to twist forcefully." (PX9). In addition, Dr. Chang noted that Petitioner "reports that in 2003 he had an episode of lower back pain. He had an MRI done at that time and went for physical therapy which helped and he has not had any trouble since that time." Later in the report, regarding an MRI of the lumbar spine, dated May 26, 2009, he states "[a]ccording to the MRI report, those films are compared to MRI images dated December 3, 2003. According to the radiologist, the L4-5 disc herniation is new since the previous MRI, while the L5-S1 disc herniation remains the same." Dr. Chang's impression was: "Acute right L5 radiculopathy secondary to new L4-5 disc herniation causing significant nerve impingement, old L5-S1 disc herniation not causing radiculopathy." Dr. Chang concluded by stating "since I am confident this is a new disc herniation, I would consider the new herniation as definitely being work related since it would be consistent with the mechanism of injury as he described on May 21, 2009." (PX9).

Dr. Chang's records also include a #5166- Medical Certification Form, prepared by Dr. Lubbe which indicates that the condition was a "reaggravation of preexisting problem which had not caused any problems for multiple years-this is a work comp injury."

Petitioner testified that Dr. Chang referred Petitioner to Dr. Adlaka for an injection. Petitioner noted that Dr. Chang also referred him to a pain specialist, and eventually recommended surgery.

Petitioner subsequently sought a second opinion, visiting Dr. Edward Goldberg on July 20, 2009. Once again, Petitioner noted that he gave the same history regarding the twisting associated with his job that he had given the other providers. However, Petitioner noted that his description of the use of an articulating arm may have caused some confusion. He indicated that as a result Dr. Goldberg's record was wrong and he had to have Dr. Goldberg's office fix the description of the accident. Petitioner continued to treat with Dr. Goldberg from July of 2009 through February of 2010.

In his record of July 20, 2009, Dr. Goldberg reported the history of the petitioner's present illness as follows: "He twisted an arm of a machine and developed acute low back and right leg radicular pain." PX 5 A clarification was added to the record that stated: "We are correcting that by saying the patient twisted his waist to reach back for the arm of a machine he uses to complete his job; then he developed acute low back right leg radicular pain." The record for December 4, 2009, indicates: "He has been in therapy and they recommend

additional therapy, but unfortunately this has been denied. The therapy notes do indicate he is making progress." Later in that record, Dr. Goldberg notes: "My recommendation is that he have work conditioning for 4 weeks. He does heavy assembly line work. If work conditioning cannot be performed due to insurance issues, he will let us know."

Ford Form 5166, prepared by Dr. Goldberg on July 20, 2009, indicates that the petitioner's condition was due to the employee's occupation and states "work related incident caused injury to low back." A follow up Form 5166, dated January 6, 2010, stated "work injury May 21, 2009."

At the February 10, 2010, appointment Dr. Goldberg released the petitioner to return to work as of March 1, 2010, finding that he had reached maximum medical improvement. He prescribed an additional four sessions of physical therapy. He was released at light duty with maximum lifting limited to twenty-five pounds. It was noted that the restrictions were permanent "due to the chronic nature of his right L5-S1 neuropathic pain."

Dr. Goldberg performed surgery on August 4, 2009. The records from Rush University Medical Center include the report of the surgery that Dr. Edward Goldberg performed on the petitioner on August 4, 2009. (PX6). That surgery was described as a right L4-L5 hemilaminotomy and discectomy and right L5-S1 hemilaminotomy and partial facetectomy.

Following surgery, Petitioner began a program of physical therapy. However, Petitioner noted that Dr. Goldberg subsequently stopped physical therapy in February of 2010 and released him to return to work with a 25 pound lifting restriction. Petitioner thereupon returned to work on March 1, 2010. He indicated that he worked in several different types of jobs that allowed him to work an eight hour day, but that the jobs were not light duty. Petitioner testified that he worked on March 1 and March 2, 2010 and then went off work again due to radiating pain as well as an inability to stand, twist or bend for very long. Petitioner indicated that Ford had said they would try to accommodate him but that they never did.

Petitioner testified that after a visit to the St. Margaret emergency room he visited Dr. Martin Luken on March 8, 2010. On that date Dr. Luken noted that Petitioner "developed right-sided low back pain and sciatica at work one day in May 2009, while involved in regular work involving repetitive bending and light lifting while working on an assembly line. He recommended that Petitioner be off work and he prescribed suitable work conditioning culminating in a functional capacity evaluation.

Dr. Luken testified that Petitioner's work "involved holding a pedal down with one foot while reaching behind him to grasp and deal with a power tool of some sort." He went on to describe that the petitioner "had to keep one foot planted on a pedal while twisting to retrieve this instrument to deal with each passing car." (PX1, p.17). Dr. Luken further testified that "the repetitive mechanical stress which his work likely brought to bear on his lower back, in my opinion, very plausibly accounted for lower lumbar injury and with precipitation or exacerbation of the demonstrated disc herniation which we believe was responsible for the symptoms Mr. Mytnik reported as having developed in the course of his work in May of 2009." (PX1, pp.18-19) Dr. Luken agreed that Petitioner's bending over to pick up a bolt and twisting in the manner described was possible to herniate a lumbar disc. (PX1, p.22). He was also of the opinion that "those hours, those years involved with repetitive bending like lifting and twisting, those would seem to me to be the very competent causes of the anatomical and clinical problem observed." (PX1, p.23). Dr. Luken testified that "something happened during that workday with those repetitive mechanical stresses to his back to either precipitate or critically exacerbate the longstanding degenerative changes in his spine." (PX1, p.40).

Petitioner noted that Ford would not authorize the FCE and that he ended having the FCE on November 9, 2011 and paying it himself. The FCE demonstrated physical capabilities and tolerances to function at the light-medium category of work, indicative of two-hand occasional lift carry of thirty-five pounds from twelve inches to waist level and a two-hand frequent lift of fifteen pounds from twelve inches to waist level.

Petitioner noted that Dr. Luken kept him off work until his subsequent return to work with restrictions on November 30, 2010. He indicated that he returned to work for Respondent on that date doing different "made up" jobs, doing different tasks which were within the restrictions imposed by Dr. Luken. Petitioner testified that he had attempted to work several times after March of 2010 but that he was informed by Ford's labor relations department that there was no work available.

Petitioner testified that prior to date of the alleged accident he had had problems with his back while working for Ford. He noted that he had been working on the rear brake system using an articulating arm and which required overhead work. Petitioner indicated that he no other back injuries prior to working for Respondent.

At the request of Respondent, Petitioner visited Dr. Jesse Butler on June 2, 2010 for purposes of a §12 evaluation. After examination and review of the medical records, Dr. Butler diagnosed lumbar degenerative disc disease and herniation at L4-5. He found that Petitioner was at MMI with restrictions, if any, to be determined by a functional capacity evaluation. Dr. Butler testified that the video he reviewed of the assembly line job didn't seem to show any twisting movement and he stated that the pace with which the bolts were drilled seemed to be a very comfortable pace for someone doing the job. (RX3, p.11). He was also asked to assume that there was no lifting requirement for the job since it was not depicted in the video. Dr. Butler admitted that people with degenerative changes in their spines similar to the petitioner's prior to his accident at work could bend over to pick something up or reach for something and become symptomatic. (RX3, p.16). He also testified that it was possible that Petitioner could have herniated a disc if he had bent over to pick up a bolt. (RX3, pp.22-23).

In addition, Petitioner visited Dr. Andrew Zelby at the request of Respondent on June 1, 2011 for purposes of a §12 examination. Dr. Zelby testified that Petitioner told him that he noticed a sharp pain in his low back radiating to his right buttock and down the right leg when he bent over to pick up a bolt. (RX2, p.7). He also testified that an FCE was unnecessary. Dr. Zelby testified that he was never asked by Respondent to review the video that had been reviewed by the other evaluating physician. (RX2, p.16)

At the request of his attorney, Petitioner visited Dr. Michael Treister for an evaluation on June 16, 2011. Dr. Treister testified that Petitioner explained to him that he had to step on a pedal with one foot to lift the suspension while simultaneously reaching back to pull the articulating arm forward. (PX3, p.9). He also testified that Petitioner said sometimes a bolt would fall down and he'd have to grab it real quickly to prevent it from getting into the mechanism of the machine. He told him that he had 48 to 50 seconds to work on each vehicle and he typically did 67 to 70 vehicles per hour and he worked ten-hour days. He also told him that he was required to pick up boxes of bolts, sometimes two at a time, and that each box weighed between 20-30 pounds. Dr. Treister testified that petitioner lifted and twisted with 40 to 60 pounds. (PX3, p.10).

Dr. Treister further testified Petitioner had an MRI on April 9, 2010, a long time after his surgery, and the MRI showed postoperative changes at L4/L5 with some scar tissue that was causing central and bilateral foraminal stenosis, which was a basis for the ongoing discomfort on an objective basis. (PX3, p.16). Dr. Treister diagnosed Petitioner's condition as failed back syndrome noting persistent back pain and radiculopathy. (PX3, p. 21). Dr. Treister explained that Petitioner's condition is causally related to the accident that he had at work on May 21, 2009. He noted that Petitioner had preexisting degenerative disc disease in the lower lumbar area

which puts those discs at risk for herniation. Petitioner has sudden onset of pain while working. Dr. Treister testified to his opinion that whether from twisting, lifting or bending, the problem with Petitioner's back started while he was working. (PX3, p.22). He further testified that Petitioner was a candidate for further surgery, likely a fusion or arthrodesis. (PX3, p.23).

Petitioner testified that he was aware of the job video sent to Drs. Butler and Zelby. Petitioner indicated that he viewed the tape and that it did not accurately depict his job. Specifically, he noted that the assembly line did not move as fast as it normally ran, that he saw the line actually stop at one point and that the worker shown in the video was not putting on nearly as many parts as he did.

Petitioner testified that he currently takes something for the pain, and that he was feeling it in his back a little bit while sitting and testifying. He indicated that the pain is in his back and goes down his leg, and that sometimes the numbness will increase and his knee will buckle. Petitioner also stated that Dr. Luken had recommended a fusion but that he did not want anymore surgery at that time.

Petitioner indicated that he was not paid workers' compensation benefits while he was off work but that he did receive short term disability payments of around $200.00 per week for a gross amount of $675.00, or $547.00 net. He also noted that his medical bills were not paid other than what was picked up by Blue Cross Blue Shield.

Terrance Purdy testified on behalf of the Petitioner. Mr. Purdy indicated that he had worked for Ford for 19-1/2 years. Mr. Purdy noted that on the date of the incident, May 21, 2009, he was doing general utility work in the area. He testified that he was familiar with the "moon buggy" job that the petitioner was doing on the date of the accident because he worked on that job at the same time as the petitioner and took over his job after he was hurt. He further testified that the job required lifting and twisting to utilize an articulating arm and added that twisting and bending quickly was required to pick up dropped bolts. He noted that bolts were dropped fairly regularly. He testified that he was injured after he bent down to pick up a dropped bolt. He said that dropped bolts had to be quickly retrieved to avoid assembly line jams. The witness testified that the assembly line did not stop often. He said that while working on that job, he worked ten-hour days and worked 63 to 68 cars per hour. In his testimony, the witness explained that the job required twisting quickly to get the articulating arm and he noted that the arm needed to be pulled into position to work on the vehicles.

Hugh Ferguson III, the videographer for Ford, testified that he was asked by Ford's workers' compensation department to take a video of Petitioner's job. He testified that he's worked for Ford for 44 years and is currently its Government Regulations Coordination Assistant. He testified that the workers' compensation department showed him what they wanted videoed and he didn't know why the video was needed. The video was shown and he stated that six minutes of the video was the petitioner's job. He testified that he was given no written instructions and made no notes regarding the video. He further testified that he did not know the date that he took the video and he was not told how long to run the video. He testified that he was not provided with a job description, nor was he given any information concerning the petitioner. He said that he did not know if the petitioner's job was explained to him and he testified that he didn't know what he knew about the person who was in the video he took. He also testified that he recalled seeing someone drop a bolt while doing the job, but he didn't remember seeing anyone bending over while doing the job. He said that he had taken a video of that job just that one time.

Zack Bozanic appeared and testified at the request of Respondent. He testified that he was a supervisor for Ford on May 21, 2009, and had worked for Ford twelve years prior to that at its Michigan truck plant. He knew the petitioner and knew that the petitioner had reported the accident. He said that the petitioner was a good

employee. The witness testified that sixty-three vehicles were done in an hour. He said that the line stopped, but he did not have any training on the petitioner's job. He said that he had no information regarding any significant time the petitioner had off from work prior to the date of this accident. The witness testified that he didn't know how the petitioner had been injured. He didn't know anything about the petitioner's injuries or that he had surgery. He testified that he is not told anything about employees working with restrictions.

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

The evidence introduced at hearing established that Petitioner worked for Respondent since October of 1994 and that his work on the assembly line required him to stand for upwards of nine hours per day, performing repetitive labor involving lifting, twisting, reaching and occasional bending. Although there was some variation in the medical records concerning the details of exactly what work was being done on the date of the accident, the overwhelming medical evidence established that Petitioner was performing repetitive duties for the employer on the date and he bent over to pick up a bolt that he had dropped while performing those duties.

The facts established at hearing, through Petitioner's testimony, the testimony of the witnesses, the medical records, the medical opinions, and the other documents admitted into evidence, Petitioner had been working for years with a less than healthy spine. He had lost no significant time from work since the time he previously had trouble with his back in 2003. Petitioner testified that the problem with his back in 2003 came from the repetitive work that he had done for the respondent. On the date of the accident, Petitioner reported to his supervisor what had happened. He was sent to the employer's medical department where it was documented on that date that he was complaining of his low back pain that was radiating into his right hip and upper leg. Those documents indicate "twisting" and also "Ill/Rep. Mot.", which presumably means the "illness" relates to the "repetitive motion" related to the petitioner's position of employment. The subsequent medical records indicate, that in addition to the petitioner's repetitive duties, the petitioner more likely than not aggravated his preexisting degenerative disc disease when he bent over to retrieve a bolt that he had dropped on the assembly line.

The Arbitrator is not persuaded by the opinions of the Section 12 examiners for the respondent given the facts of the accident, the course of the treatment and the overall medical evidence introduced at hearing. The Arbitrator finds the opinions of the petitioner's treating and evaluating physicians more persuasive than those of Drs. Butler and Zelby. Likewise, the Arbitrator is not persuaded by a six minute video of an assembly line job that runs at least ten hours per day and which petitioner testified did not accurately depict the entirety of his duties on the assembly line, including those instances wherein he would have to bend down in order to pick up bolts from off the line.

The Arbitrator finds that the evidence, taken as a whole, supports his decision that the petitioner has established that an accident occurred that arose out of and in the course of his employment and that his current condition of ill being is related to the accident that occurred on May 21, 2009, including the need for the surgery that was performed on August 4, 2009.

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

The Arbitrator finds, based upon the evidence introduced at hearing, that the medical services provided to the petitioner for treatment of his back injury, as indicated in the medical records admitted into evidence and as delineated in petitioner's group exhibit (PX15), were reasonable and necessary to cure or relieve the petitioner from the condition caused by the work accident. The Arbitrator finds respondent liable for the medical bills related to the foregoing related treatment contained in petitioner's Exhibit 15 and supported by the corresponding medical records. Payment of the bills by the respondent is to be consistent with the provisions of Section 8.2 of the Workers' Compensation Act or the Workers' Compensation Commission Medical Fee Schedule.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds, based upon the evidence introduced at hearing, including the testimony of the petitioner, the medical records, and the testimony of Dr. Martin Luken and Dr. Michael Treister, that the petitioner did not return to work and was unable to return to work, except for two (2) days, March 1 and March 2, 2010,. Along these lines, Petitioner testified that he worked on March 1 and March 2, 2010 and then went off work again due to radiating pain as well as an inability to stand, twist or bend for very long.

Based on the above, and the record taken as a whole, the Arbitrator finds that the respondent is liable for temporary total disability benefits from May 23, 2009 through February 28, 2010 and from March 3, 2010 through November 29, 2010, for a period of 79-1/7 weeks.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As a result of the accident, Petitioner underwent surgery on August 4, 2009 consisting of a hemilaminotomy and discectomy at L4-L5 on the right, necessitated by a herniated disk at the level, and a "generous" hemilaminotomy and partial facetectomy at L5-S1 on the right, which was necessitated by annular bulging at the level. The Arbitrator also notes that both Dr. Martin Luken and Dr. Michael Treister have recommended further surgery, including fusion and arthrodesis. The Arbitrator further finds it noteworthy that the petitioner is no longer working in a recognized regular position of employment for the respondent and is now working within significant physical restrictions ordered by Dr. Luken and pursuant to the FCE that was done.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% person-as-a-whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that penalties and attorneys fees should not be imposed upon the respondent. Although the evidence admitted at hearing indicates that the respondent had sufficient information on the accident date regarding the details of the accident and the condition of the petitioner that would suggest benefits should have been provided pursuant to the Act, the respondent was entitled to rely on the opinions of its evaluating physicians to deny compensability. Therefore, penalties are not appropriate in this case and are therefore denied.

14IWCC0866

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD E. GRAY, JR.,

Petitioner,

vs. NO: 12 WC 28628

ADAM MUIR,

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 January 21, 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.

14IWCC0866

The party commencing the 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 7 2014
o9/23/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

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

GRAY JR, DONALD E
Employee/Petitioner

Case# **12WC028628**

14IWCC0866

ADAM MUIR
Employer/Respondent

On 1/21/2014, 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:

2888 LAW OFFICE KEITH SHORT PC
1801 N MAIN ST
SUITE 2500
EDWARDSVILLE, IL 62025

0180 EVANS & DIXON LLC
KIM M PARKS
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

14IWCC0866

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)

DONALD E. GRAY, Jr.,
Employee/Petitioner

v.

ADAM MUIR
Employer/Respondent

Case # **12** WC **028628**

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 **November 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. ☒ 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

14IWCC0866

FINDINGS

On the date of accident, **July 10, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$22,880.00**; the average weekly wage was **$440.00**.

On the date of accident, Petitioner was **41** years of age, **married** with **1** dependent child.

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

Respondent shall be given a credit of **$0** 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** in medical bills paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove he sustained an accident on July 10, 2012 that arose out of and in the course of his employment with Respondent or that his hernia was causally related to the alleged accident. Petitioner's claim for compensation is denied and 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

January 16, 2014
Date

ICArbDec19(b)

JAN 21 2014

DONALD E. GRAY, Jr.
V.
ADAM MUIR

14IWCC0866

12 WC 028628 (19(b))

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of arbitration the disputed issues were accident, causal connection; medical expenses; temporary total disability; and prospective medical care. Petitioner alleges he sustained a hernia as a result of a work-related accident on July 10, 2012[1]. Witnesses testifying at the hearing were Petitioner; Adam Muir; Ronald Arnold; and Charles "Pete" Robbins.

The Arbitrator finds:

Petitioner was examined at Litchfield Family Practice Center on September 8, 2011 for back pain stemming from a motor vehicle accident he was involved in while working. Petitioner reported that he had previously injured his back on two occasions as a result of falls. Petitioner's symptoms included low back pain and stiffness which radiated to his right thigh and hip. Petitioner reported that he had been taken off Vicodin by a previous physician and was no longer taking anything for his back pain. He had continued working. Petitioner was also noted to be having some problems with anxiety stemming from his wife's death and his beating of a man until he was unrecognizable. Petitioner was given medication and told to follow up in three to four weeks. (PX 2, pp. 29-30)

Petitioner again sought medical care at Litchfield Family Practice on October 24, 2011 for back pain he attributed to a work injury approximately one week earlier when he was roofing shingles and fell on his neck and mid-back. Petitioner's symptoms included right shoulder and neck pain along with dizziness when turning his head. Petitioner was also noted to be having some problems with anxiety. Dr. Cochran's impression was chronic back pain from multiple injuries and he noted that working as a roofer wasn't helping Petitioner's back. Pain medication was provided and an x-ray was ordered. (PX 2, p. 26)

On May 4, 2012 Petitioner presented to Litchfield Family Practice Center for right wrist complaints which reportedly occurred after a fight twelve months earlier. Petitioner reported he had undergone a direct impact to his wrist and his current complaints included pain and numbness. Petitioner's examination revealed multiple wrist injuries including a boxer's fracture. A recent x-ray showed an old and poorly healed chip fracture. Petitioner was told he could undergo a referral to an orthopedist but he wished to wait on that. (PX 2, p. 22)

Petitioner was next seen at Litchfield Family Practice Center on May 24, 2012 due to complaints of rectal bleeding, abdominal pain, dizziness, nausea and vomiting. Dr. Cochran recommended a colonoscopy which was scheduled for June 15, 2012. (PX 2, pp.19 – 21) Petitioner failed to show up for the procedure. (PX 2, p. 19) Petitioner underwent a lumbar spine x-ray on June 14, 2012 due to low back pain and stiffness, especially in his right hip region. X-rays showed a moderate-sized right parasagittal disc herniation at L5-S1 and a mild broad-based disc bulge at L4-5 with associated minimal retrolisthesis. (PX 2, p. 49)

[1] Petitioner began the hearing claiming an accident date of 7/11/12 and later amended the alleged accident date to 7/10/12.

Office records from Litchfield Family Practice indicate that arrangements were being made for Petitioner to be seen by an orthopedist at the Bayliss medical building in Springfield on July 31, 2012 for a right wrist strain. (PX 2, p. 43)

On July 12, 2012 Petitioner presented to Litchfield Family Practice at 6:48 p.m. where he was examined by Jamie Otrembiak, a nurse practitioner. Petitioner presented with an inguinal hernia on the right side. Petitioner described a sharp and aching pain which had begun three days earlier. On examination no palpable abdominal masses were noted but Petitioner was tender in the right lower quadrant. It was noted a hernia check was difficult to ascertain. Petitioner was restarted on Tramadol and Zantac and was told to follow-up tomorrow or as needed. A note was made – "Per patient, injury occurred on the job. Will call employer in the morning to learn what he needs to do." (PX 2, p. 17[2])

Petitioner presented to Litchfield Family Practice on July 13, 2012 complaining of wrist pain after a fight twelve months earlier. He was examined by Janis Collins, a nurse practitioner. Petitioner, who was noted to be ambidextrous, suffered the injury twelve months earlier and was experiencing burning, stinging, and throbbing pain along with numbness and weakness in his hand. Petitioner felt like he was losing his grip and especially noticed symptoms when engaged in a turning motion. Petitioner had undergone x-rays in April and had recently been seen by Dr. Cochran. Petitioner "remotely" saw Dr. Beyer who accused him of being a drug seeker. The office notes further indicate that, on Tuesday, Petitioner was working as a roofer and picked up a bundle of shingles and noticed right wrist pain and finger numbness. Petitioner had taken some of the Tramadol he had received the night before for his hernia but it did not help. Petitioner was given prednisone and a referral to an orthopedist for a second opinion. (PX 2, p. 15)

Petitioner was next examined at Litchfield Family Practice on July 18, 2012 for wrist pain which had occurred following a fight. The history contained in the office note mirrored that of the July 13, 2012 visit. However, Dr. Cochran also noted that Petitioner had an additional complaint regarding his abdomen, more specifically abdominal pain, swelling, nausea, vomiting, and diarrhea in the right lower quadrant. Petitioner described the pain as throbbing and stated it had begun a week earlier. Petitioner stated he had been diagnosed with an "inguinal hernia in Primetime.[3]" He was also experiencing pain radiating down his right leg. Petitioner also reported to the doctor that he was carrying shingles and felt the pain start. Petitioner was diagnosed with a very tender right-sided inguinal hernia, was given pain medication, and referred to a surgeon. (PX 2, pp. 13-14)

According to a July 18, 2012 note signed by Dr. Cochran and addressed "To who [sic] it may concern," Petitioner had been seen in his office that day for a hernia and Petitioner had been advised by the doctor to limit his lifting to ten pounds until cleared by surgery. (PX 2)

Office records from Litchfield Family Practice indicate that arrangements were being made on July 18 and 19, 2012 to send Petitioner to Dr. Billiter as soon as possible because of a right inguinal hernia that was tender to touch. (PX 2, p. 41)

Petitioner telephoned Litchfield Family Practice Center on July 19, 2012 with workers' compensation information. (PX 4, p. 1)

Petitioner next presented to Litchfield Family Practice on August 6, 2012 complaining of symptoms suggestive of depression and exacerbated by job stressors. Petitioner's symptoms included racing thoughts, employment

[2] The Arbitrator notes that the markings found on page 17 of PX 2 were not made by her.

[3] The Arbitrator believes "Primetime" refers to an after-hours type of clinic at Litchfield Family Practice. See also PX4 billing details.

difficulties, and financial difficulties. Petitioner also had some symptoms of burning and itching in the genital region which were characterized as a skin rash which had reportedly begun two weeks earlier. When examined by Dr. Cochran, the doctor noted Petitioner's anxiety seemed to primarily be stemming from financial problems. "He has a hernia that hasn't been able to get that taken care of due to work comp being held up." (PX 2, pg. 11)

On August 10, 2012 Petitioner signed his Application for Adjustment of Claim alleging a hernia injury due to a July 11, 2012 accident. (AX 2)

Petitioner presented to Dr. Cochran's office on October 18, 2012 where he was seen by a nurse, Kayla Karner. Petitioner was noted to have what appeared to be an inguinal hernia on the right side; however, Petitioner was so tender on that side it was hard to evaluate it. No swelling or erythema was noted. He was give pain medication and referred to Dr. Billiter. In the interim Petitioner was advised to refrain from lifting over ten pounds. (PX 2)

Petitioner presented to his doctor's office on October 22, 2012 complaining of right hand pain of four weeks' duration. (PX 2)

Petitioner was examined by Dr. Blaser on December 5, 2012 in regard to his right groin pain. Petitioner reported he had been told he had a right inguinal hernia and had been off work since July when the hernia occurred. Petitioner reported ongoing pain and tenderness and an occasional bulge. Dr. Blaser's examination was consistent with a reduced right inguinal hernia. Petitioner wished to proceed with a laparoscopic inguinal hernia repair. (PX 1)

Petitioner has had no further treatment since December 5, 2012.

At the arbitration hearing Petitioner testified that he was employed by Respondent as a ground laborer. Petitioner had worked for Respondent approximately four years. During July of 2012 Petitioner, and others, were working on a roofing job in Quincy, Illinois. The job was to take about three days. It began on July 7th. The ground-man would prepare the area around the house; lay tarps where needed, pick up roof shingles and place them in trash cans and would carry and stack bundles of shingles. The bundles often weighed 60 or more lbs.

On direct examination Petitioner testified that he experienced a pulled muscle sensation in his groin on July 11, 2012, while working. Petitioner testified that it rained on the 11th and he got wet. As a result, he experienced a rash between his legs. While carrying a bundle of shingles and pushing them up the roof he felt a "pulled muscle feeling" in his right upper thigh and into his groin. He also scraped his shoulder while loading some barrels. Petitioner testified that he told a co-worker, Ron, about it and Ron gave him some Vicodin. Petitioner testified that as the day progressed it got harder and he felt a sharp pain.

Petitioner further testified that he mentioned the rash to his co-workers/roommates that evening and one of them went to a local pharmacy and purchased some cream. Petitioner then retired for the evening.

According to Petitioner he used the cream the next morning, took three aspirin, and went to work. At the job site, Petitioner told "Pete" he didn't feel good and was hurting a little. Petitioner worked loading trucks and when the day was over, he went home and took a shower and noticed a knot in his right groin area. Petitioner tried to call Mr. Muir. Petitioner was unable to reach Mr. Muir by phone and "eventually" texted him. Petitioner went to the doctor (Dr. Cochran) on July 11th. Petitioner testified that he told the doctor how he had injured himself at work. Petitioner further testified that he was referred to Dr. Billington and then Dr. Blaser.

According to Petitioner he has been diagnosed with a hernia, given work restrictions on July 18th which could not be accommodated by Respondent, and has been told he should undergo surgery.

Petitioner testified that after the Quincy job was over he returned home. On Friday, Mr. Muir came by his house and picked up the work truck. The following Sunday, Mr. Muir spoke with him and "cussed [him] like a sailor." Petitioner denied any problems with his abdomen prior to July 11, 2012.

On cross-examination, Petitioner testified that the injury occurred on the second day of the job which was a Tuesday. They began working on Monday and returned to Gillespie on Thursday. If Tuesday was July 10th, the accident occurred that day. Thereafter, he spent two more nights in a hotel and two days working with Ron and Pete. Petitioner testified that he said he was in pain but acknowledged he didn't say anything about where the pain was located. He thought he had pulled a muscle. Petitioner also acknowledged that his hand is always in pain as it has been broken four times.

On further cross-examination Petitioner testified that within an hour of getting home he went to the doctor. He went to an after-hours clinic and told the doctor he had gotten home from work, taken a shower, and noticed a knot in his right groin area. He told the doctor he thought he had done it at work. He denied ever calling the doctor's office and leaving a message about a hernia. Petitioner further explained that he saw a female doctor and she was more concerned about his wrist (which was a mess). As Petitioner described it, "it was an ornament on [his] hand."

Petitioner acknowledged that he had experienced prior workers' compensation claims and knew that once he was injured he should report it. Petitioner testified that he sent a text indicating he had a hernia and Mr. Muir would need to get the truck. Petitioner also testified that he spoke to Mr. Muir about the hernia the following Sunday after coming back from North Carolina. According to Petitioner, he saw Dr. Cochran the next day (Monday) and the doctor confirmed that he had a hernia as suspected by the "lady in the clinic."
Petitioner also testified that he drove one of three work trucks back from Quincy and that he felt like he had a pulled muscle. However, he denied knowing it was a hernia at that time. Petitioner also testified that they stopped outside of Carlinville at a gas station and he bought some Tylenol for his rash. According to Petitioner he was having a difficult time walking by then due to the rash and the abdominal soreness.

At the conclusion of Petitioner's testimony, the Arbitrator was asked to take judicial notice that July 10, 2012 was a Tuesday. Thereafter, Petitioner amended his Application for Adjustment of Claim to allege an accident date of July 10, 2012.

Petitioner also testified that he is the step-father to Adam Muir's children.

Petitioner also testified that he has always been a manual laborer or a member of the military. He has been unable to locate work given his limited skill set and 10 lb lifting restriction. Respondent did not offer light duty work nor offer to pay Petitioner temporary total disability (TTD) benefits.

Respondent's owner, Adam Muir, testified that Petitioner sent him a text but admitted on cross- examination that he did not read all of the text. He admitted Petitioner's text sent Thursday evening might have contained Petitioner's accident history. He also later admitted he learned of Petitioner's injury during a cell phone conversation the weekend after the accident. Respondent stated he was not present at the job site and had no information how or if Petitioner was injured. He added that he interviewed the other employees but that they did not mention hearing Petitioner complain or see him act as though he was in pain.

Ron Arnold testified on behalf of Respondent. Mr. Arnold is a current employee of Respondent and worked on the Quincy roofing job with Petitioner. Mr. Arnold worked on the roof. He acknowledged that it did rain and that Petitioner was complaining of a rash. He did not hear Petitioner complain of hurting himself when he was lifting bundles of shingles. He saw Petitioner working Monday and noted that he was able to do his full, unrestricted work, including lifting, without restriction. Arnold did not recall hearing Petitioner mention injuring himself on Tuesday. Mr. Arnold agreed that most of the work Petitioner did on Tuesday and Wednesday was light demand level work. On Wednesday he saw Petitioner sitting down and tearing off shingles and then doing light clean up. He stated that he did not hear Petitioner mention a hernia on Tuesday or Wednesday. According to Mr. Arnold, Petitioner never appeared to be in any pain and Petitioner seemed fine when they were driving back home and stopped at the gas station as Petitioner ran to the driver's seat and was "horsing" around.

Charles "Pete" Robbins also testified for Respondent. Mr. Robbins remembered Petitioner having a rash, but no other complaints. Mr. Robbins did not think it rained during the Quincy job. He did recall that the job was three days long and that they returned home on a Thursday. He did not think Petitioner ever mentioned pulling a muscle while carrying shingles. Mr. Robbins testified that Petitioner never mentioned any abdominal/groin complaints. Mr. Robbins also testified numerous times that the events were a long time ago and that he really could not recall what happened. On cross-examination he acknowledged that he has been arrested a few times for alcohol-related matters.

The Arbitrator concludes:

Issue "C" (Did an accident occur on July 10, 2012 that arose out of and in the course of Petitioner's employment with Respondent?)

Petitioner failed to prove he sustained an accident on July 10, 2012 that arose out of and in the course of his employment with Respondent. The central issue is one of credibility. Petitioner was not altogether a credible witness either and it is Petitioner's burden of proof on the issue of accident. The Arbitrator simply does not find Petitioner's testimony that he sustained a hernia on July 10, 2012 while working in Quincy to be credible.

In concluding that Petitioner was not a credible witness the Arbitrator notes Petitioner's testimony was very confusing and contradictory. Second, there were inconsistencies in Petitioner's testimony. To begin with, Petitioner denied any abdominal problems prior to July 11, 2012. However, his own medical records clearly indicate that he sought medical attention on May 24, 2012, for abdominal pain and that a colonoscopy was recommended but Petitioner failed to appear for the procedure. Furthermore, Petitioner's presenting complaints on July 18, 2012 are almost identical to those of the May 24, 2012 visit. Third, Petitioner's testimony concerning the date of the accident was contradictory. On direct examination, Petitioner testified that it occurred on July 11, 2012. On cross-examination he testified that it occurred on a Tuesday and that if "Tuesday" was July 10, 2012 then the accident occurred on the 10th. However, according to the office note of July 12, 2012, Petitioner reported his injury occurred three days earlier. That would have been July 9, 2012. While it appears Petitioner does have a hernia, he has failed to prove by a preponderance of the credible evidence that the hernia resulted from an accident on July 10, 2012. While Petitioner testified that he worked in pain and mentioned he was experiencing pain to his co-workers while on the job in Quincy, Petitioner acknowledged that he was suffering from pain due to other medical conditions – ie., his hand. Thus, while Petitioner may have worked at a lighter level on the remaining days of the Quincy job or may have told his co-workers he was in pain, either his work capacity or pain could have been attributable to hand and/or back pain, both of which Petitioner suffered from (PX 1). Even Petitioner acknowledged he never told anyone on the Quincy job where his alleged pain was coming from.

While Petitioner's medical records may indicate Petitioner believed he had injured himself on the Quincy job and while Petitioner may have texted his employer that he had a hernia, those facts do not mean Petitioner did, in fact, sustain an accident on July 10, 2012 while roofing in Quincy. The validity of those histories rests on Petitioner's credibility which, as indicated above, is lacking in this instance.

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

Although the Arbitrator has concluded that Petitioner failed to prove he sustained an accident on July 10, 2012 arising out of and in the course of his employment she further concludes that Petitioner has failed to prove any condition with which he was diagnosed is causally related to his work activities. In so concluding the Arbitrator notes the absence of an expert opinion establishing a causal connection between Petitioner's condition and his work activities for Respondent.

The initial medical record from July 12, 2012 indicates Petitioner's physical examination revealed no palpable abdominal masses and tenderness in the right lower quadrant. No inguinal hernia was noted and the hernia check was reported to be difficult to ascertain if, in fact, he had a hernia. Petitioner was simply told to follow-up the next day or as needed. Petitioner was seen again on July 13, 2012, but that note is for wrist and hand pain. There was no physical examination regarding an alleged hernia. (PX 2)

On July 18, 2012, Petitioner was again seen for complaints primarily associated with wrist pain. There is, however, an additional complaint listed as an abdominal mass. Petitioner's symptoms included abdominal pain, abdominal swelling, nausea, vomiting and diarrhea. The pain was located in the right lower quadrant. The patient described the pain as throbbing. The onset was one week earlier and Petitioner described it as severe and unchanged. He also complained of chills, cold sweats and dysuria. The records indicate: "Note for Abdominal Mass: Pt stated that he was diagnosed with inguinal hernia in Primetime. Pt states that pain radiates down his right leg." (PX 2) Petitioner's physical examination revealed a non-tender abdomen and no palpable abdominal masses. There was also a note indicating right-sided inguinal hernia, very tender in the office today. The impression was that Petitioner appeared to have an inguinal hernia on the right but was so tender it was hard to evaluate. Will ask for surgery to see him. Does not seem to have an incarcerated tissue at this time. No swelling and erythemia were noted today. The note indicates will give some pain medication and get him in touch with Dr. Billiter. He was told to go to the ER if sharp pain that did not reduce when laying down. The last line of the impression indicates "In the meantime, no lifting greater than 10 pounds until seen by surgery." Neither provider at Litchfield Family Practice Center stated, within a reasonable degree of medical certainty, that Petitioner had a hernia or that Petitioner's condition was causally related to Petitioner's employment. (PX 2)

The only other medical record submitted by the Petitioner is Petitioner's Exhibit 1, the December 5, 2012 office note of Dr. Blaser. That note contains no history of a work accident on July 10, 2012 or description of how Petitioner's hernia occurred. Dr. Blaser provided no opinion regarding whether or not the findings noted in his report were medically causally related to any alleged work accident. (PX 1)

Finally, the Arbitrator notes the May 24, 2012 visit at Litchfield Family Practice Center at which time Petitioner presented with complaints associated with rectal bleeding and abdominal pain, dizziness, nausea and vomiting. These are the same symptoms Petitioner was complaining of in July of 2012. (PX 2)

Petitioner's claim for compensation is denied. All other issues are moot. No benefits are awarded.

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

JAMES CASTELLI,

Petitioner,

14IWCC0867

vs.

NO: 07 WC 3082

VILLAGE OF CASEYVILLE,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2014, is hereby affirmed and adopted.

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

14IWCC0867

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

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

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

DATED: OCT 0 7 2014
o9/24/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

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

CASTELLI, JAMES
Employee/Petitioner

Case# **07WC003082**

14IWCC0367

VILLAGE OF CASEYVILLE
Employer/Respondent

On 2/14/2014, 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 0.11% 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:

2412 BEATTY MOTIL & FOSTER
WILLIAM BEATTY
PO BOX 730
GLEN CARBON, IL 62034

0180 EVANS & DIXON LLC
JAMES M GALLEN
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

CORRECTED

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JAMES CASTELLI
Employee/Petitioner

v.

VILLAGE OF CASEYVILLE
Employer/Respondent

Case # 07 WC 03082

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **November 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. [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 _____

14IWCC0867

FINDINGS

On the date of accident, **12/19/06**, 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 **$28,123.00**; the average weekly wage was **$827.16**.

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 **$160,155.01** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of **$160,155.01**.

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 $551.44/week for 360 2/7 weeks, commencing 12/19/06 through 11/13/13, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $160,155.01 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $23,374.00 to Dr. David Kennedy, $10,517.00 to Dr. David Raskas, $30,243.00 to Frontenac Surgery Center, $1,615.00 to Metro East Anesthesia, $2,159.00 to Missouri Baptist Medical Center. $1,150.00 to Dr. Khaja Mohsin, $465.00 to Dr. Jason Strotheide, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay for prospective medical care, a cervical myelogram, and for charges related thereto pursuant to medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

2.7.14
Date

ICArbDec19(b)

FEB 14 2014

FINDINGS OF FACT

The Petitioner, James Castelli, sustained accidental injury arising out of and while in the course and scope of his employment with the Respondent, Village of Caseyville.

Since the Petitioner's accident, he has not returned to work. Testimony was presented by way of depositions from Dr. Kennedy, Dr. Mohsin and Dr. Chabot. Dr. Kennedy is the treating physician, and Dr. Chabot conducted three Section 12 exams of the Petitioner. Dr. Mohsin is the Petitioner's primary care physician. Both Dr. Kennedy and Dr. Chabot agree that the Petitioner is unable to perform his regular duties with the Respondent. Dr. Kennedy attributes this limitation to the injuries sustained by the Petitioner while employed by the Respondent. Dr. Chabot testified in his depositions of January 7, 2011 and November 9, 2012 that these limitations are the result of both the injuries that he relates to the Petitioner's accident and multiple co-morbidities. The Petitioner has filed this 19(b) petition seeking additional medical care and treatment, TTD and payment of medical bills. Dr. David Kennedy has testified that additional treatment is reasonable and necessary to treat the Petitioner's injuries; Dr. Chabot is of the opinion that the Petitioner has reached maximum medical improvement and is not in need of any further treatment.

On December 19, 2006, the Petitioner was performing his usual duties in the Respondent's street department. Previously, a severe ice storm had hit the area, knocking down trees and limbs. The Petitioner and his co-workers had been cleaning up storm damage by sawing up downed trees and running the logs through a wood chipper. They had been performing this cleanup for much of the year as this was the second severe storm to hit the area.

The wood chipper would accept logs up to 24 inches in size, and at the time of his injury, the Petitioner and a co-worker, Dustin Mosby, lifted a large log into the chipper. While performing this task, the Petitioner felt a surge or snap with an electric or shock-type sensation in his neck. He heard what he described as a "snap" in his neck, on the left side right below his hairline. The Petitioner completed his shift on the 19th and when he awoke on December 20th, he had severe pain and trouble taking a deep breath. He reported the accident to his employer on December 20th and requested medical attention. The employer directed him to the Midwest Occupational Medicine Clinic in Belleville, Illinois. Dr. Brian Ruiz saw the Petitioner on the 20th, and his note indicated that the Petitioner described a pop in his upper mid-back while cleaning up limbs following an ice storm. Dr. Ruiz reported spasm at the T5-6 level on the left and diagnosed musculo skeletal sprain, upper thoracic back, prescribing physical therapy and medication.

The Petitioner returned to Midwest Occupational Medicine on December 29th. Dr. Ruiz again noted spasm in the left side of the thoracic spine. He changed the Petitioner's pain medications and indicated that he was going to try to get authorization for an additional two weeks of physical therapy. He also prescribed a muscle relaxer at

that visit. Dr. Ruiz did not note or describe any examination of the Petitioner's cervical spine either on December 20th or December 29th.

The Petitioner next saw Dr. E.L. Strotheide, a chiropractic physician in Granite City, on January 8, 2007. The history taken by Dr. Stroteheide indicated that the Petitioner was lifting tree limbs into a wood chipper and felt a pop. Dr. Strotheide's exam noted muscle spasm in the cervical spine and trapezius and thoracic paraspinal regions. The Petitioner returned to Dr. Strotheide on January 10th and 11th, and received physical therapy and manipulations of the cervical and thoracic regions.

On January 15, 2007, the Petitioner sought treatment from his primary care physician, Dr. Khaja Mohsin. The Petitioner had previously seen Dr. Mohsin on October 27, 2006 for low-back pain and November 20, 2006 complaining of pain on the left side of his neck, the shoulder and low back. Dr. Mohsin testified that the Petitioner did not relate a history of injury to him at the visit on November 20, 2006.

Dr. Mohsin testified that on January 15, 2007, the Petitioner gave a history of lifting tree logs and hearing a popping sound in the upper back and neck area, with pain and a tingling sensation in both his arms and legs. The Petitioner dated this occurrence to December 20, 2006; Dr. Mohsin testified that the Petitioner is a poor historian and probably meant November 20, 2006. On examination, Dr. Mohsin noted tenderness in the cervical and upper back areas. He gave the Petitioner a pain shot and prescribed pain medications and muscle relaxers. He also ordered an MRI of the thoracic spine. This study indicated bulging discs at T3, T4, T5, and T6. At a return visit on February 5, 2007, Dr. Mohsin changed the Petitioner's pain medication and referred him to a neurosurgeon, Dr. David Kennedy.

In the interim, the Petitioner returned to the Midwest Occupational Medicine Clinic on January 19, 2007. Dr. Ruiz noted that the Petitioner apparently strained his upper back. His notes indicated that the Petitioner had no interest in receiving treatment at the MOM's Clinic. The progress note for that date indicated a diagnosis of back pain, with the patient electing to see his own physician. Dr. Ruiz's assessment stated that the Petitioner was a non-compliant patient who has chosen to take a different path. The Petitioner testified that at his initial visit on December 20th, Dr. Ruiz did not conduct an examination of him and that the therapy prescribed by Dr. Ruiz increased his pain.

The Petitioner saw Dr. Kennedy on March 1, 2007. Dr. Kennedy testified that the Petitioner related a history of injury on December 19, 2006. The Petitioner described a pain in the base of his cervical spine and intrascapular area which occurred while picking up heavy tree limbs and placing them in a wood chipper. Dr. Kennedy testified that the Petitioner described pain radiating from the base of the cervical spine on the left side into the intrascapular area and occasionally into the arm and hand. Dr. Kennedy's exam noted a loss of cervical range of motion in all planes, with scattered sensory loss in both hands. Tinel's sign partially reproduced his symptoms.

After a review of the thoracic MRI ordered by Dr. Mohsin, Dr. Kennedy noted slight bulges at T2, T3 and T4. He concluded that these findings were not the source of the Petitioner's symptoms and ordered a cervical MRI with an EMG study. Both of these tests were performed on March 8, 2007. The cervical MRI demonstrated a fairly marked cervical spondylosis at C5-6, with bilateral foraminal encroachment consistent with neuro irritation. The EMG demonstrated findings combatable with bilateral carpal tunnel, as well as a possible cubital tunnel on the left.

At the Petitioner's next visit with Dr. Kennedy on April 18, 2007, he noted that the Petitioner's symptoms had not improved and that he was compensating for his pain with a posture of rotation and tilting of the trunk. Dr. Kennedy felt that the spondylosis with bilateral nerve root encroachment was causing the neck and intrascapular pain and recommended surgical intervention. He also recommended a referral to Dr. Ollinger for assessment of his carpal tunnel condition.

The Petitioner returned to Dr. Kennedy on July 17, 2007 and still had not received an opinion regarding his carpal tunnel. The Petitioner continued to have a significant amount of pain at the base of the cervical spine radiating into the left arm. Dr. Kennedy recommended surgical intervention. The Petitioner followed up with Dr. Kennedy on August 22nd, October 3rd and November 14th. His symptoms were unchanged. Surgery was scheduled for December 19, 2007. On that date, Dr. Kennedy, assisted by Dr. Raskas, performed a C5-6 partial vertebrectomy and a microdiscectomy, decompressing the C5-6 nerve root, and installing a spacer and plating hardware to fuse C5-6.

The Petitioner saw Dr. Kennedy post-operatively and initially improved. On January 2, 2008, the first post-op visit, the Petitioner noted that his pain had improved. He returned to Dr. Kennedy for additional post-operative visits on February 19th, April 8th, May 20th, June 24th, August 5th, September 16th and October 29th of 2008. Dr. Kennedy recommended that the Petitioner undergo physical therapy at the visit of February 19th. He again recommended that the Petitioner commence therapy on May 20th, with a third recommendation at the visit of June 24th. At the August 5th visit, Dr. Kennedy noted that the Petitioner needed therapy before he could return to labor. The therapy was never approved by the Petitioner's employer. Dr. Kennedy also recommended injections; those were denied. Dr. Kennedy testified that the Petitioner's recovery was stalled by the lack of physical therapy and the ability to get the recommended treatment. The Petitioner testified that initially, following the surgery, he felt better. The swelling in his neck went down for quite some time, about 6 months. As he began to increase his activities, his pain began to increase. At the visit of October 29th, Dr. Kennedy recommended a repeat EMG test. This test was not authorized and not performed. It was Dr. Kennedy's opinion that the accident of December 19, 2006 aggravated the Petitioner's pre-existing spondylosis causing significant symptoms, and that the surgery of C5-6 was necessary to treat this condition.

The Petitioner returned to Dr. Kennedy on August 19, 2010. Dr. Kennedy noted that the Petitioner had pain at the base of the cervical spine, along the scapular border,

left greater than right. There was some intermittent radiating arm pain. Dr. Kennedy recommended a cervical myelogram for evaluation of the structural condition of the Petitioner's cervical spine. Depending on the results of this test, Dr. Kennedy would consider a pain management evaluation, with possible trigger point injections or rhizolysis. He testified that it was conceivable that depending on the results of the cervical myelogram, there may be a surgical option. The Respondent has not authorized the myelogram.

Dr. Michael Chabot, an orthopedic surgeon, examined the Petitioner on behalf of the Respondent on October 26, 2009, October 20, 2010 and April 20, 2012. In addition, he prepared a letter, dated January 3, 2011, summarizing his review of additional medical records. At the first exam on October 26, 2009, Dr. Chabot noted that the Petitioner walked in a flexed position about the waist and knees, with a slight kyphosis of the thoracic spine. He described his cervical range of motion as reduced to some degree. The healed surgical scar on his neck was not tender to touch, and there was no tenderness to palpation of the cervical spine. Dr. Chabot interpreted the March 18, 2007 cervical MRI as demonstrating disc desiccation and degeneration at C5-6 greater than C6-7, with joint hypertrophy and foraminal narrowing, worse at C5-6. He also reviewed the February 2, 2007 thoracic MRI and felt that it revealed minimal disc bulging with no evidence of herniation or neuro compression.

On the IME quick report that Dr. Chabot authored following his visit of October 26th, Dr. Chabot diagnosed chronic neck pain. Dr. Chabot explained that this was his impression following his exam, before reading the medical records. After reviewing records, Dr. Chabot diagnosed the Petitioner as having chronic neck and thoracic back pain, anxiety disorder and status post anterial cervical discectomy at C5-6. Dr. Chabot also reviewed the EMG and concluded that it revealed evidence of bilateral carpal tunnel disease, and left ulnar nerve neuropathy.

Dr. Chabot later opined that the Petitioner had chronic thoracic pain as a result of the December 19, 2006 accident. He restricted the Petitioner to limited duties, no lifting greater than 35 pounds and limited overhead lifting. He disagreed with Dr. Kennedy's opinion that the injury of December 19th aggravated his cervical spine conditions. Dr. Chabot testified that the cervical intervention at C5-6 was not warranted or related to the Petitioner's work injury since the clear origin of his complaints were not established and the Petitioner's examination by Dr. Ruiz indicated a soft-tissue injury and not a disc injury. He also believed that the surgery was not warranted because the Petitioner had multiple-level disease. He testified that there was no clear documentation that the Petitioner developed active radiculopathy or aggravated his degenerative disease as a result of the accident. Dr. Chabot testified that while Dr. Strotheide did note cervical abnormalities, including cervical spasm, they were soft-tissue findings at the base of the neck and upper thoracic region, which indicated a strain to the muscular tissue. The complaints of radiating pain were not documented by the first 2 treating physicians and Dr. Kennedy's exam failed to reveal any neurologic deficit.

Following this second Section 12 exam on October 20, 2010, Dr. Chabot noted that the Petitioner was taking 2 Norco pills per day, with persistent pain. Dr. Chabot also testified that records from St. Louis University Hospital indicated a suggested loss of cognition and ataxia as a result of an attack of the Petitioner at the White Castle Restaurant in January of 2010. This caused an occipital skull fracture, with a subdural bleed. His examination indicated mild ataxia, decreased cervical range of motion similar to that described in the previous exam. He noted no tenderness to palpation or muscle spasm in the thoracic spine. In his second report, Dr. Chabot also critiqued Dr. Kennedy's deposition and testified that the absence of neurological deficits could be a contra-indication for surgery.

Dr. Chabot testified that the injury resulting from the accident involved the base of the neck and upper thoracic at the cervical thoracic junction (C7-T1). He also testified that there is some overlap in the symptoms of carpal tunnel and a C6 nerve root impingement. He again recommended that the Petitioner's activities be limited to lifting 35 to 40 pounds. Previously, in 2009 he had indicated a 35-pound restriction. He testified that this restriction is based upon the Petitioner's age, his multiple prior accidents, the significant accident involving the pelvis, and the degeneration of the cervical spine at multiple levels. He also testified that performing overhead activity may aggravate the Petitioner's degenerative cervical disc disease.

Dr. Chabot conducted a third Section 12 exam on April 20, 2012, following the initial 19(b) proceeding which was held on January 21, 2011. He again referenced the Petitioner's injuries sustained in January of 2010, which occurred when the Petitioner was attacked at a White Castle Restaurant, sustaining a closed head injury and a fracture of the occiput. In his second deposition, Dr. Chabot testified that his opinions were essentially unchanged. Dr. Chabot noted that the cervical range of motion was decreased when compared with the second Section 12 examination of October of 2010. Dr. Chabot attributed this decrease to the injuries which occurred in January of 2010 at the White Castle Restaurant. Dr. Chabot testified that the job restrictions which he placed on the Petitioner are the result of the Petitioner's co-morbidities, including degenerative cervical disc disease, prior closed head injury and fracture of the occiput, plus a multitude of other injuries dating back 20 to 30 years. Dr. Chabot did not specify the exact nature of the injuries dating back 20 to 30 years, but records indicate that they involved injuries to the lower extremities (Respondent's Exhibit 3).

Dr. Chabot's reports gave no indication that his work restrictions were the result of any condition other than that which he related to the Petitioner's accident, thoracic strain. Dr. Chabot testified that he failed to advise the employer or the insurance carrier that his work restrictions were limited to any particular condition, or that those restrictions were not based upon his diagnosis of thoracic strain/sprain. Dr. Chabot's opinion that the work restrictions were unrelated to the thoracic strain was first expressed in his deposition of January 7, 2011.

Prior to the accident of December 19, 2006, the Petitioner had no restrictions and was regularly performing heavy labor. He had worked for the Respondent since 1999. In his 7 years of employment, he missed approximately 5 days of work.

CONCLUSIONS

Causal Connection

The Arbitrator concludes that the Petitioner's injuries of December 19, 2006 caused an aggravation of the Petitioner's pre-existing condition of spondylosis at C5-6. Two physicians offered opinion testimony as to the causal relationship between the Petitioner's accident and the aggravation of the C5-6 spondylosis. Dr. Chabot, who did not examine the Petitioner until more than twenty-two months after Dr. Kennedy's surgery, relied solely on treatment records of the Midwest Occupational Medicine Clinic (Dr. Ruiz) and to a lesser extent, Dr. Strotheide. He opined that since neither record contained a notation of a C5-6 radiculopathy, the Petitioner did not aggravate the pre-existing degenerative condition at that level. On his IME quick report, however, which was prepared for the employer, he indicated a diagnosis of chronic neck pain. His report of October 26, 2009, added the condition of chronic thoracic pain.

The treating physician, Dr. Kennedy, testified that the Petitioner complained of radiating pain at the first visit in March of 2007. The Petitioner testified that he felt a shocking or electric pain following his injury. In reaching his opinions, Dr. Chabot did not consider these complaints. Dr. Kennedy's opinion, that the accident aggravated the pre-existing C5-6 spondylosis, is based upon a course of treatment which extended over 9 months, multiple visits and examinations conducted of the Petitioner, and review of objective testing which demonstrated an abnormality at C5-6.

Dr. Kennedy believes that the accident caused an aggravation of the C5-6 spondylosis. Dr. Chabot believes that the accident caused a chronic C7-T1 sprain, the cervical thoracic junction. There is also an MRI scan which demonstrates abnormalities in the cervical spine, including C5-6, and both Dr. Kennedy and Dr. Chabot agree that the C5-6 changes are the most severe, and both agree that there is foraminal encroachment or nerve root compression at this level. Dr. Chabot agrees that the nerve root encroachment is greater on the left. The radiologist who interpreted the MRI film diagnosed an extradural defect to the left. The Petitioner's complaints have been consistently focused on the left side. Dr. Kennedy felt there was bilateral encroachment at C5-6. Both doctors agree that the Petitioner has carpal tunnel and that there is some overlap in the symptoms of carpal tunnel and a C6 nerve root irritation or compression. Finally, both doctors agree that the Petitioner is unable to perform his duties with the Respondent.

Dr. Kennedy saw and treated the Petitioner for a period of 9 months prior to performing surgery. His complaints document radiating pain to the left side. Dr. Ruiz' notes do not make any mention of the cervical spine, nor do they reflect a cervical examination. Dr. Strotheide found muscle spasm in the cervical spine.

Dr. Chabot first chose to limit the Petitioner's work restrictions to conditions other than his chronic thoracic strain when testifying in his first deposition on January 7, 2011. His reports do not contain any such opinion, and in fact suggest the converse. Dr. Chabot acknowledges that his reports failed to advise the employer/insurer that the work restrictions were in fact based upon "unrelated" conditions, and important piece of information for a Section 12 exam.

The Petitioner has worked for the Respondent since 1999 without restriction or limitation. He was first restricted from his job in the Respondent's street department following his accident of December 19, 2006. Although those restrictions are permanent, the employer has chosen not to offer restricted duty or vocational services.

For the above reasons, the Arbitrator concludes that Dr. Kennedy's opinion as to the issue of causation is entitled to greater weight than that of Dr. Chabot.

Reasonable and Necessary Medical/Surgical Care

The Arbitrator concludes that the surgery performed by Dr. Kennedy was reasonable and necessary to cure and relieve the Petitioner from the aggravation of the C5-6 spondylosis. Dr. Kennedy testified that it was his opinion that the surgery was appropriate, considering his pre-surgical findings and treatment of the Petitioner. The Petitioner's complaints of radiating pain and the findings of significant nerve root impingement on MRI (which is undisputed) support his decision to perform the surgery. Dr. Chabot testified that Dr. Kennedy's treatment was not negligent or substandard, however, it was not necessary in light of the content of other physicians' records, primarily Dr. Ruiz, the lack of a neurological deficit, and the Petitioner's lack of improvement following the surgery. Both Dr. Kennedy and the Petitioner testified that he initially improved, however, it was Dr. Kennedy's opinion that his recovery had been stalled by the failure of the employer to authorize physical therapy. Dr. Chabot agrees with Dr. Kennedy that there was a C6 nerve root compression on the left side. Both doctors agree that the radicular component could overlap with carpal tunnel. While Dr. Chabot testified that shoving a log into a wood chipper did not aggravate his C5-6 spondylosis and that condition did not require surgery, he would nevertheless restrict the Petitioner from overhead activity as future repetitive movement could in fact aggravate the C5-6 spondylosis.

At the time of the Petitioner's surgery which took place on December 19, 2007, the Petitioner had been seeing Dr. Kennedy since March 1, 2007. The Respondent chose to deny authorization and payment for the surgery and the medical bills related thereto without the benefit of any medical exam indicating that the surgery and treatment was not related to the Petitioner's accident of December 19, 2006. The only medical opinion available at the time of the surgery was that of Dr. David Kennedy, who believed that the surgery was related to the Petitioner's accident. Following this surgery, the Respondent delayed securing a Section 12 exam until August 26, 2009.

Prospective Medical Care

The Arbitrator concludes that the cervical myelogram, as recommended by Dr. Kennedy, is reasonable and necessary to cure and treat the Petitioner. Dr. Kennedy testified that the procedure was medically necessary and appropriate in order to determine the current structural condition of the spine prior to recommending any additional treatment. Although an MRI would be sufficient, Dr. Kennedy testified that the myelogram would give greater detail in light of the pre-existing fusion.

TEMPORARY TOTAL DISABILITY

The Petitioner claims that he is entitled to TTD benefits from December 19, 2006 to November 13, 2013. The Respondent now claims that the Petitioner is entitled to TTD from December 19, 2006 to October 26, 2006. Previously, on January 21, 2011, the parties stipulated on the record that the Petitioner was entitled to TTD from October 19, 2006 to January 21, 2011 (Arbitrator Exhibit 4). For the reasons described in the conclusions as to causal connection, the reasonableness and necessity of medical care and prospective medical care, the Arbitrator concludes that the Petitioner is entitled to temporary total disability benefits from December 19, 2006 to November 13, 2013.

FINDINGS

1. As to the issue of causal relationship, the Arbitrator finds that the Petitioner's accident of December 19, 2006 caused an aggravation of a pre-existing condition of spondylosis at the level of C5-6.

2. As to the issue of the reasonableness and necessity of the medical and surgical care provided by Drs. Strotheide, Mohsin, Raskas, and Kennedy, the Arbitrator finds that their care and treatment, including the surgical procedure and post-operative care was reasonable and necessary to cure or relieve the effects of the aggravation of cervical spondylosis. The Respondent shall pay medical, hospital and surgical charges in the amount of $69,523.00 (Petitioner Exhibits 1-7).

3. As to the issue of prospective medical care, the Arbitrator finds that a cervical myelogram is reasonable and necessary to cure or relieve the effects of the aggravation of cervical spondylosis.

4. As to the issue of temporary total disability, the Petitioner is entitled to TTD from December 19, 2006 to November 13, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

☒ 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

ROBIN REDDEN,

Petitioner,

14IWCC0868

vs.

NO: 08 WC 1937

WAL-MART ASSOCIATES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent disability, 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 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.

14IWCC0868

The party commencing the 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 07 2014
o9/23/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REDDEN, ROBIN
Employee/Petitioner

Case# **08WC001937**

WAL-MART ASSOCIATES INC
Employer/Respondent

14IWCC0868

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:

2489 LAW OFFICE OF JIM BLACK
TRACY JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

2593 GANAN & SHAPIRO PC
BRETT TAYLOR
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0868

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

ROBIN REDDEN,
Employee/Petitioner

v.

WAL-MART ASSOCIATES, INC.
Employer/Respondent

Case # **08** WC **1937**

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Rock Island**, on **11/7/13**. 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 _____

14IWCC0868

FINDINGS

On **10/23/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned **$34,424.00**; the average weekly wage was **$662.00**.

On the date of accident, Petitioner was **57** 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 **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$44,731.00** for other benefits, for a total credit of **$44,731.00**.

Respondent is entitled to a credit of **$57,938.79** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her low back is due repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 10/23/07. The petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

11/22/13
Date

ICArbDec p. 2

NOV 25 2013

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 57 year old RSR driver in respondent's distribution center in Sterling, alleges that she sustained an accidental injury to her lumbar spine due to her repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 10/23/07. Petitioner had been working for respondent for about 3-4 years at the time of the alleged injury.

Petitioner had prior problems with her lumbar spine that date back to 2001. At that time petitioner sustained another injury to her lumbar spine while working for another employer at a hog facility. As a result of this injury petitioner sustained a herniated lumbar disc at L4-L5 and underwent a surgical procedure to repair it. Petitioner testified that within a year of this incident she had been released to full duty work without restrictions. Petitioner denied any further treatment for her lumbar spine until 2006.

On 4/30/06 petitioner presented to KSB emergency room with complaints of back pain. She gave a history of falling down wet stairs the day before trying to put horses away and landing on her back. She rated her lower back pain as a 10/10 and stated that it radiated to her right leg. At that time petitioner lived on a farm with a friend who owned horses. Petitioner underwent a CT scan that revealed no evidence of acute fracture, status post laminotomy left L4; minimal listhesis at multiple levels, likely due to chronic hypermobility and underlying degenerative changes; spondylolisthesis of the L4-L5 level; multiple spondylosis; multilevel degenerative disc disease; and effacement of the fat planes in the left L4/5 foramen.

Petitioner testified that as a RSR driver she would drive a forklift and put products that were received that day in the racks, and replenish order fillers as pick slots empty out. Petitioner testified that this was the only job she worked for respondent unless she was asked to do an audit. An audit was not something she did every day. It was intermittent and she only did it a few days in September of 2007.

Petitioner testified that her duties as a RSR driver would include taking pallets from the slots in the rack with the forklift, and cutting the shrink wrap off. Sometimes she would take remaining stock from the front pallet and put it on another pallet. Petitioner testified that the total weight of all the items she would move over the course of a day would not exceed 100 pounds. She stated that no item she lifted was 100 pounds. She stated that she might move cases of water, gatorade, laundry soap and dog food.

When petitioner performed the audit function she would manually handle items all day. She would take the pallet, scan each item and then place the item on another pallet. Petitioner would then shrinkwrap the pallet with the items on it. Petitioner testified that she only performed this job occasionally.

Jason Pohren, supervisor of the RSR drivers, and petitioner in September of 2007, was called as a witness on behalf of respondent. Pohren testified that the primary job of the RSR was driving the forklift. He testified that the RSR driver drives the forklift 37-38 hours per week. He testified that the remaining 2-3 hours per week were spent upstocking, cutting shrinkwrap, and picking up and restocking items that had fallen.

Pohren testified that on average, RSR drivers would perform audits once a month. He agreed with the process as described by petitioner. He testified that when an RSR driver performs an audit, he/she does it for 8-10 hours. After the audit is complete the RSR driver would return to his/her regular job the next day.

Petitioner testified that in September of 2007 her back started hurting her. She denied any problems with her back before September of 2007. She stated that it was caused by heavy lifting while doing an audit. She stated that she reported these complaints to Pohren on 9/1/07. Pohren denied that petitioner reported any injury to him in September of 2007. She testified that she told Pohren that her back was killing her from upstocking, especially with audits. Petitioner asked for help with the audits. Petitioner only did a few days of auditing in September of 2007. She did not report how many days of audits she did before 9/1/07.

Petitioner testified that after her back started hurting her while doing audits one day, she returned to work as an RSR driver. She testified that she took over the counter medications but her back pain did not subside. Petitioner continued working her regular duty job until 10/23/07.

Pohren testified that at some point he noticed that petitioner appeared to be in pain. He stated that when he approached her and asked her if she was in pain, she stated that she hurt herself working at a hog/pig farm part-time. Respondent offered no evidence to support a finding that petitioner had concurrent employment. Pohren did not know when this conversation took place.

On 10/23/07 petitioner presented to her nurse practitioner, Page. She complained of low back pain, and leg spasms, more on the right. She stated that Miraprex was causing uncontrolled sleep and lower leg swelling. She stated that she visited her sister and found herself in the hospital after falling asleep. Petitioner was diagnosed with neuropathic pain, back pain, RLS, and insomnia. There is no reference in the medical records for 10/23/07 that petitioner's complaints were related to an injury at work. An x-ray taken of the lumbar spine was equivocal when compared to the CT examination of 4/30/06. Page referred petitioner to Dr. Handley, an orthopedic specialist.

On 11/8/07 petitioner returned to Page. Her complaints were unchanged. She gave a history of her pain starting 6 months ago and becoming more intense over the last three months.

On 11/9/07 petitioner underwent a repeat MRI of the lumbar spine. The impression was recurrent disc suspected at L4 – L5 impinging grossly on the exiting nerve root on the left side at this level. There was also multilevel degenerative disc disease with the findings most prominently at L2 – L3 where there was a fairly significant disc protrusion laterally impinging on the exiting nerve root on the right side at this level.

On 11/27/07 petitioner was examined by Dr. George Handley. Dr. Handley's report noted that petitioner had called and said she had fallen at work and had severe pain. Petitioner denied she called and reported that she had fallen at work. Petitioner gave a history of working for respondent for the last 4 years as a RSR driver/loader. She stated that it involved a great deal of bending/lifting/twisting/straining. She reported that she frequently picked up objects that weighed over 100 pounds. At trial petitioner clarified this and stated that the total weight of all the items she lifted might be over 100 pounds, but she never lifted anything over 100 pounds by herself. Petitioner reported that she was feeling fine and working full-time when she began to experience some low back strain in June of 2007. She complained of lumbosacral aching pain bilaterally, radiating through the buttocks bilaterally and along the posterolateral thighs bilaterally. Dr. Handley interpreted this as a significant bilateral low back strain. Petitioner reported that as the next few months passed the pain began extending along the lateral aspect of her right calf down to her ankle, which Dr. Handley believed was very common right L5 radiculopathy frequently caused by a herniated disc at L4-L5 or L5-S1. He noted that petitioner continued to work hoping that her pain would go away. She then reported that the pain had become so severe in her thighs and right lateral calf that she could no longer carry out her heavy lifting occupation.

Dr. Handley requested a new MRI after having difficulty reading the images. He was of the opinion that petitioner's neurological examination was almost completely normal, but she did appear to have a partial right foot drop. After reviewing the new MRI, Dr. Handley was of the opinion that it showed lumbar spondylosis from L2-L5; herniated discs at L2-L3 on the right; recurrent herniated disc at L4-L4 on the left; and aggravation of pre-existing spondylosis. Dr. Handley recommended a lumbar microdiscectomy/generous foraminotomy at L2-L3 on the right followed by a generous foraminotomies at L4-L5 bilaterally.

On 11/27/07 petitioner completed a Request for Leave of Absence for herniated discs. She indicated that her problem was not associated with workers' compensation. However, she testified that she reported to Rebecca Weisman that she ruptured her discs while auditing. Pohren testified that he did not learn of petitioner's alleged injury until after she took her Leave of Absence.

On 11/30/07 petitioner completed an Associate Statement-Workers' Compensation. She identified the date of her injury as approximately September 2007. She reported that she was injured doing audits, upstacking 70 cube pallets of heavy chemicals, juice and water. Petitioner then reported that she could not recall what

items she was lifting when the injury occurred. She stated that she did not report it immediately because she was afraid of getting written up and getting in trouble. On 12/1/07 an Illinois Form 45 was printed.

On 12/13/07 petitioner underwent a presurgical physical. She gave a history of working for respondent for the last four years as a loader/RSR as our driver. She stated that this involved a great deal of bending, lifting, twisting, and straining. She stated that she frequently picks up objects that weigh more than 100 pounds. She stated that she was feeling well and working full-time for the first 3 1/2 years, but began to experience some low back strain in June 2007. She noted that after the next few months she began to experience pain extending down the lateral aspect of her right calf, which is very common for right L5 radiculopathy frequently caused by a herniated lumbar disc. She stated that when the pain became so severe in the bilateral thighs and right lateral calf that she had to stop her heavy lifting occupation.

On 12/14/07 petitioner underwent a microlumbar diskectomy at L2-L3 on the right and L4-L5 on the left; generous foraminotomies at L2-L3 on the right, L3-L4 on the right, and bilaterally at L4-L5. Petitioner followed-up post-operatively with Dr. Handley.

On 12/27/07 petitioner presented to the emergency room at KSB. Petitioner gave a history of back pain since an injury 6 months ago. She refused to say how she hurt her back. She stated that she ran out of pills. Petitioner was examined and prescribed Vicodin and Valium. She was diagnosed with chronic back pain.

On 1/10/08 petitioner began a course of physical therapy. Petitioner reported that she had worked for Walmart for four years performing a lot of twisting/bending activities, and in October was not performing her original job and was auditing pallets. She reported that she had to put down, stack the pallets, and scan the items. She reported that she had asked all day for help, secondary to the load being too heavy and too high. She stated that she hurt herself and went to her supervisor and asked why she did not get any help. She stated that she did not fill out an injury form at that time. She stated that she had performed the same duties the next day without help. She stated that another supervisor saw here struggling and got her some help. Petitioner reported that her low back was bothering her a lot afterwards, and got progressively worse after that. She stated that she tried a few weeks of chiropractic care that did not help. She stated that on 11/27/07 she went to pull a pallet and could not rise back up from a bent over position. She reported increased pain and stated that her feet and hands kept falling asleep.

On 1/15/08 petitioner filed her Application for Adjustment of Claim. She alleged an accident to her back while working on 9/1/07. She made no mention that her injury was due to repetitive work activities.

In January 2008 petitioner moved to North Platte, Nebraska to live with her family. Petitioner began a course of physical therapy in Nebraska on 1/21/08.

On 2/10/08 Dr. Handley drafted a letter to Page. He reported that after examining petitioner on 2/9/08 he believed she had recovered well from her lumbar spine surgery and her right leg pain would probably be back to normal over the next 3-4 weeks.

On 2/19/08 petitioner was seen by Dr. Albert Dixon. Petitioner gave a history of injuring her back while working for respondent and undergoing a lumbar surgery as a result of the injury. Dr. Dixon was of the opinion that petitioner's condition was related to a work injury. Dr. Dixon recommended a referral to the pain clinic for possible epidural steroid injections. He recommended chiropractic care and did not think a repeat lumbar surgery would be in her best interest.

On 2/28/08 petitioner presented to Dr. Wargo for pain management. Dr. Wargo discussed treatment options. Epidural steroid injections were not advised, due to petitioner's recent postoperative status. Oral medications were prescribed. On 3/20/08 petitioner was examined by Dr. Sorensen.

On 3/20/08 petitioner presented to Platte River Rehab Medicine for further evaluation of her chronic low back pain. She reported that she was involved in a work related injury at the Walmart distribution center in November 2007. She stated that she was lifting and transferring 7 foot stacks of heavy pallets of food for two consecutive days. She complained of excruciating low back pain during her workday, and reported that she told multiple supervisors and was not relieved of duty. Following two days of this type of activity she had severe axial low back pain and bilateral leg pain. Following an examination and record review Dr. Sorenson was of the impression that petitioner sustained a work-related injury in November 2007; failed back syndrome and chronic axial low back pain status post L2 – L3 discectomy on 12/14/07; and depression. Additional therapy and a home tens unit was recommended, as well as medication. Petitioner treated through 6/2/08.

On 4/2/08 petitioner presented for chiropractic treatment at DeNaeyer Chiropractic. She reported symptoms in the spine, ribs, pelvic region that was chronic based on onset of more than 6 weeks ago, caused by a work related injury. She described the mechanism of injury as being related to lifting, which caused symptoms of pain, stiffness, weakness, and repetitive motion, which caused symptoms of pain, stiffness and weakness. She identified the date of injury as 9/1/07. The onset of her symptoms was 9/5/07 and the last day she worked was 4/1/08. Following a course of chiropractic treatment petitioner was of the opinion that her condition remained unchanged.

On 4/17/08 petitioner was discharged from physical therapy. The reason for the discharge was that petitioner refused further treatment.

On 6/18/08 petitioner presented to Dr. States. She gave a history of being in good health without problems referable to her neck or back until injuring herself while performing a variety of inventory tasks beginning in September 2007. She stated that at that time she was requested to perform a variety of overhead type activities and lifting requirements which led her to have some aching discomfort in her back. She stated that the symptoms progressed to the point where her pain became intolerable and she ultimately had to stop working on 11/27/07.

On 6/18/08 petitioner presented to Dr. Kleiner. She gave a history of low back symptoms with her work activities. Dr. Kleiner diagnosed lower back symptoms due to unstable spondylolisthesis that he related to cumulative trauma from petitioner's increased workload in September 2007. Dr. Kleiner recommended bilateral lower lumbar facet blocks and psychological evaluation. Petitioner underwent bilateral L5 facet blocks on 9/13/08. Dr. Vilims found little change following the injection and concluded that petitioner's ongoing pain was not likely arising from the L4 – L5 facet joints. He diagnosed lumbar spondylosis and lumbar degenerative disc disease.

On 9/22/08 petitioner underwent a Section 12 examination performed by Dr. Benavides at the request of the respondent. She initially reported her injury on 9/1/07 was caused by repetitive bending, heavy lifting, turning, and twisting. She complained of pain in her low back and bilateral leg pain, with the right leg being worse. She stated that she took medications, rested, and underwent chiropractic care with no relief. She then reported that in the latter part of September or first part of October, 2007, she was helping with audit work and was lifting and moving many heavy items. She stated that she repeatedly asked for assistance because she was having pain in her back. She stated that she performed this work for two days without assistance. She reported little relief of her back pain following surgery. She stated that she was in physical therapy through June of 2008 without much improvement. Petitioner then moved to Nebraska and was complaining of a relatively new onset of neck pain during her lumbar spine workup, and the doctors were recommending a complete cervical arthrodesis, unrelated to the claimed injury.

Dr. Benavides noted that petitioner initially failed to mention that she had a lumbar surgery prior to December, 2007, and a disk procedure in 2001 in South Dakota after a previous injury at a hog farm. She stated that following the 2001 surgery she was doing well until the recent episode in September of 2007. Petitioner then stated that she transferred positions in 2003 due to ongoing back problems. Dr. Benavides noted that petitioner's story then changed when she stated that she was having problems from 2004 but could not

remember. Dr. Benavides noted that discrepancies remained throughout the examination, but petitioner remained adamant that her low back problems were from activities at work during September of 2007.

Following an examination and record review, Dr. Benavides assessment was lumbar spondylolisthesis, lumbar disc herniation, degenerative lumbar disc disease, lumbar spondylosis, postlaminectomy syndrome/failed back syndrome. He also assessed cervical spondylosis. Dr. Benavides was of the opinion that petitioner's findings were more consistent with degenerative changes that certainly could present themselves with similar complaints. He was also of the opinion that since she was post status decompression and discectomy in the lumbar spine that this lends itself to a post-laminectomy syndrome in that the patient never returns to a normal presurgical/disk injury level. Dr. Benavides was of the opinion that the changes that occur are typically irrespective of activity, but can certainly be enhanced by repetitive bending and lifting. Dr. Benavides was of the opinion that petitioner demonstrated some malingering during the examination. He was further of the opinion that her history remained at best questionable. He noted that she reported doing very well without problems for 6 years after her 2001 procedure, but during further discussion pointed out that her problems began in 2004 with work. Dr. Benavides was of the opinion that petitioner's activities at work did not enhance any recovery but found it difficult to pinpoint work as the necessary causation versus progressive degenerative processes. Dr. Benavides was of the opinion that there does not appear to be anything particular that occurred on 9/1/07 to result specifically in the symptoms, and after discussing it with petitioner was of the opinion it was an arbitrary date. Dr. Benavides recommended an FCE.

On 12/19/08 petitioner was examined by Dr. Dixon. She provided a history that the onset of her symptoms were associated with her work activities. Dr. Dixon examined petitioner and diagnosed a post-laminectomy pain syndrome. He prescribed additional physical therapy in a repeat MRI scan. He did not believe additional surgery would be required. Petitioner underwent a repeat MRI on 2/21/08. The impression was postoperative changes at multiple levels of the lumbar spine without residual or recurrent disc herniation. Lumbar disc degeneration was also noted.

On 2/14/09 petitioner was terminated due to excessive absence from work.

On 3/19/09 and 3/26/09 petitioner underwent a functional capacity evaluation. It was determined that petitioner was capable of completing medium to heavy work tasks according to the DOL work categories. It was noted that petitioner may benefit from a work conditioning or work hardening program prior to returning to employment to increase her tolerance and decrease her pain responses.

On 4/20/09 petitioner underwent a left sided transpsoas retroperitoneal anterior lumbar discectomy at L4 – L5; retroperitoneal transpsoas anterior lumbar fusion with the compression of spinal canal utilizing interbody fusion cage; L3 – L4 retroperitoneal intra-lumbar discectomy; L3 – L4 decompression of spinal canal; L3 – L4 interbody fusion with interbody fusion cage; L2 – L3 bilateral facet joint fusion; L3 – L4 bilateral facet joint fusion; L4 – L5 bilateral facet joint fusion using microscopic control and endoscopic technique; minimally invasive sextant instrumentation L2 – L5 with titanium instrumentation bilaterally. This procedure was performed by Dr. Kleiner. Petitioner filed a postoperatively with Dr. Kleiner.

On 5/19/09 petitioner was examined by Dr. Bernard. Dr. Bernard diagnosed neuropathic pain in the left leg improved from her preoperative status. He prescribed analgesic medications and additional follow. Petitioner underwent an additional course of physical therapy.

On 7/29/09 Dr. Kleiner's examination revealed marked improvement in petitioner's lower back and lower extremity pain from her preoperative status. X-rays revealed good alignment at the fusion site. Dr. Kleiner prescribed additional exercises and medication.

On 4/27/10 petitioner was examined by Dr. Jeffrey Coe at the request of her attorney. In addition to an examination Dr. Coe reviewed petitioner's medical records. Petitioner gave a history of working for respondent for five years. She stated that on 9/1/07 she was participating in an audit. She stated that she was taking items from a tall pallet that was 7 feet in height, scanning the items, and then re-stacking the items. She stated that some of the items were heavy, including cases of liquids. She stated that she carried on this work for her entire workday. She stated that as she worked she began to experience pain in her low back. She stated that she completed the day, but her back pain persisted. She stated that she returned to work the next day and was placed in the same assignment in spite of her complaints of back pain. She stated that she requested assistance, but none was made available. She stated that she carried out her work activities noting increasing lower back pain. She stated that her lower back pain persisted and she eventually sought medical treatment. Petitioner gave a history of undergoing a left-sided discectomy at L4 – L5 in October 2001. She reported that thereafter she returned to full duty work and home activities until her repetitive lifting at the Walmart distribution center in September 2007. Petitioner stated that her work as an RSR driver generally involved putting away freight deliveries and replenishing warehouse shelves and pallets. She stated that she carried out this work 8-12 hours per day, four days a week. She stated that this job required constant lifting, bending and twisting of her back throughout her work shift.

Following an examination and record review Dr. Coe was of the opinion that petitioner suffered an injury to her lower back while participating in a distribution center audit. He was of the opinion that the injury

aggravated a pre-existing degenerative disc disease and degenerative arthritis in petitioner's lumbar spine, causing both acute and chronic lumbar discogenic, facetogenic, and myofascial pain with lumbar disc herniation at L2 – L3 and L4 – L5. Dr. Coe opined a causal relationship between the repetitive strain injuries suffered by petitioner at work on 9/1/07, and her current symptoms and state of impairment. He opined that repetitive strain injuries and associated surgeries have caused permanent partial disability to petitioner's person as a whole. He further opined that petitioner needs additional medical treatment for her ongoing lower back pain and stiffness. He believed this treatment would include pain management strategies with chronic oral medication. He was also of the opinion that petitioner required work restrictions due to her condition of ill being in her low back. He identified these restrictions as a limitation in any repetitive bending or twisting at the waist, and a limitation in lifting to the light physical demand level.

On 7/13/10 Dr. Benavides drafted a letter to respondent's attorney, after performing an extensive review of petitioner's medical records. Dr. Benavides was of the opinion that petitioner's degenerative processes in her lumbar spine would progress over time, and that the findings that led to her surgery in December of 2007 were more of a progression of the degenerative nature of the lumbar spine. He was further of the opinion that the revision procedure of 4/20/09 would not be causally related to her alleged accident at work on 9/1/07.

On 12/6/10 the evidence deposition of Dr. Coe was taken on behalf of the petitioner. Dr. Coe is a board-certified specialist in occupational medicine. Dr. Coe was of the opinion that based on petitioner's degenerative condition that she could certainly have aggravated or accelerated the condition during normal daily activities at home. Dr. Coe testified that he did not see a job description for petitioner's job. He stated that the only history he had regarding her employment was the history petitioner provided when she examined him. Dr. Coe testified that petitioner's history of lifting and moving objects weighing up to 100 pounds was incorporated in his opinion regarding causal relationship.

On 6/30/11 petitioner was reexamined by Dr. Benavides. Dr. Benavides notes a history of a 4-5 level cervical fusion in 2008, and lumbar fusion at L2-L5 in 2009. She also reported a left shoulder surgery on 1/29/09 after sustaining a fall. Following an examination, Dr. Benavides assessment was lumbar spondylolisthesis, degenerative lumbar disc disease, lumbar spondylosis; postlaminectomy syndrome/failed back syndrome, cervical spondylosis, cervical spinal stenosis, and arthrodesis status. Dr. Benavides was of the opinion that petitioner had reached maximum medical improvement and could return to work consistent with the findings in the FCE.

On 12/7/11 the evidence deposition of Dr. David Benavides was taken on behalf of respondent. Dr. Benavides opined that petitioner's condition of ill being that resulted in the surgery in December 2007 was not

causally related to the alleged work incident. He was of the opinion that it was just a progression of overall activities, and like activities. He based this on the fact that petitioner had prior difficulties on several occasions and had surgeries. Dr. Benavides opined that any normal daily activities would lead to the type of problems that petitioner articulated and then ultimately required her to go under surgery in December 2007. He further opined that the surgery on 4/20/09 was not causally related to any alleged incident at work.

On cross-examination Dr. Benavides opined that lifting can cause back pain; a herniated disc and lifting can cause a herniated disc; and a herniated disc can cause back pain. Dr. Benavides further opined that lifting can cause radicular symptoms and aggravate a pre-existing degenerative disc disease or cause degenerative disc disease to become symptomatic. He further opined that repetitive bending and twisting can cause back pain, and bending and twisting can cause herniated discs, radicular symptoms, and an aggravation of degenerative disc disease, or cause degenerative disc disease to become symptomatic. Dr. Benavides stated that petitioner reported that she was lifting heavy items for two days. The frequency of this repetition was not provided. Dr. Benavides was not sure if he was provided a job description by the respondent. Dr. Benavides opined that petitioner's work activities could not have been a causative factor in her development of pain based on the history she gave him about her work activities, and based on the history of her work activities contained in the medical records. Dr. Benavides based his opinion on the petitioner's inconsistent history. Dr. Benavides opined that if you assume the petitioner had little or no back pain or symptoms between 4/30/06 and 9/07, and was able to carry out the full duties of her job, that her job duties at Walmart could or might have caused, aggravated, or accelerated the condition and her lumbar spine resulting in either the development or worsening of her symptoms and necessitating the treatment which began in October 2007.

On redirect examination Dr. Benavides opined that a fall could cause the symptoms articulated by petitioner that ultimately necessitated her surgery in December 2007. He denied that petitioner ever gave him a history that she fell downstairs on or about 4/30/06 thus requiring a CT scan shortly thereafter. Dr. Benavides opined that a fall at an individual's home could cause a herniation.

Petitioner testified that she received short and long term disability from her employer. She testified that these benefits ended in 2011. Petitioner testified that currently she has a lot of pain in her back. She reported that walking, sitting, and standing causes her pain in her back. Petitioner still takes over the counter and prescription medications for her complaints.

On 1/15/08 petitioner's Application for Adjustment of Claim was filed. She alleged an injury to her back while she was working on 9/1/07. At trial on 11/7/13 petitioner amended her Application for Adjustment of Claim and changed the date of accident to 10/23/07.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?
D. WHAT IS THE DATE OF ACCIDENT?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to her lumbar spine due to repetitive work activities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity.

In the case at bar petitioner is alleging that her audit duties were the cause of her lumbar spine problems. Petitioner's regular duty job for respondent is that of an RSR driver. Her regular duties required her to use the forklift to place products that were received on any given day in the racks, and replenish order fillers as pick slots empty out. Petitioner testified that this was the only job she worked unless she was asked to do an audit. Petitioner did not know how often she performed audits. However, Pohren testified that she would perform an audit on average only one day a month. Both agreed that the job of the audit would require scanning each item off one pallet and then restocking it on another pallet. When completed, the auditor would shrinkwrap the pallet. The arbitrator notes there was no credible evidence to support a finding as to how many days petitioner was assigned the job of performing an audit while she was employed by respondent. Pohren testified that an RSR driver drives the forklift 37-38 hours of a 40 hour week, and spends the remaining 2-3 hours a week picking up and restocking product that may have fallen.

Petitioner is claiming that the repetitive activities associated with the audit are what caused her low back pain in September of 2007. However, petitioner could not testify with any certainty when she performed the audits, how many items she would lift per hour or per day, what the specific items were that she lifted and the

specific weights of each item. She also provided incorrect histories to the healthcare providers with respect to the amount of weight she would lift at any time.

At trial petitioner testified that her back started hurting her in September of 2007, and denied any problems with her back before then. The arbitrator notes that this testimony is not credible because petitioner had a prior surgery to her lumbar spine in 2001, and sought treatment for her back as recently as 4/30/06. At that time she rated her back pain at a 10/10. She further testified that she reported the incident to Pohren on 9/1/07. However, Pohren testified that petitioner never reported any injury to him in September of 2007.

The credible medical records also include a multitude of varying histories regarding the reason for, and the date of the onset of her symptomatology. They are as follows:

1. On 10/23/07 petitioner first sought treatment for her back. At that visit petitioner made no mention of any work related incident, or that her back pain was related to her work activities.
2. On 11/8/07 she gave a history of her back pain starting 6 months ago (May 2007), and becoming more intense over the last three months. Again, petitioner gave no history of her pain being related to her work activities.
3. On 11/27/07 Dr. Handley noted that petitioner had called and said she had fallen at work and had severe pain. Petitioner denied she made this call. Petitioner reported that her job involved a great deal of bending/lifting/twisting and straining, and that she frequently picked up objects that weighed over 100 pounds. She also reported that she was fine until she began experiencing some low back strain in June of 2007. Dr. Handley recommended surgery.
4. On 11/27/07 petitioner also completed a Request for Leave of Absence and indicated that it was not work related.
5. On 11/30/07 petitioner completed an Associate's Statement - Workers' Compensation claiming an injury in approximately September of 2007, while doing audits, upstacking 70 pallets of heavy chemical, juice and water. Petitioner could not recall what items she was lifting when the injury occurred.
6. On 12/13/07 she gave a history of working as an RSR driver, and reported that it involves a great deal of bending, lifting, twisting and straining. She again stated that she picked up objects that weigh more than 100 pounds. She gave a history of experiencing a back strain in June of 2007.
7. On 12/27/07 petitioner went to the KSB emergency room. She gave a history of back pain since an injury 6 months ago. She refused to state how she hurt her back.
8. On 1/10/08 while in physical therapy she stated that in October she was auditing and hurt her back. She also reported that on 11/27/07 she went to pull a pallet and could not rise up from a bent over position.
9. On 3/20/08 petitioner gave a history of a work related injury in November of 2007. She stated that she was lifting and transferring 7 foot stacks of heavy pallets of food for two consecutive days.
10. On 4/2/08 she gave a history that she sustained an injury on 9/1/07. She described the mechanism as being related to lifting.

11. On 6/1/08 she gave a history of being in good health until injuring herself while performing a variety of inventory tasks beginning in September of 2007.
12. On 9/22/08 petitioner gave a history of an injury on 9/1/07 caused by repetitive bending, heavy lifting, turning , and twisting. She then gave a history of doing an audit in the latter part of September or the first part of October lifting and moving many heavy items. She also told Dr. Benavides on this date that she transferred positions in 2003 due to ongoing back problems.
13. On 4/27/10 petitioner gave Dr. Coe a history of participating in an audit on 9/1/07 and began to experience pain in her low back.
14. At trial the petitioner amended her date of accident from 9/1/07 to 10/23/07.

Based on the above, the arbitrator finds the petitioner has provided varying histories of what caused her back problems and when that actually occurred. These histories provide an onset date that may have occurred anywhere from June of 2007 to November 2007. They also lead one to believe that the cause of the accident was the activities associated with an audit, and not her regular job. However, none of petitioner's histories provided give specifics regarding the frequency, duration, manner of performing, etc., of the activities that caused the injury. Additionally, it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities, and the arbitrator finds that not one medical expert had a detailed and accurate understanding of the petitioner's work activities. The arbitrator further finds that throughout the record, the petitioner was very vague and inconsistent with respect to the items she lifted, the weight of the items she lifted, and the frequency and duration she lifted the items that allegedly caused her injury to her low back.

The petitioner was clear that the activity that caused her injury was the activities associated with the audit. Unfortunately petitioner was unable to state with any certainty the frequency or dates she performed this activity. Furthermore, Pohren testified that the associates only worked on audits one day a month. Petitioner was not sure how often she worked the audits, and did not rebut Pohren's testimony.

Based on the above, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her low back due repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 10/23/07. The arbitrator finds the petitioner's accident histories were inconsistent, that she failed to provide specifics regarding the frequency, duration, manner of performing, etc., of the activities that caused the injury, and that the medical experts did not have a detailed and accurate understanding of the petitioner's work activities. The arbitrator notes that it is the burden of the petitioner to prove by a preponderance of the credible evidence all the elements of her claim, and the arbitrator finds the petitioner has failed to do that with respect to this repetitive trauma claim.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO 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?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her low back due repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 10/23/07, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN MOUNT,

Petitioner,

vs.

NO: 12 WC 18016

14IWCC0869

EICHENAUER 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 issue of temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation 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 modifies the Arbitrator's decision and finds that Petitioner is entitled to temporary total disability (TTD) from September 29, 2013 through and including November 18, 2013, the date of hearing before the Arbitrator.

The Arbitrator concluded that a reasonable light duty job offer had been made to the Petitioner on or about September 29, 2013, and that Petitioner failed to accept this job offer, resulting in a denial of TTD benefits. The Commission disagrees.

The Petitioner lived in Paxton, Illinois when he initially accepted a job with the Respondent in Bloomington, Illinois in April, 2011. Petitioner testified that his supervisor, Rowe Skidmore, asked if he was willing to move closer to Bloomington. He testified that Mr. Skidmore indicated he would not be able to use a company van for travel to and from his home unless he moved closer to Bloomington. Petitioner owned a home in Paxton. He testified: "So I talked to my girlfriend at the time and we agreed we would move over there. And that's about how I got the job." He decided to rent out the Paxton home and took action to locate and purchase a home in Leroy, Illinois, which he indicated is 10 to 15 minutes south of Bloomington. Petitioner testified that Paxton was between 43 and 46 miles away from Bloomington. The light duty job offer was for a position in Decatur, Illinois, which Petitioner testified was 72 to 73 miles away from Paxton. The light duty job offer did not include the use of a company vehicle. Petitioner testified that his vehicle ran at about 16 miles per gallon, and it was stipulated that his gross average weekly wage was $510.00.

Petitioner testified that he was injured on May 31, 2011, and that he resided in Paxton until he closed on the home he found in Leroy in September, 2011. He worked light duty in Bloomington from June 1, 2011 through July 28, 2011, and in that time used his own vehicle because the Respondent did not provide the company van. Petitioner resided in Leroy until January, 2013, at which point he could no longer afford the home, sold it via a short sale, and returned to his Paxton home. The Respondent offered the light duty job in Decatur on or about September 30, 2013.

Asked why he went through with the closing on the Leroy home after he had been injured months prior, the Petitioner testified that he loved his job in Bloomington and assumed he ultimately would return to it, and wanted to make sure he had the job after he recovered from his injury.

Mr. Skidmore testified that he was Respondent's manager of sales and technical operations, and was Petitioner's direct supervisor. Noting most of Respondent's business was in the Bloomington area, he stated that "it was suggested" to Petitioner that he move to Bloomington as part of his employment with Respondent. He indicated this would involve less wear and tear on the company vehicle, and would allow Petitioner to claim his morning and evening drive time towards his payroll time. Mr. Skidmore testified that Petitioner's job would not have been in jeopardy had he refused to move. He didn't recall if Petitioner had been issued a company van or not, but agreed that if a worker was local, the Respondent would allow the worker to bill their time from the moment they left their residence to the time they returned home. A worker in another "market", such as Paxton, would not be able to bill payroll time until arriving at the first job of the day. It was his understanding that the Decatur light duty job would have accommodated Petitioner's work restrictions.

Based on the above, the Commission finds that the Petitioner is entitled to the noted TTD. Petitioner took the job with Respondent and agreed to move closer to Bloomington, both because the Respondent requested that he do so to save them money, and because he would be

able to use his drive time to and from his Leroy home as part of his payroll time. It appears to the Commission that the key reason the Petitioner left his home in Leroy to return to Paxton was at least in part because of his work situation due to his injury and inability to work. Further, the Commission acknowledges Petitioner's argument that the extra driving distance from Paxton to Decatur versus Paxton to Bloomington (a difference of approximately 52 to 60 miles, round trip), would result in a significantly higher cost to get to and from work, and that it is particularly relevant here where the Petitioner's average weekly wage was only $510.00. The Commission also notes that when he was injured the Petitioner had the use of a company van. This was not offered to him as part of the light duty job in Decatur, and he therefore would also have put added wear and tear to his vehicle, as well as pay for his own fuel. This would not have been the case with his regular job.

While the Respondent may not have required the Petitioner to move closer to Bloomington when he took the service technician job, it is clear the Respondent pushed for it. Both Petitioner and Mr. Skidmore testified that part of the reason was in the Respondent's interests: less wear and tear on the company van, and lower fuel costs for the company. In fact, as noted above, Petitioner testified that Skidmore indicated he would not be able to use a company van unless he moved closer to Bloomington. In Petitioner's interests, per Skidmore, was the fact that the company would allow technicians to claim their time from the moment they left their house as work time if they were in Bloomington, while they would not be able to if they were from a different market, and Skidmore testified that Paxton was in a different market. It is clear to the Commission that if the Petitioner wanted to obtain all of the benefits available to him with the job in Bloomington, he would need to move closer to that city. While the Respondent indicated the Petitioner wouldn't be fired if he failed to do so, there were consequences in terms of higher costs to the Petitioner by failing to do so.

While he did have to drive round trip from Paxton to Bloomington before his accident, his plan from the time he was hired was to move closer to Bloomington, as this would save fuel costs, wear and tear on his vehicle, and would allow him to bill his time portal to portal. As such, the Commission finds that the additional distance required to be driven to the offered light duty job in Decatur, along with the need to use his own personal vehicle, resulted in the light duty job offer not being reasonable under the Act to allow Respondent to discontinue TTD. Petitioner therefore is entitled to TTD from September 29, 2013 through the November 18, 2013 hearing date.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $340.00 per week for a period of 7-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,600.00. 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: OCT 0 8 2014
TJT: pvc
o 08/11/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

MOUNT, JOHN M
Employee/Petitioner

Case# **12WC018016**

EICHENAUER SERVICES INC
Employer/Respondent

14IWCC0869

On 1/14/2014, 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:

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SPRINGFIELD, IL 62704

14IWCC0869

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John M. Mount
Employee/Petitioner

v.

Eichenauer Services, Inc.
Employer/Respondent

Case # 12 WC 18016

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **November 18, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 31, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$2,263.13**; the average weekly wage was **$510.00**.

On the date of accident, Petitioner was **23** years of age, ***single*** with **0** dependent children.

ORDER

Because Respondent's offer of work within Petitioner's restrictions is reasonable, TTD benefits after September 29, 2013 through the hearing date 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.

SJ Mathis
Signature of Arbitrator

1-2-2014
Date

ICArbDec19(b)

JAN 14 2014

The Arbitrator hereby makes further findings on the disputed issue of TTD (L):

As a result of an undisputed work accident, Petitioner suffered an injury to his right shoulder. As a result of the right shoulder injury, Petitioner has been placed on permanent restrictions of occasional maximum loft of 30 pounds from floor to waist, occasional maximum carry of 20 pounds, occasional bilateral overhead lifting of 12 pounds, avoidance of repetitive overhead reaching and lifting, and avoidance of ladder climbing. Petitioner's Exhibit #8.

It was undisputed that Petitioner was offered work in Respondent's warehouse located in Decatur, Illinois. According to the testimony of Respondent's Manager of Sales and Technical Operations, Roe Skidmore, Petitioner's job duties in the warehouse would be receiving parts and driving a forklift. Mr. Skidmore testified that most parts Petitioner would handle would weigh 5 pounds or less, and there was adequate help at the warehouse to make sure that Petitioner would not be required to violate any of the restrictions placed upon him. Accordingly, a finding is made that the job offered to Petitioner in Respondent's warehouse is within the restrictions placed upon Petitioner.

Petitioner testified that he will not take the warehouse job offered as it was too far for him to drive from his home in Paxton for the money that he would be paid. It was undisputed that Petitioner would continue to receive his gross weekly salary of $510.00 if he took the warehouse job.

Petitioner testified the warehouse job in Decatur is a 144 mile roundtrip from his present home in Paxton. According to MapQuest, the trip from Paxton, Illinois to Decatur, Illinois is 70.92 miles and the trip will take 1 hour and 15 minutes.

Petitioner testified that, before he began working for Respondent, he lived in Paxton. Petitioner also testified that his job interview with Respondent took place in Decatur. Petitioner testified that, when he was hired by Respondent, he was going to be based out of Bloomington. Petitioner did testify that after he was hired and prior to the accident, he did do a job in the Champaign area. Mr. Skidmore testified that while Petitioner worked for Respondent before the accident, Petitioner drove his own vehicle from Paxton to the Bloomington area or wherever work was to take place. According to MapQuest, the quickest way from Paxton to Bloomington is via Illinois 9 and it takes 49.76 miles and the trip is one hour and four minutes. While it is noted that Petitioner had moved from Paxton to Le Roy which is closer to Bloomington, this move did not take place until after Petitioner last worked for Respondent on July 28, 2011 according to Petitioner's testimony.

During the hearing, there was testimony in regards to whether Petitioner was asked to move closer to the Bloomington area after he was hired by Respondent. Petitioner testified he was asked at his interview if he was willing to move closer to Bloomington. Mr. Skidmore testified that it would have been beneficial to both Petitioner and Respondent if Petitioner had moved to Bloomington, however, there was no requirement for Petitioner to move closer to Bloomington and Petitioner would not have been disciplined or fired had he not moved closer to Bloomington.

Mr. Skidmore testified that the warehouse job was to be offered to Petitioner on a long-time basis. If Petitioner was willing to move from Paxton to Bloomington as part of his employment with Respondent at the time he was hired and prior to the accident, no reason was given as to why Petitioner could not relocate from Paxton closer to Decatur for the warehouse job within his restrictions. Even if Petitioner was not willing to relocate closer to Decatur for the warehouse job, a finding was made that the difference in mileage between the pre-accident Bloomington job and the post-accident warehouse job in

Decatur is not significantly different. When the commute time is compared, the Bloomington commute is only 11 minutes shorter than the Decatur commute

Based on the evidence and testimony at hearing, a finding is made that the warehouse job in Decatur offered to Petitioner is also a reasonable job offer. As such, Petitioner is not entitled to TTD benefits, in light of, his refusal to accept the warehouse job in Decatur.

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

Joseph Wilson,

Petitioner,

vs.

NO: 12 WC 5764

14IWCC0870

Davis Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 29, 2014, is hereby affirmed and adopted.

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

DATED: OCT 0 8 2014
TJT:yl
o 10/6/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

WILSON, JOSEPH
Employee/Petitioner

Case# **12WC005764**

DAVIS STAFFING
Employer/Respondent

14IWCC0870

On 1/29/2014, 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:

4681 MARTAY LAW OFFICE
STEPHEN R MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

2965 KEEFE CAMPBELL & BIERY ASSOC LLC
MATTHEW IGNOFFO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

14IWCC0870

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Joseph Wilson
Employee/Petitioner

v.

Davis Staffing
Employer/Respondent

Case # **12** WC **05764**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Chicago**, on **January 13, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0870

FINDINGS

On the date of accident, **1/23/2012**, 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 **$20,800.00**; the average weekly wage was **$400.00**.

On the date of accident, Petitioner was **29** 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 **$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

For reasons set forth in the attached decision, benefits are denied.

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

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

Signature of Arbitrator

January 29, 2014
Date

ICArbDec19(b)

JAN 29 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH WILSON,	)	
	)	
Petitioner,	)	14IWCC0870
	)	
vs.	)	No. 12 WC 05764
	)	
DAVIS STAFFING,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Sections 8(a) and 19(b) of the Act.

STATEMENT OF FACTS

The claimant was employed at a temporary staffing agency, beginning on January 3, 2012. Prior to that time he had been employed as a bus driver and as a union pipefitter. At the staffing agency, he was assigned out to an automotive assembly line, attaching wheels to axles. He testified he worked in the assembly plant on five different stations on a rotating basis every two hours, with different tasks at each station. A job video of these assignments was introduced as RX1. The petitioner initially observed and trained and then moved parts between stations, and then worked on the assembly line for two to three weeks before seeking medical treatment. The petitioner asserts carpal tunnel syndrome incurred through repetitive trauma with an effective date of loss of January 23, 2012.

The medical records show that on January 27, 2012, the petitioner saw Dr. Richard Rodarte. See PX1-2. He reported bilateral hand numbness, tingling and stiffness, left greater than right, for several weeks. He denied any accident or trauma. Dr. Rodarte noted left hand paresthesia and prescribed Ibuprofen, bracing, ice and elevation, as well as light duty restrictions, which the respondent accommodated. On February 3, 2012, Dr. Rodarte noted ongoing symptoms of pain and swelling without relief. Dr. Rodarte maintained light duty and referred the claimant to a hand specialist. PX1, PX2.

On February 15, 2012, the petitioner presented to Dr. Nicole Einhorn at Orthopedic Specialists of Northwest Indiana. See generally PX3. She noted nontraumatic onset of bilateral hand pain on January 23, 2012. Wrist x-rays were normal. She recommended ongoing use of splints and work restrictions and prescribed an EMG study. The EMG was done March 14, 2012, and was positive for bilateral carpal tunnel syndrome. PX3.

The respondent commissioned a Section 12 evaluation with Dr. Michael Vender on May 9, 2012. See generally RX2. Dr. Vender reviewed the job video and examined the claimant. He noted the claimant's obesity (5'9", 320#) and brief work duration and concluded that while the claimant did have carpal tunnel syndrome, and would likely benefit from surgical release of same, the petitioner's work had neither caused nor accelerated the petitioner's medical condition.

The petitioner testified his employment with the respondent ceased following the Section 12 evaluation. He has since been hired by the Chicago Transit Authority as a bus driver effective May 6, 2013.

Depositions of Dr. Rodarte and Dr. Vender were conducted on April 17, 2013 and June 7, 2013, respectively. Dr. Einhorn did not testify or provide a causal opinion report.

OPINION AND ORDER

Accident and Causal Relationship

The petitioner asserts repetitive trauma as opposed to an acute injury. In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co. v. Industrial Commission*, 414 Ill. 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987). The causation of carpal tunnel syndrome via repetitive trauma has been deemed to fall in the area of requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill.2d 438 (1982).

The petitioner told Dr. Rodarte on January 27, 2012, that he had been experiencing these problems for several weeks. Even assuming the petitioner began working on the assembly line immediately, the petitioner would have been exposed to the asserted repetition for less than two weeks before the asserted symptoms. The Arbitrator further notes the evidence supports substantial variance in the job tasks, such as the rotation between stations as well as the initial training period. The petitioner's treating orthopedist did not render a causation opinion. Dr. Rodarte, an occupational medicine specialist, provided a causal opinion in support of an aggravation theory. Dr. Vender, a hand surgeon, opined that given the rotating job duties, the brevity of the exposure and the idiopathic risk factors, no causal relationship could be established. The Arbitrator finds Dr. Vender's opinion more supported by the evidence than Dr. Rodarte's, and therefore finds the claimant has failed to prove that his conditions are causally linked.

Medical Services (Past and Prospective) and TTD

As these are not causally related, they are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Hoff,

Petitioner,

vs.

NO: 09 WC 18192

14IWCC0871

Springfield Coal Company, LLC,

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 statue of repose exposure, disease, causal connection, case continuance, evidentiary rulings, 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 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.

14IWCC0871

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $31,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 8 2014
TJT:yl
o 9/29/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOFF, THOMAS
Employee/Petitioner

Case# **09WC018192**

SPRINGFIELD COAL CO LLC ET AL
Employer/Respondent

14IWCC0871

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:

0755 CULLEY & WISSORE
HAROLD B CULLEY JR
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG
KEN WERTS
PO BOX 1545
MT VERNON, IL 62864

14IWCC0871

STATE OF ILLINOIS)

COUNTY OF SANGAMON) SS.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Thomas Hoff
Employee/Petitioner

Case # **09 WC 18192**

v.

Consolidated cases: _____

Springfield Coal Co. LLC, et. al.
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 **11-5-13**. 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 occupational disease 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: Disease/exposure, causation, Sections 1(d)-(f), 19(d), good cause under Rule7020.60(b)(C)(i).

FINDINGS 14IWCC0871

On **1-9-08**, 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; there was a timely disablement.

Good cause existed for a continuance; Petitioner proved exposure; injurious practice is inapplicable.

In the year preceding the injury, Petitioner earned $40,069.17; the average weekly wage was $1044.02.

On the date of accident, Petitioner was 55 years of age, and ***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 $N/A for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $626.41 per week for 50 weeks, because the injury sustained caused a 10 % 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.

D. Dyl Mc Carthy November 22, 2012

Signature of Arbitrator Date

DEC 2 - 2013

14IWCC0871

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

THOMAS HOFF
Employee/Petitioner

Case # 09 WC 18192

v.

SPRINGFIELD COAL CO. et. al.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR
FINDINGS OF FACT

Petitioner, Thomas Hoff, was born on May 30, 1952 and was sixty-one years old on the day of arbitration. (T-10-11). Petitioner began working for the Respondent's predecessor in 1981. His job involved coal mining, above the surface.. (T-12). Prior to mining, Petitioner went to trade school and learned welding, something he did quite a bit of during his career. (T-11-14). While mining, Petitioner would bid into more desirable and less dusty jobs when he could. He worked as a drill helper, a surface mechanic, a hoisting engineer, prep plant repairman, and plant board operator. (T-14-17). Petitioner's last mining shift was January 9, 2008, at Respondent Springfield Coal's Crown III Mine. (T-24-25).

Petitioner's last position was a plant control board operator where he worked in what was supposedly a sealed room. However, he stated that was not the case when the plant was running. "Well, there was a lot of dust when the thing was on and then when we weren't running the plant, when something would break down you were back to repairing again." (T-17). On the days he had to perform manual labor he could tell he was wearing down. (T-18-19). In explaining his decision to retire, Petitioner stated that "Well, I was having a lot of trouble, I was completely worn out. When I put in a shift of the repairing and stuff I was pretty well shot." (T-19-20). Petitioner began to notice his breathing was becoming worse doing his normal duties, such as climbing the 70 stairs in the prep plant to perform repairs. (T-29). He estimated that his breathing problems manifested during the last three to five years of mining. They progressively worsened. Since he left the mines they have remained the same, but he is not exerting himself. (T-30-31). Petitioner stated that he talked to his family doctor about his breathing problems, and decided to retire. (T-31-32). By taking an early retirement Petitioner took a 21% cut in his pension, and his income was cut substantially. (T-20). Since leaving the mines he has not sought other work because he felt unable to handle it. (T-21). Currently, he is limited in the amount of manual labor he can do. (T-34).

Petitioner maintained a welding business on the side while he was a coal miner. He testified that he quit welding in that business several years before he quit mining because "It just got too much. I was overextending myself, you know, I just was wore out and couldn't do two jobs anymore, I had enough." (T-24). Petitioner stated that he began smoking at age 25 or 26, but "quit several times, you know, and then I'd go back and it was kind of on and off." (T-35). Petitioner testified that his back causes him a lot of pain. (T-46).

Terry Sikorski, a co-worker, testified for Petitioner. Mr. Sikorski has known Petitioner since 1981when he began working at Crown III. Near the end of his own career which was in January 2006, Mr. Sikorski would see Petitioner every day. (T-52-53). At that time Mr. Sikorski was a repair mechanic and Petitioner would work with him when the plant went down and repairs were needed. (T-53-54). Mr. Sikorski stated, "We worked together a lot and he'd be short of breath, he would wheeze and spit and gag and go on like that and I'd

just say, hey, you know, Hank, you're going to have to get out of this business before you quit breathing, you know, and that's basically what I told him, and a lot of times he couldn't do the work, he'd have to go take a break or whatever because he couldn't breathe." (T-55).

Adrian Fritzsche testified for Springfield Coal. He has worked at the Crown III Mine since 1997 when he took a labor relations job. (T-60-61). Mr. Fritzche occasionally saw Petitioner at Crown III. Respondent asked him about the job of a control room operator, and about another control room operator who worked with limitations. (T-63-65). That person left that job to become an MSHA inspector, a job which required him to pass a physical. (T-69-70). Mr. Fritzche agreed that the plant would have to be shut down at times during a shift. (T-65). He agreed that when Petitioner was not in the control room he would have to work as a plant mechanic, a physically demanding job. (T-74, 76). He said that this occurred up to three times per shift. He conceded that there is always coal dust in the prep plant. (T-76).

Petitioner was recalled as a witness and explained that a board operator has to do work outside of the control room. One example was the adjustments that had to be made to nuclear devices in the coal beds called StrataTrols. To make any adjustments to their operation he "had to go out into the prep plant and work on the boards out there while the plant was running." (T-79-80).

Dr. Roger McFarlin, Petitioner's treating physician, testified that he has practiced in Hillsboro since 1972 and has treated many miners throughout the years. (PX 3-p. 4-6). Dr. McFarlin has diagnosed Petitioner with COPD secondary to smoking and coal mining. He interpreted Petitioner's chest x-rays through the years as showing fibrosis. Fibrosis is a finding consistent with coal workers' pneumoconiosis (CWP). (PX 3-p. 7-8). Dr. McFarlin did not believe that Petitioner could do the work of a coal miner, and opined that further exposure to the mining environment could risk progression of his CWP. (PX 3-p.-8-9).

On cross-examination Dr. McFarlin verified record entries wherein he had advised Petitioner to stop smoking. (PX 3-pp. 11-16). He agreed that several entries had Petitioner smoking two or more packs per day. (PX 3-pp 12-14, 16-17, 19-21). He does not hold himself out as an expert for reading chest films for CWP. Dr. McFarlin estimated that Petitioner's back problems go back at least 15 years. (PX 3-p. 23).

Dr. McFarlin provided that exposure to the coal mine environment can cause shortness of breath, cough with sputum, and pulmonary fibrosis. It can negatively affect pulmonary function testing and predispose a person to pulmonary infection. Smoking has similar effects. (PX 3-pp. 10, 28-29). He stated that smoking does not cure or prevent the COPD caused by mining. COPD can have multiple causes with each being additive. (PX 3-p. 29).

At his attorney's request, Petitioner was examined by pulmonologist Dr. William Houser. At the July 22, 2009 exam Dr. Houser noted a ten year history of breathing problems. Petitioner currently experienced shortness of breath with activities such as walking, stair climbing, or lifting. Petitioner related that he averages a half a pack of cigarettes per day, with the most he smoked being one pack per day. He had cut down to a few cigarettes a day for the past several months. His current medication included Spiriva, one capsule by inhalation once a day. Dr. Houser noted Petitioner's work history and exposures. (PX 1-p. 7-9).

Petitioner's chest exam was normal, and his pulmonary function testing showed a moderate restrictive and a mild obstructive impairment. Dr. Houser interpreted Petitioner's chest x-ray as showing CWP category 1/1 with a granuloma. Dr. Houser concluded that Petitioner had COPD secondary to mining and smoking, and CWP caused by mining. The restrictive change on pulmonary function testing was due to CWP. Based on his lung diseases Petitioner should avoid any additional coal mine exposures. (PX 1-pp. 10-12; PX 2-pp. 12-13).

Dr. Houser felt that Petitioner was not capable of performing heavy manual labor due to his pulmonary function impairment (PX 2-p. 16). Dr. Houser further stated that Petitioner would be classified as overweight, but he would not classify him as obese because he was a large muscular individual. (PX 2-p. 16).

Petitioner also submitted chest x-ray interpretations from two Radiologist/B-readers, Dr. Smith of Pennsylvania, and Dr. Alexander of North Carolina. Dr. Smith interpreted chest films of 10-05-98, 10-19-01, 05-10-04 and 02-22-05 as positive for CWP category 1/1. (PX 4). Dr. Alexander interpreted Petitioner's chest x-rays of 05-05-03, 10-29-09, 02-24-05, 10-19-01, 05-10-04, 10-05-98, and 03-21-09 as positive for CWP category 1/1. (PX 5).

The medical records of Dr. McFarlin showed that Petitioner had chronic back pain for years. (PX 6-pp. 32, 53, 60, 78, 114, 116, 143). Dr. McFarlin's records contain diagnoses of COPD. (PX 6-p. 370, 8-26-11; p. 371, 5-25-11 (shortness of breath with activity noted; p. 372, 3-14-11; p. 373, 12-29-10; p. 374, 12-28-09, 3-23-10; p. 375, 6-18-10, 8-30-10; p. 3, 10-12-09; p. 109, 9-8-09; 5, 2-20-09; p. 6, 12-01-08; pp. 7-8, 6-16-08 (shortness of breath with exertion noted; Spiriva given); p. 23, 2-24-05 (shortness of breath and rales noted).

Other entries show bronchitis or cough and congestion. (PX 6-p. 103, 12-06-79; p. 95, 01-8-92; p. 62, 10-02-98; p. 62, 10-05-98 (given Proventil inhaler); p. 61; 10-23-98; p. 38, 10-26-01 (cough, shortness of breath with any exertion); p. 35, 12-10-02; p. 28, 02-16-04 (rales and rhonchi noted); p. 27, 05-10-04 (shortness of breath on exertion). On 10-19-99 Petitioner complained of episodes at work where he becomes short of breath and sweats. (PX 6-p. 57). On 10-27-99 and 05-05-03 Petitioner complained of shortness of breath on exertion. (PX 6-pp. 33, 57). From 2008-2010 Spiriva use is documented. (PX 6-pp. 235, 238, 368).

Dr. McFarlin interpreted a chest x-ray of 10-5-98 as showing bilateral pulmonary fibrosis throughout the lung tissue. (PX 6-p. 208). Chest films of 10-19-01, 10-26-01, 05-05-03, 02-16-04, 05-10-04, and 02-24-05 also were interpreted by Dr. McFarlin to show bilateral pulmonary fibrosis. (PX 6-pp. 194, 196-197, 200-203).

Petitioner was seen by vocational expert June Blaine on 07-29-13. Her professional experience dates back to 1980. (PX 7-Depo. Ex. 1, p. 2). She has been a board member or officer in professional rehabilitation associations since the 1990's. (PX 7-Depo. Ex. 1, p. 3). Ms. Blaine noted that from 1977 to 1981 Petitioner worked in his own welding shop. He kept the business for about 15 years with the assistance of his wife. The contracts he obtained changed, and his welding services were no longer needed. For a short period of time he had up to eight employees and then had one or two welders working for his business. (PX 7-Depo. Ex. 2, p. 2). Ms. Blaine was asked to assume that Petitioner could not return to mining based on CWP and to assess his employability. She concluded that while he has a CDL he has no verifiable work experience in the last year which is required by most trucking companies. For over the road trucking he would need tractor trailer knowledge and experience. She felt his employment options would be limited to entry level wages of $9.00 an hour. However, such positions would be hard for Petitioner to obtain. (PX 7-Depo, Ex. 2, p. 2-3).

At Respondent's request, B-reader/Radiologist, Dr. Wiot, testified that he reviewed treatment x-rays of 10-02-98, 10-05-98, 10-19-01, 10-26-01, 05-05-03, 02-16-04, 05-10-04, 02-24-05, and 03-24-09 finding them all to be normal. He also read the 03-21-09 film reviewed by Dr. Houser and Dr. Smith as negative. B-readings were submitted for the films of 10-05-98, 10-19-01, 05-05-03, 05-10-04, 02-24-05 and 03-21-09. (RX 1-pp. 49-50).

At Respondent's request Petitioner was examined by Pulmonologist/B-reader, Dr. Jeff Selby, on October 29, 2009. Dr. Selby also reviewed medical records and the reports of Dr. Houser, Dr. Smith and Dr. Wiot. Petitioner's chief complaint was that he was short of breath and easily fatigued. Dr. Selby noted Petitioner's Spiriva use and his work and smoking histories. Petitioner's chest exam showed slightly decreased

breath sounds. Dr. Selby interpreted Petitioner's x-ray's as showing no CWP. Petitioner's pulmonary function testing showed normal spirometry with invalid post bronchodilator values and a mildly decreased diffusion capacity. Exercise testing was normal, but submaximal. Dr. Selby concluded that Petitioner had no pulmonary condition related to mining, (RX 2-Depo Ex 2, p. 1-4; RX 2-p. 31). Dr. Selby also reviewed the treatment x-rays of 10-05-98, 10-19-01, 05-05-03, 05-10-04, 02-24-05, and 03-24-09 finding them all to be normal. (RX 2-Depo. Ex 2, p. 16-17). None of the records he reviewed changed his opinion. (RX 2-Depo Ex 2, p. 18).

CONCLUSIONS OF LAW

The evidence established that the Petitioner was exposed to coal and rock dust during the 27 years in which he worked for the Respondent. Though he was not working underground, he was, for the most part, a welder and mechanic exposed to dust. He testified that he worked in a very dusty environment and his co-worker, Mr. Sikorski, who worked alongside him as a mechanic, corroborated his testimony. For the final five years of his employment, the Petitioner worked in a control room in the prep plant. The room was sealed and enclosed, but still had the presence of dust, a point conceded by the Respondent's witness Mr. Fritzche. More importantly, while operating the control room, the Petitioner still had to go out into the plant to make repairs on a regular basis which Fritzche said could happen up to three times a shift.,

Dr. Wiot testified that any miner who worked in such conditions for a period of ten or more years would have coal dust in their lungs. However, not all of them would develop coal workers' pneumoconiosis (CWP). The disease, which is the lung tissue's scarring as a result of coal and rock dust, is seen on radiographic studies. In this case, four B-readers, certified to determine the existence of the disease by interpreting the films, reviewed a series of films and provided opinions. Drs. Smith and Alexander, at the Petitioner's request, reviewed a number of films. They diagnosed simple CWP, category 1/1. Drs. Wiot and Selby, at the Respondent's request, examined many of the same films and found no evidence of the disease. Dr. Houser, a pulmonologist also hired by the Petitioner, examined a set of films taken March 21, 2009, and came to the same conclusions as Drs. Smith and Alexander. Dr. McFarlin, the Petitioner's family doctor whose practice involves treating a large number of miners, testified that the Petitioner had CWP, based upon his clinical findings.

While Respondent believes that Dr. Wiot should be believed because he had been a B-reader longer than anyone, this does not necessarily make him more credible. The overwhelming majority of his work has come at the request of Respondents. See *Cross v. Liberty Coal*, 08 IWCC 1260 (2008).

Dr. Selby also has some bias issues. It is relevant to note that in ***Eugene Conci v. Freeman United Coal Mining Company*, (August 13, 1999), No. 95 W.C. 64526, No. 99I.I.C. 0769.** Dr. Selby was asked about "his consistently negative readings of coal miners' x-rays over the last 7 to 8 years. Dr. Selby opined that 'there are very few positive x-rays from Southern Illinois that in all honesty are truly positive for coal workers pneumoconiosis.'" Other decisions have questioned his credibility. *Chrostoski v. Freeman United Coal Mining Co.*, (March 2, 2007), 07 I.W.C.C. 0226, 2007 WL 1202973; *Samuel v. F W Electric*, (November 12, 2008), 08 I.W.C.C. 1296, 2008 WL 5424055, *Conley v. Shawnee Contracting, Inc.*, (February 8, 2008), 08 I.W.C.C. 0164, 2008 WL 728168; *Gulley v. Freeman United Coal Mining Co.*, (November 11, 2005), 05 I.W.C.C. 892, 2005 WL 3634664.

Nothing in the evidence suggests bias on the part of Drs. Smith or Alexander. The Arbitrator finds their findings, along with the facts concerning the long period of exposure and Dr. McFarlin's experience in treating coal miners, are persuasive on the issue of whether the Petitioner suffers from CWP. The Petitioner has met his burden of proof on the issue.

The next issue raised by the Respondent deals with Section 1 (f) of the Occupational Disease Act. Under that section, disablement must occur within two years of the date of last exposure to the hazards related to the disease. Having found the existence of the disease and the exposure through the last date of employment, the issue is when disablement occurred. Virtually all of the doctors providing opinions in the case agree that if the petitioner had CWP, he should eliminate further exposures and leave the mine. The Appellate Court recently ruled on this issue in a case involving similar facts, Freeman United Coal Mining Company v. The Illinois Workers Compensation Commission, 2013 Il. App. (5th) 120564 WC.

Citing an earlier ruling in the Ameritech Services case, the Court ruled that disability is proven when a person can no longer perform his job without endangering his health. Id. at 23. As stated above, all of the medical evidence points to that conclusion in this case.

On the issue of nature and extent, the Petitioner has been diagnosed with simple CWP. He has damaged lung tissue which cannot perform like regular tissue. That said, the Petitioner testified that he has good and bad days and is able to lift 50 pounds and mow his lawn with a riding mower without difficulty. He does, on bad days have limitations on walking and climbing. He did not say whether he had more good days than bad.

He has continued to see Dr. McFarlin on a regular basis since leaving the mine. Respondent's Exhibit 3 contains office notes of those visits. Since his retirement through October 5, 2013, the Petitioner has been seen for treatment on 34 occasions. Only a few of those visits appear to be related to breathing or pulmonary problems. The majority of visits involved complaints about the lower back. The doctor did repeated tell the Petitioner to quit smoking, but the overwhelming majority of the visits were for unrelated problems.

In addition to the diagnosis of CWP, the Petitioner has been diagnosed with chronic obstructive lung disease and questionable restrictive and obstructive defects as seen on pulmonary function studies taken at various times. At best, the Petitioner has mild COPD and a moderate vent defect, both according to Dr. Houser. Dr. Selby argues effectively that the studies do not show the Petitioner to be outside of normal values.

The Petitioner argues for an award under Section 8 (d) (1) of the Act. The Arbitrator feels the proof for such an award is lacking. The reason the Petitioner cannot return to the mine is because continued exposure might lead to a progression of his CWP. There is no medical evidence which shows that he is limited from performing any number of physical jobs. The Arbitrator gives little weight to Ms. Blaine's opinion since she failed to review any medical records or reports to determine the limitations on Petitioner's employability. She suggests that the Petitioner could perform jobs in the minimum wage category, but she does not consider job possibilities which the Petitioner could reasonably be expected to physically perform. Without such an analysis, the Arbitrator does not believe the jobs suggested represent suitable employment.

The Petitioner has simple CWP as a result of his employment. The Arbitrator awards 10% Person AS A Whole for his disability.

The Respondent renews its motion that the case should not have been continued for good cause when it appeared on the May 2013 Springfield call. The Arbitrator denies said motion for reasons stated at that time contained in Arb. Exhibit 3.

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

Heradio Quintero,

Petitioner,

14IWCC0372

vs.

NO: 02 WC 64230
02 WC 64231
04 WC 53993
04 WC 53994

Mannheim School District #83,

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 denial of reinstatement, and being advised of the facts and law, affirms and adopts the Decision/Order of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision/Order of the Arbitrator filed June 3, 2013, is hereby affirmed and adopted.

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

DATED: OCT 0 8 2014
TJT:yl
o 10/6/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

STATE OF ILLINOIS)
)
COUNTY OF COOK)

14IWCC0872

ILLINOIS WORKERS' COMPENSATION COMMISSION
ORDER

Heradio Quintero

Employee/Petitioner

v.

Mannheim School District #83

Employer/Respondent

Case nos. 02 WC64230 & 02 WC 64231&
04 WC 53993 & 04 WC 53994

The ***petitioner*** filed a motion to reinstate these cases on May 15, 2013, and properly served all parties. The matter came before me on June 3, 2012, in the City of Chicago. After hearing the parties arguments and due deliberations, I hereby deny the motion. A record of the hearing ***was*** made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Pursuant to Rule 7020.90, a party has sixty days from the date of receipt of an Order of dismissal to file a Petition to Reinstate. With the cases, *instanter*, the Petition to Reinstate was timely filed on December 6, 2010 however, it was never presented. A Motion to reinstate theses cases was filed, which is the subject of this Order. Pursuant to Rule 7020.90 and relevant case law regarding due diligence and prejudice to the Respondent, Petitioner's Motion to reinstate these cases is denied.

Signature of Arbitrator

June 3, 2012

JUN - 3 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melvin Wallace,
Petitioner,
vs.
City of Chicago,
Respondent,

NO: 08 WC 39018

14IWCC0873

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 the petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 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.

The party commencing the 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 8 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:9/4/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

WALLACE, MELVIN
Employee/Petitioner

Case# **08WC039018**
09WC044708

CITY OF CHICAGO
Employer/Respondent

14IWCC0873

On 12/11/2013, 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 0.09% 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:

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

0113 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

14IWCC0873

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

MELVIN WALLACE
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **08** WC **39018**

Consolidated cases: **09 WC 44708**

An *Application for Adjustment 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 **September 4, 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 _____

14IWCC0873

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$61,673.04**; the average weekly wage was **$1186.02.**

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

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

Respondent ***has*** 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 permanent partial disability in the amount of $636.15 per week for 25.3 weeks, as provided by Section 8(e) of the Act, as the injuries sustained caused 10% loss of use of the right arm. Respondent shall receive a credit of 7% loss of use of the right arm.

Respondent shall pay Petitioner permanent partial disability in the amount of $636.15 per week for 6.325 weeks, as provided by Section 8(e) of the Act, as the injuries sustained caused 2.5% loss of use of the left arm.

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

WALLACE, MELVIN
Employee/Petitioner

Case# **09WC044708**

08WC039018

CITY OF CHICAGO
Employer/Respondent

14IWCC0873

On 12/11/2013, 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 0.09% 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:

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

0113 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

Melvin Wallace
08WC39078
09WC44708

14IWCC0873

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

MELVIN WALLACE
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **09** WC **44708**

Consolidated cases: **08 WC 39018**

An *Application for Adjustment 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 **September 4, 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. ☐ 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 _____

14IWCC0873

FINDINGS

On **July 30, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,007.69**; the average weekly wage was **$1,250.15**.

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

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

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

Respondent shall be given a credit of **$23,694.65** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$23,694.65**.

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

ORDER

Respondent shall pay Petitioner $664.72 for 50 weeks because the injuries sustained resulted in 10% loss of use of a person as a whole, pursuant to Section 8(d)2 of the Act.

Respondent shall pay to Petitioner $15,746.00, which represents the remaining unpaid medical charges outlined in Petitioner Exhibit 7, pursuant to 8a and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $833.43 of 28 & 2/7 weeks as provided in Section 8(b) of the Act. Respondent shall be given a credit of $23,694.65, which represents temporary total disability benefits paid to Petitioner.

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

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

14IWCC0873

BEFORE THE WORKERS' COMPENSATION COMMISSION OF ILLINOIS

MELVIN WALLACE, Petitioner	)	
v.	)	No. 08 WC 39018
	)	Consolidated with 09 WC 44708
CITY OF CHICAGO/FLEET MANAGEMENT Respondent	)	Arbitrator Thompson-Smith

STATEMENT OF FACTS

The parties have stipulated that on October 24, 2007, Melvin Wallace, hereinafter referred to as Petitioner, was employed by the city of Chicago, hereinafter referred to as Respondent, and their relationship was one of employer/employee. The parties further stipulated that on that date, Petitioner was involved in an accident arising out of and in the course of his employment. The parties further stipulated that timely notice of the accident was given and that Petitioner's current condition of ill-being was causally related to the work accident. The parties further stipulated that the medical care was reasonable and necessary and causally related to Petitioner's work accident. The Respondents have stipulated on the record that they have paid or will pay all reasonable, necessary and causally related medical expenses incurred up to the date of trial, subject to the medical fee schedule. The parties further stipulated that Petitioner was not temporarily, totally disabled from work, as a result of his injuries. *See,* AX1.

Petitioner testified that he was employed as a road-service tire man by the city of Chicago/Office of Fleet Management, for approximately twenty-five (25) years. He testified that when he began work on October 24, 2007, at 10:00 p.m., he felt fine. Petitioner testified that on October 24, 2007, he was at work changing a tire. The tire was stuck and he needed to pound it off with the use of a sledgehammer. While swinging the sledgehammer, he experienced an immediate onset of pain in both elbows with pain and numbness in his right and left forearm. Petitioner's testimony is credible and unrebutted.

Petitioner reported his accident and was referred, by his employer, to MercyWorks, where he was examined on October 24, 2007. The medical staff at MercyWorks obtained a history of Petitioner having an accident at work; and injuring both arms and elbows while using a sledgehammer to dislodge a frozen tire. Petitioner was subsequently referred to Dr. Heller, an orthopedic surgeon on October 26, 2007, who diagnosed him as having right lateral epicondylitis and limited left epicondylar tenderness. Dr. Heller performed a steroid injection in Petitioner's right elbow. On November 9, 2007, when Petitioner returned to see Dr. Heller, he was released from care and returned to work in a full duty capacity. *See,* PXs 1 & 6.

Petitioner testified that he worked light duty for the city of Chicago from October 24, 2007 until November 9, 2007, at which point he returned to work, full duty, as a road-service tire man.

Petitioner testified that he continued to work full duty as a road-service tire man from November 10, 2007 to July 30, 2009; on which date, he suffered an injury to his left shoulder.

Petitioner further testified that upon being released to work on November 10, 2007, he continued to experience pain and weakness in both his arms and elbows. Petitioner specifically testified that increased activity and lifting and forceful use of his hands and arms, caused pain and weakness in his bilateral arms and elbows. With respect to the injuries suffered on October 24, 2007, to his right and left elbows and arms, Petitioner testified that he is no longer treating with any doctors.

In addition, with respect to his injuries suffered on October 24, 2007, Petitioner testified that he continues to experience pain in both elbows and arms. He specifically testified that his pain increases with increased activity. He testified that on a pain scale from 1 to 10, the pain in his right elbow is at at 4 or 5 on an average day and increases to a 7 or 8 on a more active day; and the pain in his left elbow is at a 7 or 8 on an average day and reaches a 9 or 10 on a more active day. He further testified that he continues to experience pain in his bilateral forearms. Petitioner's testimony was credible and unrebutted.

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

The medical records demonstrate the extent of the injuries Petitioner suffered to his bilateral elbows and arms. Specifically, Petitioner suffered traumatic right lateral epicondylitis. In addition, he suffered left lateral epicondyle injury and tenderness. Petitioner's injuries have resulted in continued, constant pain and weakness in his bilateral elbows and arms. Further, Dr. Coe has opined that the October 24, 2207 accident, involving both arms; and the July 30, 2009 accident, involving the left shoulder and arm, have caused permanent, partial disability to both arms. Dr. Coe's opinions are unrebutted. *See,* PX5.

Based upon the testimony and review of the medical records, the Arbitrator finds that Petitioner's injuries to his right elbow and arm cause him to be permanently and partially disabled to the extent of 10% loss of use of the right arm and Petitioner's injuries to his left elbow and arm cause him to be partially disabled to the extent of 2.5% loss of use of the left arm.

As such, the Arbitrator awards 10% loss of use of the right arm, which presuming a permanent, partial disability rate of $636.15 equates to $32,189.19; and 2.5% loss of use of the left arm which equates to $4,023.65.

N. IS THE RESPONDENT DUE ANY CREDIT?

The Arbitrator notes that Petitioner previously settled a workers' compensation claim in 1997 involving his right arm, with a 7% loss of use of the right arm. As such, the above permanency award of 20% loss of use of the right arm is subject to a credit to Respondents for 7% loss of use of the right arm.

STATEMENT OF FACTS

Petitioner testified that he worked for the city of Chicago, Department of Fleet Management on July 30, 2009. He stated that he began work at 10 p.m.; and felt fine subject to minor aches and pains in his arms.

Petitioner testified that on July 30, 2009, he was changing a garbage truck tire on the Kennedy Expressway. The tire was stuck and the ground was covered with hydraulic fluid. While attempting to change the stuck tire, Petitioner was slipping in the fluid; and as he pulled, he states that he felt a sudden, sharp pain in his left shoulder that radiated into the left side of his neck and into his left arm.

Petitioner reported his accident and was referred to MercyWorks, by his employer, where he was examined by Dr. Sheth on July 31, 2009; who obtained a history of having an accident at work with pain in his left shoulder and elbow. *See,* PX1 pgs. 9-25.

Petitioner underwent a left shoulder MRI scan on September 2, 2010, at Mercy MRI Center. The scan was interpreted as showing a full thickness tear of the left rotator cuff supraspinatus with tendinopathy and bursitis. On September 8, 2009, Dr. Sheth reviewed the MRI scan, re-examined Petitioner and referred him to an orthopaedic specialist, Dr. Heller, for left shoulder evaluation and treatment.

Petitioner was again examined by Dr. Heller on September 11, 2009, who obtained the history of Petitioner's accident at work on July 30, 2009, with ongoing left shoulder pain, weakness and stiffness. Upon examination, Dr. Heller found left shoulder rotator cuff weakness and left shoulder stiffness. Dr. Heller reviewed the left shoulder MRI scan interpreting this test as showing a full thickness rotator cuff tear. Dr. Heller noted that Petitioner had failed conservative therapy and performed a left shoulder, subacromial steroid injection. Dr. Heller recommended additional physical therapy but opined that Petitioner would probably require arthroscopic repair. *See,* PX3 pgs. 5-6.

Petitioner performed physical therapy for approximately three (3) weeks with limited symptomatic improvement. Dr. Heller re-examined Petitioner on October 5, 2009. Little improvement was noted with treatment to date. Dr. Heller's examination again found marked weakness and stiffness of Petitioner's left shoulder and the doctor prescribed left shoulder surgery for rotator cuff repair. Petitioner's surgical procedure was delayed for an unrelated cardiac condition and once his cardiac condition was stabilized, Petitioner was cleared for surgery.

Petitioner underwent left shoulder surgery performed by Dr. Heller on January 26, 2011, at Mercy Hospital. At operation, arthroscopic exploration revealed a full thickness rotator cuff tear involving the supraspinatus and infraspinatus. Dr. Heller performed arthroscopically assisted rotator cuff repair and subacromial decompression. *See,* PX3, pg. 40.

Petitioner underwent rehabilitative physical therapy from February 11, 2011 to July 5, 2011. Dr. Heller released Petitioner to return as needed and at Petitioner's request, released him to return to work, in a full duty capacity, despite occasional high pain levels. *See,* PX3, pg. 86.

Petitioner followed up at Mercy Works on August 7, 2011 and was examined by Dr. Sheth, who noted that Petitioner continued to have discomfort but released him from care and opined that he could work in a full duty capacity. *See,* PX1, pg. 20.

Petitioner attempted to return to work full duty as a tire man, but noted continued pain and weakness in his left shoulder and arm. On September 13, 2011, he returned to Dr. Heller who recommended a functional capacity evaluation ("FCE"). *See,* PX1 pg. 21.

Petitioner underwent a FCE in October 2011. On October 28, 2011, Dr. Heller reviewed the FCE and released Petitioner back to work with permanent, light duty restrictions, specifically; bilateral lifting of 37 pounds floor to waist, and 27 pounds waist to above shoulder level. In addition, Petitioner was given a maximum of 32 pounds pushing and pulling and a maximum of 42 to 44 pounds of pry bar force. Petitioner followed up at Mercy Works and his permanent, light duty restrictions were confirmed by Dr. Sheth. Petitioner was also examined by Dr. Coe, at the request of his attorney, who opined that Petitioner required permanent restrictions as a result of his injuries. *See,* PX1, pg. 21; PX3, pg. 55; PX5, pg. 9.

Petitioner testified that he returned to work and that Respondent attempted to accommodate his permanent restrictions. Petitioner testified that upon returning to work he noted continued and constant pain; weakness in his left shoulder and arm; and felt physically unable to perform the job duties associated with his position. As such, he retired on January 31, 2012. At present, with respect to his left shoulder, Petitioner testified that he is no longer followed by any doctors. He stated that he has been told to return to Dr. Heller on an "as needed" basis.

Petitioner testified that he continues to experience pain in his surgically repaired left shoulder. He specifically testified that his pain increases with increased activity. He testified that on a pain scale from 1 to 10, the pain in his left shoulder is at 7 or 8 on an average day and increases to 9 or 10 on a more active day. He further testified that his left shoulder continues to be stiff and painful. Petitioner testified that he was released from his doctors' care with permanent, light duty restrictions and these restrictions were accommodated. Petitioner testified that he was unable to perform his job duties without pain, so he retired on January 31, 2012.

CONCLUSIONS OF LAW

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

The Arbitrator notes that the Respondents have offered no evidence to refute the reasonableness or necessity of the medical treatment or that the treatment was casually related to Petitioner's July 30, 2009 work accident; and that the itemized billing statements contained in Petitioner's Exhibit 7 are reasonable, necessary and casually related to Petitioner's July 30, 2009 work accident.

In addition, at trial, Petitioner identified Petitioner's Exhibit 7 as itemized billing statements that were related to his July 30, 2009 work accident, specifically his left shoulder surgery and rehabilitation. In

14IWCC0873

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
08WC39018; 09WC44708
SIGNATURE PAGE

L Thompson Smith
Signature of Arbitrator

December 10, 2013
Date of Decision

DEC 11 2013

addition, Dr. Coe has opined that all the medical treatment that Petitioner received was casually related to his work accident, and reasonable and necessary.

The Arbitrator notes that Petitioner began his treatment at Mercy Works, at the behest of his employer and was referred to an orthopedic specialist, Dr. Heller, by the doctors at Mercy Works, for treatment and rehabilitation for a torn rotator cuff. The Arbitrator further notes that the Respondents have stipulated that Petitioner's injuries, specifically left rotator cuff tear, were causally related to his July 30, 2009 work accident. Finally, the Arbitrator notes that Petitioner has testified that his treatment and surgery have alleviated his symptoms to some degree.

The Arbitrator finds that Petitioner's care and treatment relative to the injuries he sustained on July 30, 2009, have been reasonable and necessary and causally related to his work accident. Respondent specifically stipulated on the record that the city of Chicago has or will pay all reasonable, necessary and causally related medical expenses incurred up to the date of trial, subject to the fee schedule. Respondents are responsible for all reasonable, necessary and causally related charges associated with Petitioner's medical conditions and injuries.

As such, the Arbitrator finds that Respondent is responsible for all reasonable, necessary and causally related medical expenses incurred and specifically awards $15,746.00, which represents the remaining unpaid medical charges outlined in Petitioner Exhibit 7, subject to the fee schedule.

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

The medical records clearly demonstrate that Petitioner suffered significant and disabling injuries. Specifically, Petitioner suffered a full thickness left rotator cuff tear, resulting in an invasive surgical procedure. Specifically, Petitioner underwent a rotator cuff repair and subacromial decompression. Petitioner's injuries have resulted in continued and constant pain and permanent light duty restriction. The Arbitrator specifically notes that Petitioner's injuries have caused the medical necessity for permanent light duty restrictions. Further, Dr. Coe has opined as to the permanent nature of Petitioner's injuries and his opinions are unrebutted.

The Arbitrator also notes that Petitioner voluntarily retired on January 31, 2012 and testified that his injuries were causing him pain and weakness in the performance of his job duties. The Arbitrator finds that Petitioner's injuries to his left shoulder cause him to be permanently, partially disabled to the extent of 10% loss of use of the person as a whole consistent with *Will County Forrest Preserve District v. Illinois Workers' Compensation Commission*, 2012 Ill. App (3d), 110077 WC. As such, the Arbitrator awards 10% loss of use of the person as a whole, which presuming a permanent partial disability rate of $664.72 equates to $33,236.00.

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

Edna B. Murphy,
Petitioner,

vs.

Wal-Mart,
Respondent.

14IWCC0874

NO: 13 WC 16193

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 March 21, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,600.00. 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: OCT 8 - 2014
KWL/vf
O-9/29/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0874

Case# 13WC016193

MURPHY, EDNA B
Employee/Petitioner

WAL-MART
Employer/Respondent

On 3/21/2014, 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:

JOSEPH E HOEFERT ATTORNEY AT LAW PC
1600 WASHINGTON AVE
ALTON, IL 62002

WIEDNER & McAULIFFE LTD
KHRISTOPHER S DUNARD
8000 S MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0874

Case # 13 WC 16193

Consolidated cases: N/A

EDNA B. MURPHY
Employee/Petitioner

v.

WAL-MART ,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Collinsville**, on **January 22, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0874

FINDINGS

On **3/29/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,896.36**; the average weekly wage was $**324.93**.

On the date of accident, Petitioner was **49** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, $**0** for non-occupational indemnity disability benefits, and an amount to be determined for other benefits for which credit may be allowed under Section 8(j) of the Act.

Respondent is entitled to a general credit for any medical bills paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,522.73 to Dr. Rogalsky, $4,911.76 and $393.00 to BJC Healthcare, $187.73 to Neurology Associates of Alton, and $296.40 to Anesthesia Associates of Illinois, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $220/week for 12 6/7 weeks, commencing 5/21/13 through 7/8/13 and 7/30/13 through 9/10/13, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $220/week for 38 weeks, because the injuries sustained caused the 10 % loss of use of the left hand and 10% loss of use of the right hand, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from March 29, 2013 through January 22, 2014 and shall pay the remainder of the award, if any, in installments.

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

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

Signature of Arbitrator

March 18, 2014
Date

MAR 21 2014

EDNA B. MURPHY vs. WAL-MART, #13-WC-16193

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of arbitration the issues in dispute were accident, causal connection, medical expenses, temporary total disability, and nature and extent. Petitioner was the sole witness testifying at the hearing. Respondent's representative, Sarah Schneider, was present throughout the hearing.

The Arbitrator finds:

Petitioner, who is right hand dominant, began working for Respondent in May of 2011 as a cashier/scanner.

Petitioner completed a medical history form for Alton Multi Specialists on February 12, 2013. She indicated that she weighed 135 pounds, occasionally drank five alcoholic beverages at one time, and had smoked at least half a pack of cigarettes per day since she was 12 years old. She listed a history of having bilateral elbow problems along with surgery in 1982. She also reported problems with vertigo and her orthopedic history included back pain, neck pain and numbness/tingling. With regard to her 1982 elbow injury she indicated that both of her elbows had been broken. She currently had problems with dizziness, fainting spells, and hearing loss. (RX 6)

On February 20, 2013, Petitioner presented to Dr. Eric Stabell for an annual physical exam and to establish care. She complained of carpal tunnel symptoms which had begun six months earlier. Dr. Stabell noted Petitioner's symptoms were worse in the morning and she worked as a "checker." Petitioner also reported a tendency to drop things with her right hand. Dr. Stabell indicated that Petitioner's exam was positive for carpal tunnel syndrome and he referred her to an orthopedic specialist for intervention. He also noted that Petitioner had chronic problems with obesity, hypertension, and tobacco abuse. Petitioner also had more recent complaints of dizziness and nausea. With respect to her complaints of vertigo, Dr. Stabell noted it was moderate in severity and occurred intermittently and while turning her neck. Petitioner also had back complaints which felt worse after standing all day at work. (RX 6)

On February 28, 2013, Petitioner presented to Dr. Randall Rogalsky for evaluation. Petitioner reported pain, night waking, dropping objects and difficulty with day to day activities as a cashier for Respondent. Dr. Rogalsky diagnosed Petitioner with clinical bilateral right greater than left carpal tunnel syndrome. Petitioner had slight atrophy on the right side which

the doctor felt might necessitate earlier surgical intervention. He recommended nerve conduction studies and provided Petitioner with a cock-up wrist support. In addition he recommended over the counter anti-inflammatory medication. (PX 1, Dep. Ex. 2)

On March 19, 2013, Petitioner underwent the recommended EMG/NCV. The study reportedly showed evidence consistent with mild bilateral carpal tunnel syndrome. (PX 1, Dep. Ex. 2)

On March 29, 2013, Petitioner returned to Dr. Rogalsky reporting continued symptoms. He indicated that Petitioner had been unresponsive to conservative measures and as a result recommended bilateral carpal tunnel release surgeries. (PX 1, Dep. Ex. 2)

Petitioner signed her Application for Adjustment of Claim on May 9, 2013. (AX 2)

Petitioner underwent a right carpal tunnel release on May 21, 2013. (PX 1, Dep. Ex. 2)

Petitioner presented to Debbie Seymour, a certified nurse practitioner, on May 31, 2013 for a post-surgical follow-up. Petitioner was doing fairly well with expected stiffness and some ongoing numbness. Petitioner could not make a full fist. Petitioner was instructed to engage in range of motion and strengthening exercises and to continue the use of anti-inflammatories. Petitioner stated that she did not believe she needed physical therapy at that point. (PX 1, Dep. Ex. 2)

Petitioner was re-evaluated by Ms. Seymour on June 26, 2013 and reported that she had not had physical therapy for a few weeks. Ms. Seymour called physical therapy and was told that Petitioner had discontinued treatment and decided to wait until she returned for a follow up visit. She also indicated that she would not keep Petitioner off work indefinitely until the surgery was scheduled. She re-ordered physical therapy and asked that Petitioner's work activities in physical therapy be increased. (PX 1, Dep. Ex. 2)

On July 8, 2013, Petitioner returned to Ms. Seymour and reported that she had been discharged from therapy as all of her goals with respect to the right hand had been met. Petitioner was able to do her normal day-to-day activities and felt that she was able to return to work. A left carpal tunnel release was scheduled for July 30, 2013. (PX 1, Dep. Ex. 2)

On July 22, 2013 Dr. Rogalsky authored a letter to Petitioner's attorney expressing his opinion that Peitioner's job as a cashier for Pespondent was the "significant, aggravating/accelerating factor" in the development of Petitioner's bilateral carpal tunnel syndrome. A copy of the

letter was sent to Chad Perry, Respondent's adjuster. (PX 1,Dep. Ex. 2, pp. 28-29)

Petitioner underwent the recommended left carpal tunnel release on July 30, 2013. (PX 1, Dep. Ex. 2)

Petitioner returned to Ms. Seymour on August 9, 2013 for a post-surgical follow-up. Petitioner remained off work and physical therapy was ordered. (PX 1, Dep. Ex. 2)

On August 30, 2013, Petitioner presented to Dr. Rogalsky for post-op follow-up. He noted that both her right hand was doing extremely well and her left hand release had shown excellent results. Examination revealed no abnormalities. He discharged Petitioner from care and released her to return to work on September 10, 2013 without restrictions. This is the last medical record on file. (PX 1, Dep. Ex. 2)

Dr. Beyer conducted an independent medical examination on October 29, 2013. Dr. Beyer reviewed Petitioner's job description (PX 2), took a detailed history, reviewed medical records, and conducted a physical examination. Ultimately, he diagnosed Petitioner with bilateral carpal tunnel syndrome. However, he did not believe the condition was due to Petitioner's duties as a cashier. (RX 2)

In support of his opinion he cited several articles which indicate there is no scientific evidence that occupational environmental exposure contributes to or aggravates carpal tunnel syndrome. Instead, carpal tunnel syndrome has specifically been found to be a result of biological, developmental, and genetic factors. (RX 2)

Dr. Beyer believed that the primary factors for the development of carpal tunnel syndrome in Petitioner were her gender, age, smoking half a pack cigarettes since age 12, and a genetic predisposition. He also found it significant that Petitioner experienced significant weight gain over a 2 year period, going from 98 pounds to 136 pounds, which correlated with her development of carpal tunnel syndrome. He further noted that hypertension and peripheral vascular disease might also play a role. As far as Petitioner's treatment, he believed it had been reasonable to date, but did not believe any further medical care was necessary. He placed Petitioner at MMI, noted there was no need for work restrictions, and opined that Petitioner did not have any permanent impairment. (RX 2)

Dr. Rogalsky's deposition was taken on December 12, 2013. Dr. Rogalsky is a board certified orthopedic surgeon. (PX 1, p. 5) Dr. Rogalsky testified consistent with his office notes and records. Additionally, he testified that Petitioner's scanning and typing duties as a cashier during the two years she was

employed with Respondent were a "significant aggravating" factor in the development of her bilateral carpal tunnel syndrome. (PX 1, pp. 11-13) He also noted that there was no specific traumatic episode on a specific date which would suggest an acute injury and thus he believed her carpal tunnel syndrome was due to chronic repetitive aggravating activities. (PX 1, p. 13)

Dr. Rogalsky Dr. Beyer's opinion that there was no scientific evidence supporting the conclusion that carpal tunnel syndrome was generally due to occupational risks. (PX 1, p. 17) In Dr. Rogalsky's opinion the medical literature supported the conclusion that occupational hazards could, at least, be an aggravating factor in the development of carpal tunnel syndrome and to completely reject the workplace as any type of contributing factor would be an overstatement. (PX 1, p. 17) However, he did not cite specifically to any articles supporting his position, and also did not address the reliability of that literature. (PX 1, p. 18)

On cross-examination, Dr. Rogalsky indicated that he did not take a detailed written history of Petitioner's job duties during his initial visit. In addition, his only knowledge of a cashier's duties were his general layperson's familiarity with what a cashier does together with his professional experience of 27 years with people in similar positions. (PX 1, p. 19) More specifically, Dr. Rogalsky testified that although he knew Petitioner worked 30 to 34 hours per week over the previous two years, he did not know how long Petitioner's shifts were. He also did not know how long Petitioner had to go without taking breaks during her shift. Further, he admitted that he did not know how often Petitioner was required to scan or type on the cash register, or how often Petitioner had to move heavy objects along the conveyor belt, as opposed to lighter objects. He also did not know how often Petitioner used her left hand as opposed to her right hand in the performance of her duties. (PX 1, pp. 30-31)

Dr. Rogalsky also acknowledged that Petitioner had numerous co-morbidities that would predispose an individual to the development of carpal tunnel syndrome. These included her gender, her age of 49, and the fact that she had smoked since the age of 12. (PX 1, p. 25)

Dr. Rogalsky testified that his final visit with Petitioner was on August 30, 2013. At that time, he believed Petitioner had excellent results with respect to both of her hands and his examination was benign. Dr. Rogalsky testified that Petitioner had no complaints with respect to either hand, and if she had voiced any, he would have recorded them. (PX 1, pp. 23-24)

On further re-cross-examination Dr. Rogalsky was asked if all activities of daily living could have aggravated Petitioner's

carpal tunnel syndrome to which he responded "Yes." (PX 1, p. 32) He further explained that even so, there is a difference between aggravating activities and causative activities. In his opinion Petitioner had significant carpal tunnel syndrome when he initially saw her and, therefore, any activity, such as sleeping, would have aggravated it. However, sleeping didn't cause Petitioner's problem to develop; rather, her work duties contributed to the development. (PX 1, pp. 32-33)

Dr. Craig Beyer's deposition was taken on December 30, 2013. (RX3). Dr. Beyer testified he is an orthopedic surgeon and has been practicing over 20 years. (RX 3, p. 6) A copy of his CV was included as an Exhibit to the deposition and indicates Dr. Beyer was trained at the University of Chicago Medical School, followed by a five year orthopedic surgery residency at the Mayo Clinic. Additionally, Dr. Beyer is board certified in orthopedic surgery and actually acts as an examiner for board certification. (R Dep. Ex. 1). Dr. Beyer has also performed over 1,000 carpal tunnel releases in his career. (RX3, p. 18)

Dr. Beyer testified that he performed an independent medical examination of Petitioner on October 29, 2013. (RX3, p. 6) Prior to the examination he reviewed medical records from Dr. Rogalsky, along with Petitioner's March 19, 2013 EMG. (RX3, p. 8) He also had a clear understanding of Petitioner's job duties, as he reviewed a job description from the insured, and took a history from Petitioner. (RX3, p. 10) Based on the medical records, his understanding of Petitioner's job description, and his physical examination, Dr. Beyer did not believe Petitioner's job activities with Respondent caused, aggravated, or exacerbated the diagnosis of bilateral carpal tunnel syndrome. (RX3, p. 10)

In support of his position, Dr. Beyer pointed out that Petitioner's job description as a cashier did not reach what he would consider repetitive tasking. (RX3, p. 11) He stated that Petitioner had several known predisposing risk factors for carpal tunnel syndrome, including her age, gender, significant weight gain, 37 year half pack per day smoking history, and genetic predisposition. (RX3, p.15) He believed that those factors were responsible for the development of Petitioner's carpal tunnel. (RX3, p. 15)

Additionally, Dr. Beyer went into great detail about the medical journal articles he had provided in support of his causation opinions and they were attached to the deposition transcript. (RX3, p. 11)

The first article Dr. Beyer went into detail about was from the Journal of Neurology published by the Mayo Clinic. (RX3, p. 11) According to the article, the rate of carpal tunnel syndrome in the general population is the same, whether or not people perform repetitive tasks. (RX3, p. 11)

The most relevant study in Dr. Beyer's opinion was an article published by the Journal of Hand Surgery, which took a look at 166 articles that had been published on carpal tunnel syndrome, and following a comprehensive review of the state of the current literature, concluded that there was no scientific evidence of relationship between work and the development of carpal tunnel syndrome. (RX 3, p. 11) There were some studies that found a relationship between repetitive trauma and carpal tunnel syndrome, but these studies were rejected as being unreliable. In contrast, the studies identified as being of the highest quality suggest it would be scientifically irresponsible to implicate occupational factors in the development of carpal tunnel syndrome. (RX3, p. 12) Ultimately, the article concluded that carpal tunnel is largely a biological issue rather than an environmental or occupational issue. (RX3, p. 12)

On cross-examination, Dr. Beyer was asked whether he had ever found a carpal tunnel case to be work-related when he was the treating physician. Although Dr. Beyer could not recall specifically, he reiterated that there was no scientific evidence that carpal tunnel syndrome was due to occupational hazards generally. (RX3, p. 20) Additionally, he did believe that there were some cases where repetitive trauma would be work-related. However, those cases were rare and involved individuals who were required to keep their wrist in an extreme flexed position for an extended period of time, such as a colorectal surgeon. (RX3, p. 24) He noted that Petitioner's duties as a cashier did not require her to keep her hands continuously flexed, but instead she alternated between flexion and extension. (RX3, p. 26)

Dr. Beyer acknowledged that there were other studies and other orthopedic surgeons who believed occupational factors played a role in carpal tunnel syndrome. However, there were no credible studies that he was aware of in the medical literature supporting that position. (RX3, pp. 27-29, 38-39)

Dr. Beyer also acknowledged performing approximately 1,000 prior carpal tunnel releases on patients of his. Dr. Beyer was asked if in any of the prior 1,000 carpal tunnel releases he had performed did he opine or causally relate it to that person's employment and he answered "very few, if any". Dr. Beyer then stated that he may indeed have performed carpal tunnel releases and opined that that person's job duties were causative for their carpal tunnel condition. Dr. Beyer then stated that he couldn't recall ever opining such, but that it might be possible but unlikely. (RX. 3, pp.18-20) When asked if he has ever billed work comp for any of his prior 1,000 carpal tunnel releases, Dr. Beyer responded, "I don't know you would have to ask my billing department". (RX. 3, p.21) When asked what occupation the workers were engaged in when he may have opined that repetitive trauma caused their carpal tunnel, Dr. Beyer completely evaded the answer

to that question. (RX. 3, p. 21)

Dr. Beyer did acknowledge that persistent flexion of the wrist is one of the positions that may contribute to carpal tunnel. (RX. 3, p.26) It is Dr. Beyer's opinion that pushing one's self in a wheelchair, playing classical guitar and performing colorectal surgery could cause one to develop carpal tunnel given the persistent flexion of the wrist. (RX. 3, pp.24,26,35) Dr. Beyer acknowledged that a cashier/scanner is required to flex the wrist if they are sweeping the items through a scanner. (RX. 3, p.27)

With respect to Petitioner's medical care, Dr. Beyer indicated that Petitioner's treatment had been reasonable, but emphasized that it had no relation to her occupation. He did not believe Petitioner would require any further medical care. He further indicated that there was no need for work restrictions and Petitioner was at maximum medical improvement. He did not believe Petitioner would suffer from any permanent disability as a result of her condition. He testified that his opinions were all given to a reasonable degree of medical and surgical certainty. (RX3, pp. 15-17)

At arbitration Petitioner testified that as a cashier/scanner she uses both of her hands. Petitioner testified that she waves her hand in front of a belt light to start the conveyor belt so that the items to be purchased can come down the belt for scanning and bagging. Petitioner uses her left hand to turn on the register and then she picks up an item, scans, it, and bags it in the bags located on the carousel to her left. Petitioner testified that she picks up an item one time and they can weigh up to 25 or 50 lbs (such as with dog food, cat litter, and "35" packs of water). Once the bags are filled, Petitioner is required to pick them up and place them in the customer's cart. Petitioner testified that she does the same activities with both hands and her wrist is in a flexed position as though she was playing or strumming a guitar. Petitioner explained that she will generally pick up an item with her right hand and scan it and then place it in her left hand for bagging. When asked if she considered herself engaged in continuous flexion of her wrist, she stated, "Absolutely." She also testified that her job requires her to perform firm grasping as when she has to grab/hold a large bag of dog food to place on the carousel and/or grocery cart.

Petitioner testified that there is a goal (or policy) at Respondent as far as how many scans are expected of their cashiers and this is referred to as a "SPH" (Scans Per Hour). Petitioner testified that she is expected to scan and bag at least 850 items per hour and that since she has worked for Respondent she has been able to scan at this pace. Accordingly, in a one hour period at least 850 items are scanned which equates to lifting an item approximately 15 times per minute. Petitioner testified that since

going to work for Respondent, her job duties have not varied and she "pretty much" scans all the time.

Petitioner testified that she began treating with Dr. Rogalsky for bilateral hand symptoms in February of 2013 after noticing symptoms for the preceding four to six months. Petitioner testified that she was working approximately 30 to 34 hours per week, 6 to 6 ½ hours per day. If Petitioner worked over six hours in a shift she would be given two 15 minute breaks and a one hour lunch. If she didn't work six hours, she would receive two 15 minute breaks.

Petitioner testified that when her symptoms first began she would notice numbness and tingling in her hands which would worsen as she scanned items all day long. Petitioner testified she would shake her hands to get the feeling back into them. According to Petitioner by the end of the day her hands were painful. Petitioner also testified that by the time she went to Dr. Rogalsky in February of 2013 she was dropping items on the floor.

While working for Respondent, Petitioner denied having any outside hobbies or activities requiring repetitive use of her upper extremities.

Petitioner also testified she underwent a right carpal tunnel release on May 21, 2013 and was taken off work at that time. She then returned to work on July 9, 2013 but then underwent a left carpal tunnel release on July 30, 2013 for which she was again taken off work. Petitioner resumed working for Respondent as a cashier on September 10, 2013.

Petitioner further testified that she continues to have some numbness in the area of the incisions at the bottom of her palms. She also notices a weakness in her grip. Petitioner denied being diabetic or having thyroid disease.

On cross-examination Petitioner acknowledged a history of smoking, having begun at age 12. Petitioner estimated she smokes about a half a pack per day. Petitioner has also been diagnosed as being pre-hypertensive; however, she felt it was an isolated diagnosis having been associated with some stress. In any event, she would not disagree with such a diagnosis if it was recorded as such by Dr. Stabell. She also acknowledged telling Dr. Stabell she had experienced a significant weight gain in the two years prior to her initial visit with him. During that same time Petitioner also experienced vertigo which occasionally required her to leave work.

On further cross-examination Petitioner acknowledged having sustained bilateral elbow fractures in 1982 for which she underwent surgery. Petitioner testified that the fractures did not affect her wrists. Petitioner acknowledged that Dr. Beyer told her

that pre-hypertension and smoking are factors that can predispose one to carpal tunnel syndrome.

Regarding her job duties, Petitioner agreed that sometimes you don't have to lift the item but can slide it across the scanner; however, she added that the bottom scanner doesn't work half the time which requires the cashier to lift the item and scan it. She also acknowledged that sometimes customers leave the heavy items in their cart (such as dog food) thus doing away with the need to lift the bag. She then uses a hand scanner to scan the item's price. Petitioner also agreed that most of the items she lifts are on the lighter side and only about 30% of the items are heavier. Petitioner estimated her hands were in a flexed position about 80% of the time. Petitioner acknowledged there could be slow times which would make it hard to meet the goal of 850 items per hour; however, most of the time she thought she met her goal. Petitioner primarily used her right hand to scan and her left hand to pick the item off the conveyor belt. Sometimes she needs to use both hands to lift a heavier item. She uses her left hand to place the items into the bag(s). She uses both hands to place the bags in the carts. Petitioner estimated she loads items in the customers' carts, fifty percent of the time.

Petitioner further explained that she is required to bag everything and that her work days per week varied but the hours were generally 30 to 34 and in 6 to 6 ½ hour shifts.

Prior to working for Respondent Petitioner worked for six to seven years as a cashier and never experienced any symptoms.

Petitioner also testified that after her right carpal tunnel release, she was instructed to undergo physical therapy which she did. However, she stopped after four visits because she was feeling pretty good. She later resumed her therapy after seeing her doctor and noticing she wasn't up to par.

Petitioner agreed that when she was fully released by Dr. Rogalsky she was not given any restrictions and when re-examined on August 30, 2013 she was doing extremely well and denied any difficulty with activities of daily living and lacked any significant pain in either hand. Petitioner has not returned to Dr. Rogalsky and takes no medication.

Petitioner's Exhibit #2 is a job description for a cashier/scanner. This job description indicates that cashiers/scanners are required to place all items in a customer's cart upon packaging and that cashiers/scanners are required to move, lift, carry and place merchandise and supplies weighing up to 25 pounds without assistance. (PX 2)

The Arbitrator concludes:

C&F. Regarding whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, and whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator concludes:

While accident is in dispute, the focus of the dispute appears to be the "arising out of" requirement and not the date of manifestation. "When a worker's physical structure gives way under repetitive job-related stresses on the body, the injury is considered to arise out of and in the course of employment." *Interlake Steel, Inc. v. Industrial Comm'n*, 130 Ill.App. 3d 269, 273 (1985).

The Arbitrator concludes that Petitioner did sustain an accident on March 29, 2013 that arose out of and in the course of Petitioner's employment with Respondent, and that Petitioner's current condition of ill-being in her hands is causally related to said accident. In so concluding the Arbitrator relies upon the medical opinions of Dr. Rogalsky which are deemed more persuasive than those of Dr. Beyer.

In this case, two experts offered divergent opinions on a medical causation opinion. Dr. Rogalsky, Petitioner's treating surgeon, opined that Petitioner's work duties were the "significant, aggravating/accelerating factor" in the development of her bilateral carpal tunnel. (PX.1, Depo. Ex.2, p.28) Additionally, Petitioner testified and two sets of medical records confirmed, that when Petitioner's symptoms became significant, said symptoms were most noticeable while performing her cashier/scanning duties for Respondent. (PX.1, p.6; RX.6)

Conversely, Dr. Beyer, Respondent's Section 12 examiner, was of the opinion that Petitioner's work duties did not play a role in her carpal tunnel syndrome; rather, her condition was caused by her several associated risk factors. What's more, Dr. Beyer opined that "environmental or occupational factors have not been found to play a role in the development of carpal tunnel," i.e., a person's job duties can never cause that person's carpal tunnel, unless they use a wheelchair, play a guitar or are colorectal surgeons. Dr. Beyer also acknowledged that Petitioner's job would involve a flexed wrist while scanning items. After reviewing Dr. Beyer's cross-examination the Arbitrator notes he made enough concessions regarding the flexion activity associated with Petitioner's job to undermine his opinion. Dr. Rogalsky also credibly countered some of Dr. Beyer's opinions (as to the caused of Petitioner's carpal tunnel syndrome such as her weight -- PX 1, p. 27). Finally, the Arbitrator notes that Petitioner's testimony regarding her job duties was credible and unrebutted.

J. Regarding whether or not Respondent has paid all appropriate charges for all reasonable and necessary medical services,

the Arbitrator concludes:

Respondent disputed liability for the medical bills and not their reasonableness. Consistent with the Arbitrator's determination of accident and causal connection, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,522.73 to Dr. Rogalsky (PX 1, Dep. Ex.1, p.24), $4,911.76 and $393.00 to BJC Healthcare (PX 1, Dep. Ex.3), $187.73 to Neurology Associates of Alton (PX 1, Dep. Ex.4) and $296.40 to Anesthesia Associates of Illinois (PX 1, Dep. Ex.5), as provided in Sections 8(a) and 8.2 of the Act. Per the stipulation of the parties, Respondent shall be allowed a general credit under Section 8(j) of the Act for any medical bills paid pursuant to it. (AX 1)

K. Regarding what temporary benefits are in dispute, the Arbitrator concludes:

Respondent did not dispute the period of temporary total disability but liability for same. (AX 1) Consistent with the Arbitrator's determination on accident and causal connection, Respondent shall pay Petitioner temporary total disability benefits of $220/week for 12 6/7 weeks, commencing May 21, 2013 through July 8, 2013 and July 30, 2013 through September 10, 2013, as provided in Section 8(b) of the Act.

L. Regarding the nature and extent of Petitioner's injury, the Arbitrator concludes:

This accident occurred on March 29, 2013, and is subject to Section Sec.8.1b. of the Illinois Workers' Compensation Act, which provides that for accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(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. (Source: P.X.97-18,eff.6-28-11)

In accord with Section 8.1b of the Act, the Arbitrator has considered the following factors when reaching her decision regarding the issue of permanency:

(i) The reported level of impairment pursuant to subsection (a): Neither party submitted an impairment rating; therefore, this factor shall not be considered by the Arbitrator.

(ii) The occupation of the injured employee: Petitioner worked for Respondent as a cashier/scanner at the time of her accident and she returned to work at her pre-injury occupation as a cashier/scanner. She has been working without restriction since her release by Dr. Rogalsky on September 10, 2013, over four months prior to the date of arbitration. She did not testify to any problems or complaints associated with performing her job duties.

(iii) The age of the employee at the time of the injury: Petitioner was 49 years of age at the time of injury. No evidence was presented as to how Petitioner's age might affect her disability.

(iv) The employee's future earning capacity: Petitioner returned to her pre-injury occupation and no evidence was presented to show her injury might affect her future earning capacity.

(v) Evidence of disability corroborated by the treating records: Petitioner underwent bilateral carpal tunnel releases for which she currently complains of numbness at the incisional sites and diminished strength in her hands. However, as of her final visit with Dr. Rogalsky on August 30, 2013, it was noted Petitioner had received excellent results from her surgeries and was doing extremely well. Thus, there is some discrepancy between Petitioner's testimony and what the treating records reveal; however, the Arbitrator notes that when evaluated by Dr. Beyer on October 29, 2013 Petitioner reported mild incisional irritability. Petitioner has no difficulties with activities of daily living, no significant pain in either hand, takes no medication, and has no further medical care scheduled.

The Act provides that no single enumerated factor shall be the

sole determinant of disability. Petitioner underwent surgical releases to her hands/wrists and was released to her pre-injury job with no restrictions. She continues working in that position and her treating doctor described her results as "excellent." There was no impairment rating. How Petitioner's age might affect her disability and how her injury might affect her future earning capacity are unknown. She no longer treats for her condition. She takes no medication. All in all, her complaints are minor. Weighing these factors, the Arbitrator finds that as a result of the accident Petitioner has sustained permanent partial disability to the extent of 10 % loss of use of the left hand and 10% loss of use of the right hand ((190 weeks X 10% = 19 weeks) + (190 weeks X 10% = 19 weeks) = 38 weeks).

****

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

Anna Scheutz,
Petitioner,
vs.

14IWCC0875

NO: 12 WC 12318

Advocate Bromenn,
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, 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 14, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 8 - 2014
KWL/vf
O-9/29/14
42

Kevin W. Lamborn

Thomas J. Tyrrel

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0875

SCHEUTZ, ANNA
Employee/Petitioner

Case# 12WC012318

ADVOCATE BROMENN
Employer/Respondent

On 3/14/2014, 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
STEVE WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0264 HEYL ROYSTER VOELKER & ALLEN
CRAIG S YOUNG
124 S W ADAMS ST SUITE 600
PEORIA, IL 61602

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

☐ 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

14IWCC0875

Anna Scheutz
Employee/Petitioner

Case # **12** WC **12318**

v.

Advocate Bromenn
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 30, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0875

FINDINGS

On **June 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$9,878.49**; the average weekly wage was **$246.96**.

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

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$213.33**/week for **10.75** weeks, because the injuries sustained caused the **5%** loss of the **right leg**, as provided in Section 8(e) of the Act.

No other benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

March 10, 2014
Date

MAR 14 2014

14IWCC0875

FACTS:

The Petitioner sustained an undisputed accidental injury to her right knee while she was working for the Respondent on June 10, 2010. The Petitioner testified that she was employed by the Respondent as a recreational therapist and that on June 10, 2010 she tripped on the cord of a vacuum, twisted her right knee, and fell to the ground. She testified that she immediately experienced pain and swelling in her knee and she began to limp.

The Petitioner testified that prior to June 10, 2010, her right knee was "fine" and she had not been prescribed any surgery for the knee. She testified that she did have some medical treatment for her right knee prior to June 10, 2010, having undergone an MRI in 1998 and treatment with Dr. Irwin in February of 2009.

The records of Dr. George Irwin demonstrate that he saw the Petitioner on February 17, 2009 and that the Petitioner reported that, on January 20, 2009, a large dog had run into her sweeping her legs out from under her and causing her to fall to the ground. She reported that she began to notice right knee pain several days later and her pain was mostly anterior and somewhat medial in position. It was noted that the Petitioner had "previous issues" with her right knee, including an MRI, and that those problems resolved. Dr. Irwin's assessment was a patellofemoral type of dysplasia and he prescribed therapy and a patellofemoral brace.

On June 11, 2010, the Petitioner treated at Advocate Bromenn Employee Health where it was noted that. The Petitioner complained of a "right knee contusion from a fall yesterday at work". No swelling or bruising was noted and there was tenderness to the inner aspect of the knee. The Petitioner followed up on June 15, 2010, June 18, 2010, and June 22, 2010 reporting increased pain and tenderness along the medial aspect of her right knee. X-rays and an MRI were performed and the Petitioner was referred to Dr. Joseph Norris at McLean County Orthopedics. The MRI was reported to show an osteochondral lesion in the patellofemoral joint on the femoral side.

The Petitioner first saw Dr. Norris on June 29, 2010 and he noted a history of a slip without a fall and an injury to the right knee. Dr. Norris reviewed the x-rays and the MRI of the Petitioner's right knee and his impression was moderate degenerative joint disease flared up by the acute tripping injury. Dr. Norris recommended an injection, which the Petitioner declined due to her fear of needles, and he prescribed oral steroids and physical therapy. The Petitioner followed up with Dr. Norris on July 13, 2010 and on September 22, 2010 she received a Synvisc injection to her right knee.

On December 21, 2011, the Petitioner appeared for treatment with Dr. M. Allan Griffith of Advocate Medical Group. At that time, the Petitioner complained of right knee pain and reported that it had been about 10 days since she twisted it. She reported that she had no real trauma other than her twisting mechanism and that her pain started 10 days ago. She reported that she had continued to bicycle to work. She reported that she had received Synvisc injections from Dr. Norris approximately 18 months ago and that, since that time, she had been a great deal better. She reported that she had been a skier but she had to give it up

because of her knees. The diagnosis at that time was "Acute right knee strain with medial collateral ligament strain. Rule out partial tear."

On December 28, 2011, the Petitioner returned to Dr. Norris who noted having treated the Petitioner previously and giving her a Synvisc injection which had helped dramatically. The history noted indicates that the Petitioner had essentially no complaints until recently when she began experiencing insidious onset of interior and medial right knee pain, with no proceeding injury or accident. The Petitioner also reported that doing yoga seemed to exacerbate the problem. The Petitioner filled out an updated patient information form at that time and, in response to a question of whether or not this was a work injury the Petitioner circled "no". In response to a question of whether or not this was an injury which caused or aggravated her problem the Petitioner circled "caused". In response to a question asking when was the first or most serious injury, the Petitioner indicated "12/9/11". When asked to describe the injury, the Petitioner indicated right knee meniscal tear injured doing yoga. Dr. Norris gave the Petitioner another Synvisc injection at that visit.

On January 3, 2012 Dr. Norris recommended surgery for the Petitioner and on January 6, 2012 the Petitioner underwent a right knee arthroscopy with micro-fracture of the lateral femoral condyle. The post operative diagnosis was 5mm x 8mm osteochondral lesion of the lateral distal femoral condyle.

Following the surgical procedure the Petitioner followed up with Dr. Norris on February 6, 2012. The doctor noted that the Petitioner had presented to the emergency room with calf pain "last week" and that a duplex ultrasound confirmed a DVT.

On February 20, 2012, Dr. Norris noted that the Petitioner reported that she was doing very well until the previous Saturday when she slipped and fell in the Dollar General store and had a hyperextension valgus type right knee injury with immediate pain. Dr. Norris prescribed celebrex for "the acute injury" as well as a hinged knee brace. He also noted that he was going to get an MRI to rule out any significant mechanical loose body as "she has had some significant catching and locking since the injury."

On March 5, 2012, Dr. Norris noted that the Petitioner was "doing better and better". He noted that she had a post operative course complicated with a DVT, and he noted that the Petitioner had "a second injury diagnosed as an MCL strain" which also got better. On April 16, 2012 Dr. Norris noted that the Petitioner was doing "extremely well and was back to walking, swimming, and biking with no signs of effusions or mechanical symptoms. At that time, Dr, Norris discharged the Petitioner from care.

At hearing, the Petitioner testified that she currently continues to experience pain, clicking, popping, and swelling in her right knee and that kneeling causes her pain to increase. She testified that she also experiences stiffness with prolonged sitting and achiness with prolonged standing and walking. The Petitioner testified that, since her last visit with Dr. Norris, she has had no treatment to her right knee, has continued to work her regular job without restriction, and has missed no time from work.

The deposition testimony of Dr. Norris was admitted into the record as Petitioner's exhibit 1. Dr. Norris testified as to his findings and his treatment of the Petitioner and he opined that the June 10, 2010 tripping incident described by the Petitioner could have caused the findings that he noted in the Petitioner's right knee at the time of surgery. He noted that the Petitioner was asymptomatic prior to the incident and that the symptoms that she complained of subsequent to the incident were consisted with the findings noted in the June 2010 MRI and his findings at the time of surgery.

At the request of the Respondent, the Petitioner was examined by Dr. Michael Nogalski on November 20, 2012. Dr. Nogalski's deposition testimony was admitted into the record as Respondent's exhibit 1. Dr. Nogalski testified as to his examination findings, his review of the Petitioner's medical records, and his diagnosis of the Petitioner's condition. Dr. Nogalski opined that the Petitioner sustained an abrasion injury in her claimed June 10, 2010 work injury and that the condral lesion for which Dr. Norris performed surgery was not related to the Petitioner's claimed June 10, 2010 work injury. Dr. Nogalski noted that the Petitioner's history and the medical records contained no evidence of a direct blow injury, patellofemoral dislocation, or subluxation, and a history of prior significant treatment suggesting pre-existing knee issues. Dr. Nogalski opined that the Petitioner had a pre-existing right knee condition followed by multiple episodes of reported trauma.

CONCLUSIONS:

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

It is axiomatic that the Petitioner bears the burden of proving all the elements of her claim by a preponderance of the credible evidence. The Petitioner has not met that burden here.

The Arbitrator notes that the record reflects that the Petitioner had a pre-existing condition in her right knee. The Petitioner testified that she had a twisting injury to her right knee in the late 90s and had an MRI to her knee at that time. The Petitioner testified that she underwent therapy following that injury and got better. The Petitioner had a second injury to her right knee on or about January 20, 2009. She treated for that injury with Dr. Irwin who noted that the Petitioner had "previous issues" with her right knee and assessed her as having a patellofemoral type of dysplasia. He recommended an MRI and prescribed therapy and a patellofemoral brace. After some conservative treatment, the Petitioner apparently got better.

Subsequent to her work injury on June 10, 2010, the Petitioner treated conservatively for a time and got a Synvisc injection on September 22, 2010. The Petitioner did not seek

treatment for her right knee again until December 21, 2011, 15 months later, when she saw Dr. Griffith and reported that she had right knee pain which started ten days prior, after she twisted the knee. The diagnosis at that time was "Acute right knee strain with medial collateral ligament strain. Rule out partial tear." On December 28, 2011, the Petitioner returned to Dr. Norris and reported that she had essentially no complaints "until recently" when she began experiencing interior and medial right knee pain. Thereafter, Dr. Norris recommended, and the Petitioner underwent, surgery for her right knee.

Subsequent to the surgery, the Petitioner apparently experienced another injury to her right knee when she slipped and fell while shopping. On February 20, 2012, Dr. Norris noted that the Petitioner was doing very well until she slipped and fell in the Dollar General store on February 18, 2012 and had a hyperextension valgus type right knee injury with immediate pain. Dr. Norris prescribed celebrex for "the acute injury" as well as a hinged knee brace. He also noted that he was going to get an MRI to rule out any significant mechanical loose body as "she has had some significant catching and locking since the injury."

Dr. Norris, the Petitioner's treating physician, opined that there was a causal relationship between the right knee surgery he performed on the Petitioner and the June 10, 2010 incident. He based his opinion upon the fact that the Petitioner reported that she had no right knee complaints before the June 10, 2010 incident, that she became symptomatic thereafter, and that when he treated the Petitioner in September of 2010, there was a diagnosis of a chondral lesion in the lateral femoral trochlea. He noted that the symptoms that the Petitioner she complained of subsequent to the incident were consisted with the findings noted in the June 2010 MRI and his findings at the time of surgery. He opined that the tripping incident described by the Petitioner could have caused the findings that he noted in the Petitioner's right knee at the time of surgery.

Dr. Nogalski, the Respondent's examining physician, opined that there was no causal relationship between the Petitioner's June 10, 2010 accident and the surgery performed by Dr. Norris. He based his opinion on the fact that nothing indicated that the Petitioner sustained a direct blow injury, patellofemoral dislocation, or subluxation, and she had a history of prior significant treatment suggesting pre-existing knee issues. Dr. Nogalski opined that the Petitioner had a pre-existing right knee condition followed by multiple episodes of reported trauma. Dr. Nogalski also noted the 15 moth gap in treatment following the Petitioner's Synvisc injection and the report of a new twisting injury in December of 2011, prior to the surgery performed by Dr. Norris on January 6, 2012.

While the Arbitrator notes the opinions of Dr. Norris, in the instant matter, the Arbitrator finds the opinions of Dr. Nogalski to be more reliable and persuasive.

The Arbitrator finds that the Petitioner sustained a temporary aggravation of her pre-existing right knee condition as a result of her injury on June 10, 2010. The treatment the Petitioner received extending through September 22, 2010 was conservative in nature, and at the end of that treatment, the Petitioner was asymptomatic and was released on a PRN basis. In his deposition testimony, Dr. Norris indicated that he would have considered the Petitioner

to have been at maximum medical improvement from her injury when she didn't return to him in four to six weeks after he released her from his care in September of 2010.

The Arbitrator finds that the Petitioner failed to prove a causal relationship between her injury on June 10, 2010 and any other condition of ill-being in the right knee and, specifically, the Petitioner failed to prove a causal relationship between the accident of June 10, 2010 and the surgery performed by Dr. Norris on January 6th of 2012.

In support of this conclusion, the Arbitrator notes that the Petitioner had a pre-existing degenerative condition in the right knee for which she underwent conservative treatment and got better. She then went for a period of time before sustaining another injury to her right knee in February of 2009, when she was hit by a dog. Again, she had a history of conservative treatment followed by getting better and resuming her normal activities. On June 10, 2010, the Petitioner suffered a minor injury to her knee, which aggravated her underlying degenerative condition, and she then got better and resumed her normal activities. Thereafter, there was a 15 month gap in treatment between the Petitioner's release from treatment on September 22, 2010, and her return to Dr. Norris in December of 2011 after she had sustained an additional twisting injury to her right knee. This return to treatment following an intervening accident in December of 2011 follows the same pattern the Petitioner has experienced after all of her knee exacerbations both previous to, in conjunction with, and after the accident which is the subject of this case.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove a causal relationship between the June 10, 2010 work accident, and any condition of ill-being, any period of temporary total disability, any medical treatment, or any permanent partial disability associated with the Petitioner's right knee occurring after September 22, 2010.

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 and concludes as follows:

In light of the Arbitrator's findings and conclusions relating to the issue of causation, which are adopted and incorporated herein, the Arbitrator finds that the Petitioner failed to prove a causal relationship between the work injury of June 10, 2010 and any medical treatment rendered to her after September 22, 2010.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

In light of the Arbitrator's findings and conclusions relating to the issue of causation, which are adopted and incorporated herein, the Arbitrator finds that the Petitioner failed to prove any period of temporary total disability which was causally related to the work injury of

June 10, 2010. The Arbitrator notes that the Petitioner missed no time from work following the accident prior to her release from treatment on September 22, 2010. The Arbitrator finds all time missed thereafter to be unrelated to the described injury and no Temporary Total Disability benefits are awarded herein.

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

The findings and conclusions of the Arbitrator relating to the issue of causation are adopted and incorporated herein. The medical evidence admitted into the record establishes, and the Arbitrator has found, that the Petitioner did sustain an aggravation of her pre-existing right knee condition, similar to a strain-sprain type injury, which resulted in the need for some physical therapy and Synvisc injections. The Petitioner missed no time from work as a result of this occurrence and ultimately was released without restriction to return to her regular line of work. She thereafter experienced over a year and three months of no symptoms and no treatment up until an intervening incident in December of 2011. Based upon these facts, the Arbitrator finds that the Petitioner's work injury of June 10, 2010 resulted in permanent disability to the Petitioner's right leg to the extent of 5% thereof..

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

Katalin Medgyesi,
Petitioner,

vs.

SOI Pontiac Correctional Center,
Respondent.

14IWCC0876

NO: 04 WC 47073

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability 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 30, 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.

OCT 8 - 2014

DATED:
KWL/vf
O-9/30/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0876

MEDGYESI, KATALIN
Employee/Petitioner

Case# **04WC047073**

03WC017002

SOI PONTIAC CORRECTIONAL CENTER
Employer/Respondent

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

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

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

0400 LOUIS E OLIVERO & ASSOC
DAVID W OLIVERO
1615 4TH ST
PERU, IL 61354

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

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
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
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JAN 30 2014

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0876

KATALIN MEDGYESI,
Employee/Petitioner

Case # 04 WC 47073

v.

Consolidated cases: 03 WC 17002.

STATE OF ILLINOIS PONTIAC CORRECTIONAL CENTER,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was consolidated with claim no. 03 WC 17002 and 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

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. ☒ 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 29, 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 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 alleged the injury, Petitioner earned **$43,088.76**; the average weekly wage was **$828.63**.

On the date of accident, Petitioner was **50** years of age, *single* with **no** dependent children.

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

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

Respondent shall be given a credit of **$ 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 failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on January 29, 2004.

All claims for compensation by Petitioner in this matter are thus hereby denied.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

January 24, 2014
Date

ICArbDec p. 2

JAN 30 2014

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 that on January 29, 2004, she worked for Respondent as a culinary arts instructor at the Pontiac Correctional Center. On that date, Petitioner testified she was in her office checking her tool cabinet when she slipped and fell on a wet surface, falling on her legs and buttocks.

On cross examination, Petitioner admitted her legs were numb and tingly, and that was the way they get when she sits, and that condition caused her fall. Medical records of treatment in evidence reflect that Petitioner attributed her fall because her legs were numb. No mention of water or other defect exists.

An office note of Dr. DePhillips dated January 29, 2004 reveals: "The patient fell at work today. Her legs became numb and tingly and gave out. (Rx3)

Based further upon the above, the Arbitrator finds that Petitioner failed to prove she sustained an accidental injury that arose out of and in the course of her employment by Respondent on January 29, 2004.

Based further upon the above, the Arbitrator finds the condition of ill-being complained of to be not causally related to any 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?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator further finds that all medical charges introduced by Petitioner into evidence in this matter are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator further finds all periods of temporary total disability claimed by Petitioner in this matter are hereby denied.

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

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator further finds all permanent partial disability claimed by Petitioner in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATALIN MEDGYESI,
Petitioner,
vs.

14IWCC0877

NO: 03 WC 17002

SOI Pontiac Correctional 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 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 January 30, 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: OCT 8 - 2014
KWL/vf
O-9/30/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0877

MEDGYESI, KATALIN
Employee/Petitioner

Case# 03WC017002

04WC047073

SOI PONTIAC CORRECTIONAL CENTER
Employer/Respondent

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

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

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

0400 LOUIS E OLIVERO & ASSOC
DAVID W OLIVERO
1615 4TH ST
PERU, IL 61354

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

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
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
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JAN 30 2014

Kimberly B. Jenkins, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0877

KATALIN MEDGYESI, Case # 03 WC 17002
Employee/Petitioner

v. Consolidated cases: 04 WC 47073.

STATE OF ILLINOIS PONTIAC CORRECTIONAL CENTER,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was consolidated with claim no. 04 WC 47073 and 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 **August 12, 2002**, 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 **$43,088.76**; the average weekly wage was **$828.63**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **no** 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 **$ 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 **$ 10,433.09** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$552.42**/week **3-4/7** weeks, commencing **August 13, 2002** through **September 7, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$497.18**/week for **87.5** weeks, because the injuries sustained caused the **17.5%** loss to her **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.

JOANN M. FRATIANNI
Signature of Arbitrator

January 24, 2014
Date

ICArbDec p. 2

JAN 30 2014

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

Petitioner testified that she worked for Respondent as a culinary art instructor at the Pontiac Correctional Facility. On August 12, 2002, while performing daily inventory checks she slipped on a greasy floor. When she slipped she caught herself with her right arm on a metal rack and then landed on her buttocks.

Petitioner was seen in the emergency room of OSF St. James Hospital that same day where a history was recorded of injury to her right shoulder when she "fell, arm caught on shelf." Petitioner complained of right shoulder pain. X-rays performed revealed an avulsion fracture to the right shoulder.

Petitioner then received follow up treatment with Dr. Roy, an orthopedic surgeon. Dr. Roy diagnosed a right rotator cuff tear and avulsion fracture. Petitioner saw Dr. Roy 15 times in 2002 and 2003 for her shoulder. For visits through November 6, 2002, Petitioner only complained of and was treated for right shoulder symptoms. For the shoulder, Dr. Roy prescribed physical therapy, which was performed from August 26, 2002 through January 6, 2003. During these sessions, Petitioner never complained of back, right hip and leg symptoms.

Dr. Roy released Petitioner to light duty work on September 8, 2002. She was released by Dr. Nicholson from further shoulder care on January 8, 2003. At that time, Dr. Nicholson deemed her at maximum medical improvement. On February 26, 2003, she complained to Dr. Roy of back, right hip and leg symptoms, along with occasional headaches, and no longer complained of right shoulder symptoms from that visit and for the next seven visits.

Petitioner eventually ended up under the care of Dr. DePhillips. Dr. DePhillips testified by evidence deposition that he felt Petitioner had suffered a shoulder injury that had been treated. Dr. DePhillips rendered this opinion on June 12, 2003. Dr. DePhillips further testified the low back pain was a condition that had progressively worsened.

Petitioner underwent a lumbar fusion surgery on March 4, 2004 by Dr. Deutsch, and underwent a right shoulder repair with Dr. Sinha on April 2, 2009. Petitioner was diagnosed with cervical disc disease in 2007. Petitioner is missing one lumbar verbebrae, or has 4 instead of the normal 5. Petitioner has suffered multiple strokes that could have happened anytime from birth until 3 or 4 years ago. She has smoked two packs daily since 1984, and is now smoking 5 cigarettes a day.

Dr. Harel Deutsch testified by evidence deposition. Dr. Deutsch began seeing Petitioner on February 20, 2004. Dr. Deusch testified it was his opinion that Petitioner's back problems as revealed on a recent MRI he reviewed, could not be caused by a single fall, but that the fall precipitated her back pain. Dr. Deutsch did not have an explanation for the four month gap in complaints from the date of accident to her lower back. Dr. Deutsch also testified Petitioner had spondylosis of the lumbar spine and any activity of daily living could have caused chronic long term pain. Dr. Deutsch felt it would not take a fall or lifting a heavy object to cause chronic long term pain in the lumbar spine, but something as simple as putting on a shirt or riding in a car can cause the onset of the pain.

Dr. George DePhillips testified by evidence deposition. Dr. DePhillips was of the opinion that Petitioner's fall into a metal rack caused an exacerbation of a preexisting condition of degenerative disc disease. Dr. DePhillips explained the annulus of the disc was degenerating making it vulnerable to injury and any twisting or bending could cause a tear of the annulus resulting in pain. Dr. DePhillips diagnosed a torn annulus at L4-L5 based on a review of an MRI dated in March of 2003. Dr. DePhillips testified the annulus tear was found during a discogram and not through the MRI. On cross-examination, he admitted that annulus tears can happen naturally when someone has degenerative disc disease, and that she could have torn that annulus from degeneration without trauma.

Dr. Upendra Sinha testified by evidence deposition. Dr. Sinha treated Petitioner from May 16, 2007 to the present. Dr. Sinha prescribed a right shoulder MRI that was performed on June 7, 2007. This revealed a torn rotator cuff tear and questionable SLAP tear. Dr. Sinha was of the opinion that after this accident her right shoulder injury became better after physical therapy, injections and medications. Dr. Sinha also felt she suffered impingement syndrome, which he felt was very common in middle aged individuals, and could have been caused by her arthritis, the shape of her right acromion, or partial rotator cuff tear that could have produced pain.

Dr. Sinha felt the right shoulder arthritis was present at the time of the fall, based on a 2002 MRI reviewed. Dr. Sinha felt the rotator cuff tear which was visible on the first MRI in 2002, at least contributed to her right shoulder impingement that necessitated the right shoulder surgery in 2009. Dr. Sinha felt the rotator cuff tear could have been caused by the fall at work in 2002, or by natural aging processes and indicated by the age of 50, 30-40% of individuals suffering from partial rotator cuff tears were asymptomatic. Dr. Sinha testified it was possible that the trauma could have caused the tear of the right rotator cuff more so than a nature progression. Dr. Sinha further testified that he did not feel the fall caused an injury to the lower back, but may have caused some symptoms, but did not produce any damage.

Dr. Robert Eilers testified by evidence deposition. Dr. Eilers examined Petitioner at her own request. Dr. Eilers testified that Petitioner's fall on August 12, 2012 caused a right humerus greater tuberosity avulsion fracture, myofascial pain syndrome involving the cervical paraspinals, trapezius muscles and rhomboid muscles of the right neck and arm. He was also of the opinion that a L4-L5 annulus disruption caused the need for fusion surgery, a right sided rotator cuff tear, chronic right sided pain, headaches, right side carpal tunnel syndrome, and depression, anxiety and sleep disruption.

Petitioner was examined by Dr. Joseph Thometz on April 7, 2003. This was at the request of Respondent. At that time she was working full duty with no shoulder impingement and seemed well. Dr. Thometz indicated there were no complaints of low back pain during his examination and felt there was no causal relationship between the degenerative lumbar changes and this accident.

Based upon the above, the Arbitrator finds Petitioner suffered an injury to her right shoulder resulting in an avulsion fracture and an aggravation of a partial rotator cuff tear. The Arbitrator adopts the opinions of Dr. Sinha as to this issue and finds them more persuasive than those of Dr. Eilers. Based upon the above, the Arbitrator finds the right shoulder conditions as diagnosed by Dr. Sinha to be causally related to this accidental injury.

Based further upon the above, the Arbitrator finds the lower back condition complained of to be not causally related to the accidental injury. Petitioner during multiple initial visits to Dr. Roy failed to complain of any back symptoms. She eventually began complaining of back and multiple other conditions in 2003. Petitioner also suffers from multiple genetic back disorder including degenerative disc disease, and testified to having multiple strokes. Petitioner failed to prove by credible evidence her lumbar and other conditions that seemed to have developed in 2003 are related to this accidental injury. This includes right lower extremity, right sided body, right carpal tunnel syndrome, depression and anxiety.

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

See findings of this Arbitrator in "F" above.

The Arbitrator finds all medical charges that occurred prior to January 8, 2003, are causally related to this accidental injury. Respondent is found to be liable for same.

All other charges incurred after January 8, 2003 are hereby denied for the reasons cited in "F" above.

The parties are assigned the task of sorting those charges which are the liability of Petitioner as it is unclear from the evidence presented to this Arbitrator which charges were incurred prior to the January 8, 2003 cut off date as indicated above.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" above.

Based upon the above, Petitioner is entitled to receive temporary total disability benefits from Respondent commencing August 13, 2002 through September 7, 2002, the day before she returned to work on a light duty basis.

All other claims for temporary total disability made by Petitioner are hereby denied.

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

See findings of this Arbitrator in "F" above.

Petitioner is entitled to receive an award pursuant to Section 8(d)2 of the Act for the shoulder injury sustained in this matter and the award by this Arbitrator reflects that entitlement.

All other claims for permanent partial disability for anything other than the right shoulder is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

14IWCC0878

Jillian Bianchi,
Petitioner,
vs.

NO: 09 WC 43037

Children's Memorial Hospital,
Respondent.

DECISION AND OPINION ON REVIEW

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

The party commencing the 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 08 2014
KWL/vf
O-10/6/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0878

BIANCHI, JILLIAN
Employee/Petitioner

Case# **09WC043037**

CHILDREN'S MEMORIAL HOSPITAL
Employer/Respondent

On 12/30/2013, 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 0.09% 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:

0465 SCHEELE CORNELIUS & HARRISON
DAVID C HARRISON
7223 S ROUTE 83 PMB 228
WILLOWBROOK, IL 60527

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT E MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
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 14IWCC0878

Jillian Bianchi
Employee/Petitioner

v.

Children's Memorial Hospital
Employer/Respondent

Case # **09 WC 43037**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Brian Cronin, Arbitrator of the Commission, in the city of Chicago, on June 12, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 19, 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.

In the year preceding the injury, Petitioner earned **$50,960.00**; the average weekly wage was **$980.00**.

On the date of accident, Petitioner was **27** years of age, single with **0** dependent children.

Petitioner has received all reasonable and necessary medical services – under group insurance.

Respondent has paid all appropriate charges for all reasonable and necessary medical services – under group insurance.

Respondent shall be given a credit of **$0.00** for TTD benefits, **$0.00** for TPD benefits, **$0.00** for maintenance benefits and **$54,917.44** for "other benefits," for a total credit of **$54,917.44**.

Respondent is entitled to a credit for "other benefits" paid under group insurance, pursuant to Section 8(j) of the Act.

ORDER

THE ARBITRATOR FINDS THAT PETITIONER HAS FAILED TO PROVE THAT SHE SUSTAINED AN ACCIDENT THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT. THEREFORE, HE DENIES COMPENSATION. ALL OTHER 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.

Signature of Arbitrator

December 26, 2013
Date

DEC 30 2013

JILLIAN BIANCHI V. CHILDREN'S MEMORIAL HOSPITAL
09 WC 43037

FINDINGS OF FACT

The Petitioner had worked for the Respondent from February 2008 until May 2009, as a Customer Service Representative in the Laboratory Call Center. The Petitioner testified that she worked Monday through Friday from 9:30 a.m. until 6:30 p.m. She testified that she had one hour of break time a day. The job consisted of answering telephone calls, making telephone calls, and computer work. The Petitioner answered and made telephone calls by using an earpiece, which she used on either ear. To answer, or initiate a telephone call, the Petitioner tapped a button on the side of the earpiece. The Petitioner testified that it would take about one second for her to reach up and tap the button on her earpiece. The Petitioner also could answer or initiate telephone calls the traditional way: by picking up the telephone receiver. As part of her job, the Petitioner used her computer to look up lab results at the request of patients or physicians. There was no testimony of her elbows being held in a flexed position or of her work-station being awkward other than an ergonomic assessment being conducted and some changes made after she left the employ.

Victoria Harris, Administrative Director for the Department of Pathology and Laboratory Medicine, testified on behalf of the Respondent. Ms. Harris testified that she hired the Petitioner in 2008 as a Customer Service Representative in the Call Center. She testified that a majority of a Customer Service Representative's duties were answering telephones and providing customer service to clients. She testified that other duties of a Customer Service Representative included faxing, labeling of reports, and patient inquiry. Ms. Harris testified that Customer Representatives used an earpiece to answer and make telephone calls. She testified that to answer or make a telephone call, the Customer Representative would reach up and tap a button on the earpiece. She testified that a Customer Service Representative would locate the requested information by inputting a patient name or medical record number into the computer. Ms. Harris testified that the average time for a telephone call would be about one minute. Ms. Harris testified as to three months of the Petitioner's call data (Respondent's Exhibit No. 11). For the month of August 2008, the Petitioner answered and placed a total of 1,465 calls, or 63.6 calls per day. For the month of September 2008, the Petitioner answered and placed a total of 1,444 calls,

or 66 calls per day. The average talk time for all of her calls during September 2008 was 51 seconds. For the month of October 2008, the Petitioner answered and placed a total of 1,148 calls, or 49.9 calls per day. The average talk time for all of her calls during October was 1 minute and 16 seconds.

The Petitioner testified from memory and testified that she thought it was about 100 calls per day, incoming and outgoing, but agreed that it would take one second to tap the earpiece and that the length of time for each call varied.

Around May 2009, the Petitioner began to notice aching and numbness in her pinkies. She testified that she noticed these symptoms at work, as well as in the middle of the night. She testified that she feel shocks down the forearms, and a stabbing/burning feeling in the back of both elbows. The Petitioner testified that she notified her immediate supervisor and department supervisor of her complaints.

The Petitioner was initially seen by Dr. Shipley on May 19, 2009 at Rush Primary Care. The Petitioner was prescribed medication and an EMG of both elbows was ordered. The Petitioner at this time did not attribute her condition to any specific work activity.

The Petitioner was seen by Dr. Fernandez's Physician's Assistant on May 28, 2009. On the New Patient Information Form, the Petitioner indicated "unknown" when asked where and how the injury occurred (Respondent's Exhibit No. 4). The physician assistant recommended surgery on both elbows. The Petitioner was prescribed splinting and a Medrol Dosepak. The Petitioner was taken off work.

The Petitioner returned to Dr. Fernandez in June 2009 and was prescribed another Medrol Dosepak.

The Petitioner was seen by Dr. Fernandez on July 1, 2009. He recommended that the Petitioner undergo surgery. The Petitioner was kept off work.

The Petitioner saw Dr. Tulipan for a second opinion. There was no mention in Dr. Tulipan's records as to the cause of her condition; merely that surgery was appropriate.

On August 31, 2009, Dr. Fernandez performed left elbow surgery. The Petitioner testified that after surgery, she was having pain at the incision site, as well as more nerve pain. The burning in the elbow had dissipated, but she was still having symptoms She testified to having weakness in the left arm and limited range of motion at this time. Dr. Fernandez prescribed therapy and advised the Petitioner to wear a splint on the left arm at night.

The Petitioner started left-arm therapy on September 17, 2009.

On November 2, 2009, Dr. Fernandez performed surgery on the Petitioner's right elbow. He placed the Petitioner in a non-removable splint.

The Petitioner returned to Dr. Fernandez on November 16, 2009. He placed the Petitioner in another splint and ordered physical therapy for the right arm.

The Petitioner saw Dr. Fernandez in December of 2009 after continued therapy. The Petitioner testified that at this time she was experiencing pain and weakness in the right arm. She testified that by that point in time, the left-arm symptoms had gotten a little better, but then they started to get worse again. On the left side, the Petitioner noticed burning in the elbow, shocks on the arm, numbness and tingling in the pinky.

On February 13, 2010, Dr. Fernandez performed a second surgery on the Petitioner's left elbow.

The Petitioner returned to Dr. Fernandez on March 2, 2010. He removed the Petitioner's splint and put her back in therapy. She remained off work.

The Petitioner returned to Dr. Fernandez on March 30, 2010. The Petitioner was still in physical therapy and she remained off work. At this point in time, the Petitioner testified that

she was experiencing improvement with symptoms in the right arm, but still noticed weakness and stiffness. In terms of the left elbow, the Petitioner testified that she was having weakness and stiffness as well as shooting pains and aching in the pinky. Dr. Fernandez prescribed another Medrol Dosepak and splints to wear at night.

The Petitioner was seen by Dr. Michael Vender on April 2, 2010, for an independent medical examination.

The Petitioner returned to Dr. Fernandez on July 13, 2010. He prescribed home exercises for the Petitioner.

The Petitioner again returned to Dr. Fernandez on September 7, 2010. At this time, Dr. Fernandez released the Petitioner to light duty at 20 hours a week. The Petitioner testified that she found work as an Administrative Front Desk Assistant on October 18, 2010. The Petitioner testified that her job duties included greeting guests, data entry, and stocking the kitchen. She testified that she had a flare-up of symptoms, including shooting pains, numbness, tingling, and aching. The Petitioner left this employer in May 2012. When she left the employer, she was working 35 hours a week.

The Petitioner returned to Dr. Fernandez on December 2, 2010. He recommended that she continue with home exercises.

The Petitioner saw Dr. Fernandez for the last time on May 24, 2011. She testified that she was better, but still experiencing symptoms. Dr. Fernandez released the Petitioner to full duty. The Petitioner was instructed to see him if she felt she needed further evaluation or treatment.

At the time of hearing, the Petitioner admitted that she has not returned to Dr. Fernandez. The Petitioner further admitted that she has not sought medical treatment for her elbows since being released by Dr. Fernandez on May 24, 2011. The Petitioner also admitted that she was not taking any medications for her elbows.

The Petitioner testified that she is employed part time as a Physician's Assistant in an allergy practice. She testified that in performing these duties, she does use retractors.

The Petitioner testified that she still has pain in both elbows of varying degree. She testified that certain activities, such as cleaning around the house, moving furniture, carrying things, and yoga initiates some of the symptoms.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision with regard to issue (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator makes the following findings of fact and conclusions of law:

The Petitioner was employed by the Respondent, Children's Memorial Hospital, for a limited period of time – February, 2008 to May 2009.

The testimony of both the Petitioner and her Supervisor, established that she wore an earpiece on either side and that it took one second to tap the earpiece to initiate the call or to end a call. There was no testimony that the tapping of the earpiece required any force or that it was performed in an awkward manner. As to the keying, it was limited in strokes by entering into the computer the patient's name or medical record number and from there, information could be obtained from the computer and given to the inquiring medical provider or patient.

The Arbitrator notes that when the Petitioner first saw Dr. Fernandez on May 28, 2009, she was required to fill out a New Patient Information Form/Questionnaire. In that New Patient Information Form/Questionnaire, she indicated "unknown" when asked where and how the injury occurred (Respondent's Exhibit No. 4). She was unable to identify at that time any specific work activity that caused her problem. She merely indicated that she had symptoms at work as well as in the middle of the night.

Dr. Fernandez testified that he believed the Petitioner's bilateral cubital tunnel syndrome was work related. Dr. Fernandez testified that the Petitioner did not have any extrinsic risk factors such as age, increased body mass index, diabetes or tobacco use. Initially, in his deposition, he felt that her condition was not idiopathic but later in the deposition, admitted that about one-third of the cubital tunnel cases are.

Dr. Fernandez testified at his deposition that the Petitioner's extension and flexion of the elbow when she answered the telephone caused her cubital tunnel syndrome. Dr. Fernandez, however, admitted that he did not know what work activities the petitioner was doing when she first began to experience her symptoms. Dr. Fernandez was unable to recall how long the Petitioner was on the telephone per day. Dr. Fernandez admitted that he did not know how the Petitioner initiated phone calls. He admitted that he did not know whether or not the Petitioner held her hand up to the earpiece for a minute or a second. Dr. Fernandez admitted that he did not know how long it took the Petitioner to tap the earpiece, what pressure she used in tapping it, or if the headset was on one side or both sides. Dr. Fernandez admitted that he never reviewed a job description or a video of the job performed by the Petitioner.

The Commission is not required to accept a causal connection opinion when it is based on flawed, inaccurate or incomplete histories. Sorenson v. Indus. Comm'n, 281 Ill. App.3d 373, 666 N.E.713 (1st Dist. 1996)

Dr. Michael Vender provided a contrary opinion, which the Arbitrator finds to be more persuasive and credible. Dr. Vender testified that the Petitioner described her job activities to him. Dr. Vender testified that he understood her main job activity was to answer telephones through the use of an earpiece. Dr. Vender testified that he did not believe the Petitioner's work activities would be contributory to cubital tunnel syndrome. He testified that the Petitioner's condition was not caused by her work activities, because there were no stressful activities across the elbow that would be considered contributory to cubital tunnel syndrome. He testified that the Petitioner had intermittent elbow flexion and extension, with no force. Dr. Vender was asked if raising the elbow 400 times a day to tap the earpiece would change his opinion in any way as to causal connection, in which he replied in the negative. Dr. Vender testified that a great majority

of cubital tunnel cases were idiopathic. Dr. Vender testified that touching the earpiece represented nothing more than routine motion of the arms that is present throughout the day.

The Arbitrator finds the Petitioner failed to prove that she sustained an accidental injuries arising out of and in the course of her employment. In so finding, the Arbitrator relied on the testimony of the petitioner and her supervisor as to the amount of telephone calls that she would make and take and the time it took to initiate the earpiece and the length of each call. The Arbitrator also relied on the testimony regarding the keying activities finding that the Petitioner, in using the computer, would activate same by limited keying of the patient's name or medical record number and then obtaining said information from same. The Arbitrator would note that this process is unlike that of a transcriptionist or secretary who is constantly typing, but consists of limited keying with thought process.

The Arbitrator, like Dr. Michael Vender, finds that reaching up with one's arm extended to tap an earpiece one to two seconds at a time, would not be considered to be repetitive and clearly nothing which is forceful. The testimony was that this activity consisted of two-thirds of the Petitioner's workday, which would indicate that there was substantial downtime between calls. The Petitioner's supervisor testified from documented evidence as to the number of calls and length of calls as opposed to the Petitioner testifying from memory. The Petitioner, when confronted with the supervisor's testimony and documentation concerning the number of calls and length of calls, did not question same.

Based on the foregoing, the Arbitrator finds the Petitioner failed to prove that on May 19, 2009, she sustained an accident that arose out of and in the course of her employment by the Respondent.

Therefore, compensation is hereby denied. All other issues are moot.

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

EUNICE ESPARZA,

Petitioner,

14IWCC0879

vs.

NO: 07 WC 54479

COSTCO WHOLESALE,

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, permanent disability and the two-physician rule as found in Section 8(a) of the Act and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator only to the extent that it vacates the charges payable to Dr. Daniel Newman and his practice group, the Illinois Bone and Joint Institute. The Commission finds the services he rendered were outside the two physician rule as set forth in Section 8(a) of the Act.

Arbitrator Doherty, in explaining how she came to find Dr. Newman came within the referral chain of Dr. Rahid Khan, acknowledged that she relied on Petitioner's testimony of being generally referred to another orthopedic. The Commission finds this reliance on Petitioner's testimony was made erroneously as she had sustained Respondent's timely-made objection to Petitioner testifying about anything Dr. Khan might have said or any referral Dr. Khan might have made. At the time she sustained Respondent's objection, Arbitrator Doherty indicated that she would take notice of any such referral found in the record. Within the Decision of the Arbitrator, Arbitrator Doherty wrote that no corresponding record was presented. In reviewing Dr. Khan's records, the Commission found no record of Dr. Khan referring Petitioner

to anyone outside his own practice group at Advanced Health Medical Group. The closest thing the Commission can find in Dr. Khan's records to a referral is a statement within the April 30, 2008, discharge note in which it was indicated that Petitioner may require future medical care. The Commission does not find that statement be a referral.

Upon reviewing the record and comparing it against Petitioner's testimony, the Commission comes to question Petitioner's veracity. In explaining why she discontinued treating with Dr. Khan, Petitioner testified that Dr. Khan had retired sometime after seeing her on October 22, 2010. She presented no evidence of seeing Dr. Khan anytime after October 22, 2008. Also noted is no reference being made of Dr. Khan's retirement when Petitioner presented to Dr. Newman on January 6, 2011. Dr. Newman's record from that visit indicates Petitioner informed him that, in August 2010, Dr. Khan recommended that she obtain a second opinion. The Commission finds notable three things about this history. First, she did not explain to Dr. Newman the reason for her presenting to him was due to the retirement of Dr. Khan. Second, the Commission finds no evidence of Petitioner seeing Dr. Khan in August 2010. Third, Dr. Newman did not specify that Dr. Khan referred Petitioner to him, only that she was subsequently referred to his office. Dr. Newman did not identify who made the referral. To the Commission, it appears Petitioner simply never returned to Dr. Khan after October 22, 2008.

The circumstances as to how Petitioner specifically came to be seen by Dr. Newman were addressed during the arbitration proceedings. Again, the Commission questions Petitioner's veracity. Again, Petitioner, on direct examination, testified simply that Dr. Khan made a referral. On cross-examination, Petitioner acknowledged believing, at one point, she alleged Respondent's workers' compensation carrier referred her to Dr. Newman. She then acknowledged receiving a letter that instructed her to see Dr. Newman. When asked if the letter came from her attorney, Petitioner indicated, "That I do not know." She proceeded to state that she thought it came from Respondent's attorney. On redirect examination, Petitioner acknowledged the referral to Dr. Newman came from "basically like a doctor finders [sic] service called Illinois Physician Network." The Commission takes notice that the as-testified-to letter that directed Petitioner to Dr. Newman was not admitted into evidence, that no referral from the Illinois Physician Network was entered into evidence and, most significantly, that Petitioner failed to identify who referred her to Dr. Newman when she completed his new patient intake form on January 6, 2011. Petitioner's testimony implies that she does not know how she came to be seen by Dr. Newman.

The Commission is not convinced that Petitioner came to be seen by Dr. Newman by way of either an explicit or implicit referral from Dr. Khan. Petitioner presented no evidence, other than her own testimony, to support this claim. Dr. Newman's noting that Petitioner had been referred to him is insufficient to establish that it was Dr. Khan who made the referral, particularly in light of Petitioner's testimony that she was referred to him by the Illinois Physician Network.

IT IS THEREFORE ORDERED BY THE COMMISSION that the awarding of medical benefits attributable to Dr. Newman and his practice group, the Illinois Bone and Joint Institute under Sections 8 and 8.2 of the Act is vacated.

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

14IWCC0879

the sum of $315.82 per week for a period of 32-3/7 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 $284.27 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 use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $98,740.37 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: OCT 0 8 2014
KWL/mav
O: 08/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0879

ESPARZA, EUNICE
Employee/Petitioner

Case# 07WC054479

COSTCO WHOLESALE
Employer/Respondent

On 8/30/2013, 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 0.06% 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:

0347 MARSZALEK AND MARSZALEK
STEVEN GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

0210 GANAN & SHAPIRO PC
MICHELLE L LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

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

14IWCC0879

Eunice Esparza
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # **07WC 54479**

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Wheaton**, on **July 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/12/2007**, 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 **$24,636.56**; the average weekly wage was **$473.78**.

On the date of accident, Petitioner was **45** years of age, ***single*** 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 of $315.82 per week for 32-3/7 weeks commencing 11/30/07 through 4/30/08 and again on 5/20/11 though 8/1/11 pursuant to Section 8(b) of the Act.

Respondent shall pay to Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injuries pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any. SEE DECISION

Respondent shall pay Petitioner permanent partial disability benefits of $284.27/week for 50 weeks, because the injuries sustained caused the 10% loss of use of the person as a whole pursuant to 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.

Carolyn Doherty
Signature of Arbitrator

8/29/13
Date

AUG 30 2013

FINDINGS OF FACT

At trial, the parties stipulated that Petitioner sustained a work related accident on 9/12/07 and that proper notice was provided. ARB EX 1. Petitioner testified that she began working as an optician for Respondent in August 2007. Petitioner's duties included lifting and unloading boxes of delivered eye ware and data entry 4 to 5 hours per day. On 9/12/07, Petitioner was unpacking delivered boxes. Petitioner testified that she while opening a cabinet with her right hand, her right hand and wrist were jerked by the falling wooden cabinet drawer. She felt immediate pain and numbness in her right wrist and right shoulder. Petitioner is left hand dominant.

Petitioner testified that she was sent to Elmhurst Hospital by "Donna" in HR at Respondent. Petitioner testified that her first visit to Elmhurst Hospital was on 9/24/07 and explained that despite immediate symptoms of pain in the right wrist and shoulder numbness she did not have treatment between the accident on 9/12/07 and 9/24/07 due to the death of her father. The Elmhurst Hospital records of 9/24/07 document a consistent history of accident on 9/12/07 when Petitioner twisted her arm from the weight of the falling drawer off its bracket. Petitioner noted injury to her "right forearm." Complaints of ulnar pain and numbness were noted along with pain in the right wrist and numbness of the 4th and 5th fingers on the right hand. Right wrist x-rays were negative. Petitioner was released to return to work with a diagnosis of tendinitis of the right wrist and forearm and restrictions of no lifting over 5 pounds, no right handed work, no repetitive movement and the use of a wrist splint. PX 1. Petitioner was referred to Dr. Couri, a specialist, on 9/25/07. PX 1.

On 10/25/07, Petitioner saw Dr. Couri for a "physiatric consult." PX 2. Dr. Couri noted a consistent history of accident "about 1 month ago" and the development of a tingling on the dorsum of the right wrist and tingling going into the 4th and 5th fingers. He noted her visit to Elmhurst Hospital, the negative wrist x-ray, the splint and the referral to him for care. Dr. Couri noted that Petitioner was unable to make the initial appointment so her first visit with him was on 10/25/07. He noted, "the patient states that over the month, her symptoms have gotten about 97% better using the wrist splint. The only activity that is bad for her is carrying the bay or turning the key in the car ignition. She still feels a "clicking" in her wrist. She will awaken with tingling in her fingers. She denies having any weakness. When she gets the pain, it is a sharp pain which she rates at a 5 out of 10. She denies having any neck or arm pain." PX 2. Petitioner testified that she told Dr. Couri that she had acute right wrist pain and shoulder numbness but that Dr. Couri said he would treat the wrist first. Petitioner was shown the record indicating her denial of arm pain and testified that this notation was incorrect.

Dr. Couri performed an examination of Petitioner's right wrist, fingers and elbow noting a good range of motion with decreased pinprick sensation in the ulnar dorsum of her right hand, medial 4th finger and in the right medial dorsal forearm. He diagnosed "occasional wrist pain that seems to be due more so [sic] some instability at this time. Originally it probably was a tendinitis. It appears that the patient has an ulnar neuritis of unclear etiology. It is coming from the level of the elbow and is causing her to still have some of the tingling sensation that she is having." PX 2. Dr. Couri recommended occupational therapy to build up strength in the right forearm, wrist and finger flexors and extensors which "seem to have become weak as she has been using the splint more frequently." He also ordered an EMG "of her right upper extremity to further assess the ulnar neuritis." Petitioner was kept on full duty work but was told to "discontinue use of the cock-up wrist splint except for when she is carrying the baby."

Petitioner testified that her employment with Respondent was terminated after 90 days in November 2007. Petitioner testified she was terminated for making two typing mistakes while in a splint. RX 2 is a "termination/resignation" form provided by Respondent documenting that Petitioner's termination on 11/15/07 for "two serious misconduct violations regarding HIPPA acknowledgement. HIPPA acknowledgement is required by Federal law." RX 2. The form was not signed by Petitioner despite a place for employee signature. At trial, Petitioner did not agree she was fired for non-compliance with HIPPA procedures but agreed that she was fired during the HIPPA counseling meeting.

The initial occupational therapy evaluation of 11/21/07 pursuant to Dr. Couri's orders indicates that Petitioner showed increased parathesias of the ring and small fingers with lateral neck bending and that she demonstrated "parathesias and weakness throughout the RUE" right upper extremity. It was noted that Petitioner was scheduled for an EMG to rule out ulnar neuropathy at the elbow. Petitioner's symptoms were decreased in the clinic with neck and upper extremity stretching and postural corrections at the two OT visits on 11/21/07 and 11/23/07. PX 2, PX 3. Dr. Couri's office note of 12/11/07 indicates that the EMG was authorized but that Petitioner did not have the EMG done in his office. PX 2. Petitioner did not return to Dr. Couri.

Petitioner chose to treat next with Advanced Health Medicine Group on 11/30/07. This is Petitioner's *first choice of providers* as Petitioner testified that she chose this physician group on her own and without referral. At the first visit on 11/30/07, Petitioner complained of the same symptoms described above as well as pain in her right shoulder and "numbness behind her back and right upper shoulder..." occurring at the time of her injury. Dr. Khan examined her upper extremities and cervical spine noting tenderness to palpation of the cervical spine and right posterior shoulder along with "decreased sensation on the ulnar aspect of the right forearm extending to the digit four and five including complete loss of sensation with a marked sensation in the entire digit five, palmer aspect of the hand quarter, and a three-quarter of the ulnar aspect of the digit four." PX 4. Dr. Khan's initial diagnosis was "neurological deficits in sensation in the left upper extremity requiring EMG/NCV. Likely etiology includes cervical strain/sprain with disc herniation at C6-C7 or ulnar compression at the elbow." Dr. Khan ordered an MRI of the cervical spine and right wrist as well as the EMG. Petitioner was given medication and sent to PT. As of 11/30/07 Petitioner was taken off work. PX 4.

Petitioner testified and the records reflect that Dr. Khan sent her for a consult with Dr. Kaye. On 12/7/07, Dr. Kaye also noted complaints of cervical and right shoulder pain following this accident along with the right wrist and finger complaints. Following an exam, Dr. Kaye diagnosed a right wrist strain, right elbow and shoulder strain, right cervical strain, cannot exclude ulnar nerve injury and cannot exclude co-existing cervical radicular injury. Dr. Kaye performed the EMG which showed a "stretch type injury to the right ulnar nerve. Most likely it can represent a mild cervical C8 nerve root stretch, ... the F wave is prolonged on the side of the injury, and is in support of such conclusion." He further commented that "although the right ulnar nerve conduction study was normal, a positive Tinel's at the right wrist would support a mild ulnar nerve stretch/compression at the wrist that is in recovery stage currently." Petitioner continued with chiropractic care thereafter with Dr. Hara at Advanced. PX 4.

On 1/10/08, following the shoulder MRI, Petitioner saw Dr. Malhas at Advanced for an orthopedic follow up. Dr. Malhas noted that Petitioner had a musculo-ligamentous injury in her right shoulder and that the MRI showed superior labral lesion and supraspinatus tendinopathy and AC arthrosis. PX 4, PX 5. Petitioner was given an injection with some immediate relief. PX 4. Petitioner continued with chiro care

under Dr. Hara through April 2008. On 3/7/08, Dr. Khan noted that Petitioner's strength and sensation was improving and that her fingers weren't so numb. He noted that the EMG/NCV was positive for mild C8 and ulnar findings. The MRI of the cervical spine was largely negative and the right shoulder MRI showed inflammation. PX 4, PX 5. Petitioner was returned to restricted duty work with no lifting over 5 pounds on this date and PT was cut to two days per week with a follow up in 4 weeks. PX 4.

On 4/2/08, Dr. Khan noted that Petitioner sustained a double-crush syndrome to the ulnar distribution- C7 overlay on the right with decreased strength in the 4th and 5th right fingers based on the positive EMG/NCV. PT twice per week was continued as was light duty work. On 4/25/08, Dr. Kaye agreed with Dr. Khan's assessment noting also possible median nerve involvement and right shoulder tendinopathy and SLAP lesion possibly contributing to the weakness. He recommended acupuncture and electrical stimulation for the ongoing C8 nerve distribution weakness. On 4/30/08, Dr. Khan released Petitioner at MMI for right ulnar nerve distribution neuropathy and right shoulder musculature injury of chronic inflammation strain/sprain. Petitioner was released to work with a maximum lifting restriction of 20 pounds and no overhead work. Exacerbations would require more treatment according to Dr. Khan. Dr. Kahn authored a narrative report not connected to actual treatment, which was dated October 22, 2008. Dr. Kahn indicated the MRI study demonstrated a SLAP lesion necessitating surgical intervention, which Petitioner declined to have at that time. He clearly stated that at the time of Petitioner's discharge she would need surgery in the future and that it was not a "question of whether she needs surgery, but when." PX 4. He otherwise indicated a functional capacity evaluation was needed to assess her work capacity, but that she was under significant limitations due to her shoulder pain and right hand pain. He further stated that "once again, I do believe the patient's injuries as outlined above including the findings on MRI, although significant, do not result in lifelong disability and *can be treated effectively." Emphasis added.* PX 4.

Petitioner testified that returned to work thereafter but had problems with accuracy due to continued problems with her two right digits. Petitioner worked as a cashier.

At Respondent's request, Petitioner attended a Section 12 exam with Dr. Romeo on 4/21/09- one year after Petitioner's release at MMI by Dr. Khan. RX 1. Dr. Romeo noted that he was performed an exam relative to Petitioner's right shoulder. He noted Petitioner's history of injury and complaints including those to her right wrist, arm and shoulder. He noted that the EMG revealed an ulnar neuritis and a questionable C8 radiculopathy. He noted the normal cervical spine MRI and the shoulder MRI noting some tendinitis of the supraspinatus tendon and a suspected SLAP lesion and AC joint arthritis which was also seen on the x-rays he performed. Petitioner's main complaints were that of numbness and heaviness of the right upper extremity. Exam was normal.

Dr. Romeo noted a diagnosis of right upper extremity strain and that "based upon the history provided by the patient, there is no surgical intervention that is recommended in regards to her right shoulder. There is nothing surgically that can improve the heaviness and numbness she feels throughout the right upper extremity." Based on the history provided, Dr. Romeo agreed that Petitioner's right upper extremity strain was related to the accident on 9/12/07 and that Dr. Khan's treatment was appropriate and necessary to treat that condition. However, he stated that her shoulder exam was essentially benign and that "it is not relevant to her numbness and heaviness that she feels in regard to her right upper extremity. He felt that the right shoulder MRI findings "are not clinically relevant" and are not consistent with the mechanism of

injury. He does not recommend or agree with any surgical recommendations and determined that Petitioner was capable of working without restriction. He found Petitioner at MMI. RX 1.

PX 6 contains records from a chiropractor Dr. Brownlee dated 11/12/09 and 1/27/10. Petitioner testified that she originally saw Dr. Brownlee for a job interview but then ultimately received chiropractic treatment from Dr. Brownlee. This treatment is reflected in the vague handwritten records at PX 6. Petitioner testified that she did not see Dr. Brownlee initially for treatment but rather for a job interview. However, Dr. Brownlee did an exam upon Petitioner's complaints of radiating arm pain and numbness and numbness in her fingers. Dr. Brownlee's records of 11/12/09 note that Petitioner was advised her care could not be "processed" as it was a work comp claim. PX 6. The record of 1/27/10 refers to Petitioner as Lionessa Lunes AKA Eunice Esparza.

Petitioner testified that she did not have any treatment for her complaints until September 2010 when she returned to Dr. Khan. In September 2010 Dr. Khan sent Petitioner to Premier PT for her continued right shoulder complaints. PX 7. Petitioner had another right shoulder MRI on 9/28/10 which showed a mild amount of partial thickness tearing tendinosis involving the supraspinatus tendon and mild tendinosis and possible small amount of partial thickness tearing to the subscapularis tendon as well. No full thickness tear to the rotator cuff is identified. Hypertrophic changes were noted along the AC joint. PX 8. Petitioner testified that her last visit to Dr. Khan was on 10/22/10 but no corresponding record was presented. Petitioner testified that Dr. Khan was retiring so he referred Petitioner for follow up care to another orthopedic. Again, no corresponding referral record was presented.

Petitioner next chose Dr. Newman as her treating orthopedic in place of Dr. Khan. She testified that she was not referred to Dr. Newman but found him through "physicians network." At the first visit on 1/6/11, Dr. Newman noted Petitioner's 2007 work injury and subsequent complaints to her right upper extremity. HE further noted her prior PT and testing ordered by Dr. Khan and that the therapy was being performed by a chiropractor. He noted that the "treatments were abruptly discontinued when it was discovered that they were not being paid. Ms. Esparza was essentially not treated until August 2010, when she went back to Dr. Khan who suggested that she get another opinion, and she was subsequently referred to this office." PX 9. He decided on conservative treatment for Petitioner's continued complaints of numbness and weakness of the right arm which he found "directly related to the incident that occurred at work in September 2007. She has not been symptom-free since that date. I believe she has a tardy ulnar palsy at the right elbow and evidence of a right shoulder impingement syndrome." Dr. Newman ordered an EMG to rule out a right cervical radiculopathy versus a right upper extremity mononeuropathy. PX 9.

The EMG of 3/15/11 showed a possible C5 radiculopathy in the right upper extremity and no ulnar palsy. A subsequent MRI of the cervical spine was normal. Based on her complaints of pain in the shoulder and heaviness in the right upper extremity with paresthesias into the 4th and 5th digits, Dr. Newman diagnosed that Petitioner's problems were likely emanating from the shoulder and not the cervical spine. He recommended surgery in April 2011 and on 5/20/11, he performed arthroscopy, acromioplasty, resection of the distal clavical and mini open repair of the rotator cuff. The post-op diagnosis was rotator cuff tear, impingement and degenerative arthritis of the right shoulder. Dr. Newman noted a full-thickness tear of the rotator cuff which was "quiet extensive." PX 9.

Petitioner was taken off work as of May 18, 2011. As of 6/21/11 Dr. Newman noted that Petitioner's "previous radiating pain in the right upper extremity, including the tingling and numbness in the right

hand, have subsided since the surgery." After a course of post surgical PT, Dr. Newman released Petitioner to work in August 2011. Thereafter, Petitioner was sent by Dr. Newman to a urologist Dr. Chernoff at Swedish Covenant Hospital due to medication related problems. Petitioner treated through April 2012 with Dr. Chernoff. PX 12., PX 31. Petitioner testified that her last visit with Dr. Newman was on January 10, 2013 when she received "shots" in her right shoulder.

Petitioner testified that she currently does not take medication but experiences numbness in her right shoulder and small and ring fingers or the right hand. Petitioner performs exercises to control any pain and numbness. Petitioner did not experience these problems before this accident.

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that the Petitioner's condition of ill being in her right shoulder, arm and hand is related to the accident of September 12, 2007. The Arbitrator notes that Petitioner complained initially of right wrist pain and numbness in her fingers following the "tug" injury she sustained when she pulled out a drawer which fell off a bracket at work on 9/12/07. Petitioner's complaints to her right upper extremity have persisted since the date of the accident. Prior to this accident she had no symptoms in her right upper extremity.

The Arbitrator notes that the Petitioner has consistently attributed her right upper extremity symptoms to the accident at work. She was initially seen at Elmhurst Memorial Hospital Occupational Health Service on September 24, 2007. She gave a history of her right arm being twisted from the weight of a drawer. She complained of pain in her right forearm and numbness and tingling in the fingers of her right hand. Dr. Couri took a history on October 25, 2007, indicating, "The patient states about one month ago, she was pulling out a drawer full of files with her right hand at work and the drawer fell out. She states that the files probably weighed about 20 pounds. She developed tingling on the dorsum of the right wrist and tingling going down into her fourth and fifth fingers". Dr. Couri recommended occupational therapy to build up strength in the right forearm, wrist and finger flexors and extensors which "seem to have become weak as she has been using the splint more frequently." He also ordered an EMG "of her right upper extremity to further assess the ulnar neuritis." He diagnosed ulnar neuritis of an unclear ideology probably coming from the level of the elbow. PX 2. The initial occupational therapy evaluation of 11/21/07 pursuant to Dr. Couri's orders indicates that Petitioner showed increased parathesias of the ring and small fingers with lateral neck bending and that she demonstrated "parathesias and weakness throughout the RUE" right upper extremity. PX 3.

Petitioner was next seen by her first choice of providers, Dr. Khan and the doctors at Advanced Health Medical Group including Drs. Kaye and Hara. Dr. Kahn diagnosed right ulnar nerve distribution neuropathy and right shoulder muscular injury-chronic inflammation strain/sprain. The doctor commented, "The patient's signs and symptoms are consistent with a history of the injury at Costco with mechanism of the action of the door hitting her as described by the patient initially. As such all treatment should be performed on an industrial basis." PX 4. Dr. Khan also determined in April 2008 that Petitioner was a surgical candidate for her shoulder diagnosis but stated that Petitioner did not want

surgery at that time. In October 2008, Dr. Khan reiterated that surgery was not a question of whether but of when.

PX 6 contains records from a chiropractor Dr. Brownlee dated 11/12/09 and 1/27/10. Petitioner testified that she originally saw Dr. Brownlee for a job interview but then ultimately received chiropractic treatment from Dr. Brownlee. Dr. Brownlee is Petitioner's second choice of provider. Dr. Brownlee did an exam upon Petitioner's complaints of radiating arm pain and numbness and numbness in her fingers.

On January 6, 2011, Petitioner sought treatment with Dr. Daniel Newman at the Illinois Bone & Joint Institute. Dr. Newman recorded a history that Petitioner was injured at work in September 2007. He noted that Petitioner was opening a file drawer when the drawer fell off its track, twisting her wrist and yanked her entire right extremity. The doctor then stated, "In my opinion, the complaints of Ms. Esparza presents today are directly related to the incident that occurred at work in September of 2007. She has not been symptom free since that date. I believe she has ulnar nerve palsy at the right elbow and evidence of right shoulder impingement syndrome." Ultimately Dr. Newman performed surgery on petitioner's right shoulder on May 18, 2011 with a postoperative diagnosis of rotator cuff tear impingement and degenerative arthritis of the right shoulder. PX 9.

The Arbitrator further notes that Dr. Romeo agreed that Petitioner's care and treatment from Dr. Khan for what Dr. Romeo diagnosed as an upper extremity strain was reasonable, necessary and causally related to the work accident. However, he disagreed with the need for surgery.

Based upon all of the above, the Arbitrator concludes that Petitioner's right shoulder and arm injuries are related to the accident of September 12, 2007. Although the initial recorded complaints are of numbness in the right arm and hand with pain in the wrist, the Petitioner testified to minimal use of the right shoulder and arm after the accident while wearing a splint. By November 30, 2007, it is well documented she was complaining of right shoulder pain which she consistently attributed to the accident at work. Furthermore, the accident at work is the sole explanation in evidence for the condition of ill being of the right shoulder. There is no evidence she had any right shoulder problems before September 12, 2007. The Arbitrator further notes that Petitioner's primary treating orthopedic surgeons, Dr. Khan and Dr. Newman, each opined that her right shoulder injury was related to the accident at work. In finding causal connection for Petitioner's shoulder condition and the treatment received for that condition, the Arbitrator places greater weight on the opinions of the treating physicians in light of the record as a whole.

O. Did Petitioner exceed her allowable choice of providers? J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent disputed liability for Petitioner's medical expenses in part based upon a causal connection dispute. Having found for the Petitioner regarding the disputed issue of causal connection, The Arbitrator finds Respondent is to pay Petitioner's reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related conditions.

Respondent asserts that Petitioner has exceeded her allowable choice of 2 physicians under Section 8(a), thus negating Respondent's payment of any bills emanating from the treatment provided by Dr. Newman

and any of his referred treatment. Respondent asserts that Dr. Newman was a third provider as Drs. Khan and associates were first choice followed by the second choice of Dr. Brownlee.

The Arbitrator agrees that Drs. Khan and associates were Petitioner's first choice and that Dr. Brownlee was her second choice. However, the Arbitrator finds that Dr. Newman rightfully belongs in the chain of providers emanating from the first choice, Dr. Khan. Petitioner testified that Dr. Khan was retiring when she saw him in September 2010 so he referred her for follow up care to another orthopedic. Again, no corresponding referral record was presented and despite reference by both parties at trial to a specific referral from Dr. Khan to a Dr. Goldflies, the Arbitrator could not locate that record. Left with Petitioner's testimony that she was generally referred to find another orthopedic, the Arbitrator finds that Petitioner remained within her allowable choices when she found Dr. Newman through the use of "Physician's Network." On January 6, 2011, Dr. Newman noted, "Ms. Esparza was essentially not treated until August 2010, when she went back to Dr. Khan who suggested that she get another opinion, and she was subsequently referred to this office." PX 9.

Accordingly, based on the findings of causal connection and on the issue of choice of providers, the Arbitrator further finds that Respondent is to pay to Petitioner the reasonable and necessary medical expenses incurred in connection with her causally related conditions pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

K. What temporary benefits are in dispute? TTD

The Arbitrator finds that Petitioner was temporarily and totally disabled for 32-3/7 weeks from November 30, 2007 through April 30, 2008 and from May 20, 2011 through August 1, 2011. The Arbitrator finds that Petitioner was authorized off work during these periods where her condition was not stabilized and treatment for the causally related conditions continued. PX 4, PX 9.

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

Based upon the above, the Arbitrator concludes that Petitioner has sustained an injury to her right shoulder and upper extremity as a result of the accident of September 12, 2007 resulting in surgery performed on May 20, 2011. Petitioner testified that she currently experiences numbness in her right shoulder and small and ring fingers or the right hand. Petitioner performs exercises to control any pain and numbness. She does not take medication and has returned to work. Based on the foregoing, the Arbitrator finds that Petitioner sustained 10% loss of use of the person as a whole pursuant to Section 8(d)(2) for the injuries to her right upper extremity.

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 JONES,

Petitioner,

14IWCC0880

vs.

NO: 12 WC 37009

CITY OF CHICAGO,

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 of permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator only to the extent of reducing the benefits awarded under Section 8(e) of the Act for injuries Petitioner sustained to his left leg. The Decision of the Arbitrator is attached hereto and made a part hereof.

The Decision of the Arbitrator was filed with the Illinois Workers' Compensation Commission on March 14, 2014, and, in said decision, Arbitrator Mason concluded Petitioner lost 25% use of his left leg due to injuries sustained to his left knee on August 22, 2012. In arriving at her decision, Arbitrator Mason applied the criteria for determining permanent partial disability as is set forth in Section 8.1b of the Act. The Commission takes no issue with the conclusions arrived at by Arbitrator Mason in her application of Section 8.1b with the exception to the evidence of disability corroborated by the treating medical records.

In support of her findings, Arbitrator Mason noted Petitioner's testimony as to the lingering effects of his injury with respect to his work activities as well as to non-work activities. Petitioner testified he now works more slowly and deliberately and has continues to have difficulty with stairs and ladders. Outside of the work environment, Petitioner testified that he no longer rides a bicycle and avoids picking up his granddaughter. The Commission, in reviewing Petitioner's medical records and testimony and comparing the two, finds Petitioner engaged in

embellishment.

The Commission notes Petitioner's complaints were more pronounced when he was examined by Dr. Michael Gross, his choice for an AMA examination, and by Dr. Shane Nho, Respondent's AMA examiner, than they were when he was examined by his own treating physician, Dr. Michael Maday, and his physical therapists at ATI. Before Drs. Gross and Nho, on October 30, 2013, and December 17, 2013, respectfully, Petitioner demonstrated diminished range of motion in his left knee. Dr. Maday, however, found the range of motion of Petitioner's left knee to be full as early as February 20, 2013, and either full or essentially full on subsequent examinations. Petitioner's physical therapists, the individuals most familiar with the condition of Petitioner's knee, apparently found Petitioner's range of motion of his left knee to be so unremarkable that they did not even address it in their reports. Similarly, Petitioner made complaints of tingling above and behind his left knee, of numbness and stiffness in the morning, of his knee popping when stretching and of his knee swelling when negotiating stairs to Dr. Gross. Dr. Nho wasn't provided with a history of tingling, numbness, stiffness or knee popping. Dr. Nho only recorded Petitioner as complaining of his knee swelling but that swelling was not attributed to any particular activity. Neither Dr. Maday nor the physical therapists took a history from Petitioner of his experiencing tingling, numbness or popping. In one instance, a physical therapist did note Petitioner complaining of a little stiffness in his knee. The only constant findings among the treating and examining medical professionals were complaints of pain, particularly with negotiating stairs, and mild atrophy of the left leg.

The Commission also notes the two complaints Petitioner testified to having outside of work, not being able to ride a bicycle and having to avoid picking up his granddaughter, are not found in his medical records.

The records the Commission chooses to rely on to ascertain the condition of Petitioner's left knee is the July 11, 2013, discharge report from ATI and the September 25, 2013, progress note taken at Midland Orthopedic. The discharge report indicated that Petitioner was discharged to return to full duty work with a pain intensity of 3/10. The same report also indicated Petitioner was told that he will continue to have "a little pain" in his knee. The records from Midland Orthopedic, created approximately two months after Petitioner's discharge from ATI, documented only Petitioner having "some pain" and "some difficulty" with the stairs. The apparently relatively low level of pain Petitioner is experiencing is corroborated by Petitioner indicating on Dr. Nho's intake form that he treats his condition with Advil and Tylenol and in his testimony that he doesn't take prescription medication.

The Commission takes the position that Petitioner was more forthcoming concerning the true condition of his left knee with Dr. Maday and physical therapists than he was with Dr. Gross, Dr. Nho or Arbitrator Mason and, in doing so, finds his left knee not be as permanently disabled as did Arbitrator Mason. Accordingly, the Commission reduces the permanent partial disability award by 2½%, finding Petitioner sustained a 22½% loss of use of his left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 48.375 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 22½% loss of use of the left leg.

14IWCC0880

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,600.00. 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: OCT 0 6 2014
KWL/mav
O: 09/29/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Stephen J. Mathis

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

Thomas Daffron,
Petitioner,
vs.

14IWCC0881

NO: 12 WC 42572

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 nature and extent of Petitoner's permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 7, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 8 2014
KWL/vf
O-9/30/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0881

DAFFRON, THOMAS
Employee/Petitioner

Case# **12WC042572**

STATE OF ILLINOIS
Employer/Respondent

On 3/7/2014, 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:

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 ILLINOIS ATTORNEY GENERAL
FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

MAR 07 2014

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0881

THOMAS DAFFRON
Employee/Petitioner

v.

STATE OF ILLINOIS
Employer/Respondent

Case # 12 WC 42572

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **January 15, 2014**. By stipulation, the parties agree:

On the date of accident, **November 2, 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 **$59,028.00**, and the average weekly wage was **$1,135.15**.

At the time of injury, Petitioner was **39** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been (or will be) provided by Respondent.

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

Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

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 $681.09/week for a further period of 51 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the 10.2% loss of the person as a whole.

Respondent shall pay Petitioner compensation that has accrued from December 17, 2013 through January 15, 2014, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

03/03/2014
Date

MAR 7 - 2014

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

THOMAS DAFFRON
Employee/Petitioner

14IWCC0881

v.

Case # 12 WC 42572

STATE OF ILLINOIS
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On November 2, 2012, Petitioner, Thomas Daffron, was a 39-year-old Correctional Officer at Respondent's Menard correctional facility. On said date, he sustained undisputed accidental injuries to his right shoulder while carrying an inmate to Respondent's healthcare unit for evaluation of chest pains. Petitioner testified to a previous right shoulder surgery from which he had fully recovered at the time of the November 2nd accident.

Petitioner sought treatment for his injuries with Dr. George Paletta, who diagnosed an aggravation of Petitioner's pre-existing shoulder condition and recommended injections and physical therapy. (Petitioner's Exhibit (PX) 3). Petitioner also attended an examination with Dr. Robert Kramer at the request of Respondent pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"). Dr. Kramer agreed that Petitioner sustained an aggravation of his shoulder condition on November 2, 2012. (PX 9). When conservative care failed to improve his condition, Petitioner underwent surgery on September 10, 2013 in the form of a right shoulder arthroscopy with extensive debridement and open distal clavicle excision. The post-operative diagnoses were: 1) right shoulder pain; 2) right shoulder impingement syndrome; 3) right shoulder labral tear; 4) ACL joint pain right shoulder; and 5) glenohumeral joint degenerative joint disease. (PX 8). Petitioner testified that his condition improved following surgery.

Despite the improvement from surgery, Petitioner testified that he continues to experience symptoms which he attributes to the November 2, 2012 accident. Petitioner testified to significant loss of range of motion and increased pain dependent upon his level of activity. Petitioner also testified that noticed loss of strength. Petitioner continues to perform the duties of a Correctional Officer, which involves pulling on heavy steel cell doors to ensure they are secure, lifting and carrying objects and securing inmates. He testified that these duties place stress on his right shoulder. Petitioner's right shoulder condition prevents him from sleeping on his right side and awakens him when he unconsciously rolls over to the right in his sleep. His condition has negatively impacted his hobby of weight lifting. Petitioner takes over-the-counter medication such as Aleve or Ibuprofen for his symptoms.

The parties acknowledged that Petitioner treated for his shoulder condition concurrent with other injuries which are the subject of a separate claim, with which this matter is not consolidated, *i.e.*, Case Number 12 WC 42573. Respondent shall therefore pay reasonable and necessary medical services as outlined in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, with the exception of

medical bills related to Petitioner's diagnosis and treatment for carpal and cubital tunnel syndrome, and not related to this case. (See Case Number 12 WC 42573). Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

CONCLUSIONS OF LAW

Petitioner's date of accident after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning the permanent partial disability (PPD) award being issued. It is noted when discussing the permanency award being issued that no PPD impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

Concerning Section 8.1b(b)(ii) of the Act (Petitioner's occupation), Petitioner continues to be employed as a Correctional Officer and continues to perform the duties of a Correctional Officer, which involves pulling on heavy steel cell doors to ensure they are secure, lifting and carrying objects and securing inmates. He testified that this places strain on his right shoulder. Great weight is placed on this factor when determining the PPD award.

Concerning Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of the injury), Petitioner was 39 years old on November 2, 2012. The Arbitrator considers Petitioner to be a somewhat younger individual with more working years ahead of him than older people. Significant weight is placed on this factor when determining the permanency award.

Concerning Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), there is no direct evidence of diminished future earning capacity in the record. Accordingly, no weight is placed on this factor when determining the PPD award.

With regard to Section 8.1b(b)(v) of the Act (evidence of disability corroborated by Petitioner's treating medical records), the Arbitrator notes that Petitioner sustained inflammatory injuries to his shoulder which necessitated surgery in the form of a right shoulder arthroscopy with extensive debridement and open distal clavicle excision. The post-operative diagnoses were: 1) right shoulder pain; 2) right shoulder impingement syndrome; 3) right shoulder labral tear; 4) ACL joint pain right shoulder; and 5) glenohumeral joint degenerative joint disease. Despite the improvement from surgery, Petitioner credibly testified that he continues to experience symptoms which he attributes to the November 2, 2012 accident. Petitioner testified to loss of range of motion and increased pain dependent upon his level of activity. Petitioner also testified that he noticed loss of strength. Petitioner continues to perform the duties of a Correctional Officer, which involves pulling on heavy steel cell doors to ensure they are secure, lifting and carrying objects and securing inmates. He testified that these duties place stress on his right shoulder. Petitioner's right shoulder condition prevents him from sleeping on his right side and awakens him when he unconsciously rolls over to the right in his sleep. His condition has negatively impacted his hobby of weight lifting. Petitioner takes over-the-counter medication such as Aleve or Ibuprofen for his symptoms.

Based upon the foregoing, Petitioner has sustained injuries that resulted in the 10.2% loss of the person as a whole pursuant to Section 8(d)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

Damien Ringo,

Petitioner,

14IWCC0882

vs.

NO: 12 WC 28691

American Cable & Telephone,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) & 8(a) having been filed by the Respondent herein
and notice given to all parties, the Commission, after considering the issue(s) of medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,800.00. 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: OCT 0 6 2014
KWL/vf
O-9/8/14
42

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would find the Arbitrator erred in her decision by failing to find that Petitioner re-injured his low back in July 2012 by acting with express knowledge and in direct violation of a Respondent employer's safety rule. Petitioner of his own volition performed a task outside of his light duty restrictions. The record details that Petitioner was injured as a result of a purposeful violation of his lifting restriction and Respondent's safety rule. Petitioners actions were not required nor did they benefit his employer. In Saunders v. Industrial Commission, 189 Ill.2d 623, 727 N.E.2d 247, 244 Ill. Dec. 948. The Court held where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such a rule or order, it cannot be then said that the accident arose out of the employment. The decision should be reversed.

Kevin W. Lamborn

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

14IWCC0882

RINGO, DAMIEN
Employee/Petitioner

Case# **12WC028691**

AMERICAN CABLE & TELEPHONE
Employer/Respondent

On 3/13/2014, 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:

0838 HODES GREENSTEIN & LITWIN
DAVID H GREENSTEIN
205 W RANDOLPH ST SUITE 1410
CHICAGO, IL 60606

0445 RODDY LEAHY GUILL & ZIMA LTD
PAUL W SCHUMACHER
303 W MADISON ST SUITE 1500
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
AMENDED ARBITRATION DECISION
19(b) & 8(a)

14IWCC0882

Damien Ringo
Employee/Petitioner

v.

American Cable & Telephone
Employer/Respondent

Case # **12** WC **28691**

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 **December 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **January 12, 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 as explained *infra*.

In the year preceding the injury, Petitioner earned **$21,472.36**; the average weekly wage was **$412.93**.

On the date of accident, Petitioner was **31** years of age, ***single*** with **1** dependent child.

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

Respondent shall be given a credit of **$795.14** for TTD, **$0** for TPD, **$0** for maintenance, and **$2,530.00** for other benefits (i.e., permanent partial disability advance)[1], for a total credit of **$3,325.14**. *See* AX1.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act. *See* AX1.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $275.29/week for 34 and 3/7th weeks, commencing January 10, 2013 through July 24, 2013 and October 28, 2013 through December 11, 2013 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from January 12, 2012 through December 12, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $795.14 for temporary total disability benefits that have been paid.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care requested pursuant to Section 8(a) of the Act in the form of post-operative physical therapy prescribed by Dr. McComis.

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] Respondent asserts a credit for this amount of permanency paid in advance. No determination has yet been made regarding the nature and extent of Petitioner's injury. Thus, this amount is noted, but shall not be applied until a permanency determination is made on disposition of the issue of the nature and extent of Petitioner's injury.

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

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

Signature of Arbitrator

March 4, 2014
Date

ICArbDec19(b)

MAR 13 2014

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED* ARBITRATION DECISION *ADDENDUM
19(b) & 8(a)

14IWCC0882

Case # 12 WC 28691

Consolidated cases: N/A

Damien Ringo
Employee/Petitioner

v.

American Cable & Telephone
Employer/Respondent

FINDINGS OF FACT

The issues in dispute are causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to temporary total disability benefits, and whether he is entitled to prospective medical care in the form of post-operative physical therapy as prescribed by Dr. McComis. Arbitrator's Exhibit[2] ("AX") 1.

Background

Petitioner testified that he was employed by Respondent as a cable installer for approximately 11 months before his injury at work and had no health problems that caused him to lose any significant period of time from work before then.

Petitioner testified that he was called to do a reconnection installation at a residence in Palos Heights, Illinois, which required him to connect cable and internet wire from outside the house and inside the house. While drilling a hole in the wall in a very small, cluttered space so that the outside wire could feed into the house, petitioner injured his back while laying prone on the floor. More specifically, Petitioner testified that as he completed drilling the hole and tried to stand up balancing on the bed in the room he heard a snap in his back and it was very painful. Petitioner testified that he could not work.

Medical Treatment

Petitioner testified that he contacted his manager, Mr. Andujar, who told him that he was calling an ambulance and not to move. Petitioner was transported in ambulance to Palos Community Hospital where he testified that he complained of pain in his lower back, a burning sensation, and an inability to move. He was examined, underwent a CT scan, given pain medication, and discharged home.

Petitioner then went to North Point Orthopedics to see Dr. McComis on January 26, 2012. PX1. Petitioner testified that a lady from Traveler's insurance asked him where he lived and she recommended Dr. McComis. At this initial visit, Petitioner reported mid and low back pain after a consistently reported injury at work. *Id.* He also reported that he had problems getting out of bed in the morning and sleeping. *Id.* On examination, Dr. McComis noted tenderness in the right lumbosacral area, extension to 0 degrees and flexion to about 80 degrees, and a negative straight leg raise test. *Id.* Dr. McComis noted that Petitioner weight 267 lbs., reviewed Petitioner's CT scan, which he noted showed a central disc herniation at the L4-L5 level more paracentral to the

[2] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

left. *Id.* He diagnosed Petitioner with a herniated lumbar disc, ordered physical therapy and Tramadol, and restricted him to seated work only. *Id.*

Petitioner began the recommended physical therapy at Accelerated on February 10, 2012 and continued to do so through July 16, 2012. PX2.

On February 16, 2012, Petitioner reported that the Tramadol was not helping him, but that he was feeling a lot better and that Aleve was now taking away most of his pain. PX1. He ordered continued physical therapy and Mobic, and returned Petitioner to work with a 20 lb. lifting restriction with no repetitive bending or stooping. *Id.* Dr. McComis maintained these restrictions and ordered additional physical therapy on March 15, 2012. *Id.*

Respondent offered a letter dated February 20, 2012 provided by Respondent's human resource manager to Petitioner requesting his acknowledgement that his "light duty restrictions set by Gregory P. McComis, M.D. and that [he] will not exceed the [no lifting, pushing or pulling over 20 lbs, and no repetitive bending or stopping] restrictions while on light duty...." RX1. Petitioner signed this letter. *Id.*

Petitioner testified that while he was working through 2012 he was under restrictions and that he made a conscientious effort to work within those restrictions. Petitioner testified that he tried to avoid repeated bending, stooping, etc.

On April 19, 2012, Petitioner returned to Dr. McComis reporting left leg and heel pain and numbness, right-sided low back pain, and that he "had been doing well and not been going to physical therapy where he re-aggravated his back one week ago when he had to lift a lot of boxes. [Petitioner] states that he is back to where he was when [Dr. McComis] first saw him." *Id.* Dr. McComis ordered a new MRI and returned Petitioner to sedentary work only with a 10 lb. lifting restriction. *Id.*

On June 7, 2012, Dr. McComis noted Petitioner's report of continued low back, left buttock, and left leg pain whether he was at rest, standing or sitting. *Id.* He also reported that walking seemed to cause the most symptoms that radiated to his left ankle. *Id.* Dr. McComis reviewed Petitioner's May 8, 2012 MRI, which showed a disc herniation on the left at L4-L5 displacing the left L5 nerve root and foraminal stenosis. *Id.* He ordered a left L4-L5 transforaminal epidural steroid injection and indicated that if Petitioner was not better, he would need a left L4-L5 lumbar discectomy. *Id.*

On July 12, 2012, Petitioner reported that the epidural steroid injection helped him out a fair amount. *Id.* Dr. McComis ordered work hardening and placed Petitioner on a 20 lb. lifting restriction. *Id.*

Petitioner returned to Dr. McComis on August 1, 2012 who noted "...the epidural injection took away all of his pain for about a week-and-one-half. About a week ago he re-injured his back when pulling down a lift gate on the truck he was riding in. Now the pain in his low back area is persistent. He's had to take the day off because of the pain." *Id.* Dr. McComis placed Petitioner off work until August 7, 2012 and recommended that Petitioner undergo surgery sooner rather than later. *Id.*

At trial, Petitioner testified regarding the re-injury in July of 2012. He testified that he was at the office on a Friday and was to go to Comcast warehouse and pick up equipment for the week and drop off returned equipment. Petitioner testified that he was alone at the time and that, generally, others loaded equipment onto and off of the truck. Petitioner normally opens back lift gate and a Comcast employee would come out to pick up returned merchandise with a forklift. He testified that there is a button that raises and lowers the lift gate, but

that the lower portion of the lift gate must be manually folded out. He testified that he did this and experienced an aggravation of pain in his back.

On cross examination, Petitioner testified that there was no one to ask for help with the lift gate at Comcast's warehouse. He acknowledged that there is a policy with regard to restrictions that if an employee was placed on light duty, it was provided by Respondent and the employee was supposed to stick to it. He acknowledged that he was accommodated with light duty after the accident within his various restrictions as ordered by Dr. McComis. With regard to his assignment going to and from Comcast, Petitioner acknowledged that Comcast employees would load and unload the truck at their warehouse and then Respondent's warehouse employees would load and unload the truck at Respondent's warehouse. Petitioner admitted that he was not to operate the lift gate, but testified that there were occasions were warehouse personnel were not around to load or unload equipment at Respondent's warehouse and he was supposed to park the truck and leave it there.

Javier Andujar

Respondent called Petitioner's immediate supervisor, Javier Andujar ("Mr. Andujar") as a witness. Mr. Andujar testified that he has been employed by American Cable & Telephone for 8 ½ years in various positions including as a supervisor which consisted of monitoring employees, scheduling employees for work, etc. Mr. Andujar testified that Respondent has a policy that if an individual is injured on-the-job and if an employee is released to return to light duty work the restrictions will be accommodated if possible.

Mr. Andujar testified that Petitioner was accommodated while he was limited to light duty work and that Petitioner acknowledged his restrictions in a letter signed by Petitioner dated February 20, 2012. RX1. Mr. Andujar testified that the petitioner, while working light duty was not to exceed these restrictions.

Mr. Andujar also testified that he was familiar with the truck that Petitioner drove and that he was to drive this vehicle to and from Comcast. Petitioner was not supposed to do any lifting or perform any activities which exceeded Dr. McComis' restrictions. Mr. Andujar testified that the tail lift gate did involve lifting of a steel plate or gate weighing anywhere from 75 to 100 pounds, but that Petitioner was not supposed to engage in any activities which exceeded his physical restrictions. If there was an issue with the gate, Petitioner was to seek assistance from co-employees.

Petitioner's Rebuttal Testimony & Continued Medical Treatment

Petitioner testified that when he was given duties to drive the truck there were several occasions when he operated the lift gate. Petitioner testified that he did this all the time if you included pushing the lift gate buttons to mean operating the lift gate. He also testified that he would operate the lift gate on a few occasions when there was no one to assist him on Fridays, but he would get yelled at. During all of the months that Petitioner was making these deliveries he testified that he would push the lift gate button in Mr. Andujar's presence. He added that he was told not to touch it or do anything with the lift gate after July, but that he had not been instructed NOT to operate the lift gate before July 2012. *But see* RX1.

At a follow up visit on August 21, 2012, Petitioner reported progressively worsening pain and that riding in a car for about 10-15 minutes caused him increased pain to the point that he had to get out of the car and an inability to walk more than short distances now. *Id.* Dr. McComis again recommended surgery and noted that Petitioner was going for an independent medical evaluation. *Id.* In the interim, Dr. McComis restricted Petitioner to sedentary work only with no driving over 15 minutes at a time. *Id.*

Regarding the work that he performed during this period of time while restricted from certain activities by Dr. McComis, Petitioner testified that when he initially returned to work he was restricted to seated work only and no heavy lifting, repetitive bending or stooping. He was no longer going out as an installer. For the first week-and-a-half or so, Petitioner testified that he was making cable jumpers by hand, which was within his restrictions. Petitioner then began different work while still under restrictions and he would drop off equipment to technicians in whatever cities they were in. Someone would scan the information to him and put the equipment into the work truck for him to deliver it to the employee in need of the equipment. Petitioner testified that he would sometimes load the vehicles with equipment, which varied in size and weight but within his restrictions. While under restrictions, Petitioner testified that he did work outside of the warehouse once where someone else would drive him and this was during the first 2-3 times he was assigned to drive a large vehicle.

Section 12 Examination – Dr. Kornblatt

On September 24, 2012, Petitioner underwent an independent medical examination with Dr. Kornblatt at Respondent's request. RX2. Petitioner provided a history. *Id.* Dr. Kornblatt examined Petitioner, reviewed various medical records, and issued a report of the same date. *Id.* Dr. Kornblatt noted Petitioner's report that on July 27, 2012 he lifted a truck gate and then after driving to his destination and exiting the vehicle experienced increased left low back pain. *Id.*

Ultimately, Dr. Kornblatt diagnosed Petitioner with mechanical low back pain – myofacitis with a history of work-related lumbosacral strain that had resolved. *Id.* He indicated that Petitioner presented to the evaluation without abnormal objective findings, with no presentation of clinical radiculopathy, and that his MRI scan findings are within normal limits with no indication of a herniated disc, degenerative disc disease, or nerve root impingement. *Id.* He opined that Petitioner's then-current subjective complaints were unrelated to his January 12, 2012 injury at work and that Petitioner reached maximum medical improvement six weeks after that injury. *Id.* Dr. Kornblatt also opined that Petitioner's mild subjective complains of mechanical low back pain were unrelated to his lumbosacral low back strain, but were related to his myofacitis, obesity, and deconditioned state. *Id.* He indicated that Petitioner's conservative medical treatment was appropriate, but that he required no further medical treatment or surgery and that he was at maximum medical improvement. *Id.*

On cross examination, Petitioner testified that the examination by Dr. Kornblatt was very limited. He testified that he was instructed to bring his *ID*, any records from prior examinations and diagnostic testing including the MRI DVD. Petitioner testified that Dr. Kornblatt did not ask him for the MRI even though he asked Dr. Kornblatt if he wanted to see it.

Continued Medical Treatment

On October 11, 2012, Petitioner returned to Dr. McComis who noted that Petitioner continued to have pain down his legs to the point that he had difficulty sleeping, inability to perform any repetitive bending because it caused severe pain, and some mild back pain with most of the pain localized in the buttock and leg. PX1. Dr. McComis also noted Petitioner's report that "[h]e did go downtown and saw Dr. Kornblatt who told him there was nothing wrong with him[,]" the examination with Dr. Kornblatt was less than five minutes, and that Dr. Kornblatt did not review his MRI scan because it was in Petitioner's pocket the whole time. *Id.* Dr. McComis read Dr. Kornblatt's report, but indicated that his surgical recommendation had not changed and that the

examination reported by Dr. Kornblatt could not be possible given Petitioner's reports to him (Dr. McComis). *Id.*

A physical therapy note from Accelerated dated December 4, 2012 reflects that "[o]n 7/31/12 patient called to report he re- injured back while at work on 7/27/12 and will need to see MD for new injury per patient progressing into a work conditioning program." PX2.

On December 26, 2012, Petitioner saw Dr. McComis reporting that "he re-injured himself while at work on 11/22/12 while lifting a box. [Petitioner] states that his back locked up on him." PX2. He reported left buttock and leg pain, as well as pain down into the right leg. *Id.* Dr. McComis ordered various medications including a Medrol Dosepak, reiterated his recommendation for surgery, and ordered a new MRI before surgery. *Id.*

On January 10, 2013, Petitioner reported yet another injury at work occurring on "January 3 when he was at work bending down and picking up a cable box. [Petitioner] states that he could not stand back up. He once again has back and buttock pain, left greater than right." *Id.* Dr. McComis noted Petitioner's weight to be 270 lbs., reiterated his surgical recommendation and order for another MRI, and placed Petitioner off work. PX1; PX3. Petitioner testified that about this re-injury and indicated that the box in question was about a foot long and weighed maybe 6-7 lbs. He testified that he was bending over to get the box which was the problem, not the weight of the box.

In a letter dated March 1, 2013, Dr. McComis noted that Petitioner was under his care for a herniated lumbar disc causing him significant back pain, and he placed Petitioner off work until he obtains an MRI of his lumbar spine. PX1. Dr. McComis also opined that Petitioner's then-current pain was as a result of his "initial injury" at work on *January 3, 2012*. *Id* (*emphasis* added).

In an almost identical letter dated March 15, 2013, Dr. McComis noted that Petitioner was under his care for a herniated lumbar disc causing him significant back pain, and he placed Petitioner off work until he obtains an MRI of his lumbar spine. PX4. Dr. McComis also opined that Petitioner's then-current pain was as a result of his "initial injury" at work on *January 12, 2012*. *Id* (*emphasis* added).

Petitioner testified that he returned to work on July 25, 2013 until October 24, 2013. He testified that he was doing seated work and "post-calls' calling customers to see that their service was good and to avoid repeat services.

On September 12, 2013, Petitioner's recommended surgery was authorized by Traveler's insurance. PX5.

Petitioner testified that he eventually had the recommended surgery on October 28, 2013 at St. Margaret Hospital in Indiana performed by Dr. McComis. The medical records reflect that Dr. McComis diagnosed Petitioner with

In a noted dated November 1, 2013, Dr. McComis indicated that Petitioner was to be off work with an anticipated return date of December 2, 2013. PX1. On November 13, 2013, Petitioner saw Dr. McComis and reported some residual left hip pain, but that the recommended post-operative physical therapy was being refused by the insurance carrier. *Id.* Dr. McComis noted that Petitioner's weight was 310 lbs., ordered Percocet and reiterated his order for post-operative physical therapy. *Id.*

14IWCC0882

Additional Information

Petitioner testified that he was previously able to engage in activities outside of work including playing basketball three times per week and on Sundays he would play 7-8 hours of basketball. After his accident, he has not returned to play basketball. He also testified that he used to do normal things with his now 4 year old son who lives in Florida since early 2011 including roughhousing, running around, picking his son up, and playing catch, basketball, and baseball. He testified that he has not engaged in these activities since his accident. Petitioner also testified that since January of 2012 he gained about 50 lbs. Petitioner offered a selfie[3] dated December . 2011 which he testified showed him approximately 50 lbs. lighter. PX7.

During the time that he worked under restrictions, Petitioner testified that he would receive work restrictions from Mr. Andujar or TJ and they would tell him what work he should do. Petitioner testified that he has not received any temporary total disability benefits for the claimed periods. He also testified that his weight has changed as a result of his reduced physical activity.

Petitioner testified that he has not started the post-operative physical therapy because it has not been approved and that he remains under Dr. McComis' care.

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 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 in the low back is causally related to the injury sustained at work on January 12, 2012 as claimed.

In so concluding, the Arbitrator notes that Petitioner's alleged re-injury at work on July 27, 2012 which was not witnessed was brought about by Petitioner's own actions clearly exceeding the work restrictions that Petitioner had acknowledged in writing on February 20, 2012, contrary to his testimony at trial. Indeed, Petitioner's testimony that he had not been told *not* to operate the lift gate in any manner before July 27, 2012 is contradicted by Mr. Andujar's credible testimony on this point and Petitioner's own signature on a written acknowledgement dated February 20, 2012. Additionally, Petitioner had prior to this alleged re-injury, but after his undisputed accident on January 12, 2012, also reported re-injuring his low back at work on other occasions.

Notwithstanding, the medical records and Dr. Kornblatt's Section 12 report reflect that Petitioner—who was 31 years of age at the time of his accident—had no prior low back condition, pain, or symptoms before January 12, 2012. Moreover, while Petitioner was obese at that time, and gained over 40 lbs. after his injury in the following year, an employer takes its employees as it finds them. There is no credible evidence that Petitioner's

[3] "Selfie" is defined by the online Oxford dictionary as "a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and uploaded to a social media website."
http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited February 7, 2014).

May 8, 2012 MRI showing a disc herniation on the left at L4-L5 pre-existed his initial work accident or that the condition substantively changed such that the recommended surgery, which Respondent ultimately approved for Petitioner, was inappropriate to treat Petitioner for his post-January 12, 2012 low back condition. Also, Dr. Kornblatt's opinion that the MRI showed no disc herniation whatsoever is questionable given Petitioner's testimony that he did not view the MRI. Petitioner's testimony on this point is corroborated in Dr. McComis' records, although there is also no evidence establishing that Dr. Kornblatt was not otherwise provided the MRI films by Respondent which is plausible given his notation about the MRI "scan" in his report.

In sum, the Arbitrator finds no persuasive evidence in the record, when viewed with all of its shortcomings, that Petitioner's low back condition after July 27, 2012 was solely the result of an intervening injury on July 27, 2012 breaking the chain of causal connection or that Petitioner's questionably injurious conduct at work on that date was the sole cause of his need for the post-operative physical therapy he now seeks. Thus, the Arbitrator finds that Petitioner has established by a preponderance of evidence that his claimed current low back condition of ill-being is causally related to his accident at work.

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 more fully above, the Arbitrator finds that Petitioner's claimed current condition of ill being is causally related to his accident at work on January 12, 2012. Based on the record as a whole, the Arbitrator finds that the medical care rendered to Petitioner was reasonable and necessary to alleviate him of the effects of his condition and awards the medical bills incurred by Petitioner, that remain unpaid, and that were submitted into evidence to be paid by Respondent as provided in Sections 8(a) and 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:

As explained above, the issue of causal connection has been resolved in Petitioner's favor. Moreover, the record reflects that Petitioner was placed off work by Dr. McComis as it related to his low back condition. Thus, based on review of the record as a whole, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits as claimed.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained in the foregoing causation analysis, the Arbitrator finds that Petitioner's claimed current condition of ill-being is causally related to his accident at work as claimed. Thus, the Arbitrator awards the prospective medical care requested by pursuant to Section 8(a) of the Act in the form of the recommended post-operative physical therapy prescribed by Dr. McComis as it is reasonable and necessary to alleviate Petitioner from the effects of his injury at work.

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

JENNIFER JURCAK,

Petitioner,

14IWCC0883

vs.

NO: 10 WC 43618

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, temporary total disability (TTD), causal connection, and medical, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Jennifer Jurcak sustained an accident and injury to her right knee only that arose out of and in the course of her employment on September 21, 2010. 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 has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties. Based on the evidence, the Commission finds that Ms. Jurcak sustained a work-related accident on September 21, 2010 resulting in an injury to her right knee. Petitioner failed to prove that she sustained any other injury as the result of her work accident.

As the result of the work-related accident, the Petitioner is entitled to TTD from September 22, 2010 through October 21, 2010 and from June 24, 2011 through November 17, 2011. The Petitioner is entitled to all reasonable and necessary medical expenses related to the right knee through November 17, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW 14IWCC0883

The Commission makes the following findings:

1. Jennifer Jurcak filed an Application for Adjustment of Claim on November 12, 2010 alleging injury to her right knee and low back while at work on September 21, 2010.

2. The Petitioner has been employed as a Traffic Control Aid with the City of Chicago since November 1998. She sustained a prior work-related injury on January 31, 2002 when she was struck by a car. T.10. She underwent three right knee surgeries and, as a result, could only straighten her right leg eighty percent of the way. *Id.* As a result of the 2002 injury, Petitioner received permanent restrictions and was found to have sustained forty percent loss of use of the right leg. T.25.

3. Jurcak was seen by Dr. Jayant Sheth on April 27, 2006 (this is the final medical examination of the right knee prior to the September 2010 accident). Examination revealed a mild limp on the right side secondary to knee pain. The right knee had mild swelling and no joint effusion or instability. Her extension was near normal secondary to restricted flexion of 110 degrees with mild pain. Her diagnosis was chronic right knee pain. She was at MMI and discharged with limited duty restrictions. PX.2.

4. Petitioner testified that she did not receive any right knee treatment between April 2007 and September 21, 2010. T.16. During this period, however, her right leg never went straight. She could not ride her bike and had to learn to live with her knee condition. *Id.*

5. On September 21, 2010, Ms. Jurcak was working during rush hour in the middle of the intersection of State and Madison street in downtown Chicago. She was directing the two lanes of turning traffic. T.7. As she was backing up "kind of swiftly" guiding traffic, her right leg "totally" went straight and "jolted." *Id.* She testified that she was trying "so quickly" to move back to turn the cars as it was rush hour when her leg went straight and she jolted. T.8. She did not fall to the ground, but tried to stop herself from losing her balance. T.10. She testified that she was walking backwards when the incident occurred and did not look to see if there were any bumps or cracks in the road. T.24. She worked 4 more hours despite her pain and finished her shift. T.12. Jurcak described a burning pain between the right knee and ankle and a shooting pain with a stiff back and a poking sensation. *Id.*

6. Petitioner reported the incident to her supervisor, Louise Gomez. A Report of Occupational Injury or Illness was completed on September 21, 2010. Petitioner reported that she thought she popped her knee when she was backing up. RX.2.

7. Petitioner presented to Mercy Hospital Medical Center on September 21, 2010 following the incident with her right knee and low back. She reported hearing a popping sound in

her knee while directing traffic. Examination of the right knee revealed moderate swelling with extension limited by pain. She had a negative anterior drawer and McMurray's test. She had no ligament laxity. Examination of the back revealed no swelling or spinous process. There was mild paraspinous TTP. Flexion reproduced pain. The diagnosis was knee effusion and lumbar strain. PX.1.

8. Petitioner underwent an x-ray of the right knee on September 22, 2010 that revealed degenerative disease. She was continued off work. PX.1.

9. Petitioner was seen by Dr. Sheth on October 21, 2010 with continued low back pain. Her right knee had improved to its pre-injury condition. She had a normal gait. She had tenderness of the LS spine along with some tightness in the paraspinal lumbar muscle on the right. She could forward flex up to mid leg with pain. The remainder of movements caused minimal discomfort. The right knee was near pre-injury level and she had no tenderness. The diagnosis was lumbar muscle strain. She was returned to limited duty work. PX.1. Ms. Jurcak testified that she returned to full-duty work on October 22, 2010. T.14.

10. Petitioner underwent an MRI without contrast of the right knee at Premier Health Imaging on December 6, 2010. There was no evidence of an acute bony injury. No meniscal tear or ligament disruption was appreciated. She had developed a shallow trochlear groove of the femur. There was mild scarring in the Hoffa's fat pad. PX.4.

11. Petitioner underwent right knee surgery on June 24, 2011 followed by physical therapy. T.14.

12. Ms. Jurcak was seen by Dr. Newman on October 18, 2011. She had pain along the medial joint, the medial collateral ligament, and the medial capsule. Dr. Newman reviewed the MRI and noted that Petitioner's symptoms were consistent with arthritic pain. He recommended chronic anti-inflammatory medication. She was close to MMI. She was off work due to her back. PX.3.

13. Petitioner was seen by Dr. Newman on November 15, 2011. She had continued medial right knee pain that was rather diffused. He opined that Petitioner's symptoms were probably early degenerative arthritis secondary to her original injury and subsequent surgeries. She was nearing MMI. An FCE was recommended. PX.2. She was to remain off work. PX.3.

14. Petitioner was seen by Dr. Slack on November 17, 2011. According to the medical record, Petitioner no longer had right leg pain. Dr. Slack's impression was that Ms. Jurcak had persistent low back derangement status post lumbar disc excision. He recommended a new lumbar MRI to rule out any significant evidence of disc re-

herniation to account for her consistent symptoms. She was to remain temporarily totally disabled from work. PX.3.

15. Petitioner underwent a Section 12 examination with Dr. Pietro Tonino at Loyola University on June 17, 2013 at the request of the Respondent. Examination revealed very diffuse tenderness parapatellar. There was no effusion and the ligaments were intact. There were no signs of meniscal or ligamentous pathology. The x-rays were normal. She had reached MMI for her right knee. No further treatment was necessary. She could return to work with regard to her right knee. Based on her multiple knee surgeries, it was unlikely that the September 2010 incident was a significant causative factor. RX.4.

16. Dr. Tonino authored an addendum to his June 17, 2013 report on July 10, 2013. He reviewed the MercyWorks records from September 22, 2010. He opined that the September 22, 2010 incident was not a significant aggravating factor of her right knee. The complaints she alleged began while stepping backwards with no fall or direct impact to the knee. RX.5.

17. Petitioner underwent a Section 12 examination with Dr. Alexander Ghanayem of Loyola University on July 18, 2013 at the request of the Respondent. He noted that the mechanism that she reported of stepping back and having her knee pop would not be sufficient to cause a back injury of any significance. The degenerative findings at L4-L5 and a small, non-compressive central disc protrusion at L5-S1 in all likelihood pre-dated the September 2010 incident. Her condition was not at risk for aggravation given the mechanism of injury. She had non-compressive disc pathology, which did not correlate with her low back symptoms. She did not have any radicular pain as well, but rather knee pain on the right side. She may have sustained a back sprain at worse. Her need for surgery did not emanate from her 2010 accident. She was not restricted from work. A lumbar strain would not cause any long term disability. She had reached MMI. Removal of the hardware was acceptable, but un-related to the accident. She could return back to work without restrictions. RX.3.

18. Ms. Jurcak testified that she currently notices that her knee grinds when she walks. Her knee is stiff when she wakes up in the morning and she has to move her leg if she sits too long. T.17. She has learned to accommodate herself with the pain. *Id.* She can walk a couple of blocks and up to 3/4 a mile before the grinding starts. T.18. Her leg is worse now and is a lot weaker. *Id.* If she sits for about an hour, she gets a tingling sensation and her knee goes stiff. T.19. She does not take any medication. T.20. Her back is in constant pain and she experiences a poking sensation. *Id.* She also feels a compression, squeezing sensation. T.21. Her daughters help her with the laundry. *Id.* She did not have any of the knee and back sensations prior to September 21, 2010. T.23.

The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the

evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991).

In order for accidental injuries to be compensable under the Act, a Petitioner must show such injuries arose out of and in the course of his employment. *Eagle Discount Supermarket*, 82 Ill. 2d at 337-38, 412 N.E.2d at 496; *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103, 1106, 641 N.E.2d 578, 581, 204 Ill. Dec. 354 (1994)."Arising out of" 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. See *Eagle Discount Supermarket*, 82 Ill. 2d at 338, 412 N.E.2d at 496; *William G. Ceas & Co.*, 261 Ill. App. 3d at 636, 633 N.E.2d at 998. In addition, an injury arises out of the employment if the Petitioner was exposed to a risk of harm beyond that to which the general public is exposed. *Brady v. L. Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548, 578 N.E.2d 921, 161 Ill. Dec. 275 (1991). "In the course of" refers to the time, place, and circumstances under which the accident occurred. See *William G. Ceas & Co.*, 261 Ill. App. 3d at 636, 633 N.E.2d at 998. The determination of whether an injury arose out of and in the course of a claimant's employment is a question of fact for the Commission.

Employers take their employees as they find them. *O'Fallen School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 417, 729 N.E.2d 523, 246 Ill. Dec. 150 (2000). To result in compensation under the Act, a claimant's employment need only be a causative factor in his condition of ill-being; it need not be the sole cause or even the primary cause. *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill. Dec. 6 (1982).

The Commission notes that Ms. Jurcak had a pre-existing right knee condition. The Petitioner sustained a prior work-related accident in 2002 that resulted in three surgeries to her right knee. As a result of the accident and subsequent surgeries, Ms. Jurcak was unable to fully straighten her leg. She subsequently returned to work with permanent restrictions. The Commission further notes that the record is void of any mention of Jurcak receiving medical treatment to her right knee between April 2007 and September 21, 2010. There is no indication that Petitioner's pre-existing right knee condition impeded her ability to perform her job duties as a traffic control aid prior to September 21, 2010.

On the day of the incident, Petitioner was in the middle of the street directing rush hour traffic in downtown Chicago. Despite the Petitioner's testimony that she did not see anything that caused her to feel the jolt in her right knee, the unrebutted evidence establishes that Ms. Jurcak was walking backwards quickly while directing oncoming traffic when the incident occurred. The evidence demonstrates that Jurcak's job required her to direct rush hour traffic. The Commission finds that the Petitioner was exposed to a risk of injury greater than that which is faced by the general public.

The Commission finds that Petitioner's pre-existing condition was aggravated by the work accident of September 21, 2010. Ms. Jurcak is entitled to TTD from September 22, 2010 through October 21, 2010. On October 21, 2010, Dr. Sheth's examination revealed that Petitioner's right knee was near her pre-injury level and she could return to limited duty work. The Petitioner is also entitled to TTD from June 24, 2011, the date of her right knee surgery, through November 17, 2011, the date Dr. Slack noted Petitioner no longer had right leg pain. The Petitioner is entitled to all reasonable and necessary medical expenses related to her right leg.

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). The resolving of conflicting medical views, including those relating to causation of a physical condition, is peculiarly within the province of the Industrial Commission. *Ford Motor Co. v. Industrial Com.*, 55 Ill.2d 549, 554.

The Commission adopts the opinions of Dr. Ghanayem in finding that Petitioner's back condition is not related to her work accident. Dr. Ghanayem noted that the mechanism of stepping back and having her knee pop would not be sufficient to cause a back injury of any significance. Dr. Ghanayem noted that the degenerative findings at L4-L5 and a small, non-compressive central disc protrusion at L5-S1 in all likelihood pre-dated the September 2010 incident. They were not at risk for aggravation given the mechanism of injury. She had non-compressive disc pathology which did not correlate with her low back symptoms. She did not have any radicular pain as well, but rather knee pain on the right side. Based on Dr. Ghanayem's opinion, the Commission finds that the work accident was not the cause of Jurcak's back condition and, as such, her back condition is not causally related to the accident.

The Commission remands this case back to the Arbitrator for a hearing on permanency related to the right knee only.

IT IS THEREFORE ORDERED BY THE COMMISSION, that the Decision of the Arbitrator filed on October 16, 2013, is hereby reversed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $598.15 per week for a period of 25-2/7 weeks, from September 22, 2010 through October 21, 2010 and from June 24, 2011 through November 17, 2011 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.

14IWCC0883

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

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

The party commencing the 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 9 2014

Michael J. Brennan

Thomas J. Tyrrell

MJB/tdm
O: 8-19-14
052

DISSENT

I respectfully dissent from the decision of the majority. I would affirm Arbitrator Carlson's thorough and well reasoned decision in its entirety and without modification.

Kevin W. Lamborn

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

JURCAK, JENNIFER
Employee/Petitioner

Case# **10WC043618**

CITY OF CHICAGO
Employer/Respondent

14IWCC0883

On 2/10/2014, 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:

1071 VASILATOS & COTTER LLC
ANITA M DeCARLO
555 W JACKSON BLVD SUITE 700
CHICAGO, IL 60661

0766 HENNESSY & ROACH PC
AUKSE GRIGALIUNAS
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

14IWCC0883

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
AMENDED DECISION
19(b)

Jennifer Jurcak
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 10 WC 43618

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **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. ☒ 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 21, 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.

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

In the year preceding the injury, Petitioner earned $**46,655.96**; the average weekly wage was $**897.23**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **3** 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 $ **0** for other benefits, for a total credit of $ **0**.

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

ORDER

The Arbitrator finds that the petitioner did not sustain an accident arising out of her employment. As such, no benefits are awarded. See attached for specific findings of law and fact.

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

12-08-13
Date

ICArbDec19(b)

FEB 10 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Jurcak,	)	14IWCC0883
	)	
Petitioner,	)	
v.	)	
	)	10 WC 43618
City of Chicago,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

The petitioner testified that she had been working for the City of Chicago as a Traffic Control Aide since November of 1998. Her job duties were to direct vehicles in the streets of the central business district of Chicago.

The petitioner stated that on September 21, 2010, she was directing traffic on State and Madison streets, was backing up to get out of the way of cars and to direct other lanes of cars turning left, and felt leg pain. She stated that her leg went back and went totally straight, which it never does, due to a previous surgery. She testified that her body jolted at that time. The petitioner testified that she did not fall, and was able to continue working until the end of her shift.

The petitioner reported the incident to her supervisor, Luis Gomez. Mr. Gomez filled out a City of Chicago Report of Occupational Injury or Illness on September 21, 2012. (RX 2) At that time, it was stated that the petitioner walked in and stated "I think I popped my knee . . . I was at Madison and State on the double west bound lanes of State when I was backing up I poped [*sic*] my knee at 1630 hr."

The petitioner was then seen at Mercy Hospital and Medical Center. (PX 1) The history provided was that the petitioner "Denies new injury, but states she heard 'popping' sounds in knee today . . . presents with a complaint of right knee pain, right knee swelling and s/p directing traffic and twisting wrong on knee, feeling 'pop' and twisting back in the process with now back pain. Pt did not fall." (PX 1) The petitioner was diagnosed with knee swelling and a lumbar strain at that time. The petitioner remained off work from September 22, 2010 through October 21, 2010 and then was released to return to work full duty.

The petitioner was able to work her full duty job from October 22, 2010 through November 29, 2010. Eventually the petitioner came to see Dr. Newman seeking treatment for her right knee pain on November 30, 2010. (PX 3) At that time, Dr. Newman related the petitioner's knee condition to the September 21, 2010 incident and recommended an MRI for the knee and physical therapy for the low back.

On December 6, 2010, and MRI of the right knee was performed which showed no knee joint effusion, no periarticular bursal effusion or cyst detected, no evidence of acute bone injury and no meniscal tear or ligament disruption. (PX 4) Upon review of the MRI, Dr. Newman recommended conservative treatment including physical therapy. (PX 3)

On January 10, 2011, the Petitioner presented to MRI of River North for an MRI of her lumbar spine per the recommendation of Dr. Newman. (PX 4) The MRI revealed that there were degenerative changes with mild degeneralized annular bulging at L4-5 and focal posterior central disc bulge at the L5-S1 level. There was no significant canal or foraminal stenosis or evidence of neural impingement. On January 11, 2011, the Petitioner followed up with Dr. Newman. (PX 3) The Petitioner had not improved. Upon examination, the Petitioner had pain and crepitation in the knee, which Dr. Newman stated "we have accepted as being an aggravation of an old injury." (PX 3) Upon review of the Petitioner's January 10, 2011 low back MRI, Dr. Newman disagreed with the radiologist's findings and opined that the Petitioner had a significant foraminal encroachment at the L4-5 level. Dr. Newman opined that the Petitioner was a candidate for a surgical intervention, and Dr. Newman referred the Petitioner to Dr. Charles Slack.

On January 26, 2011, the Petitioner was evaluated by Dr. Charles M. Slack. (PX 3) Upon examination, Dr. Slack reviewed the standing lumbar flexion/extension x-rays, which were done on January 26, 2011 and the MRI scan of January 10, 2011. Dr. Slack's impression was that the Petitioner had persistent severe right lumbar radiculopathy of the L5 nerve area with L4-5 spondylosis with or without L4-5 disc bulge and superimposed right-sided small disc protrusion. Dr. Slack's plan included having a right-sided transforaminal epidural steroid shot at the L4-5 level. On February 7, 2011, the petitioner underwent a right L4-5 transforaminal epidural steroid injection.

On March 3, 2011, the Petitioner was seen at a follow-up visit with Dr. Slack. The petitioner reported no improvement with the epidural steroid injection. Dr. Slack's plan included recommended cervical intervention with a lumbar disc excision on the right at L4-5 as the patient has failed conservative treatment.

On April 8, 2011, the Petitioner presented to Dr. Slack at Swedish Covenant Hospital. (PX 5) The Petitioner underwent a right L4-L5 hemolaminectomy, medial facectetomy, and excision of herniated nucleus pulposeus. The Petitioner's pre-operative diagnosis and post-operative diagnosis was herniated lumbar disc, L4-L5 on the right.

Following little to no relief with conservative treatment for her right knee, on June 14, 2011, Dr. Newman opined that the petitioner would be a candidate for a repeat arthroscopic procedure. (PX 3) This was performed on June 24, 2011 and the post-operative diagnosis was "synovial impingement of the right knee". The petitioner underwent a post-operative course of care

including physical therapy and cortisone injections in order to attempt to reduce swelling in the petitioner's knee.

On October 18, 2011, Dr. Newman opined that the petitioner's symptoms were consistent with arthritic pain and suggested that the Petitioner be placed on chronic anti-inflammatory medication. Dr. Newman opined that the Petitioner was very close to having reached her maximum medical improvement point. Dr. Newman did not think that further diagnostic studies or surgical interventions were indicated. On November 15, 2011, the petitioner returned one final time to Dr. Newman who opined that the Petitioner's symptoms were probably early degenerative arthritis secondary to her original injury and subsequent surgeries. Dr. Newman opined that she is getting close to being at maximum medical improvement. Dr. Newman's plan was to schedule an FCE. (PX 3) No FCE was performed because the petitioner was still treating for her low back. The petitioner testified that she has not seen Dr. Newman since November of 2011 because she has been treating for her low back.

On November 17, 2011, the Petitioner presented to Dr. Slack for a follow-up visit. (PX 3) Dr. Slack noted that the Petitioner was no longer having right leg pain. Dr. Slack's impression was that the patient had persistent low back derangement status post lumbar disc excision. Dr. Slack's plan was to have the Petitioner undergo a new lumbar MRI scan to rule out any significant evidence of disc re-herniation to account for her consistent symptoms. The Petitioner was to remain temporarily totally disabled from her work.

On January 16, 2012, the Petitioner presented to Dr. Slack. She had undergone a lumbar MRI scan on November 28, 2011. (PX 4) Physical examination revealed that the Petitioner was basically unchanged. Upon review of the MRI films, Dr. Slack stated the MRI showed disc space narrowing at the L4-5 level consistent with the level she had undergone the lumbar disc excision. Dr. Slack's impression was that the Petitioner had persistent low back derangement that appeared to be due to a discogenic pain response from the L4-5 level status post lumbar disc excision for herniated disc. Dr. Slack's plan was to recommend the Petitioner be evaluated by Dr. Slack's associated, Dr. Ted Fisher. Dr. Slack suggested that Dr. Fisher evaluate the Petitioner for surgical intervention with interbody and instrumented posteriolateral fusion at the L4-5 level due to her ongoing pain. (PX 3)

Dr. Fisher examined the petitioner on March 8, 2012. (PX 3) At that time, she reported that her low back pain began when she was hit by a car while working approximately 10 years ago. The petitioner did testify as to an accident which occurred in 2002 when she was hit by a car. At that time, Dr. Fisher diagnosed the petitioner with post laminectomy syndrome. Since the petitioner had failed conservative treatment including injections of physical therapy, a surgical procedure was recommended in the form of an L4-S1 PLIF procedure, or fusion. This procedure was performed on August 3, 2012. (PX 6) Following same, the petitioner returned to Dr. Fisher reporting that her lower extremity radicular symptoms have resolved.

The petitioner returned three months status post fusion on November 1, 2012 denying radicular symptoms, but reporting some right sided back pain. At that point, she was to start physical therapy.

On April 4, 2013, the petitioner returned to see Dr. Fisher reporting pain 5 out of 10 to 10 out of 10. The petitioner was continued on a home exercise routine and was recommended for a CT scan of the lumbar spine.

The petitioner returned to Dr. Fisher on May 23, 2013. At that time a trigger point injection was performed. A recommendation of hardware removal from L4-S1 was made and the petitioner indicated her willingness to undergo same. (PX 3) The petitioner testified that she wishes to undergo the procedure as recommended by Dr. Fisher.

The petitioner was seen by Dr. Tonino for a Section 12 medical exam on June 17, 2013. (RX 4) At that time, the petitioner reported a consistent history wherein she stepped backwards and felt her knee pop. In Dr. Tonino's supplemental report dated July 10, 2013, he stated that the petitioner's work incident was "not a significant aggravating factor of her right knee. Complaints, she alleges, began while stepping backwards with no falls to the knee or direct impact to the knee." (RX 5) Dr. Tonino also opined that the petitioner can return to full duty as a traffic aide with regard to her right knee. (RX 4)

The petitioner was seen for a second Section 12 medical exam at the request of the respondent by Dr. Ghanayem. (RX 3) Dr. Ghanayem stated that the petitioner reported an accident history that she was at work, walking backwards and felt a pop in her knee. Afterwards she "jerked her back". Dr. Ghanayem opined that the mechanism that she reported to him would not be sufficient to cause a back injury of any significance. He stated that the MRI findings of degenerative changes at L4-5 and L5-S1 would have predated her September of 2010 incident, nor was she at risk for an aggravation given the mechanism of injury. He goes on to state that the petitioner had non-compressive disc pathology which did not correlate with her low back symptoms. He stated that as a result of the incident, the petitioner would have sustained a back strain, at worst. Finally, Dr. Ghanayem stated that in spite of the petitioner's non-causally related fusion and possible need for hardware removal, that she should be able to return to work full duty without restrictions as far as her low back is concerned.

The petitioner testified that she still has stiffness in the right knee, especially when she wakes up in the morning. She stated she could walk about three-quarters of a mile but then experiences grinding in her knee and pain. She states she can sit for an hour, then has to walk because otherwise her knee gets stiff. Regarding her back, the petitioner testified that her back is always in pain, and she experiences a poking or stabbing type pain. She also feels a squeezing sensation. She gets help from her daughter with lifting things from floor level, and estimates she can carry approximately 10-12 pounds.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE C, WHETHER THE PETITIONER SUSTAINED AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the facts presented and the petitioner's stated accident history, the arbitrator finds that the petitioner did not sustain an accident arising out of her employment because the accident as described by the petitioner does not rise to the definition of accident within the

meaning of the Illinois Workers' Compensation Act. The petitioner bears the burden to prove that her job puts her at a greater risk than the general public. Indeed, while being a traffic control aid puts a person at greater risk of being hit by a car (which was the case in the petitioner's 2002 compensable claim), the petitioner testified that she was walking backwards and felt a pop in her knee which caused her back to twist. The petitioner stated that there was no defect in the premises. The petitioner stated that she was walking swiftly, but that she was not, for instance, jumping out of the way of an oncoming vehicle.

The petitioner's claim is analogous to the claim in Smith v. Chester Mental Health State of Illinois, 07 W.C. 19684, No. 11 I.W.C.C. 0032 (January 10, 2011). In that case, the petitioner testified that he worked as a security guard and performs repetitive walking on a daily basis. Indeed it was unrebutted that, "Petitioner engages in prolonged work related weight bearing which is far beyond that experienced by the general public." In that case, the petitioner testified that he was making rounds when he felt his knee pop. The Commission affirmed the Arbitrator's decision in that case stating, "the accident described . . . is not an accident within the meaning of the Act, nor does the description of those events support the Petitioner's contention of a repetitive walking claim." Similarly, in this case, the petitioner is on her feet for prolonged periods of time – arguably greater than the general public. However, her mechanism of accident as described by her is nearly identical to the incident described in Smith. Therefore, in light of the facts presented before the Arbitrator, and in keeping with current case-law, the Arbitrator finds that the petitioner did not sustain an accident arising out of her employment. As such, all benefits are hereby denied.

Finally, please consider the case of Elliott v. Industrial Commission, 153 Ill.App.3d 238, 106 Ill. Dec. 271, 505 N.E.2d 1062 (1st Dist. 1987), where a correctional officer employed by the County of Cook was descending a flight of stairs in prison when his leg gave way resulting in injuries to his back and leg. The Industrial Commission and the Circuit Court found the case compensable. The Appellate Court reversed and found that the fall was idiopathic rather than an unexplained fall, and therefore, was not compensable. The Court noted that the fall was not employment related but rather resulted from an internal, personal condition, a preexisting weakened back and leg resulting from an automobile accident.

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

The Arbitrator has found that the petitioner has not sustained an accident arising out of and in the course of her employment. As such all other issues are moot. If the petitioner is found to have sustained an accident arising out of and in the course of her employment, the arbitrator should find that the petitioner's current condition of ill-being is not causally related to the injury.

Regarding the petitioner's right knee claim, it is clear from the record and the petitioner's testimony that she has a long-standing history of knee problems. She had prior surgery and obtained a trial award for that condition. At trial, the petitioner testified that her knee even prior to the incident was symptomatic, and she could not straighten it all the way. Her accident history indicated that she was walking backwards and felt her knee pop. She did

not fall or twist her knee in any way and there was no defect in the premises. Though Dr. Newman opined that the petitioner's ongoing knee condition is causally related to the work incident of September 21, 2010, the arbitrator finds Dr. Tonino's opinions more persuasive and credible. Dr. Newman did not discuss the mechanism of injury in any great detail in his reports, nor is there any mention of the petitioner's prior knee condition. He simply stated that the petitioner's condition is related to the September 21, 2010 incident. Dr. Tonino's opinions are more credible because he discusses the petitioner's prior knee condition and its effect on the petitioner's current condition. Indeed, Dr. Tonino had evaluated the petitioner shortly before the September 2010 incident in May of 2010 and reviewed the entirety of her prior medical history. (RX 4)In his supplemental report, Dr. Tonino opined that "considering this patient's past medical history of multiple arthroscopies of this knee, it is my impression within a reasonable degree of medical and surgical certainty that the September 22 [*sic*], 2010 incident was not a significant aggravating factor of her right knee. Complaints, she alleges, began while stepping backwards with no falls to the knee or direct impact to the knee." (RX 5) Therefore, the most complete opinion, taking into account the petitioner's medical history regarding her right knee, as well as the mechanism of injury, is Dr. Tonino's opinion. Therefore, the Arbitrator finds that the petitioner's current condition of ill-being as regards her right knee is not causally related to the work incident of September 21, 2010.

Regarding the petitioner's low back condition, while the petitioner gives a consisted accident history that her body jerked when her knee popped on September 21, 2010, the arbitrator finds that her current condition of ill being as regards her low back is not related to that incident. In support of same, the arbitrator relies on the opinions of Dr. Ghanayem, and finds them to be the only credible opinion from a spinal specialist in the record. (RX 3) This is based on the fact that Dr. Ghanayem reviewed the petitioner's symptoms, diagnostic reports and examination in conjunction with a discussion of the mechanism of accident. Neither Dr. Slack, nor Dr. Fisher, the spinal specialists treating the petitioner, opined as to whether or not her symptoms are causally related to the September 21, 2010 incident. (PX 3) Dr. Newman, who initially treated the petitioner for her right knee and lumbar spine, did opine that her symptoms, as of November 30, 2010 were related to the September 21, 2010 incident, however he diagnosed the petitioner with a lumbar strain – the exact same diagnosis provided by Dr. Ghanayem. (PX 3) Dr. Ghanayem specifically stated in his report that the, "mechanism of injury she reported me of stepping back and having her knee pop would not be sufficient to cause a back injury of any significance." (RX 3) He further stated that the petitioner's MRI findings predated her September 2010 incident, nor was there risk of an aggravation given the mechanism of injury. Therefore, because Dr. Ghanayem is the only spinal specialist providing an opinion regarding causation of the petitioner's low back condition, and stating that the petitioner may have sustained a back sprain, at worst, consistent with Dr. Newman's initial diagnosis, the Arbitrator finds that the petitioner's current condition of ill being is not causally related to the September 21, 2010 occurrence.

WITH RESPECT TO THE REMAINING ISSUES, J, K, L, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has found that the petitioner did not sustain an accident arising out of her employment. The Arbitrator has also found that the petitioner's conditions as relate to her right

knee and low back are not causally related to the September 21, 2010 occurrence. As such, all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARL CRITTENDEN,

Petitioner,

vs.

NO: 08 WC 19505

14IWCC0884

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of the Petitioner's 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 Commission agrees with the Arbitrator that the Petitioner has proven entitlement to a wage differential award under §8(d)(1) of the Illinois Workers' Compensation Act. However, the Commission finds that the Petitioner is entitled to a different amount than that awarded by the Arbitrator.

Pursuant to §8(d)(1), in a wage differential scenario, the claimant is entitled to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.

In this case, the Arbitrator calculated the weekly wage differential to be $581.06 per week, starting as of April 9, 2012, and continuing thereafter for the duration of the Petitioner's disability. She indicated that there was no real dispute that the Petitioner, but for being injured,

would have been earning $32.79 per hour in his pre-injury job with Respondent (see Petitioner's Exhibit 10). She then noted that the two vocational experts who evaluated Petitioner and opined on his earning potential, Julie Bose and Steve Blumenthal, essentially determined Petitioner was capable of earning $8.25 to $13.78 per hour in suitable employment per §8(d)(1). She found that $11.00 per hour would be reasonable, and then determined the weekly wage differential by multiplying each weekly wage by 40 hours ($1,311.60 for the former, $440.00 for the latter), subtracted the weekly wage Petitioner was capable of earning from what he would have been earning but for the injury, and took 66-2/3% of that figure, as required by §8(d)(1).

The Commission finds that it is more reasonable in this case to determine, based on a review of all of the evidence, that the Petitioner is capable of earning $13.78 per hour. This results in a weekly wage differential of $506.93. The Commission believes that the Petitioner did not provide the effort that he should have in performing his job search, and exaggerated the difficulties he encountered in dealing with the Respondent's initial method of vocational assistance. While the Arbitrator indicates she did not find that Petitioner's participation in GED classes was vital to his finding work, the Commission believes that his lack of full participation was evidence of a lack of effort on his part. This lack of effort was also supported by the testimony of Julie Bose, who indicated that over time Petitioner's compliance deteriorated, in that he was not submitting his GED attendance sheets, was not following up on provided job leads and was not submitting weekly documentation. She also noted inconsistencies in the contacts he did provide, including one contact at a location that had been out of business for some time prior to the alleged contact. In reviewing his job logs (Respondent's Exhibit 1), it is clear that he often would return to the exact same locations he previously contacted versus making new contacts. When Bose requested that Petitioner sign off on a release form to obtain his attendance records for his GED classes, Petitioner refused to do so. Petitioner's complaints of a weekly 3 hour round trip ride via public transportation to drop off his job search records to Chicago City Hall also support a lack of true effort on his part to locate employment and to work with the program. While such travel may not have been pleasant, the time consumption he reported is difficult to believe given his residential location and the City Hall location he had to provide his records to.

When a claimant is receiving weekly benefits while performing a search for alternative employment, the search is his "job" during this time. Taking the evidence as a whole, the Commission agrees that the Petitioner has clearly shown entitlement to a wage differential, however his lack of effort in obtaining alternative suitable employment leads us to determine that he is capable of earning the highest amount that Mr. Blumenthal opined he was capable of earning, $13.78 per hour. We note that while the Respondent could have initially provided more assistance to the Petitioner in his job search than it did, but this does not absolve the Petitioner's responsibility to do his best and give his best effort in finding alternative employment. In this case, we do not believe he provided such effort, and as a result have determined the proper weekly wage differential should be $506.93 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $758.84 per week for a period of 100 weeks, from April 12, 2008 through April 27, 2008 and from April 30, 2008 through March 15, 2010, that being the period of temporary total incapacity for work under §8(b) of the Act.

14IWCC0884

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $758.84 per week for a period of 107-6/7 weeks, from March 16, 2010 through April 8, 2012, that being the period of temporary partial incapacity for work under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on April 9, 2012, Respondent pay to Petitioner the sum of $506.93 per week for the duration of Petitioner's disability, as provided in §8(d)(1) of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. This includes, but is not limited to, the $150,891.76 temporary total disability and temporary partial disability credits indicated in the Arbitrator's decision.

The party commencing the 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 9 2014
TJT: pvc
o 08/11/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRITTENDEN, CARL
Employee/Petitioner

Case# **08WC019505**

CITY OF CHICAGO
Employer/Respondent

14IWCC0884

On 2/15/2013, 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 0.12% 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:

0494 JOSEPH J SPINGOLA LTD
47 W POLK ST
SUITE 201
CHICAGO, IL 60605

0010 CITY OF CHICAGO LAW DEPT
MICHAEL GENTITHES
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

14IWCC0884

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

Carl Crittenden
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **08** WC **19505**

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 **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **1/4/13**. 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. [x] What temporary benefits are in dispute?
   [ ] TPD [x] 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 **4/11/08**, 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 **$59,189.52**; the average weekly wage was **$1,138.26**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$71,005.42** for TTD, **$N/A** for TPD, **$79,886.34** for maintenance, and **$N/A** for other benefits, for a total credit of **$150,891.76**.

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 $758.84 /week for 100 weeks, commencing 4/12/08 through 4/27/08 and 4/30/08 through 3/15/10, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $758.84/week for 107 6/7 weeks commencing 3/16/10 through 4/8/12, as provided in Section 8(a) of the Act. For the reasons set forth in the attached conclusions of law, the Arbitrator declines to award maintenance benefits after April 8, 2012, as requested by Petitioner.

Wage differential

For the reasons set forth in the attached conclusions of law, the Arbitrator finds that Petitioner is partially incapacitated from pursuing his usual and customary line of employment as a result of his undisputed work accident and that he is entitled to benefits under Section 8(d)1 of the Act. On this record, the Arbitrator finds it appropriate to begin the award of such benefits on April 9, 2012, there being no real disagreement between the parties as of that date as to the suitability of a cashier or customer service position. Respondent shall pay Petitioner wage differential benefits of $581.06/week from 4/9/12 through 1/4/13, a period of 38 5/7 weeks, and continuing thereafter for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 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.

Molly C Mason
Signature of Arbitrator

2/15/13
Date

FEB 15 2013

14IWCC0884

Arbitrator's Findings of Fact

Petitioner was fifty years old as of the hearing held on January 4, 2013. In 1985, he began working for Respondent as a sanitation laborer, or garbage collector. His job involved pulling garbage cans to trucks, picking up debris and disposing of large items such as couches and appliances. A job description in evidence reflects that sanitation laborers are required to "perform strenuous physical tasks," lift and carry up to 75 pounds continuously, lift up to 100 pounds continuously and carry up to 100 pounds frequently. PX 9. Respondent raised no objection to PX 9.

Petitioner testified he previously pursued workers' compensation claims against Respondent. None of these claims involved his back and all of them were settled. In the claim now under consideration, he is seeking a wage differential award stemming from a back injury.

The parties agree that Petitioner sustained a work injury on April 11, 2008. Arb Exh 1. At about 8:00 AM that day, Petitioner lifted a bag containing yard waste, tossed the bag into the back of the garbage truck and felt extreme pain in his lower back. On direct examination, he testified he was unable to continue working after this incident. At Respondent's direction, he sought treatment at MercyWorks on Cumberland in Norridge, Illinois, where he saw Dr. Marino.

Dr. Marino's note of April 11, 2008 sets forth a consistent history of the lifting incident. The doctor noted Petitioner had injured his back thirty years earlier. Petitioner complained of severe lower back pain radiating to his left leg, as well as tingling in his left foot.

On examination, Dr. Marino noted tenderness in the mid-lumbar area, minimal muscle spasm, positive straight leg raising at 60 degrees bilaterally and an inability to bend or twist due to severe pain. He diagnosed an acute low back strain. He prescribed Naproxen and Cyclobenzaprine. He directed Petitioner to refrain from working and return to the clinic on April 15, 2008. PX 1.

Petitioner returned to MercyWorks on April 15, 2008, as directed, and saw Dr. Bleier. Dr. Bleier indicated that Petitioner reported improvement. On examination, Dr. Bleier noted flexion to 60 degrees, limited extension and negative straight leg raising. He instructed Petitioner to stay off work, start a home exercise program and return in a week. PX 1.

On April 22, 2008, Petitioner saw Dr. Bleier again and indicated he felt ready to try working. The doctor described Petitioner's gait as normal. He noted pain in the L2-L4 region and painful lateral hip rotation. He instructed Petitioner to remain off work. PX 1.

Two days later, Dr. Bleier re-examined Petitioner and noted "no radicular complaints." He released Petitioner to full duty as of April 28, 2008 and instructed him to return to MercyWorks in two weeks if he remained symptomatic. PX 1.

Petitioner returned to MercyWorks on April 29, 2008 and again saw Dr. Bleier. The doctor noted that Petitioner "did return to work" but was now "complaining of increased low back pain" and "pain radial to left buttock." On examination, Dr. Bleier noted flexion to 90 degrees and very limited extension. He prescribed a lumbar spine MRI and took Petitioner off work. PX 1.

The MRI was performed without contrast on May 1, 2008. Dr. Simon, the interpreting radiologist, described the L3-L4 level as the "most significant level of abnormality," noting a moderate diffuse disc bulge along with an annular tear and a small, left-sided disc protrusion and bilateral neural foraminal narrowing. PX 2.

Petitioner returned to Dr. Bleier on May 5, 2008 and reported some improvement. Dr. Bleier reviewed the MRI results and recommended a course of physical therapy. He instructed Petitioner to remain off work. PX 1.

Petitioner underwent therapy at Bryn Mawr Physical Therapy between May 6 and May 16, 2008 and returned to Dr. Bleier on May 19, 2008. Petitioner reported no improvement. He complained of "persistent low back pain radiating to left thigh." The doctor's examination findings were unchanged. He kept Petitioner off work and prescribed additional therapy. PX 1.

After three more therapy sessions, Petitioner returned to Dr. Bleier on May 29, 2008 and complained of increased pain after "just bending over to pick up paper off floor." The doctor kept Petitioner off work and arranged for him to see Dr. Cupic.

Dr. Cupic administered two epidural steroid injections in June of 2008 and a lumbar facet injection in July of 2008. Petitioner testified that he "felt a little better for a little while" after undergoing these injections.

On July 24, 2008, Petitioner saw Dr. Spencer, a spine surgeon. Petitioner testified that MercyWorks referred him to Dr. Spencer.

Dr. Spencer's initial note of July 24, 2008 sets forth a history of a work-related back injury on April 11, 2008 followed by therapy and injections. Petitioner indicated he was gradually getting better.

Dr. Spencer described Petitioner's gait as normal. He noted no abnormalities on examination. He described Petitioner's complaints as "largely mechanical and non-consistent." He interpreted the MRI as showing some degenerative changes with no evidence of significant nerve root compression or disc herniation. He indicated Petitioner "appears to be recuperating

from an acute back sprain." He prescribed Naprosyn and instructed Petitioner to remain off work for an additional two weeks. PX 2.

Petitioner returned to Dr. Spencer on September 10, 2008 and indicated he was making no progress. The doctor re-evaluated him and concluded that surgery was in fact necessary, despite his previous findings. He recommended a discectomy and fusion at L3-4 and instructed Petitioner to remain off work. He saw Petitioner again on October 1, 2008 and wrote to Respondent's Committee on Finance, indicating he was awaiting approval of the proposed surgery. PX 2.

Dr. Spencer performed an L3-L4 laminectomy, discectomy and posterior lumbar interbody fusion at Advocate Lutheran General Hospital on October 20, 2008. PX 2.

Petitioner testified the surgery relieved his leg pain but he continued to have low back pain.

Petitioner continued to see Dr. Spencer postoperatively. On January 22, 2009, the doctor recommended five more weeks of therapy before a possible return to work. On March 5, 2009, the doctor released Petitioner to work but instructed him to return in three months for a re-check X-ray. PX 2.

Petitioner returned to Dr. Spencer on April 16, 2009 and complained of pain secondary to performing his regular duties. The doctor prescribed Flexeril for night time pain and spasm and released Petitioner to light duty with no lifting over 20 pounds and no bending. PX 2.

On June 11, 2009, Dr. Spencer took Petitioner off work and recommended additional therapy progressing to work hardening. PX 2. Petitioner began a course of therapy at Advanced Physical Medicine Centers on June 17, 2009. PX 2.

On August 11, 2009, Dr. Spencer released Petitioner to light duty and told Petitioner to discontinue therapy. PX 2. Petitioner testified that no light duty was available, that he advised Dr. Spencer of this and that the doctor then recommended work conditioning.

At Respondent's request, Petitioner saw Dr. Kern Singh of Midwest Orthopaedics for a Section 12 examination on September 3, 2009. Petitioner rated his low back pain at 4/10. He indicated that therapy had provided minimal relief.

On examination, Dr. Singh noted 5/5 positive Waddell findings. He characterized Petitioner's condition as degenerative. He recommended a functional capacity evaluation and indicated Petitioner should undergo two to four weeks of work conditioning if the evaluation proved to be valid. PX 4.

On September 17, 2009, Dr. Spencer recommended a functional capacity evaluation. PX 2. Petitioner underwent this evaluation at Athletico on October 17, 2009. Petitioner reported that he performed one day of full duty at April of 2009 but was limited by pain.

Petitioner also reported that he was currently subject to a 20-pound lifting restriction but that Respondent was unable to accommodate this restriction.

The evaluator concluded that Petitioner put forth "good, though not entirely full, effort" during the evaluation. He based this conclusion on the fact that Petitioner was "limited by reported low back pain before objective measures of physical effort . . . indicated that full effort was being exerted." He described Petitioner's subjective reports of pain to be "both reasonable and reliable." He found Petitioner capable of functioning at a light physical demand level and noted that Petitioner "did not meet the identified physical demand requirements of his target job of laborer/refuse collector." He recommended a variety of work restrictions, including no lifting or carrying over 20 pounds on an occasional basis, no frequent or repetitive bending or twisting and no prolonged walking. PX 3.

On October 29, 2009, Dr. Spencer noted that Petitioner had completed a functional capacity evaluation. He stated: "we are going to attempt to release [Petitioner] to work full duty." Two weeks later, Petitioner returned to Dr. Spencer and indicated he was back to work but experiencing pain. The doctor prescribed Motrin, to be taken three times daily. PX 2.

On January 20, 2010, Dr. Spencer recommended a repeat lumbar spine MRI due to Petitioner's ongoing complaints. The MRI, performed without contrast on February 2, 2010, showed post-operative changes at L3-L4 with no evidence of central or foraminal stenosis.

On February 11, 2010, Dr. Spencer reviewed the repeat MRI and recommended that Petitioner return to work within the restrictions recommended by the functional capacity evaluator. PX 2.

At Respondent's request, Dr. Singh re-examined Petitioner on March 18, 2010. Dr. Singh noted a pain rating of 4/10. On examination, he noted no positive Waddell findings. He found Petitioner's current symptoms to be causally related to the work injury. He found Petitioner to be at maximum medical improvement. With respect to work status, he recommended permanent restrictions based on the functional capacity evaluation. PX 5.

On March 27, 2010, Petitioner saw Dr. Chmell for an examination at the request of his attorney. The doctor's report of March 29, 2010 sets forth a consistent history of the April 11, 2008 work accident and subsequent treatment. The doctor noted that Petitioner had not worked since December 9, 2009 "because he has not been provided with a light duty job."

Petitioner complained of mild low back discomfort with minimal activities. Petitioner indicated he did reasonably well when inactive but would develop back pain radiating into his buttocks and thighs "even with a small amount of physical activity, such as household chores." He reported taking Ibuprofen frequently and a muscle relaxer occasionally.

Dr. Chmell described Petitioner's gait as normal. On examination of the lumbar spine, he noted a healed surgical scar between L1 and L5, tenderness of the paraspinal muscles on

both sides of this scar and a diminished range of motion. He was able to accomplish straight leg raising to 80 degrees bilaterally "with back, buttock and thigh pain."

Dr. Chmell reviewed Dr. Singh's reports along with the functional capacity evaluation and various treatment records. He found Petitioner to be at maximum medical improvement and characterized the treatment to date as reasonable and necessary. He agreed with the results of the functional capacity evaluation and indicated Petitioner could never resume working as a laborer. PX 6.

At the request of his attorney, Petitioner met with Steven Blumenthal, MS, CRC, a certified rehabilitation counselor [hereafter "Blumenthal"], on August 2, 2010 for purposes of a vocational rehabilitation assessment. Blumenthal issued a report the same day. He also prepared and signed a rehabilitation plan in accordance with Section 7110.10 of the Rules Governing Practice Before the Commission. PX 7.

In his report, Blumenthal described Petitioner as cooperative and communicative. He observed no pain behaviors. He stated that Petitioner "appeared motivated to return to work in another capacity."

Blumenthal described Petitioner's driving status as follows:

> "[Petitioner] reports that he holds a valid standard Illinois driver's license but that it is currently suspended due to receiving two speeding tickets and he expects to be able to have his license active again as of December 2010."

Petitioner denied any felony convictions but reported a DUI arrest in 1995.

Petitioner rated his current back pain level as 3/10. He had last seen Dr. Spencer in February 2010 and had no follow-up appointments. He reported taking Ibuprofen twice weekly and doing stretches at home on a daily basis. He denied having any health problem other than his back condition that would affect his ability to resume working. When asked about his current emotional status, he indicated it was difficult for him to not be able to get up in the morning and go to work. He reported "looking at other work such as customer service and sales."

Petitioner indicated he graduated from Wells High School in Chicago in 1980. He described himself as a "C" student. He had attended a computer class for two to three weeks in the 1980s. He reported having a home computer. He described himself as a "hunt and peck" typist.

Petitioner reported having worked as a bagger and cashier at a Jewel store in the early 1980s. He was unemployed between 1983 and 1985. In 1985, he began working as a laborer/garbage collector for Respondent. He was a member of the laborers union during the

period he worked for Respondent. As of his April 11, 2008 work accident, he earned $26.00 per hour. Between 1997 and 2003, he worked part-time for Target as a supervisor in customer service. When he left Target in 2003, he was earning $11.00 per hour. Between November 2007 and April of 2008, he did some maintenance-related work for Shriners Hospital, cleaning a kitchen and vacuuming floors. He earned $12.00 per hour for this work.

Petitioner informed Blumenthal he was receiving $495/month in disability pay from the pension board along with his workers' compensation benefits. He denied applying for Social Security disability benefits.

Petitioner indicated he felt he could still perform his customer service job at Target if his restrictions could be accommodated. He also expressed willingness to work as an unarmed security guard in a residential or industrial setting.

Blumenthal administered various tests to Petitioner. He indicated that the Gates-MacGinitie reading test showed Petitioner's reading skills to be "in the average range in comparison to entering community college students." Petitioner's WRAT [Wide Range Achievement Test] scores showed that his spelling, math paper and pencil computational skills were below average. Petitioner scored in the "low average to average range of non-verbal problem solving ability" on BETA III testing.

Blumenthal concluded that Petitioner's work experience was a better indicator of his aptitudes and abilities than his test scores, noting that Petitioner worked slowly and "was not a good test taker."

Blumenthal opined that Petitioner "would be a good candidate for vocational rehabilitation job placement services." He projected that job placement could take up to six months or longer and would cost about $15,000. He opined that Petitioner would benefit from job readiness and computer training.

Blumenthal projected that Petitioner "will earn $8.25 to $13.78 an hour based on State of Illinois Department of Economic Security Wage Data." PX 7.

Petitioner testified he received temporary total disability benefits from Respondent while he was undergoing treatment and some maintenance benefits after he concluded treatment. In 2010, he received a letter from Angie Matos, an administrator with the Department of Streets and Sanitation. Matos directed Petitioner to attend a meeting. Petitioner testified he attended this meeting in September of 2010. The meeting was held in a Streets and Sanitation building at 39th and Iron. When Petitioner walked into the room where the meeting was being held, he saw five individuals sitting at five separate tables. Matos was present. Petitioner gave the letter he had received to Matos and she directed him to start a job search. Over Respondent's objection, Petitioner testified that Matos gave him a form and told him to log ten job contacts weekly on this form and turn the form in at City Hall every Monday between 8 AM and 4 PM. Petitioner identified PX 8 as the form he received from Matos.

According to Petitioner, Matos did not ask him about his educational background or skills. Nor did she provide any other instructions as to how Petitioner was supposed to look for work.

Petitioner testified he does not have a high school degree. After he met with Matos, Respondent did not offer him an opportunity to acquire computer skills or attend GED classes.

Petitioner testified that, after he met with Matos, he started looking for work at various retail stores in his area. Those stores included Target and Wal-Mart. He listed his job contacts on a form similar to PX 8 and turned the form in at City Hall each week. Since he does not have a driver's license, he had to travel to City Hall via public transportation. It took him three hours, round trip, to accomplish this.

Petitioner testified he continued looking for work and turning in the requisite forms until he received a letter from Respondent advising him that his maintenance benefits had been suspended as of September 29, 2011. Petitioner identified PX 8 as a copy of this letter. The letter bears the signature of Kirstjen Lorenz, director of Respondent's workers' compensation division. Lorenz advised Petitioner his benefits were being suspended due to non-compliance with Respondent's "Injury on Duty Job Search Program." PX 8 reflects that Petitioner's counsel and Angie Matos received carbon copies of the letter.

Petitioner testified that Respondent suspended his benefits because he failed to present the requisite forms for several weeks. On September 30, 2011, he went to City Hall and supplied the missing forms. He had the forms time-stamped that day. [PX 8 contains these forms.] Despite the fact he supplied the forms, Respondent failed to pay him maintenance benefits for the period September 29, 2011 through October 16, 2011. Respondent did resume paying him benefits at a later point.

At Respondent's request, Petitioner met with Julie Bose, a certified vocational rehabilitation counselor, on October 3, 2011. Bose questioned him about his educational background, his skills and the status of his driver's license. At Bose's direction, Petitioner enrolled in a GED course at Triton Community College at the end of 2011. Petitioner testified that Triton is about 30 to 45 minutes away from his home via public transportation. The GED class was held from Monday through Thursday, 9 AM to 12 PM each day. Petitioner also enrolled in a computer literacy class at Elmwood Park Library. This class was held each Tuesday at 1:00 PM. Petitioner testified he continued attending the GED and computer classes until Respondent terminated vocational rehabilitation efforts. During this time, he continued to go to City Hall between 1:00 and 4:00 PM every Monday to drop off completed sheets.

Under cross-examination, Petitioner testified he was not asked about his prior medical history during his initial visit to MercyWorks. [Dr. Marino's note reflects Petitioner did in fact relate that he had injured his back many years earlier.] Petitioner testified he last underwent injury-related treatment at MercyWorks in May 2010. He has been back to MercyWorks since that time for general check-ups pursuant to his pension plan. He is eligible for a pension by virtue of his age but he is not currently receiving pension benefits. He is not currently taking

any medication for his low back. He has no upcoming appointments for low back care. He is 5 feet, 9 inches tall and weighs 197 pounds. He has not injured his low back since the work accident. He has a beer maybe twice a month. He lost his driver's license due to a DUI and had no license while he was undergoing vocational rehabilitation. Respondent required him to make ten job contacts per week. Between September 2010 and October 2011 there were occasions when he failed to turn in sheets reflecting ten weekly contacts. About 70% of the job contacts he made were in person. On some occasions he wrote "not hiring" on the sheets indicating he could not obtain an interview. He repeatedly contacted the same retail outfits, such as Lowe's, Jewel, Target and Wing Stop, while looking for work. The Lowe's, Target and Jewel stores he visited are in the Brickyard Mall. Wing Stop is on Harlem.

Petitioner testified he met with Blumenthal on one occasion. Blumenthal did not make job contacts for Petitioner. Petitioner testified he told Blumenthal he did not have a valid driver's license. He also told Blumenthal he lost his license due to DUI issues, not speeding tickets. He denied telling Blumenthal he expected to have his license again by December 2010. He did not recall telling Blumenthal he graduated from high school in 1980. After looking at Blumenthal's report, he recalled telling Blumenthal he graduated from high school in 1980 and was a "C" student. While he was undergoing vocational rehabilitation with Med Voc, he was required to make ten job contacts per week and pursue leads supplied by Med Voc. Med Voc sent him job contact information.

Petitioner acknowledged he did not provide Med Voc with attendance slips from his GED classes. [Petitioner did, however, offer into evidence records from Triton College concerning the reading and math classes he attended in early 2012, PX 11.] He has not yet obtained his GED. He again contacted various Brickyard Mall stores, including Jewel, Home Depot and Wing Stop, in April 2012.

Petitioner testified he took public transportation to the Commission. This took an hour. He arrived at the Commission at 8:00 AM. His low back pain was aggravated by sitting at the Commission.

On redirect, Petitioner testified that, when he contacted prospective employers, he asked about cashier and sales-related jobs. He did this because he worked as a cashier in the past. When he used the term "pending" on a sheet dated July 21, 2010, this meant he submitted an application and was told to check back every couple of weeks. When he wrote "no" with respect to his resume, this meant he had previously submitted a resume.

In addition to the exhibits previously summarized, Petitioner offered into evidence PX 10, a June 27, 2012 letter authored by Robert Chianelli, the assistant business manager of Local 1001. In this letter, Chianelli indicated that as of June 27, 2012, the hourly wage of a sanitation laborer is $32.79 "under the current collective bargaining agreement between [Respondent] and Laborers' Local 1001." Respondent did not object to PX 10.

Respondent called Julie Bose, a certified vocational rehabilitation counselor, to testify. Bose testified she has a master's degree in counseling from IIT. She has taken post-master's classes at IIT in order to maintain her certification. She owns Med Voc. Med Voc provides an array of services, including testing, retraining when appropriate, ergonomic studies and labor market surveys. She has operated Med Voc for thirteen years. She previously worked for Grzesik, another vocational rehabilitation outfit, for fifteen years.

Bose testified she first met Petitioner in October 2011. They met at a Burger King in Petitioner's neighborhood. After she met with Petitioner, she created a vocational plan and issued a report setting forth that plan. Thereafter, it was her employee, Laura Kronenberg, who interacted with Petitioner. Bose testified she never met with Petitioner again. She and Kronenberg met weekly to discuss Petitioner's progress. Bose supervised Kronenberg as necessary and wrote reports.

Bose testified she recommended a GED program to Petitioner because Petitioner told her he did not finish high school. The plan that Bose developed consisted of GED monitoring by Med Voc until Petitioner could begin GED classes at Triton, job search efforts and computer classes.

Bose acknowledged that Petitioner has no transferable skills from his laborer job. However, Petitioner has retail experience and expressed interest in working in retail.

Med Voc requires individuals to make a minimum of ten job contacts per week. Five of those contacts are to be made in person. Med Voc sends out job leads weekly. Med Voc requires individuals to send E-mail confirmation of job contacts made via the Internet.

Bose testified that Petitioner's compliance was less than full at the outset and "completely deteriorated" thereafter. By April of 2012, Petitioner was failing to follow up on job leads and failing to provide Med Voc with evidence that he was attending the GED classes at Triton. After Petitioner failed to supply signed attendance sheets, Bose contacted Triton. Triton would not release information unless Petitioner signed a release form. Bose sent this form to Petitioner (with a copy to Petitioner's counsel) but Petitioner refused to sign it. Bose was thus never able to confirm attendance. In March of 2012, Petitioner indicated he went to Menard's on West Diversey to find a job but there was no Menard's store at the address Petitioner provided.

Bose testified that, when she first met with Petitioner, he told her his driver's license had been suspended due to two recent DUIs. Since a driver's license can be very helpful to someone who is looking for work, Bose asked Petitioner what steps he was taking to regain his license. Petitioner said he did not anticipate getting his license back "anytime soon."

Bose testified that she reviewed Blumenthal's report and that Petitioner's reporting to Blumenthal was inconsistent with his reporting to her. Petitioner told Blumenthal he lost his license due to speeding tickets. Had this been true, Bose could have negotiated the tickets and

eased the vocational rehabilitation process. Petitioner also told Blumenthal he graduated from high school. If in fact Petitioner is a high school graduate, there would be no reason for him to attend GED classes. The inconsistencies impair Blumenthal's opinions concerning Petitioner's employability. Blumenthal was trying to find a security guard job for Petitioner. You need a PERC card to get such a job and you need a GED or high school degree in order to obtain a PERC card.

Under cross-examination, Bose acknowledged she met with Petitioner only once. Bose also acknowledged that Petitioner is physically unable to resume his old job. At the outset, she asked Respondent about light duty jobs it might have available. Respondent told her it had "internal staff" to address this and that she was not to be involved in looking for alternative work within Respondent.

Bose testified that the vocational plan she formulated in this case is set forth on pages four and five of her initial report. In this plan, she described Petitioner as a "good candidate" for vocational rehabilitation. She did not prepare a vocational assessment on the designated Commission form.

On redirect, Bose testified that employers typically do not broach the subject of salary without an application having been made. She did not use the Commission form to describe her plan because the form consists of only one page and it requires Petitioner's signature. In the thirty years she has been involved in vocational rehabilitation, no claimant has signed such a form. Petitioner agreed to the plan she set forth in her initial report. Her list of possible jobs for Petitioner is not exhaustive.

In addition to the exhibits previously discussed, Respondent offered into evidence a group of reports issued by MedVoc. RX 4. Petitioner's attorney raised a hearsay objection to all of the documents in RX 4 other than Bose's initial report (separately offered as RX 2), noting that Bose never met with Petitioner after October 22, 2011 and that he had no opportunity to cross-examine the MedVoc employees who met with and evaluated Petitioner's level of cooperation after that date. The Arbitrator sustained Petitioner's objection. The Arbitrator notes that the reports at issue were co-authored by two individuals, Laura Kronenberg, B.A. and Lauren Egle, B.A., both of whom are described as "job placement specialists." There is no indication that either of these individuals is a certified vocational rehabilitation counselor.

Respondent also offered into evidence a large group of pre-printed "City of Chicago Injury on Duty Job Search Logs" completed by Petitioner. These documents run from June 4, 2010 through April 6, 2012. Each document contains the following instructions:

> "This is to document your job search now that you have reached Medical Maximum Improvement (MMI). Please fill out this form out [sic] and deliver it in person each week to the address listed below. Failure to complete and deliver this form by the end of each week may result in the

suspension or termination of your disability payments."

Each form allows the person documenting his job search to list up to six prospective employers.

Arbitrator's Credibility Assessment

Petitioner was a calm and articulate witness. Respondent has employed Petitioner for 27 years, a factor which weighs in Petitioner's favor, credibility-wise.

There were discrepancies between Blumenthal's and Bose's accounts of Petitioner's education and driver's license suspension. At the hearing, Petitioner denied telling Blumenthal he finished high school and lost his driver's license due to speeding tickets. Petitioner stipulated he lost his license due to DUIs. Blumenthal's report reflects that Petitioner mentioned a DUI arrest.

The Arbitrator has considered the variances between the two reports in assessing Petitioner's credibility. On this record, the Arbitrator is unable to conclude that Petitioner deliberately misled Blumenthal. To the extent that Blumenthal relied on inaccurate information, that information could have prompted him to project higher rather than lower potential earnings.

While it is true that a DUI conviction has a negative connotation, as Bose testified, there is no evidence suggesting that Petitioner used his lack of a valid driver's license as an excuse for failing to look for work. Rather, the evidence suggests that Petitioner is comfortable with, and regularly takes, public transportation to get where he needs to go.

Arbitrator's Conclusions of Law

Is Petitioner entitled to maintenance benefits from September 29, 2011 through October 16, 2011 and from April 9, 2012 through the hearing of January 4, 2013? Is Petitioner entitled to wage differential benefits?

In his report of March 18, 2010 (PX 5), Respondent's Section 12 examiner, Dr. Singh, found Petitioner to be at maximum medical improvement and in need of permanent restrictions per the functional capacity evaluation (PX 3).

Petitioner claims maintenance from March 16, 2010 through the hearing of January 4, 2013. Respondent contends that Petitioner was entitled to maintenance during only two intervals: from March 16, 2010 through September 28, 2011 and from October 17, 2011 through April 8, 2012.

The Arbitrator finds that Petitioner was entitled to maintenance during the first disputed interval, September 29, 2011 through October 16, 2011. Before September 29, 2011,

Petitioner participated in Respondent's "job search program" by reporting to City Hall every Monday and turning in the requisite sheets. On September 29, 2011, Respondent sent Petitioner a letter indicating his benefits were being terminated due to "non-compliance" with this program. Petitioner acknowledged having failed to turn in several sheets prior to September 29, 2011. He immediately remedied the situation by going to City Hall on September 30, 2011 and handing in the missing sheets. He had the presence of mind to have copies of those sheets time-stamped. PX 8. He went back to City Hall on October 3 and 24, 2011 and submitted other sheets listing contacts he made between September 26 and October 21, 2011. [See the sheets time-stamped October 3 and 24, 2011 in RX 1.] Respondent resumed the payment of maintenance on October 17, 2011 and never provided an explanation of its failure to pay Petitioner from September 29, 2011 through October 16, 2011. Since "compliance" with Respondent's program consisted solely of producing the sheets each Monday, with Respondent providing no guidance as to how Petitioner should be going about his job search, and since Petitioner took steps to supply Respondent with the missing information, the Arbitrator finds that Respondent should be held liable for maintenance from September 29, 2011 through October 16, 2011.

With respect to the second disputed period, April 9, 2012 through January 4, 2013, the Arbitrator awards Petitioner wage differential benefits but not maintenance. Respondent contends Petitioner is entitled to no benefits after April 8, 2012 based on alleged non-compliance with vocational rehabilitation. Petitioner contends he is entitled to maintenance because Respondent did not provide true vocational rehabilitation and there is no evidence of non-compliance. The Arbitrator has carefully considered these arguments. The Arbitrator agrees with Petitioner that, before October of 2011, Respondent did not provide vocational rehabilitation as contemplated by the Act. The evidence, including Petitioner's credible testimony and the forms in RX 1, leads the Arbitrator to conclude that Respondent provided no actual job search assistance before October of 2011. [See W. B. Olson, Inc. v. IWCC, 2012 Ill.App. LEXIS 907, in which the Appellate Court held that "vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining, including education," citing 820 ILCS 305/8(a) (West 2010) [emphasis added]. Even after Respondent decided to alter its approach and retain MedVoc, it prevented MedVoc from exploring the most obvious source of light duty work, i.e., its own job bank.

The Arbitrator turns to the issue of whether Petitioner cooperated with MedVoc's efforts. As noted previously, Petitioner's interaction with MedVoc consisted of one meeting with a certified vocational counselor and subsequent supervised evaluations by non-certified personnel. Even if one goes beyond Bose's initial report and testimony and considers all of the rejected MedVoc reports in RX 4, there is no evidence that Petitioner consistently refused to pursue job leads or show up for appointments. In her report of April 9, 2012, Egle acknowledged that Petitioner typically submitted job sheets, attended scheduled appointments and dressed appropriately. Egle noted that Petitioner did not always meet MedVoc's goal of ten contacts per week but conceded that Petitioner typically came close to meeting this goal. Egle expressed some concern about Petitioner's motivation but again sent Petitioner job leads on April 13, 2012, after Respondent stopped paying benefits. There is no evidence that Bose,

Kronenberg, Egle or anyone else at MedVoc ever recommended that rehabilitation efforts be discontinued. Bose faulted Petitioner for failing to allow her access to his Triton College records but, in the Arbitrator's view, there is no convincing evidence that Petitioner's participation in GED classes was vital to his finding work. The MedVoc reports do not reflect that any prospective employer declined to interview or hire Petitioner because he lacked a high school degree.

Having said this, there is also no evidence that Petitioner continued to seek work on his own between early April 2012 and the January 4, 2013 hearing. [See Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500, 506 (5th Dist. 2004), in which the Appellate Court upheld an award of maintenance during a period when the claimant conducted a self-directed job search.] Petitioner did continue to attend classes at Triton after April 8, 2012 but only until early May. PX 11.

On this record, the Arbitrator finds it appropriate to award wage differential benefits rather than maintenance from April 9, 2012 forward. There was never any dispute as to Petitioner's inability to resume his former laborer job. Nor is there any dispute as to how much Petitioner would be earning, i.e., $32.79 per hour, if he could still perform that job. PX 10. While Blumenthal and Bose did not rely on identical histories, their opinions overlapped to the extent that they both targeted cashier and customer service jobs when they evaluated Petitioner in 2010 and 2011, noting Petitioner's past retail experience. Blumenthal noted that Petitioner was earning $11.00 per hour when he left his part-time job at Target. Blumenthal projected earnings of $8.25 to $13.78 per hour. Bose did not criticize this projection or make a projection of her own. The Arbitrator selects $11.00 per hour as a reasonable wage. The Arbitrator arrives at a wage differential rate of $581.06 by multiplying $32.79 by 40 hours to arrive at $1,311.60, subtracting $440.00 [$11.00/hour x 40] to arrive at $871.60 and dividing $871.60 by 2/3.

In summary, the Arbitrator awards maintenance benefits in the amount of $758.84 per week from March 16, 2010 through April 8, 2012, with Respondent receiving credit for the $79,886.34 it paid in maintenance benefits prior to the hearing (Arb Exh 1), and wage differential benefits in the amount of $581.06 per week from April 9, 2012 through January 23, 2013 and continuing thereafter for the duration of Petitioner's disability.

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEPHANIE HOLDER,

Petitioner,

vs. NO: 12 WC 24571

CARSO, INC.,

14IWCC0885

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 causation, temporary total disability (TTD), medical expenses, permanency 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 Respondent raises several issues on review before the Commission. The Commission affirms the Arbitrator on all but one of those issues, prospective medical treatment, and reaffirms the Arbitrator's, and the Commission's, discretion to determine that the Petitioner had not yet reached maximum medical improvement despite the parties appearing for hearing with a stipulation to address permanency.

Although a case brought before the Commission is in essence an appeal, the Commission has original jurisdiction in cases that come before it and can consider a new

theory of recovery in a case brought on review. Caterpillar Tractor Co. v. Industrial Commission, 215 Ill.App.3d 229, 238-39, 574 N.E.2d 1198, 1203, 158 Ill. Dec. 805 (1991). The procedure in workers' compensation cases is generally informal, to facilitate avoiding the cumbersome procedures and technicalities of pleadings and in order to reach the right decision by the shortest and quickest possible route. Caterpillar Tractor Co., 215 Ill. App. 3d at 239, 574 N.E.2d at 1204. Because the Commission must decide a case on the evidence presented and on the merits of the case before it, it must not be restricted to the information provided on a form, but as long as a party's substantial rights are not prejudiced, it may sua sponte consider a new theory of recovery. Caterpillar Tractor Co., 215 Ill. App. 3d at 239, 574 N.E.2d at 1204."

The cases cited by Respondent, in its argument that the Arbitrator did not have the ability to determine that prospective medical treatment is indicated when the parties have stipulated to permanency being at issue, are distinguishable. The Thomas and Jording cases (Thomas v. Industrial Commission, 78 Ill.2d 327 (1980); Jording v. Industrial Commission, 253 Ill.App.3d 318 (1993)) involved determinations of permanency pursuant to hearing under Section 19(b) of the Act. In such case, because the parties have indicated that they are seeking further benefits prior to a determination of permanency, a finding of permanency prevents the parties from obtaining and presenting evidence in support of the nature and extent of the injury or injuries. In the case at bar, it is just the opposite: the parties have indicated that permanency is at issue, but evidence has clearly been presented with regard to the need for further treatment.

In the case of a 19(b) hearing resulting in a decision by the Arbitrator awarding permanency, the Arbitrator would be broadening the scope of the hearing by including a post-maximum medical improvement (MMI) award when the parties intended for the decision to determine if the claimant was entitled to further benefits or if he or she had reached MMI. In contrast, in a case where permanency is put at issue but the Arbitrator determines the claimant has not yet reached MMI, the scope is not broadened, but rather is narrowed. We believe the O'Neal case, cited by Respondent in its statement of exceptions (O'Neal Bros. Construction Co. v. Industrial Commission, 93 Ill.2d 30 (1982)), is consistent with this determination. Where the evidence indicates that the Petitioner has not yet reached MMI, it is within the discretion of the Commission to determine that the issue of the nature and extent of the injury, i.e. the permanency, is not yet ripe for determination.

The Commission agrees with the Arbitrator that the Petitioner had not yet reached MMI. The only opinion indicating she has is that of Dr. Holmes. While Dr. Holmes is a well-respected orthopedic surgeon and his opinion is deserving of weight, in this case it appears that the Petitioner's ongoing condition may require evaluation from a physician with a different specialty than orthopedics.

The Commission modifies the Arbitrator's award of prospective medical in order to make it more specific. Instead of generally awarding the treatment recommended by Dr. Furry, the Commission believes the most prudent course of action in this case is that Petitioner undergo evaluation at the Mayo Clinic, as recommended by Dr. Furry, prior to any further treatment

being undertaken. Questions exist in this case as to exactly what Petitioner's diagnosis is, and the Commission finds that a Mayo Clinic evaluation would be highly reasonable prior to any determination of whether a third spinal differential should be performed or a spinal cord stimulator should be implanted. It is not clear to the Commission why a spinal cord stimulator would be recommended prior to a definitive diagnosis being determined. This is particularly the case where, as here, there is at least some evidence of possible depression in Petitioner, and a psychological evaluation has not been performed prior to the stimulator being recommended. Dr. Furry's explanation as to the Petitioner's reaction to the spinal differential also seems to be convoluted. While he states that the lack of reaction to the prior differentials on the left side might be due to an inability to obtain and use lidocaine as the active anesthetic, he also notes that there was a reaction on the right side. If the anesthetic was the problem, why would there have been a reaction on the right side? The Commission finds that any award of a spinal differential or a spinal cord stimulator is premature at this time.

Based on the discrepancies among the physicians involved in this case and the stellar reputation of the Mayo Clinic, an evaluation at that facility is warranted in this case. It should be noted that, so long as complete records and accurate information are provided to the Mayo Clinic, the determinations made there would likely be given significant weight by the Commission in the future. We mention this to assist the parties in avoiding further disputes with regard to the future treatment involved in this claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $713.77 per week for a period of 48-2/7 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. Respondent is entitled to credit of $36,198.34 for temporary total disability previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the medical expenses submitted by Petitioner at hearing as Petitioner's Exhibit 2, subject to the fee schedule pursuant to §§8(a) and 8.2 of the Act. Respondent is entitled to credit for any such expenses that were previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for a medical evaluation, per the recommendation of Dr. Furry, with the Mayo Clinic.

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.

14IWCC0885

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 $6,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 0 9 2014
TJT: pvc
o 08/11/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOLDER, STEHPANY
Employee/Petitioner

Case# **11WC024571**

CARSO INC
Employer/Respondent

14IWCC0885

On 12/17/2013, 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 0.09% 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:

0874 FREDERICK HAGLE FRANK & WALSH
PATRICK HANLON
129 W MAIN ST
URBANA, IL 61801

1256 HOLTKAMP LIESE SCHULTZ ET AL
R KENT SCHULTZ
217 N 10TH ST SUITE 400
ST LOUIS, MO 63101

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

STEPHANY HOLDER
Employee/Petitioner
v.
CARSO, INC.
Employer/Respondent

Case # 11 WC 024571

14IWCC0885

An *Application for Adjustment 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 Dearing, Arbitrator of the Commission, in the city of Urbana, 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 **Maintenance**

FINDINGS

14IWCC0885

On **May 3, 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 **$55,673.80**; the average weekly wage was **$1,070.65.**

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

Petitioner ***hasnot*** 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 **$36,198.34** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$5,363.95** for other benefits, for a total credit of **$41,562.29**. Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner is not at maximum medical improvement. Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the fee schedule. Respondent shall pay reasonable and necessary prospective medical care recommended by Dr. Furry, pursuant to the fee schedule. Respondent shall be given a credit for any amount of medical bills previously paid.

Maintenance benefits are denied. Respondent shall be given a credit of $1,733.03 for an overpayment of temporary total disability benefits paid from April 10, 2012 to April 23, 2012. Respondent shall pay Petitioner temporary total disability benefits of $713.77/week commencing October 3, 2012 through October 15, 2012, less Respondent's credit of $1,733.03. Respondent shall pay Petitioner temporary partial disability benefits pursuant to Section 8(a) commencing October 16, 2012 through the present, and continuing as long as statutorily applicable. Respondent shall pay Petitioner temporary disability benefits that have accrued from October 3, 2012 through October 18, 2013, and shall pay the remainder of the award, if any, in weekly payments.

The Arbitrator declines to make findings or award benefits representing Petitioner's nature and extent of the injury at this time. Therefore, Petitioner's credit of $5,363.95 for an advancement of permanent partial disability benefits representing 5% of a foot is rendered moot at this time, as no permanent disability benefits are awarded herein. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary or permanent disability, if any.

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

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

Signature of Arbitrator

December 11, 2013
Date

DEC 17 2013

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

14IWCC0885

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

STEPHANY HOLDER,
Employee/Petitioner

v. Case 11 WC 24571

CARSO, INC.,
Employer/Respondent.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that Respondent previously provided an advancement of permanent partial disability benefits in the amount of $5,363.95, representing 5% of a left foot, and that this amount should be credited against any permanent partial disability benefits awarded in this hearing. The parties further stipulated that Respondent is entitled to a credit in the amount of $1,733.03, representing an overpayment of temporary total disability benefits for 2 3/7 weeks.

This matter was previously tried pursuant to Section 19(b) of the Act before Arbitrator McCarthy on August 9, 2012. In his Decision, Arbitrator McCarthy ordered Respondent to pay Petitioner temporary total disability benefits of $713.77/week for 48 2/7 week, from May 8, 2011 through April 9, 2012, because the injury sustained caused the disabling condition of Petitioner through April 9, 2012. In so finding, Arbitrator McCarthy stated that the evidence failed to show how Petitioner's condition would prevent her from unrestricted work as of her last date of examination by Dr. Anderson on April 9, 2012. Arbitrator McCarthy found that the evidence showed that Petitioner was able to perform her regular job duties, and as such, declined to award temporary total disability benefits after April 9, 2012. Respondent was ordered to pay for prospective medical treatment recommended by Dr. Furry and past medical expenses. Respondent was given a credit for amounts previously paid. Joint Ex. 1. This Arbitrator adopts and incorporates the findings and conclusions of law of Arbitrator McCarthy in his Decision dated September 3, 2012.

Subsequent to the 19(b) hearing, Petitioner presented to Dr. Furry on September 27, 2012 with continued complaints of pain in her left ankle, foot, and leg. A physical examination of her extremities revealed a mottling, reddish or ruddy discoloration to the left ankle and foot. The right side showed normal coloration. She was sensitive on light touch to the left lower extremity, and it showed allodynia in a non-dermatomal pattern over the foot, ankle, and leg up to and slightly surpassing more cephalad to the knee by about 6-8 cm and then the cephalad fades. Dr. Furry's impression was type 2 complex regional pain syndrome of the left ankle, foot and leg.

He ordered prescription medication, and scheduled an additional sympathetic lumbar block, but noted a less-than-favorable prognosis due to the lapse in treatment. PX 1.

Petitioner underwent a medical examination for commercial driver fitness determination on October 3, 2012. On the report, Petitioner indicated that she had had an illness or injury in the last five years, and a missing or impaired hand, arm, foot, leg, finger or toe. She reported that she had been diagnosed with a sprain and ATF tear by Dr. Jason Anderson and Dr. John Furry, and complex regional pain syndrome type 2. The medical examiner found that Petitioner did not meet the standards, and noted that Petitioner had an antalgic gait/limp, insufficient strength of lower extremities to operate pedals, and pain on palpation of left thigh, calf, and ankle. PX 4.

On October 30, 2012, Petitioner underwent a lumbar sympathetic block with a diagnosis of sympathetic mediated pain in the left leg. On January 15, 2013, Petitioner underwent a differential spinal examination for complex regional pain syndrome of the left lower extremity. In a follow-up record of January 21, Dr. Furry noted that because lidocaine was not available in the hospital during the differential spinal, bupivacaine was used instead. The differential resulted in an indeterminate pain score and continued sensory response to the left lower extremity, which still did not provide an answer as to whether Petitioner's pain could be interrupted peripherally or whether this represents a centralized pain syndrome in the left lower extremity. Because Petitioner continued to complaint of spasms, Dr. Furry added baclofen, and ordered lidocaine 5% spinal. If the lidocaine was still unavailable, Dr. Furry was going to attempt a tetracaine spinal at the next visit to completely separate peripheral versus central pain syndromes in Petitioner. Dr. Furry indicated that regarding Petitioner's occupation of driving a truck with a clutch, he did not feel that she is safe to continue same secondary to the pain responses that she has with pressure eon her left foot. PX 1.

On November 29, 2012, Petitioner returned to Dr. Furry's partner, Dr. Shane Fancher, and reported no relief from the last injection. She also reported rolling her ankle at a truck stop, which caused pain to shoot up her leg with much weight on her heel. Dr. Fancher's treatment plan was a sympathetic and nonsympathetic block, and an injection at L5-S1, as the previous injection at L3-4 did not help. Petitioner received an interlaminar epidural steroid injection on the same day at L4-5 on the left under fluoroscopic guidance with contrast confirmation. PX 1.

On February 15, 2013, Petitioner underwent a differential spinal with tetracaine. After one hour, Petitioner had normal sensory to light touch and hyperalgesia and hyperpathia as well as allodynia even through the tetracaine spinal anesthetic. Dr. Furry noted a similar reaction with bupivacaine anesthetic spinal on January 21. He ordered an MRI, as he believed there was either some scar tissue or some other matter of stenosis preventing free flow of anesthetic to the left side which is involved in the complex regional pain syndrome. PX 1.

On March 12, 2013, Dr. Furry noted that Petitioner's MRI had not yet been obtained as it had been denied, and at that time, he recommended a trial of spinal cord stimulator for five to seven days for the left lower extremity. If Petitioner had approximately 50% pain relief, she would be considered a candidate for a permanent spinal cord stimulation therapy and if not, an intrathecal narcotic trial would be considered. PX 1.

The MRI of Petitioner's lumbar spine without contrast was obtained on August 1, 2013, and revealed no disc herniation or spinal stenosis and facet arthritis at multiple levels. On September 12, 2013, Petitioner underwent a lumbar and thoracic myelogram, in which the impression was simply "Thoracic and lumbar myelogram." A CT thoracic and lumbar myelogram obtained on the same date was negative. PX 1.

On September 23, 2013, Petitioner returned to Dr. Furry. Based upon the two separate subarachnoid blocks with two separate agents that failed to give good sensory or motor block on the left side, but a very good block on the unaffected side, Dr. Furry stated that he had "no explanation for this anatomically" and recommended Petitioner undergo a 5% lidocaine, full dose spinal under fluoroscopic examination with contrast. If this treatment did not affect a full spinal block, he indicated that Petitioner would be a candidate for tertiary examination and exploration at a level such as Mayo, University level, or Johns Hopkins to explain anesthetic resistance side of a complex regional pain syndrome. PX 1.

Dr. John Furry testified by way of evidence deposition on July 23, 2013. Dr. Furry is a board certified orthopedic surgeon specializing in pain management. He treated Petitioner at the referral of Dr. Jason Anderson, a podiatrist. Dr. Furry testified that, within a reasonable degree of medical certainty, that Petitioner's condition of complex regional pain syndrome disabled her from her position of an over-the-road truck driver during the periods of time he treated Petitioner from February 12, 2012 through March 2013, and he presently did not feel that she could return to that employment, because he did not believe it would be safe for her to utilize a clutch. Dr. Furry testified that he did not know whether Petitioner's left lower extremity symptoms may have an original in her lumbar or thoracic spine and likened it to a "black box." Dr. Furry, at the time of his deposition, recommended a temporary trial of a spinal cord stimulator to ascertain whether the overall pain syndrome and impulses can be turned down sufficiently to increase Petitioner's activity level. He indicated that if Petitioner had a positive response from the temporary trial, he would recommend the permanent implantation into the spine, which if proven beneficial, may alleviate her symptoms so as to allow her to return to work as an over-the-road truck driver. Dr. Furry stated that he was recommending the trial stimulator because there had not been an approval of further diagnostic testing to help him diagnose what was going on in Petitioner's spine. Dr. Furry testified that there has been a chronicity to her symptom complex, which would allow him to opine that Petitioner has a chronic and ongoing condition that, but for more effective treatment, will remain a chronic, debilitating condition. PX 5.

Following the 19(b) hearing, Respondent had Petitioner reexamined pursuant to Section 12 by Dr. George Holmes on April 10, 2013. Petitioner has previously been examined by Dr. Holmes on September 14, 2011 and April 4, 2012. Dr. Homes provided a review of her records since her last examination, and performed a physical examination of Petitioner. In his opinion, Petitioner does not suffer from a diagnosis of complex regional pain syndrome, as he had no objective findings that were consistent with Petitioner's complaints of subjective pain. He opined that Petitioner did not require any further orthopedic management, and Petitioner could work without restrictions. He deferred to a neurologist or neurosurgeon with regards to any issues pertaining to the possibility of Petitioner undergoing the implantation of a pain pump or implantable stimulator. Dr. Holmes issued an addendum report on April 23, 2013, reiterating his

opinion that in his opinion, Petitioner does not have a diagnosis of complex regional pain syndrome, and that she was able to return to work without restrictions. RX 3.

Dr. Holmes testified by way of evidence deposition on August 6, 2013. Dr. Holmes is a board certified orthopedic surgeon specializing in the treatment of foot and ankle injuries. He testified concomitantly with his reports dated April 10 and April 23, 2013. He explained that he did not believe that Petitioner suffered from complex regional pain syndrome because she did not display objective findings supportive of that diagnosis, which would include a physical examination demonstrating atrophy, skin changes, temperature variations, skin dryness or sweating, change in hair pattern, toe curling, discoloration, mottling, or radiographs, a bone scan or MRI confirming the diagnosis. RX 2.

Petitioner testified at Arbitration. She testified that she had an upcoming appointment with Dr. Furry for an epidural injection with 5% lidocaine. For long-term treatment, Dr. Furry recommended she present to Mayo Clinic or Johns Hopkins for complex regional pain syndrome. She is not currently scheduled to undergo any surgical procedures. Following the 19(b) hearing, Petitioner contacted Respondent regarding returning to work. She testified that Respondent wanted her to drive a tractor trailer, but before doing so, she had to complete a physical for the Department of Transportation, which she took on October 3, 2011. As a result of that examination, Petitioner did not obtain employment with Respondent and she was not offered alternative employment by Respondent. She sought employment with other employers. Ultimately, Petitioner became employed by Hardee's in Monticello, Illinois as a cashier on October 16, 2012. She worked twenty hours when she first obtained employment earning $8.50/hour. Petitioner is still currently employed by Hardee's, making the same rate of pay of $8.50/hour, but she only works ten hours per week because she testified that continuous standing required in her position at Hardee's worsens her left leg condition. She works four-hour shifts because her "leg gives out." Petitioner stated that Hardee's would like to have her as a full time employee, which entails working seven hours per day, and thirty five to thirty seven hours per week. She identified PX 2 as her accurate wage documentation from January 1, 2013 to October 7, 2013. Petitioner stated that there are two four-week gaps in time when she lost her pay stubs, and a two-week gap in which she was not working due to contracting chemical meningitis.

Outside of her employment with Hardee's, Petitioner has attempted to obtain alternative employment. She testified that she applied at Masterbrand, HydroGear, Pizza Hut, Rosati's Pizza, Rural King, Culver's, Taco Bell, Arby's, and Dollar General. The employment at Taco Bell, Dollar General and Rural King were for cashier positions, but she has not received any interviews or callbacks. The Masterbrand and HydroGear positions are factory positions. The Pizza Hut position was a delivery position. When applying for these positions, on all of her applications, Petitioner indicated that she has restrictions of squatting, kneeling bending and lifting that she believes she has from Dr. Anderson, whom she stated she has not seen since April 2012, and based upon the Functional Capacity Evaluation of December 2011. She indicates, however, on the applications that she is available for work. Most of her employment applications have been submitted electronically online, but she presented the applications to Burger King, Taco Bell and Arby's in person. Since beginning work for Hardee's in October 2012, Petitioner testified that she has attempted five job searches.

Petitioner has been prescribed Baclofen and Lyrica, but she is not currently taking them, because they have been denied by workers' compensation and she cannot afford to pay for them herself. Petitioner tendered eighteen pictures of her lower extremities in PX 3.

Petitioner testified that the molting and discoloration that she previously experienced up to her mid-calf has now progressed all the way up her left leg. Other than the progressive mottling, her symptoms, limitations and restrictions remain the same as they were before the 19(b) hearing. Petitioner stated that she experiences the symptoms of pain sensitivity, cooler temperatures and pain in the left leg every day, but she can ease some symptoms with elevation and a heating pad. She indicated that she reports all of her symptoms to each and every doctor that she has presented to for treatment in the exact same manner and description to each provider. Petitioner testified that she is able to perform certain activities, including shopping, going to garage and yard sales, as best she can. She wore, at the time of her last hearing, and presently, a tied lace shoe on a regular basis. Petitioner indicated that that type of shoe is the only pair of shoes she has. She continues to wear the orthotic supports ordered by her physician. Petitioner is able to drive an automobile, but she has not attempted to drive an automobile with a clutch or a semi truck.

CONCLUSIONS OF LAW

The issues present for this Arbitrator's consideration and determination were whether Respondent is liable for additional medical expenses, whether Petitioner is entitled to maintenance benefits, and the nature and extent of Petitioner's injury. Although the Request for Hearing places maintenance benefits without a specific time period at issue, Petitioner requested wage differential benefits pursuant to Section 8(d)1 and an award of prospective medical treatment from this Arbitrator, while Respondent, relying upon its Section 12 physician's opinion of maximum medical improvement, addressed permanency on the basis of loss of use to Petitioner's left foot pursuant to Section 8(e)(11). However, given the lack of credible evidence supporting a finding of Petitioner to be at maximum medical improvement, discussed further below, the Arbitrator finds the issues of maintenance benefits and the nature and extent of Petitioner's injury to be premature.

The issues of whether a claimant is temporarily totally disabled and the length of time for which he is entitled to temporary disability benefits are questions of fact to be resolved by the Commission. *Archer Daniels Midland Co. v. Industrial Commission*, 138 Ill. 2d 107, 118-119 (1990). In Illinois, it is well-settled that an employee is temporarily totally incapacitated from the time an injury incapacitates him from work until such time as he is far recovered or restored as the permanent character of his injury will permit. *Id.* at 118; *McKay Plating Co. v. Industrial Commission,* 91 Ill. 2d 198, 209 (1982); *Brinkmann v. Industrial Commission,* 82 Ill. 2d 462, 467 (1980); *Health & Hospitals Governing Commission v. Industrial Commission*, 72 Ill. 2d 263, 273-74 (1978). A claimant's release to light duty is one factor utilized in determining whether he has reached maximum medical improvement. "Equally important is the medical testimony concerning the claimant's injury, the extent thereof, the prognosis, and most importantly, whether the injury has stabilized." *Beuse v. Industrial Commission*, 299 Ill. App. 3d 180, 183 (1st Dist. 1988).

The Arbitrator finds that Petitioner is not at maximum medical improvement because her condition had not yet stabilized at the time of the present hearing, as evidenced by Petitioner's continued active treatment at the time of hearing, Dr. Furry's recommendations for further treatment designed to improve Petitioner's condition, and Petitioner's testimony that her symptomatology had progressed since the 19(b) proceeding.

Arbitrator McCarthy found that the evidence presented at the 19(b) hearing indicated that Petitioner's complex regional pain syndrome was relatively mild at that time. Petitioner credibly testified, however, that presently, the mottling and discoloration has progressed from her mid-calf area up to her knees, indicating a worsening of her symptomatology, though she indicated that her other symptoms indicative of complex regional pain syndrome have remained the same.

Further, Petitioner most recently presented to Dr. Furry on September 23, 2013, less than a month before the present hearing. At that time, Dr. Furry recommended Petitioner undergo a 5% lidocaine full dose spinal under fluoroscopic examination with contrast. PX 1. Prior to that recommendation, Dr. Furry recommended a trial spinal cord stimulator, which he stated may alleviate Petitioner's symptoms so as to allow her to return to over-the-road truck driving. PX 1, 5. Respondent's Section 12 examiner, Dr. Holmes, opined that Petitioner did not have complex regional pain syndrome, placed her at maximum medical improvement for an ankle sprain, but deferred to a neurologist or neurosurgeon with regards to any issues pertaining to the possibility of Petitioner undergoing the implantation of a pain pump or implantable stimulator. RX 3. Given Arbitrator McCarthy's findings that Petitioner suffers from complex regional pain syndrome, this Arbitrator finds the testimony and opinions of Dr. Furry to be more persuasive and consistent with the law of the case that than of Dr. Holmes. Therefore, based upon the foregoing, the Arbitrator finds that Petitioner's condition has not stabilized and she is not at maximum medical improvement.

Section 8(a) of the Act requires Respondent to pay for medical treatment "...reasonably required to cure or relieve [Petitioner] from the effects of the accidental injury." In light of Dr. Furry's recommendations for additional treatment and his prognosis that same may improve Petitioner's symptomatology and condition, the Arbitrator orders Respondent to pay for the prospective medical treatment recommended by Dr. Furry.

With regard to the disputed issue (J), the Arbitrator finds the care and treatment rendered by Dr. Furry to be reasonable and necessary. Respondent shall pay all reasonable and necessary past medical services, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for any amount of medical bills previously paid.

With regard to disputed issue (L), because the Arbitrator does not find Petitioner to be at maximum medical improvement, the Arbitrator denies maintenance benefits as put at issue by the parties. Instead, the Arbitrator awards temporary disability benefits. Pursuant to Section 8(b), weekly compensation...shall be paid...as long as the total temporary incapacity lasts." "When the employee is working light duty on a part-time basis or full-time basis and earns less then he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits." 820 ILCS 305/8(a). When ascertaining whether a claimant is entitled to temporary total disability benefits, the dispositive

inquiry is whether his or her condition has stabilized. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 142 (2010). Once an injured employee's physical condition stabilizes, he is no longer eligible for temporary disability benefits. *See Archer Daniels Midland Co.*, 138 Ill. 2d at 118.

Arbitrator McCarthy found that, at the time of the 19(b) hearing, the evidence did not show that Petitioner was unable to perform her regular job duties, and as such, he declined to award temporary total disability benefits after April 9, 2012. It is unclear as to whether Arbitrator McCarthy was presented with Dr. Furry's work restriction of no over-the-road truck driving at the time of the 19(b) hearing. Following the 19(b) however, Petitioner testified that the parties attempted to return Petitioner to her regular job duties of over-the-road truck driving, which required her to recertify her commercial driving license. Obtaining Petitioner's license necessitated Petitioner undergo a physical examination for a commercial driver fitness determination, which she did on October 3, 2012. PX 4. Based upon the medical examiner's physical examination findings of Petitioner's extremities, spine and neurological systems (PX 4), Petitioner did not meet standards, and did not receive her commercial driving license. Petitioner's inability to obtain her commercial driving license precludes her from performing her regular job duties as an over-the-road truck driver. Petitioner testified, which Respondent did not rebut, that Respondent was unable to accommodate her in another position following the commercial driving examination.

Because Arbitrator McCarthy found that Petitioner's complex regional pain syndrome is causally related to her work accident of May 3, 2011 and based upon the testimony of Dr. Furry, this Arbitrator finds that Petitioner's physical condition forming the basis upon which Petitioner was denied her commercial driving license, including an antalgic gait/limp, insufficient strength of lower extremities to operate pedals, and pain on palpation of left thigh, calf and ankle, is a result of her complex regional pain syndrome. Therefore, this Arbitrator finds that Petitioner is incapable of returning to her regular job duties as an over-the-road truck driver for Respondent because of her inability to obtain her commercial driving license due to her physical condition resulting from complex regional pain syndrome. Accordingly, this Arbitrator awards Petitioner temporary total disability benefits from October 3, 2012, the date in which Petitioner became unable to return to her regular job duties with Respondent, through October 15, 2012, the day prior to Petitioner becoming employed as a cashier with Hardee's. Thereafter, the Arbitrator awards Petitioner temporary partial disability benefits pursuant to Section 8(a) to commence on October 16, 2012, the time in which Petitioner became employed by Hardee's, and to continue as long as statutorily applicable.

With regard to disputed issue (N), based upon the Arbitrator's foregoing findings, the Arbitrator declines to make any findings or award any benefits representing Petitioner's nature and extent of the injury. Therefore, Petitioner's credit of $5,363.95 for an advancement of permanent partial disability benefits representing 5% of a foot is rendered moot at this time, as no permanent disability benefits are awarded herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary or permanent disability, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kerry L. Douglas,

Petitioner,

vs.

NO: 06 WC 3617

14IWCC0886

Atkinson Construction,

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 Respondent's entitlement to 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.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 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.

14IWCC0886

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

DATED: OCT 0 9 2014
TJT:yl
o 8/19/14
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

While I concur with the majority's decision affirming the arbitrator, I would dissent as to the issue of respondent's $189,000.00 credit for statutory loss payments against a subsequent permanent disability award. This issue is addressed in the case of Modern Drop Forge Corporation v. Industrial Commission, 284 Ill.App.3d 259, (1996). There the Appellate Court held that individuals who receive amputations should immediately be compensated for the statutory loss when no dispute exists as to whether the injury arose out of and in the course of the employment, all pending the commissions ultimate determination of disability, citing Lester v. Industrial Commission, 256 Il.App.3d 520 (1993). This holding regarding immediate payment creates the possibility of an overlap of payment when there is a subsequent award of disability. The Appellate Court resolved this indicating that, "...the respondent is entitled to a credit for any compensation already paid toward permanency at the time of arbitration." Modern Drop Forge at p. 266. I would modify the decision per this holding.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOUGLAS, KERRY
Employee/Petitioner

Case# **06WC003617**

ATKINSON CONSTRUCTION
Employer/Respondent

14IWCC0886

On 12/30/2013, 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 0.09% 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:

0013 DUDLEY & LAKE LLC
PETER SCHLAX
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

1109 GAROFALO SCHREIBER HART ET AL
DAN GRANT
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

14IWCC0886

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

Kerry Douglas
Employee/Petitioner

v.

Atkinson Construction
Employer/Respondent

Case # **06** WC **03617**

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **07/18/2013**. 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 ___

14IWCC0886

FINDINGS

On **11/18/2005**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$72,800.00**; the average weekly wage was **$1,400.00**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **5** dependent children.

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

ORDER

Credits

Respondent shall be given a credit for **$0.00** awarded benefits to be paid under Section 8(f) of the Act.

Medical

Respondent shall pay reasonable and necessary medical services of **$2,040.00**, as provided in Section 8(a) of the Act.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of **$933.33**/week for life, commencing **07/19/2013**, as provided in Section 8(f) of the Act.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 26, 2013
Date

DEC 30 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION

KERRY DOUGLAS,	)	
	)	14IWCC0886
Petitioner,	)	
	)	
v.	)	Case No. 06 WC 03617
	)	
ATKINSON CONSTRUCTION,	)	
	)	
Respondent.	)	

ARBITRATOR'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

IN SUPPORT OF ARBITRATOR'S DECISION REGARDING "L" (NATURE AND EXTENT OF THE INJURY), THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner suffered a serious injury in the course of his employment as a tunneler for Atkinson Construction on November 18, 2005 when, while working on platform suspended within a vertical shaft, the platform violently shifted and Petitioner's left leg was crushed against rebar lining the vertical shaft walls. Petitioner was immediately taken to Northwestern Medical Center in Chicago where surgeons unsuccessfully attempted to revascularize Petitioner's severely injured left leg with a bypass graft from Petitioner's right leg. On November 22, 2005, Petitioner's left leg was amputated above the knee. (Pet. Ex. 1). Thereafter, Petitioner underwent a substantial period of rehabilitation, which included fitting of a left above knee orthosis.

On June 14, 2012, Petitioner underwent a Section 12 examination by Dr. David Shapiro. At that time Petitioner voiced substantial ongoing complaints of phantom pain in his left leg as well as chronic low back pain. Dr. Shapiro stated that the back condition was related to Petitioner's accident and use of his prosthesis and recommended ongoing pain management. (Pet. Ex. 1).

At the arbitration hearing, Petitioner stated he currently experiences constant pain to varying degrees for which is dependent upon narcotic pain medication for control. He has difficulty standing,

walking and sitting and is largely dependent upon family members for assistance in activities of daily living.

On October 6, 2012, his attorneys requested Petitioner undergo a vocational rehabilitation evaluation by a certified rehabilitation counselor, Susan Entenberg. In her report Ms. Entenberg detailed Petitioner's current physical limitations, his previous work history as a construction laborer, and the difficulty he would likely have performing purely sedentary activity. Ms. Entenberg opined: "given his severe limitations, his lack of transferable skills, limited education, lack of computer or clerical skills and his inability to sustain tasks on a regular basis, it is my opinion that a stable labor market does not exist for him." (Pet. Ex. 3, p. 4)

At Respondent's request Petitioner underwent a vocational assessment by Mr. Donald Follensbee. After reviewing Petitioner's significant ongoing physical limitations and chronic pain, his previous work and education history, Mr. Follensbee concluded "due to Mr. Douglas' work injury of left above knee amputation and significant phantom pain, lumbar pain, right leg pain and numbness, limited education abilities, semi-skilled work in concrete and construction no transferable skills allow Mr. Douglas to return to employment were identified. No further vocational assistance appears warranted at present. No labor market survey is recommended." (Pet. Ex. 4, p. 4).

The Arbitrator also notes at commencement of the arbitration hearing, Respondent stipulated that Petitioner's work related accident resulted in his complete disability rendering him wholly incapable of work and therefore entitling him to permanent total disability benefits under Section 8(f) of the Act.

In light of Respondent's stipulation and the substantial evidence of Petitioner's complete and total disability as detailed above, the Arbitrator finds that Petitioner's accident did result in complete disability rendering Petitioner wholly and permanently incapable of work and therefore entitling him to

permanent total disability benefits as set forth in Section 8(f) of the Act, commencing as of July 19, 2013.

IN SUPPORT OF ARBITRATOR'S DECISION REGARDING "J" (PAYMENT OF REASONABLE AND NECESSARY MEDICAL SERVICES) THE ARBITRATOR FINDS THE FOLLOWING:

In the Request for Hearing form, (Arb. Ex. 1), Respondent has stipulated they remain liable for an unpaid medical expense to Nova Counseling in the amount of $2,040.00. (Pet. Ex. 5). The Arbitrator therefore awards payment to Petitioner in the sum $2,040.00 in payment of this agreed unpaid medical expense.

IN SUPPORT OF ARBITRATOR'S DECISION REGARDING "N" (CREDIT) DUE RESPONDENT) THE ARBITRATOR FINDS THE FOLLOWING:

The parties have stipulated on the Request for Hearing (Arb. Ex. 1), that Petitioner is entitled to temporary total disability benefits for the period of October 19, 2005 through July 18, 2013, representing 403 weeks. The parties have further stipulated that Petitioner's average weekly wage was $1,400.00 resulting in a TTD rate of $933.33 per week of temporary total disability. Finally the parties have stipulated that Respondent has in fact paid the total sum of $376,136.02 in temporary total disability benefits. Therefore, entitlement to TTD and credit for amounts paid for TTD are not at issue.

The parties have also stipulated that Respondent paid to Petitioner on January 13, 2010, pursuant to Section 8(e)(12), the sum of $189,000.00 for statutory loss of Petitioner's left leg above the knee. At issue is Respondent's entitlement to assert credit as a result of this statutory loss payment against Petitioner's entitlement to permanent total disability benefits, which are to commence as of July 18, 2013.

The Arbitrator notes that Petitioner's entitlement to statutory benefits for amputation

commences no later than time, which the employer reasonably knows the extent of Petitioner's amputation. Greene Welding & Hardware v. Illinois Workers' Compensation Commission, 396 Ill. App. 3d 754, 919 N.E.2d 1129 (4th Dist. 2009). The parties stipulated that Respondent paid the statutory loss in a lump sum on January 13, 2010 in the amount of $189,000.00. This statutory payment under Section 8(e)(12) represents 225 weeks of compensation at Petitioner's permanent partial disability rate of $840.00 per week of compensation. Respondent asserts that under cases of Modern Drop Forge Corp. v. Industrial Commission, 284 Ill. App. 3d 259, 219 Ill. Dec. 586, 671 N.E.2d 753 (1st Dist. 1996), as well as Payetta v. Industrial Commission, 339 Ill. App. 3d 718, 791 N.E.2d 682, 274 Ill. Dec. 590(2nd Dist. 2003), Respondent is entitled to assert a credit of $189,000.00 against the permanent partial disability award entered herein.

However, in this case, Petitioner suffered not **only** the amputation of his left leg, entitling him to the statutory loss payment under Section 8(e)(12), his injury has now been determined to have resulted in the **additional** loss of his being wholly and permanently incapable of work, thereby entitling him to permanent total disability benefits under Section 8(f). Beelman Trucking v. Illinois Workers' Compensation Commission, 233 Ill. 2nd 364, 909 N.E.2d 818, 330 Ill. Dec. 796 (2009); Freeman United Coal Mining Co. v. Illinois Industrial Commission, 99 Ill. 2d 487 (1984).

Although Respondent is entitled to credit for $189,000.00 statutory loss payment it made pursuant to Section 8(e)(12) against its obligation to make that payment, almost eight years has elapsed since Petitioner's accident and the loss of his leg. The full statutory benefit, representing 225 weeks of compensation, has long since fully accrued and any credit arising from said payment has fully accrued as well. Respondent is not now entitled to an additional or ongoing credit against permanent total disability benefits awarded herein under Section 8(f) for the complete disability which has rendered Petitioner wholly and permanently incapable of working in any future gainful employment.

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

Betty Ann Jorgensen,

Petitioner,

vs.

NO: 14 WC 002083

Mundelein School District 75,

Respondent,

14IWCC0887

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,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 14, 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: OCT 10 2014
MJB/bm
o-10/6/2014
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

JORGENSEN, BETTY ANN
Employee/Petitioner

Case# **14WC002083**

MUNDELEIN SCHOOL DISTRICT 75
Employer/Respondent

14IWCC0887

On 3/14/2014, 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:

0013 DUDLEY & LAKE LLC
PETER SCHLAX
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

0863 ANCEL GLINK
ERIN BAKER
140 S DEARBORN 6TH FL
CHICAGO, IL 60603

14IWCC0587

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)

BETTY ANN JORGENSEN,
Employee/Petitioner

v.

MUNDELEIN SCHOOL DISTRICT 75,
Employer/Respondent

Case # 14 WC 02083

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 **Woodstock**, on **February 5, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0887

FINDINGS

On the date of accident, **December 16, 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 **$73,140.50**; the average weekly wage was **$1,828.51**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **one** dependent child.

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

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

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

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

ORDER

Respondent shall pay to Petitioner temporary total disability benefits of **$1,219.00**/week for **7-2/7** weeks, commencing **December 17, 2013** through **February 5, 2014,** as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of **$4,824.00,** as provided in Section 8(a) of the Act, subject to the provisions of the medical fee schedule of Section 8.2. Respondent shall be given a credit for any 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 pay for post-surgical care as prescribed by Dr. Zoellick and Dr. Hamming.

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

March 10, 2014
Date

ICArbDec19(b)

MAR 14 2014

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

Petitioner testified she works for Respondent as a special education teacher and bus aide. On the date of accident, December 16, 2013, she arrived per her usual starting schedule shortly after 6:00 a.m. Petitioner testified she was required to be at the school early while it was still dark in order to fulfill her bus aide duties. She parked in Respondent's parking lot located on school grounds. She then walked across an adjacent bus lane, which was also located on school grounds and was under the control of Respondent's maintenance personnel, when she slipped and fell on black ice, fracturing her left arm.

Petitioner testified that at the time of her fall, she was walking towards a single door school entrance for which she had been provided a key by Respondent. Following the fall, she was able to get to her feet, not without difficulty, and walked into the school building, where co-workers summoned an ambulance. The ambulance transported Petitioner to the hospital emergency room at Advocate Condell Medical Center. Petitioner after being seen in the emergency room, ultimately underwent surgery.

Mr. Robert Tropple testified on behalf of Respondent. Mr. Tropple testified he is in charge of all facilities maintenance for Respondent. He testified he is familiar with the location of the fall, and had overall responsibility for plowing and salting the area. Mr. Tropple testified the parking lot and bus lane were on school property and maintained by himself and other school employees. Mr. Tropple testified the bus lane would have to be repeatedly salted due to the tendency of ice to form.

Based upon the above, the Arbitrator finds that Petitioner's fall did arise out of and in the course of her employment with Respondent on December 16, 2013. The accident occurred on Respondent's premises in an area under the control and maintenance of Respondent. Petitioner was walking towards a building door for which she had been provided a key by Respondent. Although the school parking lot was open to the public, provided individuals registered at the school upon arrival, Petitioner was placed at an increased risk due to her employment duties which required her to be early and walking toward a specific entrance for which she had been provided a key. Petitioner testified the entrance otherwise remained locked during the work day.

Respondent cited *Wal-Mart Stores Inc. v. Industrial Commission,* 326 Ill.App.3d 438 (2001), where the claimant was being picked up from work by a friend who had pulled into the lot open to the general public. The court in that case found no increased risk to the employment under those circumstances. In *Caterpillar Tractor v. Industrial Commission,* 129 Ill.2d 52 (1989), the claimant injured herself when she stepped off a common curb located on the employer's premises. There were no allegations of any other hazards.

In the case before this Arbitrator, Petitioner was walking on a bus lane in an attempt to enter a specified door to which she had been given a key by Respondent. The lane was utilized for school buses in order to drop off students. Petitioner in this case slipped on black ice. Taken as a whole, these factors placed Petitioner at an increased risk to suffer the fall she experienced on that date, see *Suter v. Illinois Workers' Compensation Commission,* 2013 Ill.App. 4th, 130049 WC.

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

See findings of this Arbitrator in "C" above.

Petitioner testified that following her fall, she was transported by ambulance to the emergency room of Advocate Condell Hospital, where she was diagnosed and treated for a fractured left arm. Petitioner underwent an open reduction and internal fixation of the fracture site by Dr. Zoellick on December 18, 2013. (Px2) Petitioner testified she remains under the care of Dr. Hamming and Dr. Zoellick at Illinois Bone and Joint Institute, where she is undergoing occupational therapy. She is currently restricted from working.

Based upon the above, the Arbitrator finds the above condition of ill-being to be causally related to the accidental injury of December 16, 2013.

J. Were 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 incurred charges from Advocate Condell Medical Center in the amount of $4,824.00 on the date of accident. Respondent has stipulated that it will hold Petitioner safe and harmless from all medically related charges incurred as a result of this accidental injury, provided the case was found to be compensable.

See findings of this Arbitrator in "C" above.

Based upon said findings, Respondent is found to be liable to Petitioner for all medical charges incurred as a result of treatment for this particular accidental injury.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" and "F" above.

Petitioner testified she remains under the post surgical care of Dr. Zoellick and Dr. Hamming.

Based upon said findings, the Arbitrator further finds that Respondent is liable for such prospective medical care and treatment in this matter.

L. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" above. Petitioner as been consistently prescribed to be off work by her treating physicians commencing December 17, 2013 through the hearing before this Arbitrator. Petitioner is also in need of further medical care and treatment.

Therefore, based upon the above, the Arbitrator further finds that as a result of this accidental injury, Petitioner is entitled to receive temporary total disability benefits from Respondent commencing December 17, 2013 through February 5, 2014.

M. Should penalties or fees be imposed upon Respondent?

Petitioner has sought penalties and attorneys fees from Respondent for a delay of payment of temporary total disability benefits.

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator denies all claims for penalties and attorneys fees in this case as Respondent's delay in payments were due to a question of the location of the fall. Therefore, the Arbitrator does not feel the delay was unreasonable or vexatious and declines to award penalties in this case.

N. Is Respondent due any credit?

Petitioner and Respondent stipulated at trial that if found to be liable, Respondent would hold Petitioner safe and harmless from all medical charges incurred as a result of this accidental injury. In addition, the parties further stipulated that Respondent would receive a credit pursuant to Section 8(j) of the Act and would hold Petitioner safe and harmless from all attempts at reimbursement by the group health insurance carrier.

This Arbitrator so finds under these stipulations.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelly Margrave,

Petitioner,

vs.

NO: 11 WC 47239

14IWCC0888

Southwest Airlines,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on Remand from the Circuit Court of Illinois. The Circuit Court remanded the matter back to the Commission with the following instructions:

> "[T]he Commission is ordered to provide a detailed, reasoned opinion to support its conclusions on the issues of accident, causation, TTD, past medical, prospective medical treatment, penalties and fees. The Commission is admonished, in its findings of credibility in particular, to address the weight given to the evidence of record and to provide a reasoned explanation of the basis for its decision."

Therefore, pursuant to the instructions from the Circuit Court, the Commission issues the following:

Procedural History

This matter was originally tried before Arbitrator Gallagher on February 8, 2013 as a 19(b) hearing. Arbitrator Gallagher issued his decision on April 16, 2013. In his decision, Arbitrator Gallagher made the requisite findings of fact and conclusions of law, and found that Petitioner suffered a work-related injury on August 7, 2011, and awarded temporary total disability benefits and medical expenses. The Arbitrator further granted Petitioner's Petition for Penalties and Attorney's fees and awarded penalties under Sections 19(k) and 19(l) of the Illinois Workers' Compensation Act (hereinafter "Act") and attorney's fees under Section 16 of the Act.

Respondent filed a Petition for Review and oral arguments were held before the Commission on November 21, 2013.

Section 19(e) of the Act states, in pertinent part, that a Commission decision "shall be concise and shall succinctly state the facts and reasons for the decision." 820 ILCS 305/19(e) 2013. Section 19(e) further states:

> The Commission may adopt in whole or in part, the decision of the arbitrator as the decision of the Commission. When the Commission does so adopt the decision of the arbitrator, it shall do so by order. Whenever the Commission adopts part of the arbitrator's decision, but not all, it shall include in the order the reasons for not adopting all of the arbitrator's decision." 820 ILCS 305/19(e) (2013).

On December 5, 2013, pursuant to Section 19(e) of the Act, the Commission modified the Arbitrator's decision regarding penalties and attorney's fees by vacating the award for penalties and fees under Sections 19(k) and 16, modifying the award for penalties under Section 19(l), and otherwise affirmed and adopted the Arbitrator's decision regarding all other issues. The Commission, as required by Section 19(e) of the Act, explained, in detail, the reason for not adopting the Arbitrator's decision regarding penalties and fees under Sections 19(k) and 16, and modifying the award for penalties under Section 19(l).

Respondent appealed the Commission Decision to the Circuit Court. Despite the Commission's strict adherence to the requirements of Act in its decision, on June 11, 2014, the Circuit Court remanded the case back to the Commission with instructions to "provide a detailed, reasoned opinion to support its conclusions on the issues of accident, causation, TTD, past medical, prospective medical treatment, penalties and fees" and to "address the weight given to the evidence of record and to provide a reasoned explanation of the basis for its decision." Therefore, pursuant to the order from the Circuit Court, but in complete derogation of the Act's express requirement that Commission decisions be concise and succinct, the Commission makes the following detailed conclusions of law:

Accident and Causal Connection

The Arbitrator concluded that Petitioner sustained an accidental injury arising out of and

in the course of her employment for Respondent on August 7, 2011, to her right ankle and right knee. The Arbitrator further concluded that subsequent to the accident of August 7, 2011, Petitioner experienced symptoms to the low back and that these symptoms are causally related to the accident of August 7, 2011. The Arbitrator also concluded that, because of the injury and instability in Petitioner's right leg, that she sustained a fall and injured her right shoulder and that the right shoulder injury is causally related to the August 7, 2011 accident. The Arbitrator detailed the facts of the case and his reasoning for his conclusions. The Commission again hereby affirms and adopts the Arbitrator's findings of facts and conclusions of law regarding accident and causal connection.

Credibility

Based on the totality of the evidence and our complete review of the record, the Commission finds Petitioner credible. In doing so, the Commission again affirms and adopts the Arbitrator's findings of facts and conclusions of law finding Petitioner's testimony credible.

Temporary Total Disability

The Arbitrator concluded that Petitioner is entitled to payment of temporary total disability benefits from August 7, 2011 through February 8, 2013, a period of 78-4/7 weeks. The Arbitrator detailed the facts of the case and his reasoning for his conclusion. The Commission again hereby affirms and adopts the Arbitrator's findings of facts and conclusions of law regarding temporary total disability benefits.

Medical Expenses

The Arbitrator concluded that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred by Petitioner for such treatment. The Arbitrator detailed the facts of the case and his reasoning for his conclusion. The Commission again hereby affirms and adopts the Arbitrator's findings of facts and conclusions of law regarding medical expenses.

Prospective Medical Treatment

The Arbitrator concluded that Petitioner is entitled to prospective medical treatment, including, but not limited to, diagnostic procedures and surgeries as recommended by Dr. Gornet and Dr. Solman. The Arbitrator detailed the facts of the case and his reasoning for his conclusion. The Commission again hereby affirms and adopts the Arbitrator's findings of facts and conclusions of law regarding prospective medical care.

Penalties and Attorney's Fees

The Commission vacated the Arbitrator's award of penalties and attorney's fees under Sections 19(k) and 16, and modified the Arbitrator's award of penalties under Section 19(l). Below is a reiteration of our original findings and conclusions on the issue:

The Arbitrator awarded penalties under Section 19(k) and 19(l), as well as attorney's fees under Section 16 of the Act, noting that:

> "While Dr. Phillips opined that Petitioner did not sustain a lumbar spine injury, he did state that Petitioner sustained a gluteal strain

injury for which additional treatment was indicated and for which Petitioner was subject to work restrictions. Respondent failed to tender to the Petitioner both the treatment recommended by Dr. Phillips as well as any offer of the work conforming to Dr. Phillips' work restrictions." (Arb.Dec.8)

The Arbitrator is correct that Respondent failed to follow the treatment recommendation made by its Section 12 examiner, Dr. Phillips. However, the Commission notes that while Dr. Phillips diagnosed Petitioner as having a gluteal strain, Dr. Phillips did not attribute the gluteal strain to the August 7, 2011 work accident. Respondent's decision to not follow Dr. Phillips' treatment recommendations falls in line with its stance that Petitioner suffered right knee and right ankle injuries on August 7, 2011, but not a low back injury. The Commission further notes that Dr. Weber, another of Respondent's Section 12 examiners also found that Petitioner's lumbar condition was not causally related to the August 7, 2011 work accident. The Commission does not find Respondent's reliance on its Section 12 examiners unreasonable or vexatious. Therefore, the Commission vacates the Arbitrator's award of penalties and attorney's fees under Sections 19(k) and 16 of the Act.

The Commission does, however, agree with the Arbitrator's award of penalties under Section 19(l) of the Act. The Commission notes that Respondent terminated temporary total disability benefits on December 4, 2011. (T.18) Respondent also stopped authorizing additional treatment after December 4, 2011. (T.18) Yet, the records show that neither Dr. Phillips or Dr. Weber found Petitioner to be at maximum medical improvement regarding Petitioner's right knee. (RX3 & RX4) The records further show that while Petitioner had started to focus more on her low back pain as time went on, she continued to have right knee problems. Finally, Dr. Solman, Petitioner's Section 12 examiner, ordered a patellofemoral chondroplasty with possible lateral retinacular release and attributed the need for the surgery to the August 7, 2011 accident. As noted above, Respondent stipulated to Petitioner's right knee injury. The record establishes that Petitioner continued to have right knee problems and had not been released from care regarding her right knee injury. Regardless of its stance that it was not responsible for Petitioner's low back condition, Respondent had taken responsibility for Petitioner's right knee condition. Therefore, its failure to pay medical expenses and temporary total disability benefits regarding Petitioner's ongoing right knee problems after Petitioner had made numerous written demands for payment of benefits constituted a delay in payment of benefits.

Respondent discontinued temporary total disability benefits and stopped authorizing treatment for Petitioner on December 4, 2011. Under Section 19(l) of the Act, Petitioner is entitled to $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been withheld or refused, not to exceed $10,000.00. *820 ILCS 305/19(l) (2007)* From December 4, 2011 through February 8, 2013 (date of hearing) is 433 days. Based on the above and the limits set in Section 19(l), the Commission affirms the Arbitrator's award of $10,000.00 in penalties under Section 19(l) of the Act.

For the reasons set forth above, the Commission again modifies the decision of the Arbitrator as stated above, 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).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 16, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $660.00 per week for a period of 78-4/7 weeks, from August 7, 2011 through February 8, 2013, that being the period of temporary total incapacity for work under Section 8(b), and that as provided in Section 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 reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Section 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.

IT IS FURTHER ORDERD BY THE COMMISSION that Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, diagnostic procedures and surgeries as recommended by Dr. Gornet and Dr. Solman.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

14IWCC0888

DATED: OCT 10 2014
MJB/ell
disc-10/06/14
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

14IWCC0889

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

Joshua Allenbaugh,

Petitioner,

vs. NO: 13 WC 18975

City of Peoria Police Dept.,

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, notice, causal connection, medical expenses, prospective medical treatment and temporary total disability and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident as stated below. Petitioner, a 40-year-old police officer, alleged that he injured his neck and low back in a motor vehicle accident on March 5, 2013. The accident occurred on Petitioner's commute in his personal vehicle to a mandatory training session. The training was to occur on a regular work day and at the same location where Petitioner regularly reports for duty, however the training was to be held at 8:00 a.m. and Petitioner's usual work began at 2:45 p.m. The Arbitrator found that Petitioner's accident occurred in the course of and arose out of his employment by Respondent. After reviewing all of the evidence and for the following reasons we disagree.

Findings of Fact and Conclusions of Law:

Petitioner lives in East Peoria and works in Peoria; he drives his personal vehicle to and from the police department. His regular hours are 2:45 p.m. to 11:00 p.m. He testified that he could also be called in to work in an emergency situation. He is also required to attend training

sessions. Petitioner was issued written orders on January 28, 2013 directing him to attend a training session to occur at 8:00 a.m. on March 5, 2013 at the Peoria Police Department. (RX 5) On cross-examination, Petitioner agreed that he was a salaried employee and would not receive any additional compensation to attend training. The training session was to be held at the Peoria Police Department. He would not be required to work his regular shift that day in addition to the mandatory training session.

Petitioner testified on direct-examination that in his opinion he works "24/7" because he could always be called in for an emergency. Also, he believed that he was required to respond if any unlawful act occurred in his presence, even while off-duty. On cross-examination, Petitioner agreed that at the time of the accident he was not responding to unlawful conduct nor had he been been called in for an emergency. Assistant Chief of Police Jerry Mitchell testified for Respondent. He disagreed that Petitioner's job could be considered "24/7." Assistant Chief Mitchell explained that only specific units, none of which Petitioner is assigned to, are issued work phones and vehicles and are compensated accordingly for on-call status. Assistant Chief Mitchell also disputed Petitioner's testimony that off-duty officers are absolutely required to act in the presence of unlawful conduct. He explained that off-duty officers are to use their discretion as to whether to act under the circumstances, however they are absolutely required to report unlawful conduct and to be a witness.

Petitioner testified that he left his house at 7:45 a.m. on March 5, 2013, driving his personal vehicle and transporting the police equipment he was ordered to bring to training. Petitioner testified that it was snowing that morning and there was ice and slush on the roadway. An oncoming car crossed into his lane and struck the left front side of his truck. Petitioner testified that "it forced me off the roadway and into a ditch where I struck several trees." Petitioner testified that he immediately called 9-1-1 and the police department. He spoke with Sergeant Bainter and reported that he was involved in an accident on his way to training and that he was going to the hospital and would not be able to attend the training.

The police officer who responded to the scene of the accident, Chris Hutt, testified via deposition on July 25, 2013. (PX 16) Officer Hutt testified that he was called to the scene at approximately 7:50 a.m. He recalled that it was snowing and that the road was covered in slush. When he approached the scene he noticed Petitioner's vehicle in a line of trees alongside the road and the other vehicle in the middle of the roadway. Petitioner was still in his vehicle when Officer Hutt arrived. Officer Hutt testified that he recognized Petitioner as an acquaintance. He told Petitioner not to move from his truck "because of his injuries. And in my opinion he wasn't able to get out anyway because of the damage and the trees around it." Officer Hutt recalled that Petitioner was concerned about getting to his training session. Petitioner testified that Officer Hutt removed Petitioner's police equipment from Petitioner's truck after Petitioner was taken to the hospital and later returned the equipment to Petitioner's wife.

The East Peoria Fire Department arrived at the scene at 8:11 a.m. and found Petitioner complaining of back pain. Petitioner was immobilized for spinal precautions and transported to

OSF St. Francis. The East Peoria Fire Department records state that Petitioner had swerved to avoid a collision with the other driver and that the damage to Petitioner's vehicle appeared to be minor, the airbag did not deploy, and there was no intrusion into the passenger compartment. Petitioner was wearing a seatbelt at the time of accident and the Fire Department records indicate no other injuries. (RX 3)

At the OSF St. Francis emergency room, Petitioner complained of left paraspinal back pain. He was not admitted to the hospital but was treated with prescription painkillers and muscle relaxers and issued a slip to remain off of work until March 7, 2013. Petitioner was diagnosed with a mid-back strain and was instructed to follow up with Dr. Crnkovich. (RX 4, PX 8) Petitioner testified that he believes that he stopped by the police department after he left the hospital and told them he would not be back at work until March 8, 2013. Petitioner testified that on March 6, 2013 or March 7, 2013 he called in to work and spoke with the administrative secretary, Christy Williams. He told Ms. Williams that his back was hurting and told her about the accident and she rescheduled Petitioner for training on March 8, 2013. Petitioner also testified that Ms. Williams accepted his medical paperwork related to the accident. Ms. Williams did not testify at hearing.

Petitioner testified that he sought treatment with his chiropractor, Dr. Childs, on March 19, 2013 because he was having severe back spasms. Petitioner denied that he had any treatment for his low back or neck in 2012 or 2013 prior to the date of accident. Records offered into evidence by Respondent from Dr. Childs' practice, JSK Chiropractic, between September of 2006 and December of 2012 show that Petitioner in fact had a history of chiropractic treatment for stiffness and soreness in his neck, upper back and mid and lower back. (RX 9)

Petitioner was examined by Dr. Crnkovich on March 28, 2013. Petitioner gave a history of a motor vehicle accident on March 5, 2013 with low back spasms and pain in the mid-lower back shooting down his right side. Dr. Crnkovich ordered physical therapy and excused Petitioner from work retroactively from March 5, 2013. He issued work restrictions of no lifting or prolonged sitting or standing. (PX 10, PX 13) The following day, Petitioner requested light duty work "as a result of a non-duty related auto accident/injury" in a written memo to the Support Services Captain. (RX 7) He testified "I was told this wasn't a duty related accident" and that he was told by Assistant Chief Mitchell to state in the memo that it was a non-duty related accident. Assistant Chief Mitchell denied that he told Petitioner that he could get light duty only if he claimed his injury was not work-related. Petitioner admitted on cross-examination that he has had prior workers' compensation claims against Respondent and is familiar with the procedures for making claims; he agreed that he did not go through those procedures with respect to the accident of March 5, 2013.

Petitioner remained on light duty from March 29, 2013 through June 3, 2013. He was then placed back on full duty. Assistant Captain Mitchell testified that Petitioner was returned to full-duty because he failed to update the department as to what his restrictions were and the timetable of his expected return to full duty. On July 11, 2013 Petitioner wrote a new memo

requesting light duty again "for an injury sustained as the result of a motor vehicle accident." (RX 8) He was then returned to light duty and remained on light duty on the date of hearing. Petitioner agreed on cross-examination that he took two vacations while on light duty and participating in physical therapy. The vacations were a big game hunting trip to Texas and a fishing trip to Alabama. He denied that he exceeded his light duty restrictions while on his vacations and he testified that he was cleared by his physical therapist and his doctor.

Petitioner was last seen by Dr. Crnkovich on July 22, 2013. Dr. Crnkovich recommended continued physical therapy and light duty work, with no projection for a full duty release. Dr. Crnkovich testified via deposition on August 22, 2013. Dr. Crnkovich is board certified in internal medicine, and as part of his practice he sees patients with back strains and bulging discs. Dr. Crnkovich opined that he believed Petitioner's symptoms of neck, thoracic and lumbar pain were the result of the injury sustained during the motor vehicle accident. He testified that he relied on Petitioner history that he had no complaints of pain prior to the motor vehicle accident. Dr. Crnkovich testified that he had been treating Petitioner since 2004 or 2005 but he was not sure whether Petitioner had ever mentioned prior chiropractic treatment. Dr. Crnkovich interpreted Petitioner's lumbar MRI as "fairly unremarkable until you got to the L5-S1 level. Then, you know, there was some arthritis" and "a little disc bulge. It was not dramatic, but, nonetheless, the patient had pain." Dr. Crnkovich testified that Petitioner did not have any neurological deficits. He believed that work restrictions to prevent re-injury would be necessary until Petitioner could be examined by a back specialist. He recalled that Petitioner went on two vacations, one of which was a fishing trip, but he did not know any details about Petitioner's activities on vacation. He testified that restrictions should be adhered to whether or not at work.

Petitioner testified that he currently notices pain on the right side of his low back that radiates. He occasionally feels a sharp pain between his quadriceps and hamstring and a shooting pain to the front of his heel.

Respondent argues that the accident did not occur in the course of or arise out of Petitioner's employment and furthermore that Petitioner failed to provide timely notice to Respondent of his alleged work injury. The Arbitrator found that the order requiring the Petitioner to appear at his mandatory training in the morning of March 5, 2013 was sufficient evidence to find a compensable accident. We do not agree. Although Petitioner was required to attend the training at a specific place and time, we do not find an exception to the general rule that the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest. Petitioner lived outside of the City of Peoria, he drove his personal vehicle to and from work, he was not reimbursed for travel expenses, he was not directed to travel a particular route, and he was not performing any activities of employment at the time of accident.

Accidental injuries to otherwise off-duty police officers have been found compensable in some cases that are distinguishable from the case at hand. In these cases, off-duty officers were injured while performing activities in their official capacity; responding to unlawful activity or

providing aid in an emergency situation. *Keller v. Industrial Comm'n*, 125 Ill. App. 3d 486 (Ill. App. Ct. 5th Dist. 1984); *County of Peoria v. Industrial Comm'n*, 31 Ill. 2d 562 (Ill. 1964). In another case, injuries to a police sergeant from a car accident on his lunch break were found compensable where the sergeant drove an unmarked squad car with a radio. Not only was he on-call "24/7," he always had to have the radio on. The Court found that the employer "intended to retain authority over the claimant at the time his injuries arose." *Springfield v. Industrial Comm'n,* 244 Ill. App. 3d 408 (Ill. App. Ct. 4th Dist. 1993)

Under the circumstances of the case at hand, we do not find that Petitioner's accident was incidental to his employment by Respondent where he was merely commuting from his home to his usual work location in his personal vehicle. The only factor that could support compensability is that Petitioner was directed to attend training at a different time than his normal work shift. We do not find this to be a sufficient basis for compensability. We do not believe that the travelling employee doctrine should be extended to include any claimant who is involved in an accident on their way to their normal workplace, driving their personal vehicle without any additional compensation and not performing any duties incidental to their employment when the only basis for finding so is a department order that the claimant's regular work shift was different for that particular day.

With respect to the notice requirement, although we do not find that Petitioner's accident arose out of and in the course of his employment, we agree with the Arbitrator that Petitioner's notice of the alleged accident was sufficient. The purpose of the notice requirement is to enable an employer to investigate an alleged accident. Notice is reasonable as long as the employer possesses known facts related to the accident within forty-five days. Petitioner testified without rebuttal that he notified Respondent on the date of accident that he had been in a motor vehicle accident, was in the hospital and would not be able to attend training. Under the circumstances of this case, Petitioner's notice would not be defective for failure to specifically notify Respondent that the accident was allegedly work-related. Whether Petitioner's accident arose out and in the course of his employment is a legal question ultimately to be decided by the finder of fact.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed October 24, 2013 is hereby reversed and Petitioner's claim for benefits under the Act is denied.

14IWCC0389

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

DATED: OCT 10 2014
RWW/plv
o-8/26/14
46

Ruth W. White

Daniel R. Donohoo

DISSENT

I must respectfully dissent from the majority's finding that Petitioner failed to prove that his accidental injuries arose out of the scope and in the course of his employment.

The Petitioner was a police officer for the City of Peoria. On March 5, 2013, the Respondent ordered him to attend a mandatory training session. This mandatory session took place during a shift different from the one the Petitioner was ordinarily assigned.

The Petitioner was doing more than merely commuting to and from his place of work. He was commuting at the request of his employer and doing so at a time which he normally wasn't required to report to work. The Petitioner became a "travelling employee" and was subject to the street risks that he encountered. The employer placed the Petitioner in a hazardous condition since the weather that day was snowy and slushy. Because of the weather, Petitioner was involved in a motor vehicle accident.

The Arbitrator should be affirmed and adopted.

DATED: OCT 10 2014

Charles J. DeVriendt

14IWCC0890

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

Jose F. Ramirez,

Petitioner,

vs. NO: 07 WC 53073

Thermo Fisher Scientific,

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 expenses, prospective medical treatment, temporary total disability benefits and penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator on the issue of penalties and fees as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner claimed entitlement to temporary total disability benefits from April 16, 2007 through June 13, 2007, October 30, 2007 through August 4, 2008, and November 3, 2008 through the date of hearing, June 25, 2013, a total of 179 and 1/7 weeks. The Arbitrator found that Petitioner was not entitled to temporary total disability benefits after May 31, 2011 and failed to sustain his burden of proof to support a claim for prospective medical treatment. Respondent actually paid temporary total disability benefits through October 23, 2012 and for an additional period from January 4, 2013 through February 15, 2013, a total of 250 and 6/7 weeks, for which Respondent was awarded credit. However, the Arbitrator found that several payments

of temporary total disability benefits were either late or underpaid, and he awarded $12,745.49 in §19(k) penalties. The Arbitrator also found that Respondent unreasonably delayed making payments of temporary total disability benefits to Petitioner with respect to the time period of November 3, 2008 through October 8, 2009 and he awarded $10,000 in §19(l) penalties. The Arbitrator further awarded $2,386.73 in §16 attorney's fees. Respondent argues on review that the Arbitrator's award was not supported by a preponderance of the evidence and penalties and fees are not warranted. After reviewing all of the evidence, we reverse the Arbitrator's award of §19(k) penalties and §16 fees. Respondent offered its Exhibit #11, a ledger documenting payments made over the lengthy course of this claim. We note that there is no testimony supporting Petitioner's claim that temporary total disability benefits were unreasonably or vexatiously delayed or refused or intentionally underpaid. We do not find that mere dates contained in Respondent's Exhibit #11 identifying when payments were made is sufficient evidence that Respondent acted in bad faith. Respondent filed responses to Petitioner's petitions stating its defense to causal connection and we find no evidence that Respondent has engaged in frivolous defenses which do not present a real controversy. In conclusion, we affirm the Arbitrator's award of $10,000 in §19(l) penalties and reverse the Arbitrator's award of §19(k) penalties and §16 fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed December 31, 2013 is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $10,000 as provided in §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $377.87 for 179 and 1/7 weeks, commencing April 16, 2007 through May 21, 2007; October 30, 2007 through August 5, 2008; and November 3, 2008 through May 31, 2011, as provided in §8(b) of the Act. Respondent will receive a credit for the 250 and 6/7 weeks of temporary total disability paid, totaling $94,787.44.

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.

14IWCC0890

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

DATED: OCT 10 2014
RWW/plv
o-9/10/14
46

Ruth W. White

Daniel R. Donohoo

DISSENT

I must respectfully dissent and would affirm the Arbitrator's award of $12,745.49 in Section 19(k) penalties and $2,386.73 in Section 16 attorney's fees. Respondent repeatedly delayed payment of temporary total disability (TTD) benefits for months at a time and failed to provide evidence that its failure to timely pay those benefits was not unreasonable and vexatious. Despite agreeing that Petitioner was entitled to TTD as of November 3, 2008, Respondent's own documents prove that Respondent did not pay any benefits until May 27, 2009 when it paid $5,000. (Rx11). Moreover, this payment only covered the TTD benefits that had accrued through February 3, 2009. Respondent then delayed another four months before making another payment of $4,500.00 in October 2009. Respondent continued to make late payments and underpayments. I would find that Respondent's repeated and excessive delays in the payment of TTD were unreasonable and vexatious in this case.

Charles J. DeVriendt

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

14IWCC0890

RAMIREZ, JOSE F
Employee/Petitioner

Case# **07WC053073**

THERMO FISHER SCIENTIFIC INC
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:

0247 HANNIGAN & BOTHA LTD
RICHARD D HANNIGAN
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
MATTHEW IGNOFFO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

14IWCC0890

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)

Jose F. Ramirez
Employee/Petitioner

v.

Thermo Fisher Scientific Inc.
Employer/Respondent

Case # **07** WC **53073**

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 **6-25-13 and 9-23-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **03-16-07**, 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 **$29,473.60**; the average weekly wage was **$566.80**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of **$94,787.44** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $377.87 for 179 and 1/7 weeks, commencing 4-16-07 through 5-21-07; 10-30-07 through 8-5-08; and 11-3-08 through 5-31-11, as provided in Section 8(b) of the Act. Respondent will receive a credit for the 250 and 6/7 weeks of TTD paid, totaling $94,787.44.

Penalties

Respondent shall pay to Petitioner penalties of **$2,549.08**, as provided in Section 16 of the Act; **$12,745.40**, as provided in Section 19(k) of the Act; and **$10,000**, as provided in Section 19(l) of the Act as Petitioner has not sustained his burden of proof to support a claim for penalties.

Prospective Medical Treatment

Prospective medical treatment was not an issue identified on the Request for Hearing form. Regardless, Petitioner has not sustained his burden of proof to support a claim for prospective medical treatment.

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

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

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

Carl Lee
Signature of Arbitrator

12/23/13
Date

ICArbDec19(b)

DEC 31 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jose F. Ramirez
Employee/Petitioner

v.

Thermo Fisher Scientific Inc.
Employer/Respondent

Case # **07** WC **53073**

FINDINGS OF FACT

Petitioner testified he was employed with Respondent for seven years on the date of March 16, 2007 when he fell at work while traversing stairs. Tr. at 13,14. He testified he injured his right knee and left shoulder in the fall. Tr. at 14.

In considering medical conditions and care prior to this event, the Arbitrator notes Petitioner admitted to previous right knee problems dating back to generalized pain beginning in September of 2004. Tr. at 173. A February 1, 2005 right knee MRI disclosed mild tricompartmental osteoarthritis as well as chondromalacia and small joint effusion. PX #4 at 76. Petitioner underwent right knee surgery for this issue on April 5, 2005 performed by Dr. Steven Levin. Tr. at 171, PX #3, PX #4 at 101. Petitioner advised Dr. Neal of ongoing right knee pain following this surgery. Tr. at 91.

Returning to the event in 2007, Petitioner presented to Condell Immediate Care Center on March 16, 2007 stating he was going down stairs and fell on his right knee and left shoulder. Petitioner complained of pain to right knee and left shoulder. The diagnosis was sprain right knee and left shoulder strain. PX #1.

Three weeks later, on April 5, 2007, Petitioner presented to Dr. Levin. The record notes he performed Petitioner's original non-work-related right knee surgery two years prior consisting of a partial meniscectomy. After examination, the diagnosis was knee strain with medial collateral ligament versus meniscus tear. Dr. Levin recommended a MRI of the right knee. PX #3.

On April 19, 2007, Petitioner presented to Dr. Levin. An x-ray of the left shoulder was performed with an impression of normal shoulder joint; osteoarthritis of the acromioclavicular joint; cortical irregularity of the inferior aspect of the scapula just medial to the glenoid rim. PX #3.

On April 23, 2007, Petitioner had a MRI of the right knee with an impression of postoperative changes related to partial medial meniscectomy; meniscal cyst within the posterior horn of the medial meniscus, suspicious for a retear; stable mild tricompartmental osteoarthritis; and moderate diffuse thinning of the patellar articular cartilage with interval improvement in previously seen bone marrow edema at the patellar apex. PX #3.

On May 2, 2007, Petition had a left shoulder arthrogram with an impression of abnormal extension of contrast into at least a partial thickness tear of the rotator cuff, without extension into the subacromial-subdeltoid bursa to suggest full thickness tear. PX #3.

Four months later, on October 30, 2007, Petitioner presented to Evanston Northwestern for a left shoulder arthroscopic subacromial decompression, debridement, and rotator cuff repair. PX #4.

On December 1, 2007, Petitioner presented to Dr. Levin complaining of left shoulder pain as well as right knee pain. Dr. Levin stressed the importance of physical therapy on his left shoulder and not actively participating could result in frozen shoulder. Regarding his right knee there was no erythema, color or effusion. The impression was mild degenerative arthritis of the knee. PX #3.

On January 3, 2008, Petitioner presented to Dr. Levin stating his left shoulder felt better, but he had stiffness and his right knee was "much, much better." PX #5 at 53. Petitioner had no complaints regarding his knee on this date. Id. It was noted Petitioner had full painless range of motion in the knee. Id. The left shoulder pain appeared to be out of proportion to findings and this apparently had been an issue since Dr. Levin began treating Petitioner. Id.

On March 2, 2008, Petitioner presented to Dr. Levin for follow up of his shoulder. PX #5 at 43. Again the complaints appeared to be out of proportion to exam. Id. The record notes Petitioner was doing fairly well. Dr. Levin noted he has known Petitioner for quite some time and Petitioner has a low pain tolerance. Id.

On May 8, 2008, Petitioner presented to Dr. Levin stating his left shoulder had mild pain, but overall no real complaints. PX #5 at 22. Petitioner had reached maximum medical improvement. Id. Dr. Levin stated Petitioner had vague complaints regarding his knee, but Dr. Levin could not come up with any further reason to explain away the patient's pain. Id.

On July 24, 2008, Petitioner presented to Dr. Levin noting he had been participating in work hardening. PX #5 at 18. There were no complaints regarding the shoulder or knee. Id. Petitioner was to complete work hardening and as of August 5, 2008 he was released to full duty work. Id. Petitioner testified Dr. Levin told him there was nothing further he could do for Petitioner. Tr. at 185.

Following a release from work conditioning Petitioner returned to work for Respondent from August 6, 2008 through November 2, 2008. Tr. at 183.

On November 3, 2008, Petitioner was referred by his attorney to Dr. Pietro Tonino. PX #8 at 1. Petitioner complained of left shoulder and right knee pain. On November 5, 2008, Petitioner underwent X-rays of the right knee and left shoulder. PX # 8 at 72, 74. X-ray impressions of the right knee revealed mild tricompartmental degenerative joint disease most pronounced in the patellofemoral compartment. Impression of the left shoulder revealed no fracture or dislocation with a small osteophyte seen at the glenohumeral joint. Id.

On May 28, 2009 a left shoulder MRI impression revealed a minimal partial tear of the rotator cuff, subacromial bursitis, moderate to severe acromioclavicular joint arthropathy, trace joint effusion, and mild to moderate glenohumeral joint space narrowing and degenerative changes. PX #8 at 4. A right knee MRI of the same date indicated a horizontal tear of the posterior horn of the lateral meniscus, small bony contusions at the posterior inferior surface of the patella, and mild chondromalacia of the medial femoral condyle and the tibial plateaus. PX #2 at 105.

On October 28, 2009, Petitioner presented to Dr. Verma for an IME. RX #7. He noted Petitioner would require a right knee arthroscopy, confirming the condition was causally related to the work injury. Id.

On March 25, 2010, Petitioner was evaluated by Dr. Tonino. PX #8 at 107. Petitioner continued to complain of left shoulder and right knee pain. Dr. Tonino recommended right knee surgery, but Petitioner was not sure he wanted it. Id. Petitioner underwent an x-ray of the left shoulder. PX #8 at 115. Impressions revealed no fracture or dislocation, but did see mild degenerative joint disease at the glenohumeral and AC joints. Id. An x-ray of the

right knee taken on this date revealed minimal tricompartmental degenerative joint disease and miniscule joint effusion. PX #8 at 114.

On April 20, 2010, Petitioner presented for a right knee arthroscopy performed by Dr. Tonino. PX #8 at 30.

On July 22, 2010 Petitioner followed up with Dr. Tonino. PX #8 at 90. On exam, Petitioner's knee range of motion was full. According to Dr. Tonino Petitioner would benefit from alternative treatment of the chondromalacia which was noted at surgery. Id.

On September 30, 2010, Petitioner presented for treatment with Dr. Belich. PX #14 at 5. The impression was patellofemoral arthritis, right knee. Id. He was taking two Advil a week which was not consistent with a reported pain level of 8 out of 10. Id.

On December 15, 2010, Petitioner returned to Dr. Verma. RX #8. Dr. Verma indicated he saw no indication for further treatment to the left shoulder or right knee based on his exam and review of post-operative MRIs. He noted it was unlikely Petitioner would respond to any additional surgical procedures considering he already underwent previous arthroscopy of both the left shoulder and right knee. He indicated Petitioner had reached MMI and recommended an updated FCE. Id.

On May 31, 2011, Petitioner again returned to Dr. Verma. RX #9. Dr. Verma noted he did not see any indication for further shoulder diagnostic testing or further knee injections. He reaffirmed his opinion of MMI as of December 15, 2010 and continued his recommendation of an FCE.

On August 16, 2012, Petitioner followed up with Dr. Tonino. PX #8 at 99. Petitioner complained of right knee pain and left shoulder pain. Dr. Tonino diagnosed chondromalacia of the right knee and left shoulder rotator cuff tendinopathy. Id.

On September 27, 2012, Petitioner followed up with Dr. Tonino. PX #8 at 98. Petitioner continued to complain of left shoulder and right knee pain. The knee complaints were noted to be due to chondromalacia identified in the operative report. Id. Also on this date, Petitioner underwent an x-ray of the right knee. PX #8 at 112. The impression revealed degenerative joint disease most prominent at the patellofemoral compartment. Id.

On November 14, 2012, Petitioner presented to Dr. Bryan Neal at Respondent's request. Dr. Neal testified live in this matter on June 23, 2013. Tr. at 44. Dr. Neal noted the improvement Petitioner had in his left shoulder as early as June 14, 2007. Tr. at 69. The knee diagnosis as of August 23, 2007 was patellofemoral syndrome, degenerative arthritis, and impingement. Tr. at 70. He commented on Dr. Levin noting degenerative arthritis in the right knee as of December 1, 2007. Tr. at 72. The subjective pain complaints Petitioner relayed to Dr. Neal were 8 on a scale of 1 to 10. Tr. at 89. Dr. Neal testified it was his opinion the right knee complaints were consistent with osteoarthritis. Tr. at 90. Regarding the left shoulder complaints of Petitioner Dr. Neal could not explain the same as Dr. Neal felt they were too painful and this amount of reported pain was not expected. Tr. at 94-96. Dr. Neal noted symptom magnification. Tr. at 101-102.

Regarding Petitioner's 2004 right knee pain and April 2005 right knee surgery Petitioner told Dr. Neal the surgery partially helped his pain, but he did have continued pain following his return to work. Tr. at 91. Petitioner never had complete right knee pain relief following the 2005 surgery. Tr. at 92. Dr. Neal reviewed the January 2005 right knee x-rays as well as the February 1, 2005 right knee MRI and confirmed they were consistent with osteoarthritis. Tr. at 96-98.

Dr. Neal's overall diagnosis for Petitioner was symptomatic right knee osteoarthritis or arthritis, left knee arthritis, and residual left shoulder pain from rotator cuff tendinopathy. Tr. at 98-99. He noted how Petitioner's right knee symptoms faded and it could be argued they were totally resolved by December 2008 or January 2008 consistent with Dr. Levin's records. Tr. at 99-100. He indicated the symptomatic right knee osteoarthritis was present prior to the March 2007 work injury date. Tr. at 102. The left knee arthritis would not be related to the March 2007 work incident and neither would the recommended surgery. Tr. at 103, 104. There would be no compensatory element as alleged by Dr. Tonino. Tr. at 104.

According to Dr. Neal work restrictions would not be necessary regarding the March 16, 2007 incident. Tr. at 105-106. The injuries to the right knee and left shoulder were treated and the symptoms improved. Tr. at 108. The work hardening discharge noted 95% resolution of shoulder symptoms, the records note right knee symptoms were absent at times, and Petitioner returned to work. Id. As such, he would be able to work with respect to the injuries sustained on March 16, 2007. Id. The current symptoms were due to non-work-related arthritis and also pre-dated the March 16, 2007 incident. Id. and 109-110. Dr. Neal opined the arthritis would become symptomatic regardless of the March 16, 2007 injury. Tr. at 113.

In January 2013 Petitioner began to complain of left knee pain and he testified he would like to undergo left knee surgery at the recommendation of Dr. Tonino. Tr. at 33, 37, 185, PX #22 at 36.

On May 13, 2013, the evidence deposition of Dr. Tonino was taken. PX #22. On November 3, 2008, Dr. Tonino diagnosed arthritis of the left shoulder. PX #22 at 12, 42. Dr. Tonino noted right knee chondromalacia at the time of the 2010 right knee surgery he performed. PX #22 at 20, 24. Dr. Tonino testified to continued right knee complaints from March 16, 2007 through January 2013. PX #22 at 28. Dr. Tonino admitted Petitioner did not get resolution of the right knee symptoms with the surgery he performed. PX #22 at 34. He opined chondromalacia was probably responsible for the medial knee pain Petitioner complained of in November 2008. PX #22 at 42. Dr. Tonino sent Petitioner to Dr. Belich for treatment of the chondromalacia or arthritis and did not think he would treat him again. PX #22 at 49-50. As of September 27, 2012 Petitioner's right knee complaints were related to the chondromalacia. PX #22 at 51.

CONCLUSIONS OF LAW

WITH REGARD TO ISSUE (F), WHETHER PETITIONER'S CURRENT CONDITION OF ILL BEING IS CAUSALLY RELATED TO THE MARCH 16, 2007 WORK INCIDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, ***Edward Don v Industrial Commission,*** (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For an employee's workplace injury to be compensable under workers' compensation, Petitioner must establish the injury is due to a cause connected with the employment such that it arose out of the employment. ***Hansel & Gretel Day Care Center v Industrial Commission,*** (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. It is not enough Petitioner is working when accidental injuries are realized; Petitioner must show the injury was due to some cause connected with employment. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** 44 Ill.2d 207.

After carefully considering the testimony of all witnesses along with medical records and exhibits, the Arbitrator finds Petitioner has failed to prove a causal connection for the purpose of determining TTD after 5/31/11.

The Arbitrator makes this determination based on the fact Petitioner underwent authorized and paid for surgical repair to both his left shoulder in October 2007, and the right knee in April 2010. Such knee treatment was authorized even though as of January 2008 the treating doctor records identify no right knee complaints. PX #5. The ongoing diagnoses involve arthritis and general degeneration in Petitioner's body. Such diagnoses are identified by both Petitioner's treating doctor, Dr. Tonino, and the Section 12 examiners, Dr. Verma and Dr. Neal. The initial treating physician, Dr. Levin, indicated in August of 2008 there was nothing further he could do for Petitioner. PX #5 at 22.

Furthermore, in regard to the right knee specifically, Petitioner's testified his complaints go back to September 2004 as this is the time he first started having knee pain. Surgery was performed by Dr. Levin in April of 2005, but the evidence indicates the complaints continued after this surgery as Petitioner told Dr. Neal the 2005 surgery only partially helped his pain and such pain continued following his return to work. Tr. at 91. Petitioner returned to work until March 16, 2007 when he fell and injured his right knee again and left shoulder. Such body parts were appropriately treated over the next three years while temporary total benefits were paid even though he was released by his treating doctor, Dr. Levin, in August 2008 following recovery from the left shoulder surgery.

The Arbitrator notes the Petitioner testified to, and Dr. Tonino appears have the same understanding, that Petitioner has been in constant and significant pain since March 2007. This does not appear to be the case according to treating records as they indicate all right knee complaints had resolved by January 2008. PX #5 at 53. The pain tolerance of Petitioner as well as symptom magnification also appear to be significant issues in this matter as they were noted not only by Respondent's Section 12 examiner, Dr. Neal, but Petitioner's treating surgeon Dr. Levin and an additional treating doctor, Dr. Belich. See PX #5 at 22, 43, 53, PX #14 at 5, and Tr. 185.

Only after Dr. Levin indicated there was nothing further he could do for Petitioner did Petitioner's attorney send him to Dr. Tonino. But Dr. Tonino himself admits the right knee surgery he performed in April 2010 did not resolve Petitioner's symptoms. After over six years of surgeries, injections, MRIs, and therapy the complaints continue and actually spread to new body parts as starting in January 2013 Petitioner testified to new left knee complaints.

The Arbitrator finds the treatment Petitioner underwent through May 31, 2011, including surgery to both the right knee and left shoulder, and TTD paid up to this date to be appropriate and necessary as related to the March 16, 2007 work incident. The Arbitrator finds Petitioner has not proven a causal connection between his current condition and the March 16, 2007 work incident for the purpose of determining TTD after 5/31/11.

WITH REGARD TO ISSUES (K), WHETHER THE PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL CARE, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

For treatment of an employee's workplace injury to be compensable under IL workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other cause or condition. ***Hansel & Gretel Day Care Center v Industrial Commission,*** (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244.

First, the Arbitrator notes prospective medical treatment was not an issue identified on the Request for Hearing form submitted into evidence as Arbitrator Exhibit #1. Regardless, as noted above, the Arbitrator has not found causation for Petitioner's condition after May 31, 2011. Thus, the Arbitrator finds Petitioner is not entitled to prospective medical care.

WITH REGARD TO ISSUE (L), THE AMOUNT OF TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

To show entitlement to TTD, Petitioner must not only show that he did not work, but that he was incapable of working and attempted to locate work within his abilities. ***Robert F. Beuse, Sr. v. Industrial Commission of Illinois***, (1998) 299 Ill.App.3d 180, 701 N.E.2d 96, 233 Ill.Dec. 453. A Petitioner who voluntarily removes himself from the workforce while under light duty restriction is not entitled to TTD benefits. ***Kathleen Gallentine v. The Industrial Commission et al.***, (Aug. 22, 1990) 201 Ill.App.3d 880, 559 N.E.2d 526, 147 Ill.Dec. 353; ***City of Granite City v. The Industrial Commission et al.***, (June 6, 1996) 279 Ill.App.3d 1087, 666 N.E.2d 827, 217 Ill.Dec. 158.

The Arbitrator finds Petitioner to be entitled to temporary total disability benefits of $377.87 for 179 and 1/7 weeks, commencing 4-16-07 through 5-21-07; 10-30-07 through 8-5-08; and 11-3-08 through 5-31-11, as provided in Section 8(b) of the Act.

Respondent will receive a credit for the 250 and 6/7 weeks of TTD paid, totaling $94,787.44.

WITH REGARD TO ISSUE (M), WHETHER PENALTIES OR FEES SHOULD BE IMPOSED ON RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

THE ARBITRATOR FINDS THE RESPONDENT WAS LATE UNREASONABLY LATE IN THE PAYMENT OF TTD FROM 11/3/08 TO 5/27/09 AND FROM 2/3/09 TO 10/8/09 FOR A TOTAL OF 452 DAYS. SINCE 19L PENALTIES ARE CAPPED AT $10,000.00, THE ARBITRATOR AWARDS $10,000.00 IN 19 L PENALTIES.

BASED UPON RESPONDENT'S EXHIBIT 11, THE ARBITRATOR FINDS THAT THE RESPONDENT LATE PAID OR UNDER PAID THE PETITIONER FOR THE FOLLOWING PERIODS AND AMOUNTS:

11/3/08 TO 5/27/09;	$5,000.00
5/28/09 TO 10/8/09;	$4,500.00
10/9/09 TO 2/2/10;	$9,929.68
2/3/19 TO 4/2/10	$1,623.51
8/27/10 UNDERPAYMENT	$4,437.61
TOTAL	$25,490.80

ACCORDINGLY, THE ARBITRATOR AWARDS PETITIONER $12,745.49 IN 19K PENALTIES AND $2,386.73 IN SECTION 16 ATTORNEY 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Linda Thompson,

Petitioner,

14IWCC0891

vs.

NO: 12 WC 20176

Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, penalties and fees, permanent partial disability and temporary total disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Arbitrator found that Petitioner, a 61-year-old caseworker for Respondent, sustained bilateral knee injuries on August 26, 2011 in the course of and arising out of her employment by Respondent. While walking and talking with a coworker on her way to pull a file, Petitioner tripped over a misplaced stool and fell onto both knees. Petitioner reported the accident to her supervisor and three days later Petitioner completed an incident report. We affirm the decision of the Arbitrator with respect to the issues of accident, notice, causal connection, medical expenses and temporary total disability. For the reasons set forth below, we modify the Arbitrator's award of permanent partial disability and we vacate the Arbitrator's award of penalties and fees.

Petitioner went to the emergency room at Alton Memorial Hospital on August 29, 2011. Both knees were x-rayed and Petitioner was diagnosed with contusions. She was examined by Dr. Norman on September 1, 2011 and began a course of conservative treatment for "bilateral knee osteoarthritis which has been flared up since her fall." Petitioner alleged that she was off of work per Dr. Norman from September 1, 2011 through December 8, 2011. We agree with the Arbitrator's denial of temporary total disability benefits during this period where the records do not corroborate Petitioner's claim that Dr. Norman restricted her from work. Petitioner participated in six weeks of physical therapy followed by a series of right knee injections during March of 2012. On October 29, 2012 Dr. Vest, Petitioner's former knee surgeon and an associate

14IWCC0891

of Dr. Norman's, released Petitioner at maximum medical improvement "for the falls." Dr. Vest indicated that Petitioner's ongoing complaints were related to her severe arthritis and he did not recommend any further diagnostic testing or treatment; he advised Petitioner to take Tylenol as needed for pain.

The Arbitrator awarded permanent partial disability benefits representing losses of 10% of the right leg and 5% of the left leg. Petitioner had a history of severe arthritis in both knees and underwent bilateral arthroscopies during the previous year. Although at hearing Petitioner denied any ongoing problems prior to the accident, Petitioner actually stated the contrary in an email to her supervisor on August 26, 2011. Petitioner explained that she had "knee surgery last year and was still experiencing pain in my right knee." Aside from contusions, we find no objective evidence of further injury to Petitioner's knees as a result of the August 26, 2011 accident. Therefore, we reduce the Arbitrator's award of permanent partial disability benefits to 5% of the right leg and 2.5% of the left leg.

The Arbitrator awarded $4,332.80 in Sec 19(k) penalties, $10,000 in 19(l) penalties and $866.56 in Sec 16 attorneys' fees. The Arbitrator reasoned that Respondent's behavior and its refusal to pay the medical bills was unreasonable and vexatious. We do not agree and we vacate the Arbitrator's award of penalties and fees. Respondent denied Petitioner's claim on the basis that it did not arise out of her employment. The record shows that the denial was based on the information available to Respondent at the time. We find that a bona fide dispute with respect to compensability existed between the parties. Petitioner apparently failed to submit the workers' compensation forms she was asked to complete, and upon Respondent's denial of her claim, Petitioner obtained treatment through her group health insurance.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 16.125 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 5% loss of use of the right leg and 2.5% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,665.61 for medical expenses under §8(a) and subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of penalties and fees pursuant to §19(k), §19(l) and §16 is vacated.

DATED: OCT 10 2014
RWW/plv
o-7/22/14
46

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMPSON, LINDA
Employee/Petitioner

Case# **12WC020176**

14IWCC0891

DEPARTMENT OF HUMAN SERVICES
Employer/Respondent

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:

4620 ARMBRUSTER DRIPPS WINTERSCHEIDT
JOHN WINTERSCHEIDT
219 PIASA ST
ALTON, IL 62002

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

DEPARTMENT OF HUMAN SERVICES
608 W ST LOUIS AVE
PO BOX 270
ALTON, IL 62024

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAY 29 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0891

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

Linda Thompson
Employee/Petitioner

v.

Department of Human Services
Employer/Respondent

Case # 12 WC 20176

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 15, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 26, 2011, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $68,224.00; the average weekly wage was $1,312.00.

On the date of accident, Petitioner was 61 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $8,665.61, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 32.25 weeks because the injury sustained caused the 10% loss of use of the right leg and 5% percent loss of use of the left leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner penalties of $4,332.80 as provided in Section 19(k) of the Act; penalties of $10,000.00 as provided in Section 19(l) of the Act; and attorneys' fees of $866.56 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.

William R. Gallagher, Arbitrator

May 21, 2013
Date

MAY 29 2013

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on August 26, 2011. According to the Application, Petitioner fell over a stool and sustained bilateral knee injuries. No one filed an entry of appearance on behalf of the Respondent. Because of Respondent's failure to obtain legal representation on its behalf, Petitioner's counsel filed a motion that the case be set for a trial date certain. This motion was heard by the Arbitrator and an order granting the motion was entered on January 22, 2013, which set the case for a trial date certain on April 15, 2013 (Petitioner's Exhibit 1). At trial, Petitioner's counsel tendered into evidence a letter directed to Respondent that both advised of and attached the Arbitrator's Order of January 22, 2013, as well as a confirmation receipt from the United States Postal Service which indicated Respondent had received same on January 24, 2013 (Petitioner's Exhibit 2). There was still no entry of appearance filed by or on behalf of the Respondent and, on April 15, 2013, there was a default hearing pursuant to the trial date certain Order.

Petitioner testified that she worked for Respondent as a caseworker for approximately 18 years. On August 26, 2011, Petitioner was at the Respondent's office in East Alton, Illinois, and was walking from the front office. For some unknown reason, a stool was left in the middle of the floor which Petitioner tripped over landing on both of her knees. At that time, Petitioner had an onset of pain in both knees.

Petitioner reported the accident on the date of its occurrence to her supervisor, Ulanda Lloyd. Petitioner also sent an e-mail to both Ulanda Lloyd and Angela Willhite, informing them of the accident. On August 29, 2011, Petitioner completed the CMS form entitled "Workers' Compensation Employee's Notice of Injury" which described the accident of August 26, 2011. Petitioner's counsel tendered both of these documents into evidence at trial. (Petitioner's Exhibits 3 and 4). According to the request for hearing (Arbitrator's Exhibit 1), at the time of the accident Petitioner was 61 years of age without dependents and had an average weekly wage of $1,312.00.

Petitioner testified that she had prior problems with both of her knees and had undergone arthroscopic surgeries in 2010 by Dr. Bruce Vest. None of the prior medical records were tendered into evidence; however, Petitioner testified that the last treatment she received for her knees prior to August 26, 2011, was sometime in 2010. Prior to August 26, 2011, Petitioner stated that her right knee would get stiff and she would experience "popping" in that knee but that her left knee was doing very well.

On August 29, 2011, Petitioner sought treatment from Dr. Kenyatta Norman of Orthopedic and Sports Medicine Clinic but was unable to be seen by her because Petitioner had an "unapproved work comp claim." Petitioner went to the ER of Alton Memorial Hospital where both knees were x-rayed and Petitioner was diagnosed with bilateral knee contusions.

On August 30, 2011, an e-mail was sent from Tammy Hinds to Denise Myles (who Petitioner identified as being involved with workers' compensation matters for Respondent), a copy of which was sent to Petitioner, which stated that Petitioner was involved in a work comp injury on

Friday and requested assistance in obtaining approval for medical treatment. On that same day, Denise Myles sent a responsive e-mail to Hinds with a copy to Petitioner which stated that she had talked to the doctor's office and that Petitioner was not too inform that office that she had a work comp claim. (Petitioner's Exhibit 5).

On September 1, 2011, Petitioner was seen by Dr. Norman and the histories of the prior knee surgeries and work accident were recorded. Petitioner stated that the "popping and pain" had resolved until the fall, that she had "knots" in her knees and had been experiencing locking and popping of both of her knees. Dr. Norman diagnosed Petitioner with bone bruises and patella femoral syndrome of both knees. She prescribed some medication.

Dr. Norman saw Petitioner on October 13, 2011, and Petitioner still had complaints in regard to both knees. Dr. Norman diagnosed Petitioner with bilateral osteoarthritis and prescribed physical therapy. Dr. Norman saw Petitioner on December 8, 2011, and opined that Petitioner had "Bilateral knee osteoarthritis which has been flared up since her fall." A slip was prepared on that date authorizing Petitioner to return to work; however, the medical did not indicate that Petitioner was ever authorized to be off work.

Petitioner continued with physical therapy and was seen by Dr. Norman on January 26, 2012, and her condition had improved although she still had complaints of buckling of her right knee. Dr. Norman recommended that Petitioner have an injection into the right knee joint. Petitioner had injections to her right knee on March 1, March 8, and March 15, 2012, but they only gave her some minimal relief of the symptoms.

On October 29, 2012, Petitioner was seen by Dr. Bruce Vest (who performed the prior knee surgeries) and was also an associate of Dr. Norman. Petitioner was still complaining of locking in the right knee. On examination, Dr. Vest noted that the range of motion was limited in both knees and he diagnosed Petitioner with severe degenerative arthritis. Dr. Vest opined that Petitioner was at MMI and discharged her from treatment at that time.

As a result of the accident of August 26, 2011, Petitioner incurred medical bills of $8,665.61. Respondent has made no payment and Petitioner has paid $40.00.

At trial, Petitioner complained of "tingling" in her left knee with pain going down the right side of the knee. After sitting for a period of time, the left knee also tends to lock. Petitioner has more significant complaints in regard to the right knee because the pain is much more intense than it is in the left, she cannot bend the knee all of the way, the knee locks up more frequently and she has pain at night and when walking. Petitioner testified that both knees are weaker now than what they were prior to the accident of August 26, 2011.

Conclusions of Law

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

The Arbitrator concludes that Respondent was operating under the Illinois Workers' Compensation Act and that there was an employee–employer relationship.

In regard to disputed issues (C), (D), (E), (G), (H) and (I) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on August 26, 2011. Petitioner gave notice to Respondent of said injury. At the time of the accident, Petitioner had an average weekly wage of $1312.00, Petitioner was 61 years of age and that she had no dependents.

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 August 26, 2011.

In support of this conclusion the Arbitrator notes the following:

Petitioner's unrebutted testimony and the medical support the conclusion that Petitioner's bilateral knee arthritis was aggravated and made symptomatic because of the accident of August 26, 2011.

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

The Arbitrator concludes that all of the medical treatment received by 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 of $8,665.61, 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 not entitled to any temporary total disability benefits.

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 10% loss of use of the right leg and 5% loss of use of the left leg.

In support of this conclusion the Arbitrator notes the following:

The Petitioner has been diagnosed with arthritis of both knees and continues to have symptoms, more so on the right than on the left.

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

The Arbitrator concludes that Petitioner is entitled to penalties of $4,332.80 as provided in Section 19(k) of the Act; penalties of $10,000.00 as provided in Section 19(l) of the Act; and attorneys' fees of $866.56 as provided in Section 16 of the Act.

In support of this conclusion, the Arbitrator notes the following:

Petitioner's unrebutted testimony, the Workers' Compensation Employee's Notice of Injury and various e-mails to/from Respondent's representatives and the medical records all unequivocally support that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent, Respondent had timely notice of said accident and that Petitioner was in need of medical treatment. In spite of the preceding, Respondent paid no medical bills and directed Petitioner to bill her private insurance.

Respondent ignored the fact that an Application for Adjustment of Claim had been filed, that the case was set on January 22, 2013, and, further, ignored the Arbitrator's Order setting this case for trial date certain on April 15, 2013. Because of its conduct, Respondent has caused the Arbitrator and Commission to devote considerable time to what would otherwise be a simple case.

The Arbitrator hereby finds that Respondent's refusal to pay the medical bills is unreasonable and vexatious and awards 19(k) penalties of $4,332.80 (50% of the medical bills) and Section 16 attorneys' fees of $866.56 (20% of $4,332.80). These amounts are subject to adjustment upon application of the medical fee schedule.

The Arbitrator finds Petitioner is entitled to Section 19(l) penalties of $10,000.00. Respondent was unresponsive to the demand for payment of medical bills referenced in the e-mail of August 30, 2011.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adam Rodriguez,

Petitioner,

14IWCC0892

vs.

NO: 10 WC 26171

Armato Paving,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County. In a March 6, 2014 order the honorable Edward S. Harmening reversed the Commission's decision on the issue of temporary total disability, finding that it was contrary to the manifest weight of the evidence. The parties stipulated that Petitioner was temporarily totally disabled from October 20, 2009 through July 2, 2010. In a June 11, 2012 decision on review pursuant to §19(b), the Commission reversed the decision of the Arbitrator and found that Petitioner's left leg, left shoulder, and left fourth finger conditions are causally related to the undisputed work accident of October 19, 2009. The Commission found that Petitioner was not entitled to temporary total disability benefits after July 2, 2010 due to the lack of any records from Petitioner's doctors keeping him off of work or restricting him in some capacity, and due to the fact that Petitioner's apparent new choice of career as a locksmith would fit within the Petitioner's medium demand level abilities determined by the May 10, 2014 functional capacity evaluation. The Commission awarded prospective medical treatment related to the left thigh hematoma, the left shoulder, and Petitioner's left fourth finger as well as credit to Respondent for temporary total disability benefits already paid. The Circuit Court subsequently remanded the case for clarification. In a September 4, 2013 decision and opinion on remand, the Commission clarified its decision and explained that it did in fact find Dr. Newman's opinion that the work accident exacerbated the preexisting condition to be reasonable, persuasive and credible in support of its award of prospective medical treatment related to Petitioner's left thigh, left

14IWCC0892

shoulder and left fourth finger. The Commission also explained that it did not actually find that Petitioner was working as a locksmith after July 2, 2010. Therefore, the Circuit Court remanded this case again, finding that the Commission's decision on temporary total disability was contrary to the manifest weight of the evidence. Dr. Newman examined Petitioner pursuant to §12 on September 2, 2010. Dr. Newman opined that Petitioner was unable to work other than sedentary duty at that time, and required further treatment for his work-related injuries. In accordance with the March 6, 2014 Order of the Circuit Court and in reliance on the opinion of Dr. Newman the Commission hereby awards additional temporary total disability benefits to Petitioner representing the period from July 3, 2010 through January 27, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,243.00 per week (the maximum allowable under the Act) for a period of 66 3/7 weeks, commencing October 20, 2009 through January 27, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act, 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 the prospective cost of treatment to Petitioner's left thigh, left shoulder, or fourth finger 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 the $45,457.75 it has already paid in temporary total disability benefits.

Bond for removal of this cause to the Circuit Court is hereby fixed at the sum of $8,600.00. 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: OCT 10 2014
RWW/plv
o-8/5/14
46

Ruth W. White

David L. Gore

Daniel R. Donohoo

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CATHLEEN HUBBIRD,

Petitioner,

vs.

NO: 13 WC 24108

14IWCC0893

CITY OF CHICAGO,

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 and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds the following facts. Petitioner testified that on January 28, 2013, she worked as a crossing guard. She was crossing children when a car started to pass the yellow line. Petitioner said she saw the car ready to turn, which would have resulted in hitting a child. Petitioner threw out her left arm that was holding the stop sign to stop the car when her arm popped. Petitioner said she thought she just a pulled muscle.

Petitioner continued to work and reported the injury in early February 2013. Petitioner said she told her supervisor that on Monday her arm hurt, on Tuesday, she could not lift it and then on Wednesday she said she could not move her arm at all. Petitioner said following her

accident, she continued to work but was unable do anything at home as she was hurting and in so much pain.

Petitioner first sought medical treatment on February 7, 2013, when she was sent to MercyWorks, Respondent's clinic, and Dr. Diadula. Dr. Diadula noted Petitioner rated her shoulder pain at 8-9/10, and that was worse when she tried to raise it. The pain radiated to the left elbow and left side of her neck with tingling in her fingers. Dr. Diadula noted Petitioner's left shoulder showed swelling with no ecchymosis, her range of motion was limited, she had tenderness in trapezius, subacromial area and deltoid, and a positive isolation test. The diagnosis was left shoulder sprain and rule out rotator cuff tear. Dr. Diadula wrote Petitioner off work. Petitioner also had an x-ray on with the impression "findings suggestive of chronic rotator cuff tendinitis."

Petitioner had an MRI on March 6, 2013. The impression was: "mild distal infraspinatus tendinopathy with undersurface fraying without discrete or full thickness tear. There is suggestion of mild adjacent subacromial subdeltoid bursitis. Given history of trauma, these findings may also be related to mild strain of the distal infraspinatus muscle/musculotendinous junction. Trace abnormal signal within the greater tuberosity may represent normal cellular marrow versus a small resolving contusion. Correlate for point tenderness." It also found mild AC joint hypertrophy with mild impression upon the supraspinatus that correlates for signs of impingement.

Petitioner saw Dr. Diadula again on March 8, 2013. He noted the MRI did not show a definite rotator cuff tear. Her shoulder pain decreased and range of motion increased but she was still tender to the trapezius, subacromial and deltoid. Dr. Diadula's diagnosis was impingement syndrome and left shoulder bursitis. He referred Petitioner to Dr. Heller. Petitioner also attended physical therapy for her left shoulder.

Petitioner first saw Dr. Heller at Midland Orthopedics on March 18, 2013. On the physical exam, Dr. Heller found Petitioner's range of motion was guarded but good and all special tests elicited a sharp pain response deep within the glenohumeral joint but no gross popping or subluxation. He reviewed the MRI that showed mild to moderate tendinopathy and fluid that could represent a SLAP lesion. His assessment was left shoulder possible SLAP lesion from a traction injury. Petitioner also received an injection that day. Petitioner testified that it gave her temporary relief for about 24 hours and failed to provide permanent relief.

She had a left shoulder MRI arthrogram on April 1, 2013. The finding noted a well defined defect in the anterior superior labrum, possibly result of a normal congenital variant. The impression was "better demonstrated anterior distal infraspinatus tendinopathy with undersurface fraying" and "stable mild AC joint hypertrophy with impression upon the supraspinatus. Consider impingement."

Petitioner followed up with Dr. Heller on April 4, 2013. Dr. Heller said he reviewed the MRI arthrogram. He noted the main finding was a cleft through the anterior/superior labrum that the radiologist believed could be a normal variant. Dr. Heller wrote he agreed it could be normal but it could also be a SLAP lesion, which was his initial concern. Dr. Heller explained that he is concerned about a SLAP lesion, even though the MRI arthrogram did not really confirm such a lesion.

Petitioner saw Dr. Heller again on May 17, 2013. He recorded that she continued to complain of sharp left shoulder pain and the physical therapy note documented improved motion but painful popping which occurred several times a day and limited her function. On exam, Petitioner had sharp painful responses to O'Brien's compression test and recoiled in pain in full abduction and external rotation. Dr. Heller could not illicit instability signs but found pain with rotator cuff strength testing. In the plan, Dr. Heller wrote Petitioner continues to have severe pain complaints and exam findings consistent with possible SLAP lesion. He added: "MRI arthrogram was somewhat equivocal but did demonstrate contrast dye leaking beneath the superior labrum which could be consistent with SLAP lesion." Dr. Heller noted that conservative measures of physical therapy and injections failed, she couldnot perform her work duties and did not had sufficient improvement. Therefore, he recommended arthroscopic surgery.

Petitioner saw Dr. Heller for the last time on July 23, 2013. Petitioner reported her left shoulder was worsening and she could not sleep at night and she wants surgery. Dr. Heller wrote he thought she was developing capsulitis, had increased pain and significant guarding. Dr Heller requested approval for surgery on Petitioner's left arm and shoulder.

Dr. Tuder performed a utilization review for Respondent on May 30, 2013. He did not certify the left shoulder arthroscopy SLAP repair because the proposed plan was not consistent with the clinical review criteria. Dr. Tuder noted that the records did not include documentation of significant conservative care or that she has failed conservative care. Dr. Tuder wrote that he spoke to Dr. Heller who noted Petitioner received a good, albeit temporary, response to an injection and failed therapy. Dr. Tuder said he received additional information and imaging, but still, there was no documentation of a SLAP tear consistent with guidelines for repair.

Dr. Kauffman performed a second utilization review for Respondent on July 17, 2013. The surgery was again not certified. Dr. Kauffman noted the mechanism of injury was a strain and the imaging does not evidence Petitioner presents with a significant SLAP tear needing surgical intervention at this point in Petitioner's treatment.

Petitioner said she is still not working and is receiving pay from the Police Department. Petitioner said her left arm is getting worse and freezing on her. She cannot lift it over her head or behind her back. Petitioner said she is constantly in a lot of pain in her left shoulder that runs down around her shoulder blade to her elbow.

14IWCC0893

Based on the aforementioned facts and considering the evidence as a whole, we hold Petitioner's current condition of ill being is causally connected to the January 28, 2013, work related accident. We further hold that Petitioner is entitled to prospective medical care in the form of surgical care as requested by Dr. Heller.

It is undisputed that Petitioner suffered a work accident on January 28, 2013. Thereafter, Petitioner attempted to continue to work but her pain increased to the point where she reported her injury and was no longer able to perform her work duties. Petitioner then sought medical treatment with Dr. Diadula at MercyWorks, which is associated with Respondent.

Petitioner then continually sought medical treatment and consistently voiced the same complaints. Dr. Diadula referred Petitioner to Dr. Heller. Petitioner treated with Dr. Heller several times, had a positive O'Brien's compression test and underwent an MRI arthrogram. After reviewing the MRI arthrogram, Dr. Heller expressed his concern that Petitioner suffered from a SLAP tear that requires surgical intervention. Petitioner also attended physical therapy and received an injection; however, the conservative treatment failed to alleviate her complaints of pain.

The chain of causation theory supports finding a causal connection in this case. After suffering and reporting a work injury, Petitioner continually sought medical treatment. Nothing in the record suggests Petitioner injured her left shoulder outside of work or performed any activity that would serve as an intervening incident. Therefore we find that Petitioner proved her current condition of ill being is causally connected to her work injury.

Moreover, we award Petitioner prospective medical treatment in the form of surgical intervention as recommended by Dr. Heller. Petitioner attempted conservative treatment in the form of physical therapy and an injection but did not experience lasting relief. Petitioner continues to complain of significant pain that greatly hinders her quality of life. She is unable to work and testified that her left arm and shoulder are worsening. Dr. Heller recommended Petitioner undergo surgical intervention. The Commission holds that Petitioner is entitled to such surgery.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is reversed. We hold that Petitioner's current condition of ill being is causally connected to her work related injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize prospective medical treatment in the form of surgical care as requested by Dr. Heller and related medical bills per the fee schedule 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

14IWCC0893

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

DATED: OCT 14 2014
TJT: kg
R: 8/18/14
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Williams' well reasoned decision in its entirety and without modification.

Kevin W. Lamborn

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

HUBBIRD, CATHLEEN
Employee/Petitioner

Case# **13WC024108**

CITY OF CHICAGO
Employer/Respondent

14IWCC0893

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:

1759 WILLIAM H MARTAY
134 N LASALLE ST
9TH FLOOR
CHICAGO, IL 60602

0113 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
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)

14IWCC0893

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

CATHLEEN HUBBIRD
Employee/Petitioner

Case #13 WC 24108

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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on December 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 January 28, 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.
- 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 $14,976.00; the average weekly wage was $288.00.
- At the time of injury, the petitioner was 54 years of age, *single* with no children under 18.
- Necessary medical services were provided by the respondent.
- The parties agreed that the respondent has paid and continues to pay the petitioner her full salary.

ORDER:

- The petitioner's request for a left shoulder arthroscopy is denied.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

14IWCC0893

Signature of Arbitrator

January 2, 2014
Date

JAN 3 - 2014

FINDINGS OF FACTS:

The petitioner, a crossing guard, injured her left arm on January 28, 2013. The petitioner continued her work duties and did not seek immediate medical care. On February 7th, the petitioner received medical care for left shoulder pain at MercyWorks with Dr. Diadula. X-rays were suggestive of chronic rotator cuff tendinitis. The diagnosis was left shoulder sprain for which she was given pain medication and taken off work. An MRI on March 6th revealed no definite rotator cuff tear but subacromial subdeltoid bursitis and mild AC joint hypertrophy with mild impression on the supraspinatus. Dr. Diadula's diagnosis on March 8th was impingement syndrome and bursitis.

On March 18th, the petitioner saw Dr. Heller, who she last visited four years earlier for a right shoulder rotator cuff tear and SLAP lesion. Dr. Heller noted sharp pain with evocative maneuvers and assessed a possible SLAP lesion. He gave the petitioner an injection of Depo-Medrol and placed the petitioner on restrictions of no work. An MRI arthrogram on April 1st revealed anterior distal tendinopathy with undersurface fraying and stable mild AC joint hypertrophy with an impression on the supraspinatus. Dr. Heller opined on April 5th that the MRI revealed no significant rotator cuff pathology but felt that contrast dye tracking beneath the anterior/superior labrum to the subcoracoid recess could represent a labral tear. He recommended physical therapy and light duty.

On May 17th, the petitioner reported continued shoulder pain and Dr. Heller recommended an arthroscopy to explore the labrum and perform any necessary SLAP lesion repair. A utilization review on May 30th resulted in a non-certification of the arthroscopy for the petitioner's left shoulder from Dr. Dmitry Tuder based on no

evidence of a positive labral tear and failed conservative care. Dr. Christopher Kauffman renewed the initial non-certification decision on July 17th after an appeal.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that her current condition of ill-being with her left shoulder is partially causally related to the work injury.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner failed to prove that the left shoulder arthroscopy and possible SLAP lesion repair recommended by Dr. Heller is reasonable medical care necessary to relieve the effects of the work injury. Based on the determinations of the utilization reviews and the lack of any evidence of labral tears on the MRIs, the recommendation of a left shoulder arthroscopy by Dr. Heller is not sufficiently supported. The petitioner's request for a left shoulder arthroscopy is denied.

14IWCC0894

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

Young A. Park,
Petitioner,
vs.

NO: 07WC 51048

Glenbrook Hospital,
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 notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 5, 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: OCT 15 2014
MJB/bm
o-10/7/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARK, YOUNG A
Employee/Petitioner

Case# **07WC051048**

14IWCC0894

GLENBROOK HOSPITAL
Employer/Respondent

On 2/5/2014, 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:

0598 LUSAK & COBB
JOHN E LUSAK
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
TIMOTHY J O'GERMAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

14IWCC0894

☒ 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

YOUNG A. PARK
Employee/Petitioner

v.

GLENBROOK HOSPITAL
Employer/Respondent

Case # **07** WC **51048**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **January 3, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 22, 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.

For the reasons set forth in the attached, the Arbitrator finds that Petitioner failed to provide Respondent with timely notice of her claimed repetitive trauma injuries of November 22, 2006. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

In the year preceding the injury, Petitioner earned **$36,400.00**; the average weekly wage was **$700.00**.

On the date of accident, Petitioner was **56** 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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

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

ORDER

For the reasons set forth in the attached, the Arbitrator finds that Petitioner failed to provide Respondent with timely notice of her claimed repetitive trauma injuries of November 22, 2006. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. Compensation is denied.

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

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

Molly C Mason
Signature of Arbitrator

2/5/14
Date

FEB 5 - 2014

Young A. Park v. Glenbrook Hospital
07 WC 51048

Arbitrator's Findings of Fact

Petitioner was born on January 5, 1950. Her native language is Korean. A Korean interpreter was available at the hearing. Petitioner initially testified through this interpreter but switched to testifying in English. She explained that she left Korea in 1973 and did not know the Korean words for many of the technical terms she needed to use in order to explain the job duties she performed at Respondent hospital. T. 15.

Petitioner's Application, filed on November 14, 2007, alleges a manifestation date of November 22, 2006. The Application alleges injuries to both hands secondary to "repetitive arm and hand motions." It also alleges that Petitioner provided Respondent with oral notice of these injuries. RX 3.

Petitioner, a registered nurse (RX 7), testified she began working for Respondent in November of 1998. T. 12. At that point, she worked 72 hours every two weeks. T. 35. She was initially classified as an intravenous therapist. Later, Respondent changed her job title so as to reflect she was part of the hospital's "VAT," or "vascular access team." T. 12.

Petitioner testified she stopped working approximately two years before the January 3, 2014 hearing. T. 11. Respondent was her last employer. At the point at which she left Respondent, she was only working four hours per week. T. 38. She had gradually decreased her hours over time. She first began reducing her hours in 2004, 2006 or 2007. She did this at the recommendation of Dr. Cohen, who suggested she work less and switch departments so as to avoid using needles. T. 36. She tried to work in hemodialysis but that work involved operating a big machine and preparing tubing.

RX 5 is a form entitled "Employee Application for Transfer Consideration." Petitioner identified her signature on this form. T. 51-52. The form is dated August 22, 2002. It reflects a hire date of November 23, 1998. It also reflects that Petitioner had been working as an IV therapy staff nurse for three years and nine months and was seeking a position in hemodialysis. The "reason for requesting transfer" reads as follows: "seeking position with minimal use of arthritic thumb; also wish to learn hemodialysis technique."

RX 6 is another "Employee Application for Transfer Consideration." This form bears the date February 11, 2004. The form reflects that Petitioner had been working in her then-current hemodialysis staff nurse position for one year and five months and was seeking a transfer to a "position with minimal use of arthritic finger; also [decreased] working hours (from 64 hours/2 weeks to 64 hours/4 weeks)."

Petitioner testified her intravenous therapist/"VAT" job duties included drawing blood, placing central lines and IVs and performing intravenous injections. T. 13.

Petitioner testified that, before 2004, her job duties involved the use of metal needles. In 2004, Respondent changed its procedures and started using plastic needles. T.18. Before 2004, she performed the following steps while placing an IV in a patient: 1) she procured the necessary supplies; 2) she used a metal needle to draw saline from a bottle; 3) she opened the covers of two 10-cc syringes and pulled out the tip covers; 4) she placed the needle in the tip of each syringe and then pulled back, using her right hand, in order to "get some solution" while using her left hand to hold the saline bottle; 5) she opened packaging containing extension tubing and pulled out the covers of the tubing; 6) she connected the tubing; and 7) after finishing with the patient, she typed a report. T. 16-19.

Petitioner testified that, when she began using plastic needles in 2004, per Respondent's new protocol, she had to take many more steps than those listed above in order to start an IV line. The additional steps included attaching a "clavicle connector" to the vial and using "some extensions." She also had to "twist harder" with her right hand. T. 22, 35. She also had to disconnect PICC lines that had, in most cases, previously been placed by physicians. She testified the physicians tended to make "very tight" connections when placing central lines, to avoid blood loss, and it was difficult for her to "disconnect the line." Initially, she would try to disconnect the line by donning a glove and twisting, using her right hand. If this did not work, she would use "two hemostats with both hands." She was sometimes required to place PICC lines on her own. T. 28. This required a "surgical approach," even though she placed the line in a patient's room and not an operating room. She had to wear a special gown which she had to remove from packaging. T. 27.

Petitioner testified that placing an IV required "pulling, twisting [and] picking." Each IV placement involved about 80 to 100 steps. During an 8-hour shift, she could perform 20 to 30 such placements. T. 20.

Petitioner testified that, when she would place lines in 2006 and 2007, she would notice a red line on the inside of her right wrist along with some bruising and swelling. T. 43-44. Her hands always felt worse after she performed a procedure. T. 42, 45. She cut down her hours over time because her hands were worsening. T. 46.

Petitioner testified that, on November 22, 2006, she developed triggering in her left middle finger after successfully disconnecting tubing from an ICU patient who had a "double lumen PICC line." Petitioner testified this patient was post-operative and needed blood work "right away." A doctor and a nurse were unsuccessful in their attempts to disconnect the tubing. Petitioner achieved success after using her hands in a forceful twisting fashion but her left middle finger "triggered right after success." T. 30. She went to Respondent's Emergency Room but could not be seen right away. While she was waiting to be seen, she went into a bathroom and began massaging the finger while letting hot water run over her left hand. After one hour, the triggering stopped. Petitioner testified that Emergency Room personnel gave her a splint so that the triggering would not recur. She was also instructed to follow up with an orthopedic surgeon. T. 31.

The treatment records in evidence do not include any Emergency Room records from Respondent hospital. Nor do they include any records concerning a left middle finger injury of November 22, 2006. The only record in evidence dated November 22, 2006 is a right wrist MRI report from Respondent hospital. This report lists Dr. Bello as the prescribing physician. The "indication" portion of the report reads as follows: "56-year-old female with radial-sided right wrist pain." The interpreting radiologist compared the results with a previous right wrist MRI performed on August 9, 2005.

The only records in evidence relating specifically to the left middle finger are notes from Dr. Bello dated May 9, 2006 and November 16, 2006. [Earlier records from Dr. Bello reflect that Petitioner initially saw the doctor for a rheumatology/pain medicine consultation on March 9, 2006 due to "progressive pain over the right wrist and hand" for which she had previously seen Dr. Benson. Dr. Benson had seen Petitioner on July 19, 2005 for "left thumb CMC joint and pain along the right wrist. His note of that date contains no mention of a work accident or work activities. PX 1] Dr. Bello's May 9, 2006 note reflects that Petitioner was seen in follow-up for DeQuervain's tenosynovitis but now had complaints of swelling in her left middle finger, left hand and left elbow. The note contains no mention of a work accident or work duties. On examination, Dr. Bello noted a positive Finkelstein test with significant tenosynovitis extending down the right arm, active synovitis in the first IP joint and synovitis in the third PIP joint on the left hand and in the left elbow. Dr. Bello assessed Petitioner as having inflammatory polyarthritis and, based on the new symptoms, "evolving rheumatoid arthritis." He prescribed medication and instructed Petitioner to continue using a wrist splint. Petitioner continued seeing Dr. Bello thereafter. On November 16, 2006, the doctor noted a complaint of right wrist pain and "clicking" in the left middle finger. The note contains no mention of a work accident or work duties. It was at this point that the doctor recommended the right wrist MRI which is described in the preceding paragraph. On December 20, 2006, Petitioner underwent a left hand MRI, with the interpreting radiologist comparing the scan with a left wrist MRI taken on December 22, 2001. [No MRI report of December 22, 2001 is in evidence.] The radiologist noted moderate to severe osteoarthritis at the first carpo-metacarpal joint, which had progressed since the 2001 MRI, and tendinosis and tenosynovitis involving the flexor tendon complex to the third digit/long finger. PX 2.

Petitioner testified she saw Dr. Oh who referred her to Dr. Jablon, a hand specialist. She also saw Dr. Vender for an examination, at Respondent's request. Various doctors have recommended she undergo hand surgery but she has declined. She is afraid of having surgery, in part because her hands are little and she is worried the surgery will not go well. T. 33. [The Arbitrator notes that Petitioner is petite and small-boned.]

Petitioner testified she continued having problems with her hands after she stopped working for Respondent. Her symptoms were "less than before" since she was no longer being required to twist, pull, push and lift, but she still experienced hand swelling. She would also wake at night. As of the hearing, she was still experiencing swelling and soreness in her wrists,

right worse than left. T. 39-40. She continues to wear wrist braces. When she experiences pain, she applies ice or engages in paraffin therapy. T. 40-41.

Petitioner testified she has never undergone treatment for diabetes, hypertension or hormonal problems. She continues to seek treatment for her hands but "tries not to go" often since she knows the doctors are going to suggest steroid injections and/or surgery. She makes every effort to treat her symptoms at home. T. 42-43.

Under cross-examination, Petitioner testified she performed the same repetitive movements of twisting, pulling and pushing during her workdays. On those occasions when she worked an eight-hour shift, she would see twenty to thirty patients during that shift. T. 48. She suffered a trigger finger while working but she is not sure this occurred on November 22, 2006. This occurred somewhere around 2006 or 2007. T. 48. She "gradually" began having hand problems after Respondent switched to plastic needles in around 2004. T. 50. She sought a transfer in 2002 because an X-ray showed something in one of her joints. T. 51, 53. Her doctors have diagnosed her with arthritis but she cannot recall whether this diagnosis was made in 2002. T. 53. In 1975, she was treated for a thyroid problem. She had no additional thyroid problems after 1975. T. 54. She worked as a nurse for 30 years. Before she began working for Respondent, she worked as an IV therapist some of the time. She also worked as a medical/surgical nurse and a pediatric nurse. T. 54. Before she worked for Respondent, she worked as a nurse at Our Lady of Resurrection for 13 years. She had no problems with her hands during that period. T. 55.

Petitioner testified that, before entering a patient's room to draw blood or place a line, she would stand in the hall, opening the necessary packages and preparing everything. All of the materials she used came in "single dose" packages that she had to open. T. 56. She had to open packages of swabs. She had to open vial caps and various covers. She had to use her hands to break vials open. T. 58. She also had to cut tape, using scissors. T. 58. She would put Lidocaine on a patient's skin to numb the area before inserting the line. She was good at finding veins. She was usually able to find a vein with only "one stick." T. 59. She applied a dressing after inserting the line. T. 61. She never counted how many procedures she performed per hour. Her supervisor said the "average" was three to four per hour but she [Petitioner] was a "fast worker" and could do five to six per hour. T. 60.

On redirect, Petitioner testified she underwent an X-ray of one of her hands in 2002, after she had a "hot flash or something." It was after this X-ray that she transferred to hemodialysis and began working 64 hours every two hours. Eventually, Dr. Cohen told her that hemodialysis was "not for her." T. 64-65.

No other witnesses testified at the hearing.

Other potentially pertinent treatment records in evidence include the following:

1. An EMG/NCV study performed by Dr. Ro on January 4, 2007 showed

"electrophysiologic evidence for moderate, chronic median neuropathies at both wrists, as in carpal tunnel syndrome" and "evidence for mild chronic cervical polyradiculopathies involving the C6-7 myotomes bilaterally and the C8-T1 myotomes on the right, slightly more severe on the right." Dr. Ro's history reflects Petitioner was referred to him by Dr. Oh "for evaluation of intermittent electric shock pains and numbness of both hands x 3-5 years." The doctor noted that Petitioner is a phlebotomist but he made no mention of any specific work duties. He also noted a previous diagnosis of rheumatoid arthritis. PX 2.

2. On March 26, 2008, Dr. Zaacks, a rheumatologist, issued a letter addressed "to whom it may concern" indicating that she had been treating Petitioner for osteoarthritis and tenosynovitis of the hands. Dr. Zaacks noted that Petitioner had experienced "difficulty working due to pain" but had recently improved. Dr. Zaacks indicated Petitioner could now "work 4-hour shifts 2-3 days per 2 weeks with occasional 8-hour shifts as long as her condition is stable."

3. On February 16, 2009, Dr. Jablon issued a lengthy report to Dr. Oh. He indicated that Petitioner "presents with complaints of overuse and repetitive activities in her work that has led to triggering fingers, among other problems." He noted that Petitioner complained of hand stiffness, triggering and locking in her left long finger, pain at the base of her thumbs and pain on the radial aspects of her wrists.

   Dr. Jablon noted that Petitioner had seen Dr. Phillips, who had "injected her twice and recommended surgery." He also noted that Petitioner had undergone other injections administered by several different physicians.

   Dr. Jablon indicated he reviewed treatment records dating back to the December 22, 2001 left arm MRI. He reviewed various MRI reports along with the EMG/NCV report.

   Dr. Jablon indicated that Petitioner attributed her symptoms to "difficulty with opening a catheter in her work duties which led to a locked finger." He noted stiffness in the fingers of the left hand on examination. He described Petitioner's "carpal tunnel syndrome symptoms" as "not significant at today's visit."

   Dr. Jablon indicated that Petitioner could consider undergoing a left thumb arthroplasty and/or a left long finger trigger release If she remained symptomatic.

Dr. Jablon addressed causation as follows: "it appears that the hand problems that [Petitioner] has may be on occasion aggravated by her work activities as evidenced by the difficulty she had with a locked left long finger trying to open a catheter sheath."

4. On November 16, 2009, Dr. Oh, an internist, issued a letter addressed "to whom it may concern" indicating that he is Petitioner's primary care physician, that Petitioner "has diffuse osteoarthritis and cervical myalgia affecting her hands and her neck" and that "her symptoms are exacerbated by her work." Dr. Oh indicated Petitioner was "able to work 4-hour shifts 2-3 days every 2 weeks, as long as her condition remains stable."

In addition to the exhibits previously summarized (RX 3-5), Respondent offered into evidence depositions given by Dr. Vender, its Section 12 examiner (RX 1), and Dr. Jablon, one of Petitioner's treating physicians (RX 2).

Dr. Vender, a board certified orthopedic surgeon with added qualification in hand surgery, testified he sees at least 100 patients per week and performs over 10 surgeries per week. RX 1 at 6. At Respondent's request, he examined Petitioner on March 12, 2012. RX 1 at 6. At that examination, Petitioner indicated she first developed right upper extremity symptoms in 2002. Those symptoms were in the wrist and thumb. Petitioner recalled developing similar left-sided symptoms about two years later. RX 1 at 8. Petitioner complained of pain in both upper extremities, right worse than left, diffuse numbness and tingling in both hands and pain in the wrists and thumbs. RX 1 at 8.

Dr. Vender testified that, after examining Petitioner and obtaining bilateral hand and thumb X-rays, his impression was that Petitioner had bilateral carpal tunnel syndrome, diffuse arthritis in both hands and de Quervain's disease on the right side. RX 1 at 10. Dr. Vender testified that de Quervain's can be caused by degeneration and that arthritis is a degenerative condition by definition. RX 1 at 10. He further testified that about half of carpal tunnel cases are idiopathic in nature. Various risk factors come into play in the remaining cases. Those risk factors include age, female gender, thyroid disease, obesity, smoking and diabetes. RX 1 at 11.

Dr. Vender testified he reviewed records from Drs. Zaacks, Phillips and Jablon along with an EMG of 2007, a left upper extremity MRI of December 2006 and a right wrist MRI of November 2006. RX 1 at 12.

Dr. Vender testified he does not believe any of Petitioner's conditions stem from her job as a staff nurse. Petitioner's arthritis is "extremely diffuse." Some of the arthritis is severe. It is clearly a degenerative process. In his view, Petitioner's duties were of insufficient force to aggravate this arthritis. Petitioner's job did not require excessive or repetitive forceful exertions. As for the de Quervain's, the situation is the same. Only a repeated forceful

pinching of the thumb, or repetitive usage of tight scissors, could contribute to de Quervain's. RX 1 at 14. The carpal tunnel did not stem from Petitioner's job because the job did not involve forceful grasping or heavy lifting/carrying. RX 1 at 14.

Dr. Vender testified that Petitioner's problems are "readily treatable." He would perform bilateral carpal tunnel releases and take care of the right de Quervain's during the right-sided carpal tunnel release. Based on his causation-related opinions, he does not view the need for these surgeries as stemming from Petitioner's job. RX 1 at 15-16.

Under cross-examination, Dr. Vender indicated that Petitioner mentioned a thyroid problem to him in an information form she completed at his office. There is no evidence indicating Petitioner is taking thyroid medication. RX 1 at 17. Carpal tunnel syndrome can be seen in very young people but it becomes much more common as people age. He does not know why females are more likely to develop the syndrome. RX 1 at 18. Petitioner definitely has bilateral carpal tunnel syndrome. RX 1 at 18-19. He does not know exactly what type of nurse Petitioner was. An IV nurse would have to place a tourniquet, open an alcohol pack, wipe off the patient's skin, use a kit that includes a syringe and needle, push the needle into the skin, remove the tourniquet and apply a Band-Aid. RX 1 at 20. He cannot think of any nursing activity that would involve forceful activity on a regular and persistent basis throughout the workday. RX at 21-22. He performs about ten examinations per week. About half of those are in cases such as Petitioner's. Of that half, about 90% are for the respondent or carrier. RX 1 at 22. He also does work for claimants but that work consists primarily of consultations, not examinations. RX 1 at 23. Dr. Phillips is a hand surgery colleague of his. If Dr. Phillips found causation in Petitioner's case, he would disagree. He would be curious to know how Dr. Phillips came to that conclusion. RX 1 at 25. The same could be said of Dr. Jablon. RX 1 at 26. It is a treating physician rather than an examiner who has more potential to be biased as far as causation is concerned because, for example, a treater can get paid more by workers' compensation than Medicare. RX 1 at 27-28. He believes he asked Petitioner about her job duties but he does not recall what she told him. In his report, he wrote down that Petitioner worked part-time as an IV therapist for 13 years. RX 1 at 30. If Petitioner's duties fell anywhere within the realm of nursing, those duties could not have caused or aggravated her carpal tunnel syndrome. RX 1 at 31.

Under re-cross, Dr. Vender testified the identity of the entity hiring him has never influenced his opinions. RX 1 at 31.

On redirect, Dr. Vender testified he is charging $1,000 per hour for the deposition. RX 1 at 31-32.

Dr. Jablon testified he is board certified in orthopedic surgery and has added qualification in hand surgery. RX 2 at 5-6. He believes he saw Petitioner on only one occasion, on February 16, 2009. RX 2 at 7. Dr. Oh referred Petitioner to him. RX 2 at 7-8. He obtained a history from Petitioner. Petitioner indicated that operating a catheter at work led to locking of a finger. RX 2 at 9. He does not know the frequency of Petitioner's hand usage at work. He has

not reviewed any formal description of Petitioner's job. RX 2 at 9-10. Petitioner described her left hand as her main problem. RX 2 at 10. On examination, he noted that Petitioner is 4 feet, 9 inches tall and weighs 100 pounds. RX 2 at 11. Petitioner had seen Dr. Phillips twice. Dr. Phillips, a hand specialist, administered two injections and recommended surgery. Other physicians also injected Petitioner. RX 2 at 11.

Dr. Jablon testified that, on examination, he noted Petitioner could not flex the fingers on her left hand to her palm. Her flexion deficit was nearly 2 centimeters. He also noted thickening and stiffness of the left middle finger. Petitioner's right hand had a "fuller range of motion." Tinel's was negative at the wrist. The left thumb axial grind test was positive and there was some deformity at the base of the left thumb. Finkelstein's was negative, as was Spurling's. The negative Spurling's test indicated that Petitioner "does not likely have a cervical radiculopathy." RX 2 at 12-13. The negative Tinel's and the absence of thenar atrophy showed that "carpal tunnel syndrome was not very apparent." RX 2 at 13. Finkelstein's is positive when a person has signs of de Quervain's tenosynovitis. RX 2 at 14.

Dr. Jablon indicated he reviewed the EMG along with radiographic studies dating back to the 2001 MRI. He took X-rays when he examined Petitioner. Those X-rays showed "evidence of osteoarthritic changes at the trapeziometacarpal joint for the left thumb and slight narrowing at the interphalangeal joints, especially for the right long finger." RX 2 at 16. Based on his notes, he believes Petitioner's left middle finger triggering began in January of 2007 when she tried to open a catheter. RX 2 at 17.

Dr. Jablon testified that Petitioner did not have trigger finger when he examined her. Her left middle finger was thickened but he did not appreciate any clicking. RX 2 at 17-28.

Dr. Jablon testified that all of Petitioner's conditions "can be multi-factorial." Those conditions "may have been aggravated by work activities." In terms of "actual causation," however, he does not know what caused Petitioner's carpal tunnel, de Quervain's or triggering. RX 2 at 19. Petitioner could undergo carpal tunnel releases. For the de Quervain's, she could undergo injections or splinting. If those measures failed, she could undergo surgery. RX 2 at 20.

Under cross-examination, Dr. Jablon testified that Dr. Phillips is an associate of his. RX 2 at 21. A phlebotomist draws blood. The duties of a phlebotomist "would [not] necessarily cause carpal tunnel syndrome" because a person can control his positions and how he goes about drawing blood. Pre-existing carpal tunnel syndrome could be aggravated by performing the duties of a phlebotomist. RX 2 at 23. Petitioner has a history of arthritis and thyroid disease. Under certain circumstances, those two conditions "can contribute to the etiology of carpal tunnel syndrome." RX 2 at 24.

Attached to Dr. Jablon's deposition are additional records from Dr. Zaacks. A note dated November 20, 2007 reflects that Petitioner "is an IV nurse and periodically developed trigger

fingers." This note also reflects that Petitioner was currently working 2 days per week in 4-hour intervals, "due to her arthritis."

Arbitrator's Credibility Assessment

Shortly after the hearing began, Petitioner stopped relying on the interpreter and began testifying in English. Thereafter, she seemed to have difficulty understanding some questions. She also had some difficulty making herself understood. It appeared to the Arbitrator that she was making every effort to provide an honest account of her job duties and transfers.

Did Petitioner provide Respondent with timely notice of her claimed repetitive trauma injuries of November 22, 2006?

The Arbitrator views the issue of notice as a threshold issue in this case.

Petitioner testified she began working for Respondent in November of 1998. She denied having any hand or arm problems at that point. The records in evidence relate to a variety of cervical spine, upper extremity, hand and finger problems. Those records make it clear Petitioner's left hand treatment dates back to 2001.

Petitioner's Application, filed on November 14, 2007, alleges repetitive trauma injuries of November 22, 2006 involving both hands. On direct examination, Petitioner testified she developed triggering of her left middle finger on November 22, 2006, after successfully removing a device from an ICU patient. Petitioner further testified she underwent treatment at Respondent's Emergency Room on the day she experienced this triggering. No witness contradicted this testimony but no Emergency Room records are in evidence. Petitioner later acknowledged she was unsure of the date on which the triggering took place. She did not complain of triggering at the hearing. After reviewing RX 5 and RX 6, Petitioner testified she sought job transfers in 2002 and 2004 due to an arthritic thumb and/or finger condition. Neither RX 5 nor RX 6 reflects that Petitioner claimed the arthritic condition to be work-related. Petitioner did not otherwise offer any testimony bearing on the issue of manifestation or notice. Petitioner offered into evidence two letters, dated March 26, 2008 and November 16, 2009, with both of the authoring physicians referring to hand problems and commenting obliquely on causation, but there is no evidence indicating Petitioner tendered either of these letters to Respondent.

In White v. IWCC, 374 Ill.App.3d 907 (4th Dist. 2007), the Appellate Court held that "in a repetitive trauma case, the employee must allege and prove a single, definable accident." The Court also held that "the date of such an accident, from which notice must be given, is the date when the injury 'manifests itself.'" The Court further noted that "an employer's mere knowledge of 'some type of injury' does not establish statutory notice." Petitioner's Application, filed almost a year after the alleged manifestation date, appears to be the first notice to Respondent of any claimed work-related condition.

Based on the foregoing, the Arbitrator finds that Petitioner failed to establish timely notice to Respondent. The Arbitrator views the remaining disputed issues as moot.

Compensation is denied.

11WC28749
11WC28751
Page 1

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

14IWCC0895

Juan Jesus Figueroa,
Petitioner,
vs.

NO: 11WC 28749
11 WC 28751

Woolf Distributing,
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 petition to reinstate, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2013, is hereby affirmed and adopted.

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

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

The party commencing the 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 15 2014
MJB/bm
o-10/7/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF MOTION AND ORDER

ATTENTION. You must attach the motion to this notice. If the motion is not attached, this form may not be processed.
Upon filing of a motion before a Commissioner on review, the moving party is responsible for payment for preparation of the transcript.

Juan Jesus Figueroa
Employee/Petitioner

v.

Woolf Distributing
Employer/Respondent

Case # 11 WC 28749

11WC28751

TO: Niles & Associates 906 W. Gunninson St. #2 Chicago, IL 60640

On 01/03/14, at 9:00 AM, or as soon thereafter as possible, I shall appear before the Honorable Arb. TBA, or any arbitrator or commissioner appearing in his or her place at McHenry Government Center 2200 N. Seminary Rm. A140 Woodstock, Illinois, and present the attached motion for:

- ☐ Change of venue (#3072)
- ☐ Consolidation of cases (#3071) (list case#) ____
- ☐ Dismissal of attorney (#3052)
- ☐ Dismissal of review (#3085)
- ☐ Fees under Section 16 (#1600)
- ☐ Fees under Section 16a (#1645)
- ☐ Hearing under Sect.19(b) (#1902)
- ☐ Penalties under Sect. 19(k) (#1911)
- ☐ Penalties under Sect. 19(l) (#1912)
- ☒ Reinstatement of case (#3074)
- ☐ Request for hearing (#R33)
- ☐ Withdrawal of attorney (#3073)
- ☐ Other (explain) ____

Signature Petitioner ☒ Respondent ☐

James Ellis Gumbiner #243
Attorney's name and IC code # (please print)

James Ellis Gumbiner & Associates
Name of law firm, if applicable

180 N. Michigan Ave. Ste 2100
Street address

Chicago, IL 60601
City, State, Zip code

312-236-9751
Telephone number

E-mail address

ORDER

The motion is set for hearing on _____

Signature of arbitrator or commissioner

Date

ORDER

The motion is ☒ Granted ☐ Withdrawn ☐ Continued to _____
☐ Denied ☐ Dismissed ☐ Set for trial (date certain) on _____

Signature of arbitrator or commissioner

Date 1/3/13

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.

I, James Ellis Gumbiner, affirm that I delivered ☒ mailed with proper postage ☐

in the city of Chicago a copy of this form

at 5:00 PM on 10/28/13 to each party at the address(es) listed below.

Niles & Associates 906 W. Gunninson St. #2 Chicago, IL 60640

Signature of person completing *Proof of Service*

Signed and sworn to before me on _____

_____

Notary Public

[1] The Workers' Compensation Commission assigns code numbers to attorneys who regularly practice before it. To obtain or look up a code number, contact the Information Unit in Chicago or any of the downstate offices at the telephone numbers listed on this form.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY VEATH,

Petitioner,

14IWCC0896

vs.

NO: 10 WC 45773

STATE OF ILLINOIS-MENARD CORRECTIONAL 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 issues of accident, date of manifestation, causation, notice, temporary total disability, partial permanent disability, and medical expenses and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below and finds that Petitioner did prove accident and causation to current conditions of ill-being of his hands and arms bilaterally.

Findings of Fact and Conclusions of Law

1. Petitioner testified he has been employed by Respondent for 22 years. He was a correctional officer ("CO") for four and a half to five years, was promoted to Sergeant as which he served for another four and a half years, and was then promoted to Lieutenant in 1999.

2. Petitioner testified he reviewed information about the job duties of a CO and Sergeant to Respondent's facility, including a job site analysis, job description, video, and the deposition and report of Dr. Sudekum. The job descriptions are generally accurate but there are some flaws.

3. Petitioner noted that most of the doors do not open easily which is contrary to Dr. Sudekum's report. In addition his career as a Sergeant was almost exclusively in the 11-7 shift and he did the exact same job as a CO, except as Sergeant he was responsible for the paperwork. The job of Lieutenant is also similar except he is responsible for more paperwork and supervision.

4. Petitioner began to develop symptoms in his hands and arms. It became harder to hang onto things and he would drop things unwittingly. His hands would cramp and go numb, especially at night. He lost strength in his hands.

5. He sought treatment from Dr. Brown, tests were performed for his condition, and he was referred to Dr. Paletta, who ordered additional testing. He explained to Dr. Brown and Dr. Paletta the demands of his job. Drs. Brown and Paletta tried conservative treatment consisting of splints and minimal exercises. That treatment did not help.

6. Currently, Petitioner works for Respondent as a hearing investigator which involves a lot of typing. His hands go numb while typing and he cannot write for very long and has to stretch his hands. However, his primary function is in the cell house where he still pulls doors and uses Folger Adams keys. It is now harder to turn those keys and he has to use both hands on hard ones. The strength of his grip is "not near what is used to be." By the end of the day his hands are just numb. He takes just over-the-counter aspirin for his symptoms.

7. Petitioner disagreed with the statement of Dr. Sudekum that Sergeants turn Folger Adams keys infrequently. He testified they turn those keys "a lot actually." The duties of an 11-7 Sergeant are a lot different from those on the day shift. In addition, when he was on the 11-7 shift as a Lieutenant, there was generally only was a single Lieutenant on duty which increased his work load.

8. Petitioner also testified that a lockdown or deadlock is when all the inmates are required to stay in their cells, unless they are escorted by a CO. When the facility is in that status, the duties of the COs, Sergeants, and Lieutenants increase because they had to do all the duties normally performed by the inmate porter; "so you have to carry all the trays because they are fed in their cells," pick up all the laundry, and trash, and sweep the galleries. In 2009 they were under lockdown 40-50% of the time. 2010 probably was not that bad.

9. On cross examination, Petitioner testified he was assigned "down in the pit of max" and not "up on the hill" for his entire 22 years. He has been a hearing investigator one year and four months "maybe." In that position he basically acts as an arbitrator regarding disputes among inmates. He occasionally does cell block work. He estimated that was at least one day a week and probably two. He is now working day shift, 7am – 3pm. He generally worked that shift while a cell block Lieutenant, but he did a lot of overtime, he worked 25 hours of overtime already that week.

10. Petitioner testified he could not remember exactly when his symptoms started. Now that he knows he has the condition, "it goes back farther than [he] can remember." He just thought he was fumbling and dropping things. He used the date Dr. Brown diagnosed his conditions as the date of manifestation. He had to say he had symptoms of numbness, cramping, and fatigue in the arms back when he was Sergeant, but he could not remember whether he had those symptoms when he was a CO. He only sought treatment after a friend told him he had the same symptoms and he had it checked out, so Petitioner thought maybe it was not just him; "maybe there was something wrong."

11. Petitioner believed he reviewed the deposition of Dr. Sudekum within the past six months. He believed the deposition he reviewed was about his job duties specifically and not about the duties of a CO generally. Petitioner agreed that COs use keys more often than Lieutenants. He went back to work within five days of the first surgery but the second did not go as well and he did not return to work for three weeks.

12. Petitioner testified that Dr. Paletta's treatment note of November 28, 2011, indicating that he had virtually no pain was incorrect. He told Dr. Paletta that his hands were still tender and sore and that was why he could not do push-ups. He used to do "calisthenics and push-ups" but has given up. Dr. Paletta told him it would get better with time. He did not know what Dr. Paletta meant when he used the term "weightlifting." He does not lift weights. However, Petitioner agreed that he indicated to Dr. Paletta that he was quite pleased with the results at that time.

13. On redirect examination, Petitioner testified there is a lot of difference when he was doing light duty as when he returned to work as a Lieutenant. In light duty all he did was open envelops.

14. The medical records show that on November 22, 2010, Petitioner presented to Dr. Brown with problems in both arms. Dr. Brown indicated that Petitioner was a CO at Menard and told him for 19½ years his job entailed "turning Folger-Adams keys repeatedly throughout the day," bar rapping, opening and closing cell doors, opening and closing a crank box, and cuffing and uncuffing inmates.

15. Petitioner reported a two-year history of numbness and tingling in both hands and could remember no specific trauma. He has done mainly clerical work since April. After examination, Dr. Brown concluded that Petitioner had symptoms of bilateral carpal tunnel syndrome ("CTS") with a possible cubital tunnel syndrome ("CUTS") component. He ordered an EMG/NCV. Petitioner was given splints and told to take over-the-counter anti-inflammatories. Dr. Brown opined that his position as a CO was an aggravating factor in his need for treatment.

16. On December 20, 2010, Petitioner returned to Dr. Brown and reported no improvement in his symptoms. Dr. Brown indicated that Petitioner had chronic bilateral cubital tunnel syndrome and CTS which had failed conservative treatment. He was then a surgical candidate. Dr. Brown kept Petitioner on full duty until surgery.

17. On August 19, 2011, Petitioner presented to Dr. Paletta for evaluation of bilateral elbow and hand pain, numbness, and tingling. He reported symptoms for a few years, and noted "the onset of symptoms with his work activities." He reported the same job activities he did to Dr. Brown, but he was now working as an investigator so had to file reports and other computer work as well. Petitioner reported he had been scheduled for surgery on February 11, 2011, but said "nobody ever told me why, but they just cancelled it."

18. After his examination, Dr. Paletta diagnosed markedly symptomatic bilateral CUTS and mildly symptomatic bilateral CTS. Dr. Paletta recommended surgery. He opined that based on the association between the onset or increase of symptoms and work activities his conditions were caused or aggravated by those activities.

19. On August 23, 2011, Dr. Paletta performed left CTS release, subcutaneous ulnar nerve transposition, and open debridement of the medical head of triceps for left CTS and CUTS.

20. On September 27, 2011, Dr. Paletta performed right CTS release and subcutaneous ulnar nerve transposition for right CTS and CUTS.

21. On November 28, 2011, Petitioner returned to Dr. Paletta who noted that overall Petitioner was doing extremely well. He had virtually no symptoms. His only complaint was a little wrist discomfort while trying to do pushups "He is able to full weightlifting." Petitioner was quite pleased, Dr. Paletta noted an excellent outcome, and released him to full duty and from treatment.

22. On June 13, 2011, Dr. Sudekum testified by deposition. The transcript of this deposition was admitted into evidence in several workers' compensation claims by COs at Menard. He evaluated the position of CO at Menard. He has also reviewed medical records for two officers. He defined "accident" as "a change in the physiology of the person's body such that there are symptoms and there is pathology." He agreed that accident would include "the stress of their usual labor changing their symptomology and physiologically causing a need for treatment."

23. Dr. Sudekum testified he toured Menard and viewed videos of officers' activities; it is a very old facility and there is less automation there than at others he toured. The activities performed there by COs "were somewhat different, and perhaps more strenuous that at the others." He cited "bar rapping" as an activity that would aggravate their symptoms. He also mentioned that the doors are "quite heavy" and opening and closing them "can vibrate somewhat."

24. On cross examination, the witness testified his conclusions about bar rapping and door closing were "on a very generic basis." Such activities were "not a primary etiological factor, but [he did] feel that work, given [his] assumptions about what was done, could have served as an aggravating factor."

25. On redirect examination, the witness agreed that one person can develop CTS or CUTS after 10 years of intermittent bar rapping and another may not develop either condition after "bar rapping all day." "It's just a potential causal element, frankly, that may or may play a role."

26. Dr. Sudekum testified at another deposition on June 12, 2012. He was asked by Respondent to perform a records review regarding Petitioner and to render an opinion as to whether his work activities at Menard Correctional Center caused or aggravated his upper extremity conditions.

27. Dr. Sudekum indicated that there are various possible causative factors for CTS including "strenuous manual activity that involved vibration, such as operating a jackhammer or chainsaw, for the combination of heavy gripping and grasping and vibration." The activities of heavy gripping and grasping would have a lot less affect on developing CUTS rather than in CTS because of the distance to the ulnar nerve.

28. Dr. Sudekum indicated Petitioner was a CO for about five years, became a Sergeant in 1995, and became a Lieutenant in 1999. It was his understanding that the duties of CO and Lieutenant are quite different in terms of duties and activities. Dr. Sudekum testified he toured Menard Correctional Center and talked to both COs and Lieutenants and performed activities they performed such as opening door, cranking, and bar rapping. He also viewed a video of various job activities and CMS position descriptions.

29. Dr. Sudekum reviewed Petitioner's medical records and diagnosed him with mild bilateral CTS and minimal bilateral CUTS. He opined that his job activities at Menard did not aggravate those conditions. He based that opinion on the fact that he did not feel "his work provided a sufficient opportunity for injury to his hand or wrists or elbows or had the necessary force, frequency and/or duration to cause of aggravate those conditions.

30. On cross, Dr. Sudekum testified Petitioner worked at the Respondent facility for about 20 years when he was first evaluated by Dr. Brown. He was a CO for five years.

31. Dr. Sudekum did not remember that the last time he and Petitioner's lawyer were at a deposition together was regarding the case of Virgil Taylor. Dr. Sudekum was handed a copy of the Arbitrator's decision in that case. Petitioner's lawyer proffered that Major Dunham testified "that a conscientious correctional sergeant, officer, lieutenant, and major would use their hands and arms in a similar way; it would be repetitive and strenuous." Respondent stipulated that at one time Major Dunham worked as a Corrections Lieutenant. He also testified that the doors and locks to not work smoothly. Nevertheless, Dr. Sudekum disagreed with the sentiment that the duties of a CO are the same as a Lieutenant.

32. Dr. Sudekum testified that he had previously opined that bar rapping and opening and closing heavy doors are activities frequently performed by COs and those activities "could serve to aggravate a repetitive trauma condition in general, but it would depend on the condition of the individual to some extent."

33. Dr. Paletta testified by deposition on December 14, 2012. His examination and the EMG confirmed the diagnosis of bilateral CTS and CUTS. Because conservative treatment had failed and he had symptoms for some time, Dr. Paletta recommended surgery. After the surgeries, Petitioner "made a good recovery and full resolution of his symptoms." On November 28, 2011, he found Petitioner to be at maximum medical improvement, released him to full duty, and has not seen him since.

34. Petitioner reported to Dr. Paletta that he worked at Respondent facility for 21 years, the last 12 as a Lieutenant. Dr. Paletta opined that the job duties of a CO and correctional Lieutenant would cause or aggravate CTS or CUTS. Petitioner reported that his symptoms were exacerbated by repetitive keying with the Folger Adams keys, bar rapping, and opening and closing the cell doors.

35. Dr. Paletta had also reviewed the job description, job postings, and videos of activities performed by COs at Menard on more than one occasion. In his opinion those activities could cause and contribute to the development of bilateral compression neuropathy and they did in Petitioner's case.

36. On cross examination, Dr. Paletta testified he was under the impression that Petitioner opened doors both as a CO and Lieutenant, but he now had some investigative duties. He had no information on the quantification of the frequency of door opening as a CO or cell Lieutenant. Similarly, he does not have such information about bar-rapping. Dr. Paletta opined that Petitioner's work activities as a CO may have contributed to Petitioner's conditions even though that was 12 years prior to his reporting symptoms.

In finding the Petitioner did not prove accident or causation, the Arbitrator stressed that he had not worked as a CO since 1999 and that he admitted that he turned keys less often as a Lieutenant than he did as a CO. She concluded "Petitioner was not frequently engaged in the above activities when he began to complain about the pain, numbness, and inability to hold objects. Therefore, those activities could not be the cause of his condition when he sought attention for the problem in November of 2010." The Arbitrator also noted that Drs. Brown and Paletta were misinformed about Petitioner's current work activities and Petitioner "led them to believe" he was performing the offending activities much more than he actually was.

Petitioner argues the finding of the Arbitrator is against the manifest weight of the evidence. He cites numerous cases in which the Commission found peripheral compression neuropathies of COs at Menards were compensable. In particular he cites *Broshears v. SOI – Menard*, CC 13 IWCC 63 (2013).

In *Broshears*, the Commission reversed the Decision of the Arbitrator who found that Petitioner did not sustain his burden of proving an accident causing bilateral CTS and left CUTS through repetitive activities associated with his job. In *Broshears*, the claimant testified he worked at Menard for 29 years and served as a CO, Sergeant, and Lieutenant.

The Commission finds the *Broshears* case to be extremely close factually to the case now before the Commission. In addition, the Commission notes that on numerous occasions the Commission has found that the job activities of a correctional officer at Menard had caused or aggravated CTS and/or CUTS. Here, Petitioner testified that his activities as Sergeant and Lieutenant at Menard were virtually identical to those of a CO at Menard.

While Petitioner did not specifically testify regarding current bar-rapping activities, the medical records indicate he reported performing bar-rapping and his testimony that his job activities as Sergeant and Lieutenant involved the same activities as a CO, would corroborate the medical records in that regard. Dr. Sudekum acknowledged that bar-rapping could aggravate the conditions of CTS and CUTS. Respondent certainly could have presented evidence to rebut Petitioner's testimony, but did not. Rather, apparently Major Durham previously testified that COs, Sergeants, and Lieutenants all use their hands and arms in a similar, repetitive, and strenuous manner at least partially corroborating Petitioner's testimony.

The Arbitrator indicated that because Petitioner actually experienced symptoms much earlier than November 22, 2010, he did not prove a correct manifestation date. The Arbitrator is correct that Petitioner testified that he had symptoms for a prolonged period of time prior to seeking medical attention for his hands and arms. Nevertheless, the Commission has generally considered the date of diagnosis of a repetitive traumatic condition a proper date of manifestation and has indicated that a claimant should not be penalized for trying to work through discomfort.

The Commission awards the medical expenses associated with Petitioner's bilateral CTS and CUTS. The Commission is sympathetic to the sentiment expressed by Dr. Sudekum that conservative treatment should really be exhausted before surgery is contemplated. Nevertheless, the Commission is not going to substitute its medical judgment for those of Petitioner's treating physicians. Both Dr. Brown and Dr. Paletta opined that surgery was indicated and that recommendation is not so unreasonable for the Commission to deny that treatment. The Commission also awards Petitioner temporary total disability benefits on four and 1/7 weeks, the entire time he was off work.

The Arbitrator did not address the issue of permanent partial disability because she did not find accident or causation and therefore all other issues were moot. Petitioner recommends an award of 20% loss of each hand and 20% loss of each hand. The Commission thinks such an award would be excessive. Petitioner had an excellent recovery from his surgeries. Dr. Paletta specifically noted that after the surgeries, Petitioner "made a good recovery and full resolution of his symptoms." He was off duty for only about four weeks and was able to return to full duty work.

Finally, Petitioner testified to very little residual disability. He testified his hands go numb when he is typing or writing for a prolonged period of time, it is more difficult to turn the Folger Adams keys, and that his grip is not as strong as it was previously. In looking at the record as a whole, the Commission finds an award of 10% loss of the use of each hand and 10% loss of each arm is appropriate in this case.

14IWCC0896

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,008.77 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 91.6 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 each hand and the loss of the use of 10% of each arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills as identified in Petitioner's Exhibit 1 as provided in §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 injuries.

DATED: OCT 15 2014

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-9/24/14
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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 accident/causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICIA SIGEL,

Petitioner,

14IWCC0897

vs.

NO: 06 WC 35145

WAHL CLIPPER,

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, date of manifestation, causation, temporary total disability, partial permanent disability, and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below and finds that Petitioner did prove accident and causation to a current condition of ill-being of her hands bilaterally.

Findings of Fact and Conclusions of Law

1. Petitioner testified she began working for Respondent on March 13, 2006. Previously she worked as a bank teller. She did not have prior medical treatment for her hands or arms before being employed by Respondent. She did not have any numbness or tingling in her hands or pain in her fingertips prior to her employment with Respondent.

2. Petitioner was hired by Respondent as a blade assembler. The clipper would sit on a fixture and she would put the blades on the clippers. She used an overhead electric screwdriver to attach the blades to the clippers. The blades were in pans in front of her which were sprayed with oil to reduce noise. She would grip a gauge and manipulate it to make sure the blade was set right. The gauge was about 2" around and she took readings by pushing a button on it. Petitioner would then put on a temporary plastic lid on the clipper and pass to the next assembly worker. All the parts are covered in oil and she had to grasp the parts hard.

3. Petitioner worked at that job from the date of her hire to the time she was taken off work because of carpal tunnel syndrome ("CTS"). She testified the fixture did not fit the clipper well; "you had to grip it pretty good." She would hold the clipper with her little finger and middle and fourth finger of her left hand and the blade with her index finger and thumb. She did the same action every time. She had to put two blades into each clipper. She would press the screws on the blades and screw them in. The screws did not fit well all the time; "if they didn't go in straight, you would have to back it up and start all over again."

4. After the blades were installed, Petitioner would make sure she had the temporary lid on before she plugged in the clipper and turned it on. She held the clipper in her left hand and plugged it in with her right hand. There was a lot of vibration once the clipper was activated. She would have to hold on tight so the vibrations would not cause the ill-fitting temporary lid to fly off. She checked every 5th clipper to ensure they cut and every 20th for tension. To test tension she held a device and pushed a button that spread the blades apart. She had to do that a couple of times. She was expected to complete two or three clippers a minute for ten hours a day and fewer hours Saturday. When she was hired she worked 55 to 58 hours a week and made her quota on most days. Overtime was mandatory.

5. Petitioner further testified that around April 1, 2006, she noticed her hand started tingling. Around May 17, 2006, she informed her supervisor. He sent her to the nurse who told her she might have CTS, gave her braces for her hands, and told her to take over-the-counter pain medication. Her hands were getting worse and the nurse referred her to a company doctor, Dr. Pultorak, whom she saw on June 6, 2006. Petitioner was prescribed medication and started physical therapy.

6. Petitioner testified her condition was not getting any better despite the splints and physical therapy. Dr. Pultorak referred her to Dr. Walker, who took a complete history of her work activities; he was the first doctor to do so. He sent her for an EMG, which was performed on July 26, 2006. On July 31, 2006, Dr. Walker informed Petitioner she had bilateral CTS. Petitioner had surgery on both wrists and was released to work on December 18, 2006. Respondent did not take her back to work until 1/2/07. When she returned she ran a laser which did not put any tension on her hands.

7. Petitioner also testified that currently, she had numbness in the index and middle finger of her right hand, "in the left 2 fingers of her left hand," and she cannot grip very well anymore. Her hands "ache and stuff when [she worked] with them" and "when the weather changes, they ache."

8. Petitioner saw Dr. Weiss for an examination pursuant to Section 12. He did not go through her job activities as she just described to the Arbitrator. She did not remember him asking her whether her activities were particularly forceful and her telling him she did not think they were. She believed her activities were forceful after the parts got covered in oil; so the activities get more forceful as the day goes on.

9. Petitioner saw a video of the current activities of an assembler. The activities are different now because a permanent rather than temporary lid is used in the assembly process so the assembler no longer has to grip the lid. The clipper fits into the fixture better than before and the blades did not have all the oil on them as when she was doing that job. The video also does not show the periodic tests for cutting or tension.

10. On cross examination, Petitioner testified she was in training for a period after her hire, but denied that it lasted through April 1, 2006. Petitioner agreed that she could have worked only a total of 17 days before she began noticing symptoms on April 1, 2006. The hanging screw driver has a spring mechanism to allow it to be pulled down. She had to press it down to activate it. She held the clipper in her entire left hand and pressed the screwdriver down with her entire right hand. She agreed that she used her shoulder muscles as well as her hands in using the screwdriver. She had to put two screws into each clipper. She did not see her surgeon since her return to work and she has worked for Respondent full time since January 2, 2007. She agreed that the tension testing she performed could have been once every 15 minutes.

11. On redirect examination, Petitioner testified she tested tension on every 20th clipper and assembled two to three a minute. The cover that contained the blades was with her the entire work day. After the first set of blades everything in the pan was covered in oil and you had to grip the blades and screwdriver tighter because everything was slippery.

12. The medical record reveals that on June, 6, 2006, Petitioner presented to KSB Corporate Health. She reported persistent bilateral wrist pain soon after beginning work for Respondent in March 2006. "She does repetitive twisting/screwing motion with her right hand predominantly for 10 hours a day for five days a week." Dr. Pultorak diagnosed bilateral CTS "with repetitive strain of both wrists." She prescribed Ultram in conjunction with Advil, ice, splints, and physical therapy, and restricted Petitioner's work to "avoid repetitive grip with rotational movement of both hands for two weeks."

13. On June 20, 2006, Petitioner returned and reported mild improvement, 20% in the right wrist, and 40% in the left since work modification. Dr. Pultorak suspected medial epicondylitis as well as bilateral CTS. She ordered EMG/NCV to assess medial neuropathy.

14. On July 7, 2006, Petitioner presented to Dr. Walker who noted Petitioner had classic symptoms of bilateral CTS right worse than left. Petitioner reported the onset of symptoms were within weeks to months of beginning work for Respondent. However, she showed atrophy of the thenar eminence which indicated this has likely been a long-term ongoing situation.

15. On July 31, 2006 it was noted that the EMG showed findings consistent with mild left and mild to moderate right median nerve entrapment consistent with bilateral CTS. She was referred to Dr. Gabriel, the only local orthopedic surgeon on her insurance plan.

16. On September 1, 2007, Dr. Gabriel performed right CTS release for right CTS and on October 13, 2006, he performed left CTS release for left CTS.

17. Dr. Gabriel testified by deposition on December 4, 2008. He testified he had treated CTS since he started practicing medicine in 1993. Treatment of CTS includes evaluation of the etiology of the condition. An EMG had showed Petitioner had bilateral CTS. Dr. Gabriel's physical examination was consistent with the diagnosis of bilateral CTS right worse than left.

18. They decided to perform surgery because Petitioner had already tried conservative treatment such as splinting and physical therapy. In his operative report, he noted discoloration of the median nerve in the right wrist which would suggest a more severe condition of CTS than identified in the EMG. When he last saw her on December 18, 2006, he noted she was ready to return to work.

19. Dr. Gabriel indicated Petitioner apparently did "a very repetitive job with parts that don't weigh a lot, but multiple repetitions a day up to a thousand times over." He noted that she had a relatively high demand job, so he had an idea of her job activities. Dr. Gabriel opined that "in a patient who's predisposed to carpal tunnel" a highly repetitive job "would be a significant aggravating factor and in fact she was doing this job when she presented" with CTS symptoms. He would "say with confidence that what she did was an aggravating factor" for her developing CTS and her need for surgery.

20. On cross examination, Dr. Gabriel testified Petitioner was about 50 years old when he performed the surgeries. He wasn't aware that she was a smoker for 30 plus years. He thought development of CTS is multifactorial and is not caused by a single event. If a person develops it and another does not while performing the same functions, the one who developed CTS would be predisposed to developing the condition.

21. Dr. Gabriel testified he had not reviewed Dr. Pultorak's treatment note of June 6, 2006, in which she gives a brief description of Petitioner's work activities and that she developed symptoms shortly after beginning work for Respondent.

22. Dr. Gabriel also testified he has seen a description of her job, which he just received on the day of the deposition. He did not specifically remember having a conversation with Petitioner about her work activities and unfortunately there were no comments about that in his notes. Such conversation would be normal, but he had no recollection of how she described her work activities.

23. Dr. Gabriel could not remember whether he reviewed Dr. Walker's treatment note of July 7, 2006. Dr. Gabriel agreed with Dr. Walker that there had been some underlying abnormality however the symptoms only began after she began her work for Respondent. The job activities probably accelerated something that was already there. Dr. Gabriel also noted that the discoloration he described takes a long time to develop suggesting long term nerve compression. Nevertheless, he believed the job activities played a role, but it was impossible to assign percentages.

24. On redirect examination, Dr. Gabriel agreed with the recitation of the job description proffered by Petitioner's lawyer. He thought such activities contributed to the development of her symptoms and the need for surgery.

25. On re-cross examination, Dr. Gabriel testified his opinion would not necessarily change if the job description he was provided was inaccurate. The only job description he saw was provided by Petitioner's lawyer; he did not see Petitioner perform her job or a video of the job being done.

26. Dr. Weiss testified by deposition on July, 7, 2009. He testified he reviewed Petitioner's medical records and performed an examination under Section 12 of the Act. He told Petitioner he would take a history from her and would dictate the history in front of her. He asked that she should correct him if his history was inaccurate.

27. Petitioner reported a 33-year history of smoking ½ packs of cigarettes a day. She worked for Respondent a little more than three months before his examination. She described her work activities as extremely repetitive, but not particularly forceful. She processed more than 1,000 parts in a normal workday. When Dr. Weiss indicated he understood she frequently had to lift up to 35 pounds, Petitioner responded that was not part of her regular job activities. Petitioner reported the most problematic aspect of her work was performing an activity similar to using a screwdriver on every piece she picks up.

28. Dr. Weiss was provided a job description and a video of a person performing the work activities that Petitioner performed. The video showed brief use of a power screwdriver and rotation of the right hand. Dr. Weiss did not see any forceful activities. On examination, Dr. Weiss noted thenar atrophy and diminished sensation in some fingers. Thenar atrophy is wasting away of muscles innervated by nerves. It is caused by a long-term damage of the conduction of the median nerve which in Petitioner's case resulted from CTS.

29. Dr. Weiss opined that Petitioner's CTS was not related to her employment with Respondent. He posited that work activity associated with development of CTS involved "vigorous vibration" such as the use of chainsaws or jackhammers. Although it is not supported by the literature, Dr. Weiss also believed highly forceful gripping activities such that performed by certain mechanics or slaughterhouse workers can cause or aggravate CTS. Petitioner's activities involved no such activities. He also opined that a person has to perform such offending activities for at least six months, while Petitioner began experiencing symptoms within 1 month of beginning the work. He also noted that Petitioner was in the age group most likely to develop idiopathic CTS and her smoking history. He also indicated that he found evidence of multiple neuropathies.

30. On cross examination, Dr. Weiss testified the video showed a brief use of a screwdriver, but Dr. Weiss did not know whether it was on a table or suspended. All he could say about the video was noted in his report.

31. He agreed Petitioner was "a slight woman," 5'2" and 104 lbs according to her report. He could not recall the size of the person in the video or the size of their hands. He never questioned that Petitioner's work activities were highly repetitive. He assumed Petitioner worked eight hours a day.

32. Dr. Weiss testified he based his causation opinion on the video and Petitioner's history. "The fact that she did not do anything which was forceful clearly is probably the most important basis for" his opinion. Petitioner told him she processed more than 1,000 pieces a day. However, when he asked her whether it involved any forceful gripping, she answered "no."

33. Dr. Weiss believed Petitioner was comfortable with his report of history because he dictated it in her presence. Dr. Weiss testified he did not "go through the entire assembly of what she did from the time she actually received the part until the time she completed the assembly."

34. Dr. Weiss agreed that it takes more force to grip something that is slippery. He did not know whether the parts she gripped were oiled. He did not recall inquiring whether the parts she was gripping had any substance on them. He had no recollection that she mentioned anything about a "temporary lid," or whether the clipper was plugged in or whether it vibrated. It is well recognized that forceful vibration damages nerves, but the reason for such damage is not clearly understood. Petitioner's history and his viewing of the video did not demonstrate forceful gripping.

35. Dr. Weiss agreed that it would be more damaging to perform forceful gripping or experiencing vigorous vibration for 10 hours a day than six hours a day. The more one is exposed to the problematic activity the worse it would be.

36. Dr. Weiss also testified the movement of one's hands while gripping as an aggravating factor for CTS has been "pretty much disproven," in the absence of extreme positions. He cited the example of a violinist who has his hand a flexed position for three-four hours a day for years. The position must be extreme and maintained for a long period of time.

37. On redirect, Dr. Weiss testified he was unaware of any association between the size of a person's hands and the development of CTS, though "there is some statistical relationship having to do with the width of somebody's hand versus the length of something at the wrist bones."

38. The "Essential Functions" of Petitioner's job form included assembling various parts into sub-assemblies either by hand or with the aid of an arbor press, drill press, soldering iron, or electric screwdriver. He/she also prepares, connects, and solders wire and keeps feeder bowl and parts bin full, and adjusts and lubricates equipment. The operator also assembles component parts of charger housings, mechanical parts (motors, screws, blades, cases, lids, and springs) and finished machines, verifies lot sheets and packing instructions ensuring all parts are ready to be packed.

39. He/she also packs parts, finished machines, cards and stuffers in boxes, cases, cartons, or containers, and ensures proper packing, assembles boxes and cartons using tape dispenser, heat stamp machine, heat sealer and stapler, and keeps accurate record of production.

40. Finally, the operator must perform inspections to ensure quality specifications are met. These "inspections are performed by observation, listening to operation defects, the use of mechanical and electrical testing/gauging equipment and the use of snap and feeler gauges."

The Arbitrator found that Petitioner did not sustain her burden of proving accident, correct manifestation date, or causation to her bilateral CTS, based on her reading of the entire record. Petitioner argues the Arbitrator erred and that Petitioner did prove accident/causation. She stresses that she did not experience symptoms prior to her employment with Respondent and the opinion testimony of Dr. Gabriel was more persuasive than that of Dr. Weiss because Dr. Weiss did not really understand the nature of Petitioner's actual work activities.

Petitioner testified that she began to suffer symptoms soon after beginning her employment with Respondent. She testified she never had any previous symptoms or treatment of her hands or arms prior to her job with Respondent and Respondent did not submit any evidence to rebut that testimony. Based on the atrophy of the thenar eminence and the discoloration of the median nerve found in surgery, it is certainly likely that Petitioner had a long-standing underlying preexisting condition. Nevertheless, her un-rebutted testimony was that she had not suffered any symptoms prior to her employment with Respondent.

The Commission finds it plausible that the combination of repetitive gripping in a relatively forceful manner, due to the oily/slippery parts, and the vibration of the screwdriver and clipper when being tested while holding tightly on an ill-fitting lid, could be sufficient to aggravate her underlying condition and make it symptomatic. Dr. Weiss agreed that it takes more force to grip slippery items than dry items and that testing the machine involved some vibration. The fact that she became symptomatic only 17 days after her hiring could be because she had not previously engaged in activities of this nature which precipitated the sudden onset of her symptoms. Her previous job of bank teller would not appear to include the same repetitive gripping and vibration as did her job with Respondent. Therefore, the Commission finds that Petitioner did prove a causal relationship between her bilateral CTS and her work activities.

Petitioner requests temporary total disability benefits of 25&4/7 weeks, from July 7, 2006 through January 2, 2007. There do not appear to be any work-status notes in the record. Apparently, Petitioner is using a date for commencement of temporary total disability benefits corresponding to a date on or about she testified she was told to "go home and get her hands taken care of," and a termination date based on the day she was actually permitted to go back to work. The Commission does not believe Petitioner proved she was entitled to that amount of temporary total disability benefits. In the experience of the Commission, in CTS claims generally the petitioner keeps working up to the date of surgery. That may actually be the case here because Respondent accommodated Petitioner's work restrictions and her testimony suggests she was working at that position until she was taken off work for the CTS surgeries.

14IWCC0897

In addition, while Petitioner testified she actually went back to work on January 2, 2007, Dr. Gabriel released her to work as of December 18, 2006. Petitioner would not be entitled to temporary total disability benefits if the delay in returning to work was based on a seasonal layoff or a general shutdown of the factory during that time of year, which is not uncommon. Therefore, the Commission finds that an award of temporary total disability benefits from the date of the first surgery September 1, 2006, to the date Dr. Gabriel released her to work December 18, 2006, for a total of 15&4/7 weeks to be appropriate.

Petitioner requests 22½% loss of the right hand and 20% loss of the left hand. The Commission considers such an award would be excessive. Petitioner made an excellent recovery after her surgeries. There do not appear to be any current work restrictions on her. It is unclear from the record whether Petitioner eventually returned to her previous position, but there was no indication that she was physically unable to do so. Petitioner testified only to some numbness in some fingers, loss of some grip strength, and achiness associated with work or weather changes. Considering the record as a whole, the Commission finds an award of 15% loss of use of the right hand and 10% loss of use of the left hand, to be appropriate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $376.56 per week for a period of 15&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 $338.90 per week for a period of 51.25 weeks, as provided in §8(e)2 of the Act, for the reason that the injuries sustained caused the 15% loss of the use of the right hand and 10% loss of the use of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills incurred for treatment of Petitioner's work-related injuries, as provided in §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 injuries.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 15 2014

David R. Donohoo

Charles J. DeVriendt

RWW/dw
O-9/23/14
46

14IWCC0897

Dissent

I respectfully dissent from the majority decision. I would have affirmed the Decision of the Arbitrator who found that Petitioner did not prove her bilateral condition of ill-being was causally related to her work activities. The discoloration of the medial nerve as identified by Dr. Gabriel in his operative report and the thenar eminence atrophy, identified by Drs. Walker and Weiss, certainly suggest the condition was present for a prolonged period of time and the nerve compression was long-standing. Petitioner testified she began to experience CTS symptoms after only 17 days of working for Respondent. It really does not appear that the activities depicted in the video, or even according to her testimony, could cause her bilateral CTS to develop or even to significantly aggravate her preexisting condition, in that short period of time.

In this case I find the causation opinion of Dr. Weiss more persuasive that of Dr. Gabriel. While, Petitioner argues that Dr. Weiss did not have a competent understanding of Petitioner's work activities, Dr. Gabriel's understanding was certainly no better and perhaps worse. Dr. Gabriel could not remember whether he had a conversation with Petitioner about her work activities even though such a conversation would be "normal." There was no indication of such a conversation in his treatment notes. He had not seen a job description until the day of the deposition, which was provided by Petitioner's lawyer. He had no recollection of how Petitioner described her job activities. All he seemed to understand about her job was that it was "heavy demand." In addition, Dr. Gabriel acknowledged that the discoloration of the nerve would likely indicate long-term nerve compression.

On the other hand Dr. Weiss was persuasive in explaining that work activity associated with development or aggravation of CTS would involve "vigorous vibration" such as the use of chainsaws or jackhammers. Dr. Weiss also believes highly forceful gripping activities such that performed by certain mechanics or slaughterhouse workers could cause or aggravate CTS. However, Petitioner's activities involved no such vigorous vibration or no such forceful gripping. Dr. Weiss also opined that a person had to perform such offending activities for at least six months to develop or aggravate the condition; Petitioner began experiencing symptoms less than three weeks after beginning working for Respondent. He also noted that Petitioner was in the age group most likely to develop idiopathic CTS and her smoking history. Finally, Dr. Weiss also indicated that he found evidence of multiple neuropathies which would be suggestive of physiologic/idiopathic causes for developing CTS.

For the reasons stated above, I would have found Petitioner did not sustain her burden of proving her work activities caused or aggravated her bilateral CTS and I would have affirmed the Decision of the Arbitrator. Accordingly, I respectfully dissent from the majority decision.

Ruth W. White

RWW/dw

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

Glenn Sledd,

Petitioner,

14IWCC0898

vs.

NO: 11 WC 22744

Sharkey Transportation,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County. In an April 14, 2014 order the honorable Bobbi N. Petrungaro remanded this case to the Commission to specifically address the issues of temporary total disability benefits and medical benefits with respect to its March 20, 2013 decision.

On February 27, 2011 the Petitioner, a 58-year-old truck driver and resident of Paducah, Kentucky, suddenly became ill and lost consciousness while driving and sustained a motor vehicle accident. The accident occurred near Monee; Petitioner left Paducah in the morning on February 27, 2011 and was traveling to Wisconsin. As a result of the motor vehicle accident, Petitioner sustained injuries to his neck, back, and left knee. Petitioner had no known history of syncopal episodes and no direct cause of the event was subsequently determined on physiological testing. Petitioner requested medical treatment, temporary total disability benefits and prospective medical treatment which had been denied by Respondent. A §19(b) hearing was held on April 16, 2012 and the Arbitrator found that Petitioner's accident did not arise out of his employment and denied Petitioner's claim. The Arbitrator found that although Petitioner was a traveling employee, the idiopathic event that occurred and caused the accident was not the type normally to be anticipated or foreseen by the employer.

The Commission reversed and awarded benefits, finding that Petitioner's employment as a truck contributed to his injuries by increasing the affects of the accident. The Commission

awarded temporary total disability benefits from February 28, 2011 through March 27, 2012, medical expenses pursuant to the fee schedule and prospective medical treatment for the injuries sustained on February 27, 2011 including the recommended cervical and lumbar diagnostic tests.

Respondent sought Circuit Court review and in an order dated December 16, 2013, Judge Petrungaro affirmed, finding that the Commission's decision that Petitioner sustained an accident arising out of an in the course of his employment was not against the manifest weight of the evidence. Respondent subsequently requested clarification from the Circuit Court on the issues of temporary total disability and medical benefits, issues which were raised by the Respondent but not addressed in the order. The Circuit Court subsequently issued the April 14, 2014 order remanding the case to the Commission to state its reasoning in support of its decision dated March 20, 2013 on the issues of temporary total disability and medical benefits. In accordance with the order and after reviewing all of the evidence we hereby clarify our earlier decision in this case. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner testified without rebuttal at hearing that he suddenly became ill and lost consciousness before he could safely pull off of the highway. He was travelling approximately sixty miles per hour when he lost consciousness. Petitioner regained consciousness after the truck had come to a stop in a grove of trees outside of Monee. Emergency medical services arrived and Petitioner was taken to the St. James Hospital emergency room. (T. 19-20) Petitioner complained of low back pain in the emergency room and was noted to have a small laceration on his nose and a small abrasion on his right hand. He reported having no memory of the details of the accident. CT scans of the head, neck, and low back were unremarkable. Petitioner was diagnosed with a lumbar muscle strain and was prescribed ibuprofen and a muscle relaxer. Petitioner was discharged from the emergency room with instructions to follow up with his primary care provider in one or two days. (PX 1)

Petitioner testified that after he was released from the hospital he stayed in a hotel in Monee overnight and was picked up by another truck driver and taken to Quincy. Petitioner testified that he "blacked out again" while stopped for food and fuel in Decatur. He testified that an ambulance arrived and examined him but he did not go to the hospital. (T. 21-22) Petitioner subsequently returned to his home state of Kentucky and sought treatment at Livingston Hospital in Salem. On March 7, 2011, he gave a history of the two syncopal episodes and the truck driving accident. Further cardiac workup was recommended and Petitioner was restricted from driving or operating machinery until he was cleared by Dr. Barnes, his primary care physician at Livingstone Hospital. (PX 2, PX 8) Petitioner began seeing Dr. Talley at Cardiology Associates of Paducah on March 23, 2011 on referral from Dr. Barnes for additional cardiac evaluation and testing. (PX 4, PX 5)

Petitioner returned to Livingston Hospital on April 21, 2011 requesting further evaluation for complaints of neck, back and lumbar pain and he was by a physicians' assistant. Cervical and lumbar MRI scans were recommended. (PX 2, PX 3) Petitioner was next examined with respect to his neck, back and left leg on August 16, 2011, when he was seen at the request of Respondent

for a §12 examination by Dr. St. Clair. Petitioner reported a history of the accident on February 27, 2011 where he became dizzy and nauseated and attempted to pull off the road but blacked out. He explained that the truck went off the right side of the roadway, down a five foot deep ditch and then through a small grove of trees before stopping. He reported that he was wearing his seatbelt. Dr. St. Clair reviewed reports of CT scans of the neck, head and back and found them all to appear normal. Petitioner reported that he suffered another blackout twenty-four hours after the first. He reported that he had been off of work since the date of accident with no treatment for his back or neck although MRIs scans had been recommended by his doctor. Petitioner complained of pain in his left leg and numbness in his right foot, in addition to neck and back pain. Dr. St. Clair opined that Petitioner had symptoms of a lumbar strain with neck stiffness and signs of depression or post-traumatic stress disorder. She did not find any objective evidence of spinal injury. She did not recommend any further treatment for the suspected soft-tissue injuries and she noted that Petitioner had been able to run on a treadmill for his cardiac testing. (RX 1)

Petitioner returned to Dr. Barnes on August 19, 2011 with continued complaints of back and neck pain with difficulty turning his head. Dr. Barnes recommended CT scans of the cervical and lumbar spines and an EMG; Petitioner has not undergone these diagnostic tests. Petitioner saw Dr. Barnes again on January 3, 2012 and additionally reported suffering falls and experiencing difficulty climbing stairs. (PX 3) Petitioner was seen by Dr. Mundy at Livingston Hospital on March 20, 2012. He complained of the inability to straighten his left knee. He was noted to have symptoms of cervical and lumbar spine pain. Dr. Mundy recommended cervical and lumbar CT scans and an x-ray of the left knee. Dr. Mundy indicated that she understood Petitioner's pain to be related to a work injury after being in an accident but that his claim had been denied by workers' compensation. (PX 3) Petitioner testified that Dr. Talley released Petitioner to return to driving on March 27, 2012 and we note that this is the final medical record prior to hearing. (PX 5, T. 36)

Petitioner testified at hearing that he notices that he cannot straighten his left knee and he experiences a lot of pain. He testified that he turns his neck carefully due to pain and that raising his head hurts his neck as well. He testified that all of his symptoms started "pretty much right after the wreck" and were ongoing to the date of hearing; he denied any prior similar symptoms. (T. 30-31) He testified that his left knee pain began "maybe a week or so after the accident" and he denied any pre-accident left knee pain. He testified that he notices that he cannot run or lift much weight and cannot stretch his leg out and that it keeps him from sleeping well. He denied sustaining any other accidents. (T. 36-37)

We found that Petitioner met his burden of proving that his neck, back and left leg injuries were sustained during the accident and that he has been under the treatment of Dr. Barnes and his associates at Livingstone Hospital and has not reached maximum medical improvement. Lumbar spine, cervical spine, and left knee diagnostic treatment has been recommended by Dr. Barnes and Livingstone Hospital but has thus far been denied by Respondent. We found this treatment to be reasonable, necessary and related to the injuries sustained on February 27, 2011. In support of that decision, we note that Petitioner was driving sixty miles per hour when his truck left the roadway. It is unknowable what specific forces his body was subjected to while he was unconscious but Petitioner did become aware upon reviving

that his truck had run through a ditch and a grove of trees. At the emergency room, Petitioner was found to have a laceration to his nose and an abrasion to his right hand in addition to complaints of back pain. Petitioner denied that he was having any neck, back or left knee pain prior to the accident. He testified without rebuttal that he was not under any restrictions and was not taking any medications on February 27, 2011 and that his symptoms developed subsequent to the accident. We acknowledge Dr. St. Clair's opinion that Petitioner may experience some psychologically mediated pain symptoms possibly in relation to a condition of depression or post-traumatic stress disorder, but we do not find her observation to be corroborated by the records of Petitioner's treating physicians and we do not find any evidence of symptom magnification or malingering. In accordance with our decision on the issues of accident and causal connection and for the foregoing reasons, we awarded Petitioner's outstanding medical bills incurred for the evaluation, diagnosis and treatment of the conditions related to the February 27, 2011 accident, amounting to $15,203.10.

With respect to temporary total disability, we awarded benefits from February 28, 2011 through March 27, 2012, when Petitioner was cleared by Dr. Talley to return to driving. Dr. Barnes originally referred Petitioner to Dr. Talley for further treatment with respect to the potential cardiac cause of his syncopal episodes. In addition, Petitioner stipulated on the request for hearing form that temporary total disability benefits were only sought through March 27, 2012. For the foregoing reasons, we found that Petitioner was unable to work as a result of the February 27, 2011 accident and is entitled to temporary total disability benefits from February 28, 2011 through March 27, 2012.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Commission filed March 20, 2013 is clarified as stated above in accordance with the order of the Circuit Court dated April 14, 2014.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $573.56 per week for a period of 56 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 authorize and pay for lumbar and cervical spine diagnostic treatment and reasonable and necessary medical treatment related to the February 27, 2011 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $15,203.10 for medical expenses under §8(a) and §8.2 of the Act. Pursuant to §8.2, Providers of out-of-state procedures shall be reimbursed at the lesser of that state's feel schedule amount or the fee schedule amount for the region in which the employee resides. Respondent shall hold Petitioner harmless for amounts paid by its group health insurance on account of the February 27, 2011 accident.

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 $40,600.00. 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: OCT 15 2014
RWW/plv
r-9/10/14
46

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

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

William Marksteiner,

Petitioner,

14IWCC0899

vs.

NO: 04 WC 28112

Nestle NPB Services, Inc.,

Respondent.

DECISION AND OPINION PURSUANT TO §19(H) AND §8(A) OF THE ACT

This claim comes before the Commission on a petition for review under §19(h) and §8(a), filed by Petitioner on December 1, 2008. No question has been raised concerning the timeliness of the petition. Commissioner White conducted a hearing in this matter on January 24, 2014. Petitioner, counsel and Respondent's counsel were present at the hearing and a record was made. The issue on review is whether Petitioner's current condition of ill-being with respect to his right knee is related to the May 18, 2004 accident. After considering all of the evidence and being advised of the facts and law, the Commission grants Petitioner's petition for review under §19(h) and §8(a) and awards the expenses and temporary total disability benefits associated with the February 13, 2012 right total knee replacement. Furthermore because we find that Petitioner proved a material increase in his work-related disability, we award permanent partial disability benefits representing 50% loss of the right leg with credit to Respondent for the 35% of the right leg previously paid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a decision dated November 8, 2006, the Arbitrator awarded Petitioner 35% of the right leg and 5% of the man as a whole; the decision became final. Petitioner filed a petition for review under §19(h) and §8(a) on December 1, 2008. Petitioner testified at the review hearing that following arbitration his right knee became increasingly more painful but without any inciting event. He returned to McLean County Orthopedics for further treatment with Dr. Irwin in 2007 and 2008. On November 19, 2008 Dr. Irwin opined that "there is no question that there

is a causal connection between his workplace injury and the knee osteoarthritis. His original injury and the daily routine has worsened and accelerated the degeneration in the right knee." (RX 2) On May 27, 2009 Dr. Irwin recommended a total knee replacement due to Petitioner's end-stage osteoarthritis. (RX 4)

On January 19, 2010 Petitioner began seeing Dr. Hanson following Dr. Irwin's retirement. Dr. Hanson, an associate of Dr. Irwin's at McLean County Orthopedics, testified via deposition. Dr. Hanson treated Petitioner with injections to his right knee until Petitioner was ready to proceed with a total knee replacement. Petitioner testified that the injections provided only temporary improvement. Dr. Hanson performed the surgery on February 13, 2012. With respect to causal connection, he testified that Petitioner's arthritis developed at a rapid rate in the lateral joint space after the June 17, 2004 arthroscopic surgery by Dr. Irwin. He found it highly significant that Dr. Irwin basically removed the entire lateral meniscus and that at the time "there was no arthritis in the lateral compartment." He explained his opinion that it is "a pretty straightforward sequence of events where he loses his lateral meniscus, develops arthritis in that lateral compartment, and then gets the replacement." He added "that's the main reason he was bone-on-bone laterally and also was developing a valgus deformity, which means a knock-knee deformity because of his wear laterally." (PX1, p. 17-18)

Dr. Hanson testified that following the right total knee replacement on February 13, 2012, Petitioner had some post-operative complications involving infection and blistering related to Petitioner's clotting disorder and possibly an allergy to Steri-Strips. The complications necessitated a re-hospitalization on March 2, 2012. Petitioner's range of motion was limited as a result of these complications, and Petitioner required a manipulation under anesthesia on April 3, 2012. Dr. Hanson testified that Petitioner made good improvements with physical therapy. Petitioner was released to return to work on September 24, 2012 and seeks temporary total disability benefits from February 13, 2012 through September 24, 2012. Petitioner testified that he is working full duty but has knee pain, swelling and throbbing after a day of work. He takes Hydrocodone. He notices that he has reduced range of motion and feels somewhat unbalanced when walking quickly. He also continues to take Coumadin for his clotting disorder. Petitioner testified that he does not feel that the total knee replacement greatly improved the condition of his right knee.

Respondent denied authorization for the February 13, 2012 surgery on the basis that Petitioner's need for a right total knee replacement was the result of his age and history of significant injury to his meniscus and near total meniscectomy when he was sixteen, and not the "rather minor incident of May 2004." Respondent had Petitioner examined pursuant to §12 on January 27, 2012 by Dr. Monaco. Dr. Monaco opined that Petitioner's surgery at age sixteen and subsequent degeneration was the cause of the need for total knee replacement. (RX 1) Respondent argues that considering Petitioner's pre-existing condition, any normal activity would have led Petitioner to need a knee replacement by his age and without respect to the May 18, 2004 accident. We find Dr. Monaco's opinion less persuasive than the opinion of Dr. Hanson. Rather than the May 18, 2004 injury being "minor," the Arbitrator found that Petitioner sustained trauma severe enough to require a subtotal lateral meniscectomy and also to cause an aggravation of his osteoarthritic condition. We rely on the opinion of Dr. Hanson and the medical evidence indicating that the condition necessitating the February 13, 2012 right total

14IWCC0899

knee replacement, in fact, largely developed subsequent to the May 18, 2004 accident and June 17, 2004 arthroscopy. The status of Petitioner's osteoarthritis was directly observed on June 17, 2004 by Dr. Irwin. Dr. Hanson and Dr. Irwin unequivocally opined that Petitioner's advanced arthritic state requiring a right knee replacement was directly caused by the May 18, 2004 accident and the effects of the arthroscopy. (PX 1, PX 3)

After consideration of the facts in this case, the Commission grants Petitioner's petition under §19(h) and §8(a) because we find that Petitioner's current condition of ill-being is causally related to the May 18, 2004 accident and that Petitioner proved a material increase in his work-related physical disability since the arbitration hearing on October 19, 2006. It appears that Petitioner continues to experience pain and discomfort as a result of his work-related injury. We find that Petitioner is entitled to additional temporary total disability benefits, medical expenses and permanent partial disability benefits representing 50% loss of use of the right leg with credit to Respondent for the 35% of the right leg previously paid.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition under §19(h) and §8(a) is hereby granted and that Respondent shall pay any outstanding medical expenses associated with Petitioner's work-related right knee condition pursuant to §8(a) and §8.2 of the Act and shall reimburse Petitioner for out of pocket expenses in the amount of $2,113.38. Respondent shall hold Petitioner harmless for any demands for reimbursement by group insurance.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $405.00 per week for 31 and 6/7 weeks, from February 13, 2012 through September 24, 2012, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $364.50 per week for a further period of 100 weeks, as provided in §8(e) of the Act because the injuries sustained caused permanency to the extent of 50% of the Petitioner's right leg. Respondent shall have credit for 70 weeks of permanent partial disability benefits previously paid to Petitioner.

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

DATED: OCT 15 2014
RWW/plv
o-9/24/14
46

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jodiann Land,

Petitioner,

14IWCC0900

vs.

NO: 07 WC 36277

Bement Health Care 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 accident, causal connection, benefit rates, medical expenses, temporary total disability and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator on the issue of permanent disability as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Arbitrator found that Petitioner failed to prove that she is permanently and totally disabled from all employment as a result of the accident of July 20, 2007. The Arbitrator awarded 35% loss of the person as a whole pursuant to §8(d)2, relying on Dr. Fletcher's opinion that Petitioner was restricted to working in a sedentary or light duty capacity and was unable to work as certified nurse assistant ("CNA"). The Arbitrator found that Petitioner was unable to pursue her normal occupation, although she did not prove any wage loss as a result.

After reviewing all of the evidence, we find that Petitioner in fact failed to prove a loss of profession. Petitioner was 42-years-old on the date of accident, July 20, 2007. Petitioner testified that she was a high school graduate. She earned her CNA license in November of 2002 in Mattoon. No evidence was offered as to Petitioner's work history prior to her employment by Respondent commencing April 16, 2007, three months prior to the date of accident. On November 2, 2007, while still participating in physical therapy for her right knee, Petitioner began a new full-time job at a manufacturing company. She testified that it was a "desk job" and

14IWCC0900

she earned $10.32 per hour. Petitioner continued working for two years but testified that she was "let go for health reasons." (T. 49-51) Dr. Fletcher testified that Petitioner could have continued working if her other health issues had not precluded her from working. There is no evidence that Petitioner held any CNA jobs other than the three months of employment by Respondent. Subsequent to her employment by the manufacturing company, Petitioner applied for disability and she testified that she no longer believes she is capable of performing any work. Petitioner did however agree that she has never been told my any doctor that she is unable to work in any capacity. (T. 48) Petitioner testified she attempted to find employment after she left the manufacturing company, but as the Arbitrator noted, Petitioner's testimony with respect to her job-seeking efforts was vague and no documentation was offered in support of her testimony. In conclusion, on the issue of permanent disability we modify the Arbitrator's award to 35% loss of use of the right leg. Petitioner underwent a right total knee replacement on March 3, 2009. Petitioner's right knee has been examined by several orthopedic surgeons subsequent to her surgery and despite Petitioner's ongoing complaints of pain, her knee was found to be in stable condition and no further treatment was recommended.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $227.38 per week for a period of 26 6/7 weeks, commencing July 21, 2007 through November 1, 2007 and again from March 2, 2009 through May 20, 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 $227.38 per week for a period of 75.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 35% loss of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and related medical services as evidenced by Petitioner's Group Exhibit 3, pursuant 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 $1,762.81 in temporary total disability and $15,300.10 in medical payments under §8(j) made 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 15 2014
RWW/plv
o-7/23/14
46

Charles J. DeVriendt

Daniel R. Donohoo

14IWCC0900

DISSENT

I respectfully dissent from the majority's decision affirming the Arbitrator's finding on the issue of causal connection between the Petitioner's current condition of ill-being and the accident of July 20, 2007. After considering all of the evidence, I am not persuaded that Petitioner sustained any significant orthopedic injury on July 20, 2007 and I would have reversed the decision of the Arbitrator, relying on the medical records and the opinions of Dr. Weiss and Dr. Williams.

Petitioner was diagnosed with a right knee sprain at Kirby Hospital on July 20, 2007. She was taken off of work and she followed up with Dr. Price at Provena Covenant Medical Center on July 23, 2007 where she presented in a wheelchair and holding crutches. Dr. Price did not find any abnormalities in the right knee on x-ray but he kept Petitioner off of work and ordered an MRI for further assessment.

The MRI findings were completely unremarkable other than signs of early osteoarthritis. On July 25, 2007 Dr. Price reviewed the MRI and agreed with the conclusions of the radiologist. Dr. Price added that although there was no dramatic signal change in the medial tibial condyle, "if I hallucinate it does appear that she has some very slight bone bruising in the medial tibial condyle." He noted that the signal change was so mild that the radiologist did not even mention it. Dr. Price did not indicate that the extremely slight finding of a possible bone bruise or mild impaction bore any relationship to Petitioner's mechanism of injury on July 20, 2007.

Dr. Price stated that the only treatment option for a bone bruise would be to let healing take place and to protect the knee from stress in the meantime. He suggested a functional capacity evaluation and work hardening if prescribed by an occupational medicine physician, Dr. Fletcher.

Petitioner was examined by Dr. Hollander, an associate of Dr. Fletcher's, on August 8, 2007, and began physical therapy at Kirby Hospital. The physical therapy notes show that Petitioner exhibited signs of symptom magnification and functional overlay.

Petitioner underwent a functional capacity evaluation at SafeWorks on January 31, 2008, where she gave mixed effort. The therapist noted symptom magnification and abnormal pain behaviors. Petitioner tested at the light to medium demand level, although the reliability of the evaluation is questionable. By the date of the FCE, Petitioner was already working full time at the manufacturing company for the past two months.

I would have found that Petitioner sustained a right knee sprain on July 20, 2007 and did not prove by a preponderance of the credible evidence that the need for orthopedic surgery was related to the work injury.

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LAND, JODI
Employee/Petitioner

Case# **07WC036277**

BEMENT HEALTH CARE CENTER
Employer/Respondent

14IWCC0900

On 7/30/2013, 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 0.06% 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:

0874 FREDERICK HAGLE FRANK & WALSH
PATRICK HANLON
129 W MAIN ST
URBANA, IL 61801

1337 KNELL & KELLY LLC
PATRICK JENNETTEN
504 FAYETTE ST
PEORIA, IL 61603

14IWCC0900

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jodi Land
Employee/Petitioner

v.

Bement Health Care Center
Employer/Respondent

Case # 07 WC 36277

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 **June 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 **July 20, 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 $**N/A**; the average weekly wage was $**394.49**.

On the date of accident, Petitioner was **42** years of age, ***married*** 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 $**1762.82** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**1762.82**.

Respondent is entitled to a credit of $15,300.10 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $227.38/week for 26 2/7 weeks, commencing 7/21/2007 through 11/1/2007, and again from 3/2/2009 through 5/20/2009, as provided in Section 8 (b) of the Act.

Respondent shall pay reasonable related medical services as evidenced by Petitioner's Group Exhibit 3, pursuant to Sections 8 (a) and 8 (2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $227.38/week for 175 weeks, because the injuries sustained caused the 35% loss of the person as a whole, as provided in Section 8 (d) 2 of the Act.

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

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

July 25, 2013
Date

JUL 30 2013

14IWCC0900

MEMORANDUM OF THE DECISION OF THE ARBITRATOR

JODI LAND,	)	
	)	
Petitioner,	)	
	)	
Vs.	)	Case No.: 07 WC 36277
	)	
BEMENT HEALTH CARE CENTER,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

JODI LAND, now known as JODI MACKLIN, testified that she is divorced, is currently age 48 and has no children.

Petitioner testified that she worked for Respondent as a Certified Nurse Assistant which involved basic nursing and helping residents with daily living activities. Petitioner testified that she was also required to perform transportation for residents to medical appointments.

Petitioner testified that on July 20, 2007, that she was lifting a patient who was over 200 lbs. from his wheelchair into his bed. Petitioner testified that as she twisted while assisting the patient from his wheelchair toward the bed, she noticed pain in her right knee. Petitioner testified that she then placed the resident back into the wheelchair. She testified that she continued to work as her shift was about to end. Later she bent down to remove a trash bag for disposal, and her right popped with pain. She had trouble walking after that incident.

Respondent submitted Employee Report of Injury which showed that Petitioner twisted her right leg, while transferring a patient, that her knee was sore and then went to pick up trash and the knee popped. (RX 1). A fellow employee, Josh Schur, came into the room after Petitioner injured her knee while assisting the resident. (Id.). Petitioner, in describing the incident, testified that the assisting with the transferring of the patient was the triggering incident for her pain and that the separate activity of picking up the trash which caused a pop in her knee was not a separate or distinct cause of her pain. Petitioner testified that the injury occurred late in her shift and after she finished her shift, she sought out medical care that evening at the Kirby Hospital Convenient Care. The medical records submitted by Petitioner show a visit to the Kirby Hospital emergency room during the overnight hours of June 20-21, 2007. (PX 3). Petitioner testified that the Kirby Hospital staff referred her to her primary care physician, Dr. Naran Mandhan for further care.

Petitioner testified that Dr. Naran Mandhan referred her to Dr. William Price, an orthopedic surgeon with the Provena Covenant Medical Center. The medical records submitted from Provena Medical Group show an exam by Dr. William Price performed on July 23, 2007. (PX 3). The exam note from July 23, 2007 states she was referred for right knee pain and that the date of the injury was July 20, 2007 when she "Felt a twist while lifting a patient in transfer." (Id). Dr. Price advised her to stay off work, and a MRI examination of the knee performed on July 23, 2007 visit was ordered. (Id.). During a follow-up visit on July 25, 2007, Dr. Price diagnosed a bone bruise and suggested that she consult with David Fletcher, M.D., of the SafeWorks Illinois Occupational Medicine Clinic. (Id).

Petitioner testified that Dr. Fletcher put her on a light duty work restriction and that she went back to work on the restriction but was not allowed to work as a CNA. Petitioner testified that she worked from November, 2007 through January 7, 2008 but was terminated by the Respondent because she could not continue working as a CNA.

Petitioner submitted Dr. Fletcher's testimony via evidence deposition in this cause. Dr. Fletcher testified that Petitioner became a patient of his clinic on August 8, 2007 upon referral by Dr. William Price. (RX 1, p. 7). Dr. Fletcher testified that Petitioner was first examined by Kimberly Hollender, M.D., who was a physician employed by Dr. Fletcher and worked under Dr. Fletcher's supervision and at his direction. (Id. pp. 8-9).

The initial diagnosis by Dr. Hollender of SafeWorks was a bone bruise, possibly some impaction of the right knee. (Id. p. 9). After the exam by Dr. Hollender, physical therapy was prescribed which was performed at Kirby Hospital (Id. pp.10-11). Symptomatic despite the physical therapy modalities, Dr. Fletcher instructed Dr. Hollender to refer Petitioner to another orthopedic surgeon, that being Dr. Lawrence Li. (Id. pp.11-12). A functional capacity evaluation was performed on modified basis on January 31, 2008 which showed that Petitioner was unable to meet the critical job demands of a CNA. (Id. pp.12-13). Both the Petitioner and Dr. Fletcher testified that she had gotten a sedentary working for CimTek/Central Illinois Manufacturing at that time. (Id. p.13). Dr. Fletcher then testified that Dr. Li recommended that if she did not improve due to conservative treatment that she would be a candidate for diagnostic arthroscopy. (Id. p.13).

Dr. Fletcher personally conducted his first physical examination of the Petitioner on March 6, 2008 and diagnosed that she had medial meniscus tear superimposed on some degenerative osteoarthritis and that the cause of that diagnosis was her work injury of July 20, 2007. (Id. pp.14-15). Dr. Fletcher, in describing his opinions of causal connection, testified that this is a situation where this patient sought timely medical treatment (Id. p. 15). He further opined that "the history that she's provided has been consistent, was consistent with the three years I examined her, so there wasn't any changing of her story. And, you know, again for me as someone who deals with causation issues everyday in my practice, the fact that there wasn't any gap in treatment, that she had persistent complaints, you know, for all those reasons I thought there was a relationship." (Id. pp.15-16). Dr. Fletcher testified that she underwent the surgical procedure on August 29, 2008 by Dr. Li which was a diagnostic and therapeutic procedure. (Id. p.18). Dr. Li smoothed down the rough cartilage and divots in an attempt to reduce inflammation and help healing and discovered she had a grade three chondral injury to the medial femoral condyle. (Id.) The operative note from August 29, 2008 confirms the same. (PX3). Dr. Fletcher described the pain generator in Petitioner's knee being the grade three lesion that measured 2.5cm, an inch divot in her medial femoral condyle and that this chondral injury is separate from a degenerative type of problem in that it can be related to traumatic events such as she described. (Id. p.19).

Dr. Fletcher further opined that Petitioner had obvious pre-existing degenerative osteoarthritis, she was overweight, middle age but she was asymptomatic. (Id. p.20). This event occurred, made her symptomatic. (Id.). She had evidence of acute injury with chondral injury as delineated in the arthroscopy. (Id. p.20). Dr. Fletcher testified that this was a big lesion, 2.5cm, 1 inch. (Id. p.21). Dr. Fletcher continued to see Petitioner in follow-up to the arthroscopic procedure of Dr. Li and noted that she was still symptomatic despite the surgical intervention and physical therapy. (Id. p.22). Dr. Fletcher testified that she was still having significant pain and was still using a cane to ambulate and that Dr. Li felt that he could not do anything for her arthroscopically. (Id.). Because of her continued pain complaints and the advanced degenerative changes, Dr. Dodgin, a partner at that time of Dr. Li who had special expertise in knee replacements, said the only thing they had to offer was a total knee replacement. (Id. pp.22-23). Dr. Fletcher testified she underwent total knee replacement in 2009 performed by Dr. Dodgen, upon referral from Dr. Li, and that the reason for the replacement was that she had intractable pain that she was unable to live with and was disabling her from gainful employment and also affected her activities of daily living. (Id. p.23).

Dr. Fletcher and his clinic continued treating her in follow-up to the total knee replacement surgery. A functional capacity evaluation was performed on November 23-November 25, 2009 at his clinic which showed that she did not meet all the critical job demands of her previous job as a CNA. (Id. pp.25-26). The FCE showed that she had problems with her gait, walking, balance, stair climbing, squatting which she would be required to do in her position as a CNA. (Id. p.26). Dr. Fletcher saw her on December 4, 2009 and felt that she was at maximum medical improvement and was able to place permanent restrictions on her which was to maintain ground level work, sedentary type of work, avoid any prolonged standing or squatting type of activities. (Id. p.28). The restrictions further stated that she was at a sedentary or light work capacity with occasional lifts of 20 pounds and frequent lifts of 10 pounds. (Id. pp.28-29).

Dr. Fletcher testified that she could not go back to work as a CNA and that these restrictions to sedentary/light work were permanent work restrictions based upon the right knee replacement which Dr. Fletcher attributed to an aggravation of a pre-existing condition from her July 2007 work injury and not upon her cancer issue. (Id. pp.29-30). Dr. Fletcher also testified that the Petitioner could still do office work. (Id. p. 55) He said that she still would be working at her job with CIM-TEK if not for her other health problems. (Id. p. 35)

Dr. Fletcher noted that she had a further knee surgery in May of 2009 which was a manipulation because of scar tissue in her right knee. (Id. pp.30-31). Dr. Fletcher testified that he continued to see her up until January 26, 2011 and she remained restricted to sedentary/light work and was permanently disabled as a CNA. (Id. p.32). Dr. Fletcher based this upon his opinion on the fact that he has examined all of Petitioner's medical records and that he is the only board certified occupational medicine physician that has examined her and has treated her over a number of years. (Id. p.33). Dr. Fletcher summarized that his opinions of causal connection by stating that the chondral injury found by Dr. Li in the medial femoral condyle was directly related to the acute injury of July 20, 2007 and that there was a causal relationship between the work injury and the permanent aggravation of her pre-existing condition in her right knee. (Id. p.36).

Dr. Fletcher testified that she may need future medical care which would be in the form of prescription pain medication and a possible total knee revision in the future but the timing of total knee revision would be uncertain. (Id. p.37). Following the total knee replacement, Dr. Fletcher testified that he referred her to multiple orthopedic surgeons because the result she had was less than desirable. (Id. p.52).The reason for the multiple referrals was to get opinions from different physicians and that they agreed that she was not in need of a revision. (Id. p.52). Finally, Dr. Fletcher testified that all of his treatment was reasonable and necessary and causally related to the work related injury of July 20, 2007 and his charges were the usual and customary charges for that type of medical care. (Id. pp.68-69).

Petitioner had Defendant examined by two different independent medical examiners in this cause, that being Stephen Weiss, M.D. and Joseph Williams, M.D. Petitioner submitted the evidence depositions of Dr. Weiss and Dr. Williams in this cause.

Respondent submitted the evidence deposition of Stephen Weiss, M.D. taken on December 15, 2011. Dr. Weiss testified that he is a board certified orthopedic surgeon. (RX19. p.5). Dr. Weiss testified that he examined Petitioner on April 22, 2008 and as part of his exam, reviewed her medical records from Dr. Price, Dr. Hollander, Dr. Li, SafeWorks Illinois and the emergency room records. (Id. p.6). The diagnosis from Dr. Weiss that she had suffered a knee strain in the work incident in question which had resolved and believed she was demonstrating symptom magnification. (Id. p.11). Dr. Weiss opined that he saw no reason to perform the knee surgery for Petitioner as of April 2008. (Id. p.12). Dr. Weiss testified that he would expect there to be atrophy or effusion present in the knee before he would have recommended a diagnostic arthroscopic procedure and because he did not see them during his exam his opinion was that surgery was not indicated for Petitioner. (Id. pp.24-26).

Dr. Weiss testified that significant thinning of the patellar articular cartilage means it was potentially the site of an early arthritic condition because the joint surface was wearing out. (Id. pp.33-34). Dr. Weiss testified that a chondral injury is an injury to the joint surface. A chondral injury is an injury to the articular cartilage which is the joint surface. (Id. p.35). Dr. Weiss testified that a grade three chondral injury would probably consist of fissuring and loose pieces of articular cartilage hanging down into the joint and that it could the symptoms it could cause were everything from none, to pain, effusion, atrophy, etc. (Id. p.39).

Finally, Dr. Weiss testified that he owns 50% of PMRI which is the company that facilitates the performance of independent medical evaluations. (Id. p.40). PMRI performs independent medical evaluations and file reviews but the greater majority are independent medical evaluations. (Id. p.40). Dr. Weiss further testified that 90-95% of the independent medical evaluations performed by PMRI are for the Respondent. (Id. p.41). Finally, Dr. Weiss testified that 85% of his active practice is spent working for PMRI and he admitted he does not actively treat patients any longer. (Id. p.42).

Respondent also submitted the evidence deposition of Dr. Joseph Williams taken on September 19, 2012 based upon a records review and independent medical evaluation conducted of Petitioner. (Id. pp.8-9). (RX 20, pp.8-9). Dr. Williams was a board certified orthopedic surgeon. (Id. p.7).

Dr. Williams conducted an independent medical exam of Petitioner on July 20, 2012 and diagnosed her as having osteoarthritis of her right and left knees and opined that she had a very successful total knee replacement on her right knee and did not think she needed to have any work restrictions. (Id. pp.10,16-17). Dr. Williams attributed the mechanism of injury as to being a minor trauma, very minor injury as to when she picked up the two pound trash bag as opposed to when she and in his opinion that he did not believe the transferring of the patient on the date of the injury affected her right knee. (Id. pp.17-18). Dr. Williams testified that he did not think the surgery performed by Dr. Li on Petitioner on August 29, 2008 was reasonable or necessary because he did not develop a doctor/patient relationship with the patient and that he operated on her without doing any extensive conservative treatment. (Id. p.19).

Dr. Williams also opined that the subsequent total knee replacement performed by Dr. Dodgin on March 3, 2009 was not causally related to Petitioner's work injuries of July 20, 2007. (Id. p.21).

Dr. Williams testified that the cause of the need for knee replacement surgery for Petitioner was arthritis but he did not believe the arthritis was caused by Petitioner's twisting injury or lifting the trash bag on July 20, 2007. (Id. p.28). Dr. Williams also testified that Dr. Dodgin should not have performed the knee replacement surgery on her, as he would not have done if he had been Petitioner's surgeon because Dr. Dodgin didn't develop a doctor/patient relationship and that he should have tried conservative treatment and seen if a response to conservative treatment was appropriate. (Id.).

The conservative course of treatment recommended by Dr. Williams was a series of treatments which included, one, anti-inflammatory medications, two, shots of cortisone, three, ice treatments for 20 minutes 3 times a day and four, diet and also physical therapy. (Id. p.29). Dr. Williams testified that no one should ever perform surgery for arthroscopic surgery for arthritis and in support of sited a VA hospital study. (Id. p.34). However, Dr. Williams was not able to provide the name of the study, the author, the journal it was published in, the date of the study and claimed that the study has been well-accepted and well-repeated by other doctors and has been used as landmark study despite not having any of these specific or pertinent information regarding the study. (Id. pp.34-35). Dr. Williams also testified that he agreed with Dr. Dodgin that she could return to work after her total knee replacement surgery and his basis for agreeing with Dr. Dodgin on this point was that he, as her treating physician, was familiar with her condition post-surgery. (Id. pp.35-36). Dr. Williams agreed

that total knee replacement surgery is usually done for arthritis and after a patient has failed a conservative treatment program. (Id. p.37).

Dr. Williams testified that someone can have arthritis of the knee joint and be asymptomatic and that any activities of daily living, including getting out of bed in the morning, putting our clothes on, getting out a chair, out of a car, shopping, anything she does can make arthritis worse everyday. (Id. pp.41-42). Dr. Williams further testified that just by walking, just by getting out of the bed in the morning can cause arthritis in the knee joint to go from being asymptomatic to become symptomatic however, he does not believe the work injury described by the patient can cause an asymptomatic condition to become symptomatic in her knee because in his opinion she didn't do anything significant. (Id. p.42).

On cross-examination, Dr. Williams then admitted that the particular activity of transferring the patient could cause an arthritic condition to go from being asymptomatic to becoming symptomatic but said that particular activity when performed by the Petitioner could not cause her arthritis to go from being asymptomatic to symptomatic. (RX pp.42-43). It is significant to not that Dr. Williams' IME report does not reflect the weight of the patient the Petitioner was transferring when she was injured during the July 20, 2007 work incident. (RX 6, p.1). Specifically, Dr. Williams in his records review note of April 10, 2012 concluded that she had very little trauma to her knee as a result of the work accident. (Id.)

Dr. Williams testified that during his physical examination of Petitioner that his exam shows quadriceps atrophy in her right leg of 4cm which showed muscle atrophy of her right leg compared to the left. (Id. pp.52-53). Dr. Williams testified that he does about five independent medical exams a week and usually does them in workers' compensation cases at the request of the employer or the insurance company. (Id. p.56).

Petitioner submitted the MRI examination of Petitioner performed on her right knee from July 24, 2007 which showed:

> "no meniscal, ligamentous or tendonous tears seen. There is significant thinning of the patellar articular cartilage medially. Small amount of effusion in the superpatellar recess. No osseous lesion is seen. Early osteoarthritis in the right knee." (RX 11).

The medical note of Dr. Li from his August 29, 2008 arthroscopic surgery showed right knee grade 3 chondral injuries to the patella, grade 4 injury to the femoral trochlea and grade 3 chondral injuries to the medial femoral condyle. (RX 15).

Respondent submitted the Employee Report of Injury filed by Jodi Land and signed by her on July 21, 2007 and in the section of the report in which she was required to describe her injury, she stated "twisted R leg while transferring patient, knee it was sore, then continued duties and went to pick up trash, and knee popped." (RX1.) Petitioner and Respondent submitted the medical records of the Kirby Hospital from July 20, 2007 in which a history was recorded and stated that "Patient states she twisted knee at work, pain medial side of right knee." (RX8 & PX1). Finally, Petitioner and Respondent submitted the medical note of Dr. Price regarding his examination of Petitioner from July 23, 2007 in which Petitioner describes the onset of her injury to her right knee on July 20, 2007 as follows:

> "I was transferring a patient from wheelchair to his bed and I felt the knee twist. I figured to keep on working my shift out, that the pain would go away. While I was emptying a trash can, I heard the knee pop and from that moment on it hurt real bad to put weight on my right leg. I had hurt it around 9:30-9:15PM." (RX9 & PX1).

CONCLUSIONS OF LAW

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

This Arbitrator finds that Petitioner suffered an accident arose out of and in the course of employment while employed with the Respondent on July 20, 2007. Specifically, as the Petitioner was assisting a patient who weighed over 200 lbs. from his wheelchair into bed, she suffered a twisting injury to her right knee. This injury was further irritated by bending down to pick up a trash can in which she noticed a pop in the knee. This Arbitrator finds support in this decision by the testimony of the Petitioner that the assisting of the patient with his transfer was the triggering incident of her pain and that the separate activity of picking up the trash which caused a pop in her knee was not a separate or distinct cause of her pain.

This Arbitrator specifically finds that the Petitioner suffered a work-related injury while assisting the patient from the wheelchair into his bed. Further support can be found in the history of the accident given by Petitioner in the Employer Report of Injury in which she stated that she "twisted R leg while transferring patient, knee it was sore, then continued duties and pick up the trash and knee popped." (RX1). It is plain from the history contained within her Employer Report of Injury that the assisting with the transfer of the patient was the incident that caused the onset of pain in the knee as opposed to picking up the trash and that the knee was injured and causing pain before picking up the trash. Further, the medical records for Petitioner's visit to Kirby Hospital on the evening of July 20, 2007 show a history that the patient stated she twisted her right knee while at work and had pain on the medial side of the knee. (PX1 & RX8). Finally, the history given to Dr. Price on July 23, 2007 makes clear that Petitioner felt pain in her right knee when transferring a patient from a wheelchair to a bed and that the origination of this pain was before the emptying of the trash can. (RX9 & PX1). For these reasons, this Arbitrator finds that the action of assisting the patient from the wheelchair to the bed was an accident that arose out of and in the course of Petitioner's employment.

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

This Arbitrator further finds Petitioner's current condition of ill-being is causally related to the injury of July 20, 2007. Since the time of the injury of July 20, 2007 Petitioner has been under continuous medical care for the condition in her right knee. Petitioner was examined by Dr. Price, an orthopedic surgeon, three days after the work injury. Dr. Price ordered an MRI exam which showed significant thinning of the patellar articular cartilage medially and a small amount of effusion in the suprapatellar recess and early arthritis in the right knee. (RX11). Petitioner complained during her visits to the E.R. and to Dr. Price of having pain on the medial side of the knee. (PX1, RX8 & 9). The MRI shows that Petitioner had swelling in the joint and a pre-existent condition of early arthritis. (RX11).

Because Dr. Price did not offer any surgical recommendation, he transferred the care of Petitioner to Dr. David Fletcher of the SafeWorks Illinois clinic. The doctors under the employee of the clinic and working under the supervision of Dr. Fletcher as well as Dr. Fletcher himself then assumed the medical care of Petitioner from November 2007 through January 26, 2011. The Petitioner also presented the testimony of Dr. Fletcher in this case by evidence deposition. This Arbitrator notes that Dr. Fletcher has likely the most familiarity with the condition of the patient due to his extensive examinations in the long period of time that he and the doctors of his clinic have provided treatment to Petitioner for her right knee injury. Dr. Hollender, a physician working at the SafeWorks Illinois clinic under the supervision of Dr. Fletcher, prescribed physical therapy for her right knee at the time she assumed care for Petitioner in November, 2008.

After the lack of improvement from the conservative treatment of physical therapy, Dr. Fletcher then referred her to Dr. Li, an orthopedic surgeon, for a surgical evaluation. Dr. Fletcher testified that Petitioner had obvious pre-existing degenerative osteoarthritis in the knee but that she was asymptomatic prior to the work injury of July 20, 2007. (Id. p.20). Dr. Fletcher testified that the work injury of July 20, 2007 made her symptomatic and that she had evidence of an acute chondral injury as delineated by the arthroscopic procedure with Dr. Li which he reviewed as part of his treatment of Petitioner. (Id. pp19-20). Dr. Fletcher testified that the pain generator in Petitioner's knee was a grade three lesion that measured 2.5cm in her medial femoral condyle and this chondral injury is separate from the degenerative type of problem and was related to the traumatic event that she described. (Id. p.19). Because of her lack of improvement from the surgery and her continued pain complaints she was then referred to Dr. Dodgin, a partner of Dr. Li who had special expertise in knee replacements who then provided total knee replacement of her right knee in March of 2009.

Respondent submitted the testimony of Dr. Stephen Weiss and Dr. Joseph Williams as evidence in this cause. Dr. Weiss concluded that Petitioner suffered a knee strain as a result of the July 20, 2007 work incident but believed it had resolved and that she was demonstrating symptom magnification. (RX19, p.11). Dr. Weiss concluded that he saw no reason to perform the knee surgery that Dr. Li performed in April 2008 because he expected atrophy or effusion present in the knee before he would have recommended that procedure. (Id. pp.24-26). Dr. Weiss did not specify when he would expect atrophy or effusion to be present in the knee before the surgery or if he expected those symptoms to be present for the surgery in April 2008 which was a full nine months after the original injury date. The MRI of July 29, 2007 did show effusion of the knee. (RX11). Dr. Weiss agreed that the significant thinning of the patella articular cartilage was an early arthritic condition because the joint surface was wearing out and that a chondral injury is an injury to the joint surface. (Id. pp.33-35). Dr. Weiss also testified that a grade three chondral injury could cause the type of symptoms of everything from none to pain, effusion and atrophy. (Id. p.39).

Dr. Joseph Williams concluded that Petitioner had osteoarthritis of her right and left knees and that she had a very successful total knee replacement on the right knee and that she did not need to have any work restrictions. (RX20, pp.10, 16-17). Dr. Williams testified that he felt that the very minor trauma of picking up a 2lb. trash bag as opposed to assisting the transfer of the patient was the mechanism of injury and felt that the surgery performed by Dr. Li in 2008 was not reasonable and necessary because he did not develop a doctor/patient relationship with Petitioner and he operated on her without doing extensive conservative treatment. (Id. p.19). This Arbitrator finds Dr. Williams' opinions less credible because of the fact that Petitioner had very clearly undergone conservative treatment from the date of the injury of July 20, 2007 through the time of the surgery in April 2008. Petitioner had received extensive physical therapy as directed by the SafeWorks Illinois clinic and had been restricted from work prior to the referral for the surgical consultation to Dr. Li. (PX1 & RX12).

Dr. Williams also testified that someone can have arthritis of the knee joint and be asymptomatic and that the activities of daily living including getting out of bed or putting on clothes or getting out of a chair could cause the arthritis in the knee joint to go from being asymptomatic to becoming symptomatic. (Id. pp.41-42). However he just does not believe in this case that the work injury described by the patient could cause an asymptomatic condition to become symptomatic. Dr. Williams admitted in his testimony that the particular activity of transferring the patient could cause an arthritic condition to go from being asymptomatic to becoming symptomatic but that the particular activity when performed by the Petitioner could not cause her arthritis to go from being asymptomatic to symptomatic. (Id. pp.42-43). It is significant to note that Dr. Williams medical chart did not note the weight of the patient that Petitioner was transferring and that there was no explanation as to why the particular activity of transferring a patient could cause an arthritic knee to go from being asymptomatic to being symptomatic in general but not

specifically in the case with the Petitioner. For this reason, this Arbitrator finds Dr. Williams' opinion less credible on the issue of causal connection.

A further inconsistency noted in Dr. Williams' testimony is that Dr. Williams' testified he agreed with Dr. Dodgin that Petitioner could return to work after her total knee replacement surgery and his basis for agreeing with Dr. Dodgin on this point was that he, as her treating physician, was familiar with her condition post surgery. (Id. pp.35-36). However, Dr. Williams does not agree with her treating surgeons who noted in their charts and, specifically the testimony of Dr. Fletcher, that the surgeries performed on her right knee were reasonable and necessary and work-related despite the fact that these opinions were developed by her treating physicians.

As stated previously, Dr. Fletcher is the treating physician who has examined and treated Petitioner over the longest period of time. This Arbitrator finds Dr. Fletcher's opinions regarding causal connection to be more persuasive than those of Dr. Williams because of his familiarity with her condition. Dr. Williams testified that a basis for his agreeing with Dr. Dodgin on her ability to return to work was based upon the fact that he was familiar with her condition as her treating physician.

Dr. Fletcher also discussed the rationale behind his restrictions of the Petitioner in light of findings made on two functional capacity evaluations done before and after her two surgeries. He acknowledged that the examiners found evidence of symptom magnification on each exam. However, he said that in each test she gave a mixed effort, meaning that she gave legitimate efforts on part of each exam. (PX 1 at 46) He said that both tests showed that the Petitioner could not perform her normal job as a CAN. (Id. at 26) Finally he said that his permanent restrictions were based not only on the FCE's but also his numerous physical examinations of the Petitioner, her subjective complaints and his knowledge of the surgical procedures which she had underwent for her injuries. (Id. at 62) The Arbitrator finds Dr. Fletcher's reasoning to be persuasive in this case.

Finally, Dr. Williams in his physical exam of the Petitioner noted quadriceps atrophy in the right leg of 4cm as compared to the left. Again, Dr. Williams testimony clearly shows atrophy of the right leg of Petitioner which Dr. Weiss stated was absent during his exam and was the basis for his recommendation against the arthroscopic procedure performed by Dr. Li. This additional inconsistency lends a greater credibility to the opinions of Dr. Fletcher and the treating physicians than that of the independent medical examiners in this cause.

This Arbitrator finds that the condition of ill-being existing in Petitioner's right knee which necessitated the diagnostic arthroscopic procedure, the total knee replacement and then a subsequent manipulation upon anesthesia is causally related to the work injury of July 20, 2007. It has been unrebutted that Petitioner was asymptomatic with regard to her right knee of July 20, 2007. Although there has been medical evidence of symptomatic magnification by Petitioner's during the periods of time she received treatments subsequent to her knee injury there is no showing that her early arthritis in the knee was causing any symptoms prior to the July 20, 2007 work 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?

Based upon the findings under section C and F, this Arbitrator finds that the medical services as detailed in Petitioner's group exhibit two were reasonable and necessary medical expenses related to Petitioner's

work-related injury of July 20, 2007. Pursuant to this finding, this Arbitrator orders that Respondent pay to Petitioner these reasonable and necessary medical expenses pursuant to the fee schedule of the Illinois Workers' Compensation Act. This Arbitrator further finds that Respondent is entitled to any credits pursuant to Section 8(j) of the Act for any medical expenses that have been paid to date.

K. What temporary total disability benefits are payable?

The Arbitrator incorporates by reference his findings on causal connection. The evidence shows that the Petitioner was unable to work from July 21, 2007 through November 1, 2007, when she went to work on a full time basis for CIM-TEK. She was also off work under Dr. Dodgin's care from March 2, 2009, the date of her knee replacement, until his release on May 20, 2009. She is therefore entitled to TTD benefits for a period of 26 2/7 weeks.

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

With regard to the nature and extent of the injury, the treating physician of Petitioner, Dr. Fletcher based his opinions on her disability on the fact that he examined all of her medical records and he was the only board certified occupational medicine physician who examined her and treated her over a number of years. (PX3, p.33). Dr. Fletcher testified that he saw Petitioner up until January 26, 2011 and at that time, based upon her functional capacity evaluation, she remained restricted to her sedentary/light work and was permanently disabled as a CNA.

Petitioner testified that she worked from November 2007 through November 17, 2009 full time performing desk work for CIM-TEK. She said that she left the job because of her leg problems. Dr. Fletcher, her treating doctor said that she still would be at that job were it not for her other health problems. (PX 1 at 35) While the Petitioner testified that she had made a number of other job applications since then, her testimony was vague and no documentation was offered in support of her testimony. Dr. Dodgin, her surgeon, also was of the opinion that she could perform some work as of May 2009. (PX J)

The above evidence establishes that the Petitioner has not shown entitlement to an odd lot permanent and total award. She is unable to pursue her normal occupation. There is no evidence showing a wage loss. Accordingly, the Arbitrator finds that the injuries have resulted in disability under Section 8 (d) (2) of the Act to the extent of 35 %.

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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GERARD GEYER,

Petitioner,

vs.

NO: 08 WC 30748

14IWCC0901

AARDVARK BUILDERS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein, and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability (TTD), medical expenses and permanency, and being advised of the facts and law, reverses the Decision of the Arbitrator with regard to accident, and finds that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with the Respondent on June 26, 2008, for the reasons stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Respondent's comptroller, alleged that on June 26, 2008, he locked himself out of the office, and because he believed he had to get back inside generally and to respond to phone calls, he used a chair to climb through ceiling tiles, over a wall, onto a ledge, and then jumped down about eight feet, injuring his left foot.

Petitioner testified that he arrived at work and started his day. Respondent's owner, Brian Riley, came to the office around 7:20 a.m. with his son, and left shortly thereafter. A delivery driver for Respondent, Ward, parked in a loading dock area that Respondent shared with other businesses in the building. Ward got into an argument with a worker from another business there, an installer, and after Ward left Petitioner went outside to speak with the installer, closing the overhead door behind him. After calming the installer down, he went to re-enter the building and realized he had locked himself out. He testified he left his cell phone inside as well.

Petitioner testified that he needed to get back to his desk because Respondent had several jobs going on that he had to coordinate. He said he would get dozens of calls daily regarding jobs from people in the field, and he would have to assist, noting if he failed to do so it would leave workers and materials hanging in the field, and would cause delays in job completions. He was able to enter an indoor stairwell/hallway area of the building, but not Respondent's offices. He said that he found a chair on the loading dock, put it by a wall shared by the hall and Respondent's offices, stood on the back of the chair, moved ceiling tiles out of the way and pulled himself up and over the wall partition. He said he then lowered himself onto a "lookout", a wood structure jutting out from the wall inside Respondent's offices, and then jumped down about eight feet to the floor, injuring his left foot.

He indicated he had to crawl on his hands and knees to ambulate due to the injury. He got to his cell phone and called Brian Riley, indicating: "I messed up. I injured my foot", and that his wife was coming to pick him up to take him to the hospital. His wife brought him to the Evanston Hospital emergency room, where Petitioner was diagnosed with a calcaneal fracture. He underwent surgery with Dr. Ptaszek on July 10, 2008. He testified that he returned to work on December 3, 2008, and last treated for this injury on August 5, 2009.

On cross examination, Petitioner testified that Riley left the office around 7:25 a.m., and that the accident occurred around 8:35 a.m. He said he didn't call Riley, or Riley's wife Chris, to indicate he was locked out because he didn't have his keys, phone or wallet. He indicated the installer, "Joel", with whom Ward had argued wasn't present when he tried to get into the office, and thus Petitioner didn't ask to borrow his phone to contact anyone. He testified that Riley's home was about a 15 minute drive from the office.

Petitioner said the back of the chair he stood on was about 36 inches high, he is about 6 feet tall, and the plywood wall was about 12 feet high. While he stood on the back of the chair, he moved a drop ceiling tile, which left an opening in the ceiling on each side of the wall. He estimated the space between the top of the wall and the true ceiling was at least 14 inches, and that he used his feet to get on top of the wall: "It was in a corner . . . The wall was plywood. So I was able to get my foot onto a seam of the plywood to get myself leverage to get up and over the wall." (Tr. 52-57). There was a steam pipe in the space above the wall that made the space tighter, but he testified he was able to get his body onto the partition, feet first, and was parallel to the wall. He then stood on a lookout plank on the office side of the wall, and jumped about 8 feet to the floor. He said he didn't think about lowering himself down. Again, Petitioner indicated his belief that the company needed him to be available, and so he tried to get back inside the office as quickly as he could. He indicated there were no witnesses to the alleged incident.

Brian Riley testified on behalf of Respondent. He indicated that Petitioner called him on June 26, 2008, at approximately 7:40 a.m., indicating he screwed up, was in pain and that his wife was picking him up to take him to the hospital. Riley had been in the office briefly that

morning around 7:10 a.m., but was running late for a meeting and left shortly thereafter. Riley testified that multiple other business shared the building with Respondent, and most involved trades with workers who would be at their offices between 7 and 8 a.m. He initially believed Petitioner's story of how he was injured, but once he looked at the space between the top of the wall and the true ceiling, he did not believe there was any way the Petitioner could have put his body through the available space.

Additionally, there was testimony from an investigator for Respondent's insurer, as well as several photographs, that the Commission has reviewed in detail. Essentially, the testimony utilized the photographs to show that the accident could not physically have occurred the way the Petitioner described.

The Commission notes that it questions whether the accident happened the way the Petitioner states that it did. However, we find that the Petitioner failed to prove he sustained an injury arising out of his employment based on his allegations of performing an unreasonable, reckless and hazardous activity.

To be compensable under the Act, an injury must arise out of and in the course of the claimant's employment. *820 ILCS 305/2* (2002). An injury "arises out of" the employment if its origin is in some risk connected with or incidental to the employment. The injury occurs "in the course of" the employment when it occurs within the period of employment, at a place where the claimant may reasonably be in performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. *Parro v. Industrial Com.* (1995), 167 Ill.2d 385, 657 N.E.2d 882, 212 Ill.Dec. 537.

There are a number of cases decided in Illinois which support the proposition that where an injury arises from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable. (See, *e.g.*, *Orsini v. Industrial Com.* (1987), 117 Ill.2d 38 (mechanic claimant suffered leg injuries while repairing his personal auto), *Branch v. Industrial Com.* (1983), 95 Ill. 2d 268 (claimant suffered back injuries while removing his coat); *Rogers v. Industrial Com.* (1980), 83 Ill. 2d 221 (claimant's automobile, being driven by his wife, malfunctioned and struck claimant); *Jones v. Industrial Com.* (1980), 78 Ill. 2d 284 (claimant closed car door on his hand); *Fisher Body Division, General Motors Corp. v. Industrial Com.* (1968), 40 Ill. 2d 514 (claimant's car battery exploded); *Williams v. Industrial Com.* (1968), 38 Ill. 2d 593 (claimant choked on a donut during meal break); *Schwartz v. Industrial Com.* (1942), 379 Ill. 139 (claimant ate contaminated food in a nearby restaurant).)

The Commission finds that this case is factually similar to *Dodson v. Industrial Com.* (1999), 308 Ill.App.3d 572, 720 N.E.2d 275. In *Dodson*, the claimant was leaving work and, after starting her departure down a concrete sidewalk to the parking lot, decided to instead take a sloping, grassy path during a rainstorm. In that case, the court indicated that an injury does not arise out of the employment where an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience. Here, the Petitioner chose a very dangerous

14IWCC0901

activity to try to get into the offices he had locked himself out of. This choice exposed Petitioner to a danger which did not arise out of his employment, as it was not peculiar or incidental thereto.

While Petitioner argued that the purpose of this activity was only done to further the interests of Respondent, the Commission disagrees. The Commission believes that Petitioner overstated his need to return to the office immediately in seeking to push the case to the side of compensability. His job description clearly did not include breaking into Respondent's offices by using a chair to climb over a high wall, to squeeze through a very small area and to then jump down from at least eight feet above ground. The fact that the Petitioner was not breaking a "safety rule", as was the case in *Saunders v. Industrial Com.* (2000), 189 Ill.2d 623, 727 N.E.2d 247, 244 Ill.Dec. 948, is irrelevant here. We would not anticipate an employer creating safety rules for activities which would never even be contemplated by the employer. Petitioner's actions nevertheless took him outside of the sphere of his employment, and as such constituted a deviation from the work activities. We hold that Petitioner failed to prove he suffered a compensable injury arising out of and in the course of his employment for Respondent.

Based on the findings of fact and law by the Commission, all other issues are moot.

No bond is indicated in this case with regard to appeal to the Circuit Court, as no benefits are currently due and owing.

IT IS THEREFORE ORDERED BY THE COMMISSION that since the Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment with Respondent on June 26, 2008, his claim for compensation is hereby 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.

The party commencing the 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 17 2014
TJT: pvc
o 8/19/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GEYER, GERARD
Employee/Petitioner

Case# **08WC030748**

AARDVARK BUILDERS INC
Employer/Respondent

14IWCC0901

On 3/4/2013, 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 0.13% 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:

4642 O'CONNOR & NAKOS LTD
JOHN A SALZEIDER
120 N LASALLE SUITE 3500
CHICAGO, IL 60602

0210 GANAN & SHAPIRO PC
JOSEPH P BRANCKY
210 W ILLINOIS ST
CHICAGO, IL 60654

14IWCC0901

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

Gerard Geyer
Employee/Petitioner

v.

Aardvark Builders Inc.
Employer/Respondent

Case # **08WC30748**

An *Application for Adjustment 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, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 26, 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 **$50,000.00**; the average weekly wage was $**961.54**.

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $**38,491.62**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**576.92**/week for **41.75** weeks, because the injuries sustained caused the **25%** loss of the **left foot**, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

March 4, 2013
Date

MAR 4 - 2013

ICArbDec p. 2

ACCIDENT

The Arbitrator finds that the Petitioner sustained an accidental injury arising out of and in the course of his employment with the Respondent on June 26, 2008. The Arbitrator finds

the Petitioner's testimony to be credible. On Thursday, June 26, 2008, the Petitioner arrived at work at approximately five minutes before his typical starting time of 7:00 a.m. His employer's owner, Brian Riley, arrived approximately 7:20 a.m. and left about five minutes later. The Petitioner's duties as comptroller included the management of workers as well as issues involving those workers. The Petitioner's responsibilities required him to be in the office to manage communications by telephone.

Later that morning, after 8:00 a.m., an argument developed between the Respondent's truck driver, Frank Ward, and an outside contractor regarding parking of the Respondent's truck and the blocking a loading dock. The Petitioner left the office and went outside to in an attempt to defuse the confrontation. Thereafter, he realized that he had locked himself out of the office, where he had left his cell phone, keys, and wallet. The Petitioner testified he could hear the office phone ringing.

The Petitioner testified that he then went into the building hallway and used a chair to climb up, move ceiling tiles, and hoist himself on to the partition. The Petitioner testified that he then lowered himself down to a "2 by 4 lookout" affixed to the wall. The Petitioner testified that there were flexible hoses on the 2 by 4 lookout upon which he was standing. The Petitioner testified that he then jumped eight feet to the floor injuring his left foot. He then called and informed his employer that he had been hurt and that he was going to the hospital. The Petitioner's careless actions, as described in his credible testimony, were for

the benefit of the Respondent. 14IWCC0901

The Respondent contends that the injury could not have happened in that way. The Respondent offered the testimony of Brian Riley, its owner, and Todd Shurtz, a property claims adjuster from Erie Insurance Company. Neither one of them saw what happened. Their testimony that Petitioner could not have climbed the wall and entered the office is based upon inaccurate conclusions regarding means of entry and the Petitioner's height.

The Petitioner sustained a calcaneal fracture to his left foot resulting in surgical open reduction and internal fixation with placement of hardware. The Petitioner then underwent physical therapy. He returned to light duty on Monday, June 30, 2008. The Petitioner testified that he has permanent problems with his left foot.

CAUSATION

The Respondent's defense on this issue is premised upon accident, which has been resolved in favor of the Petitioner. Therefore, the Arbitrator finds that the Petitioner's injury is causally related to his accidental injury.

MEDICAL

The Respondent's defense on this issue is premised upon accident, which has been resolved in favor of the Petitioner. Therefore, the Arbitrator finds that the Petitioner is awarded his claim for medical expenses.

TTD

The Petitioner returned to light on Monday, June 30, 2008. He could have continued working his job by telephone but opted not to. Therefore, his claim for TTD is denied.

NATURE AND EXTENT

Based upon the evidence in this case, the Arbitrator finds that the Petitioner sustained a 25% loss of use of the left foot.

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

Fidel Castro,

Petitioner,

vs.

NO: 08 WC 33773

Lakewood Engineering,

14IWCC0902

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 the nature and extent of Petitioner's 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.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 1, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

14IWCC0902

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

DATED: OCT 17 2014
TJT:yl
o 8/19/14

51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would find the Arbitrator erred in her decision by awarding permanent total disability benefits. I find that the "Companion" position satisfied the Petitioner's permanent medical restrictions and would have provided the Petitioner with regular and continuous employment in a well known branch of the labor market. I would award wage differential benefits in the amount of $191.90 commencing December 26, 2012, the date the job was offered.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CASTRO, FIDEL
Employee/Petitioner

Case# **08WC033773**

LAKEWOOD ENGINEERING
Employer/Respondent

14IWCC0902

On 8/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2706 EVAN A HUGHES LAW OFFICE
30 N LASALLE ST
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CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
BARNALI ROY-MOHANTY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC0902

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

Fidel Castro
Employee/Petitioner

v.

Lakewood Engineering
Employer/Respondent

Case # **08** WC **33773**

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 **April 18, 2013, May 16, 2013 and May 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,908.20**; the average weekly wage was **$632.85**.

On the date of accident, Petitioner was **54** years of age, ***single*** 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 as explained *infra*.

Respondent shall be given a credit of **$38,212.09** for TTD, **$0** for TPD, **$58,342.74** for maintenance, and **$0** for other benefits, for a total credit of **$94,686.42**.

Respondent is entitled to a credit of for benefits paid under Section 8(j) of the Act as agreed by the parties. *See* AX1; Arbitration Hearing Transcripts.

ORDER

Credit & Termination of Benefits

As agreed by the parties, Respondent shall receive a credit for any benefits provided under Section 8j of the Act and Respondent shall hold Petitioner harmless from any claims by any providers of the services or others for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

As explained in the Arbitration Decision Addendum, the parties stipulated to Petitioner's entitlement to various temporary total disability benefits and to maintenance benefits from September 24, 2010 through the "present." AX1. The trial in this matter concluded on May 17, 2013. *See* Arbitration Hearing Transcripts. The Arbitrator finds that Petitioner's maintenance benefits cease as agreed by the parties and that his permanency benefits begin as stated below.

Medical Benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for unpaid medical bills submitted by Petitioner into evidence as provided in Sections 8(a) and 8.2 of the Act.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $441.93/week for life, commencing May 18, 2013, as provided in Section 8(f) of the Act.

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

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

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

Signature of Arbitrator

July 31, 2013
Date

AUG 1 - 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Fidel Castro
Employee/Petitioner

v.

Lakewood Engineering
Employer/Respondent

Case # **08** WC **33773**

Consolidated cases: **N/A**

The issues in dispute are causal connection, various unpaid medical bills, the nature and extent of Petitioner's injury, and termination of benefits. AX1; April 18, 2013 Arbitration Hearing Transcript ("Tr. at page(s)") 5-10; May 16, 2013 Arbitration Hearing Transcript ("Tr2. at page(s)"); May 17, 2013 Arbitration Hearing Transcript ("Tr3. at page(s)"). The parties stipulated to Petitioner's entitlement to various temporary total disability benefits and to maintenance benefits from September 24, 2010 through the "present." AX1. The trial in this matter concluded on May 17, 2013. *See* Arbitration Hearing Transcripts.

Background and Medical Treatment

Petitioner testified that he first came to the United States when he was 16 and began working for Respondent in approximately 1978 performing cleaning/janitorial functions and then spent approximately 20 years assembling and repairing fans. Tr. at 150-152. Petitioner testified that he had no low back problems before May 22, 2008. Tr. at 152. On that date, he felt back pain when he picked up a fan and turned to put it on the line. Tr. at 152. Petitioner testified that he received medical treatment and was eventually released to restricted duty work on June 10, 2008. Tr. at 152-153.

The medical records reflect that Petitioner went to Concentra on May 27, 2008. PX20. Petitioner reported injuring himself while bending to lift a large fifty pound fan from the floor to his chest while twisting to his right. *Id.* Petitioner also reported no prior injury, history of injuries or impairments to the low back before this incident. *Id.* Petitioner was diagnosed with a lumbar strain and referred to physical therapy. *Id.*

Petitioner was released to light duty work including no lifting over ten pounds, no bending greater than six times per hour and no pushing/pulling over twenty pounds of force. *Id.* He was to return for a re-evaluation on June 2, 2008. *Id.* While undergoing therapy, Petitioner reported experiencing pain at work when twisting and that he stands all day between conveyor belts and must twist to place objects onto two conveyor belts. *Id.*

On June 3, 2008, the Petitioner reported feeling much better, but he continued to have symptoms in the left lumbar area which worsened with lifting and twisting. *Id.* Petitioner was again released to light duty work including lifting up to twenty pounds, pushing/pulling up to thirty pounds, and bending up to eight times per hour only. *Id.*

Petitioner returned to Concentra on June 20, 2008 after six physical therapy sessions with continued pain in the left lumbar region. *Id.* He continued to deny paresthesias and he reported that his pain was moderate and exacerbated by bending. *Id.* Petitioner was nonetheless released to return to full duty work effective June 10, 2008. *Id.*

Petitioner then saw his primary care physician, Dr. Garcia, on July 21, 2008. PX21. He reported his injury at work and increased pain when sitting for prolonged periods or when flexing. *Id.* Petitioner also reported

chronic pain in the lumbar spine and associated paravertebral spinal muscles. *Id.* Dr. Garcia diagnosed Petitioner with back pain, prescribed a muscle relaxer and anti-inflammatory medication, and ordered a low back MRI. *Id.*

Petitioner underwent the recommended MRI on July 29, 2008. PX22; Tr. at 153. The interpreting radiologist noted mild degenerative disc disease from L3-L4 through L5-S1 and mild to moderate neural foraminal narrowing most prominently at L5-S1 on the left. *Id.*

Dr. Garcia referred Petitioner to Dr. Malek for further treatment. PX22; Tr. at 153-154. Petitioner first saw Dr. Malek on August 8, 2008, at which time he took a history and Petitioner reported low back pain that radiated down the left leg to about the knee with associated with tingling and numbness. PX22; Tr. at 154. Dr. Malek reviewed the MRI and interpreted it to show grade I spondilolisthesis at the L3-4 level, desiccation at that level as well as at L4-5 and a contained disc herniation to a lesser degree at L5-S1. *Id.* He determined that Petitioner had sustained a work related injury to the left mid-lumbar spine. *Id.* Dr. Malek prescribed various medications, ordered three epidural steroid injections, continued physical therapy, a left lower extremity EMG/NCV and possibly a discogram. *Id.*

Petitioner testified that he sought treatment with Dr. Malek from August 8, 2008 through June 23, 2009. Tr. at 154. Dr. Malek kept him off work throughout treatment. PX22.

Petitioner underwent the recommended epidural steroid injection on December 12, 2008. PX22; Tr. at 154. Petitioner returned to Dr. Malek on December 19, 2008 who then recommended a discogram and kept Petitioner off work. *Id.* Petitioner continued to follow up with Dr. Malek every few weeks for the next several months reporting continued symptomatology. *Id.* Dr. Malek prescribed various medications and physical therapy, and Petitioner underwent the two additional injections as previously recommended. *Id.* Dr. Malek restricted Petitioner from driving over one hour on February 27, 2009. *Id.* Petitioner also underwent the recommended EMG/NCV which was negative. *Id.* Dr. Malek recommended L5-S1 fusion surgery noting that it would probably extend up to the L4-L5 level. *Id.*

Petitioner submitted to an independent medical evaluation at Respondent's request with Dr. Trotter on March 24, 2009. *Id.* Dr. Malek reviewed the report and opined, in response, that Petitioner's low back condition was aggravated by his injury at work and that all of the recommended medical treatment was necessary to diagnose or treat Petitioner's low back condition as a result of the aggravating incident at work. *Id.*

Petitioner eventually underwent the recommended discogram on June 5, 2009, which showed pain generators were at L3-4, L4-5 and L5-S1, with no contribution at L2-3. PX22; Tr. at 154-155. Petitioner also underwent a low back MRI on June 20, 2009. PX22. The interpreting radiologist noted shallow left neural foraminal protrusion at L3-L4 with underlying disc bulge causing mild neural foraminal stenosis, bilateral neural foraminal/lateral protrusions at L4-five, and broad-based left neural foraminal herniation (protrusion) at L5-S1 with significant left neural foraminal stenosis. *Id.*

Petitioner underwent a lumbar fusion from L3-S1 with hardware implantation performed by Dr. Malek on June 23, 2009. PX22; Tr. at 155.

Petitioner returned to Dr. Malek postoperatively on July 3, 2009 and continued to undergo medical treatment through September 24, 2010 including continued medication management, physical therapy, work restrictions, and diagnostic testing. PX22.

Dr. Malek submitted to a deposition on June 29, 2009. PX24. He maintained his prior opinion that Petitioner's pre-existing, but asymptomatic, degenerative low back condition was aggravated by his injury at work and that all of the recommended medical treatment was necessary to diagnose or treat Petitioner's low back condition as a result of the aggravating incident at work. *Id.*

Dr. Malek prescribed a cane for Petitioner on July 31, 2009. PX22.

Petitioner underwent a functional capacity evaluation on March 30, 2010. RX4; *see also* Tr. at 173-174. Petitioner was released to medium level work. *Id.*

On April 13, 2010, Dr. Malek disagreed with the recommendations made regarding Petitioner's capabilities as identified in his functional capacity evaluation test results, imposed permanent sedentary-to-light duty work restrictions, and placed Petitioner at maximum medical improvement. PX22. Specifically, he stated that "given the fact that the patient has already had a 3-level fusion, I think that may be too aggressive and my recommendation would be to proceed with no more than light duty, given his condition, his age, and educational background that really puts him in a very difficult situation in terms of employability, but these restrictions are permanent." *Id.*

Petitioner continued to see Dr. Malek in July, September and October of 2010, in February, March and November of 2011, in September and October of 2012, and in January of 2013. *Id.* On July 16, 2010, Dr. Malek renewed Petitioner's handicapped parking sticker "permanently." *Id.* As of September 24, 2010, Dr. Malek reiterated that Petitioner was at maximum medical improvement and continued to indicate that Petitioner was unlikely to find employment given his age, market condition, and educational background. *Id.* The Arbitrator notes that Dr. Malek did not indicate that Petitioner was unemployable due to his medical condition and that the record is devoid of evidence that Dr. Malek is qualified to render an opinion regarding Petitioner's employability on any basis other than within his specific knowledge as a physician.

On March 18, 2011, Dr. Malek indicated that if Petitioner's low back pain continued, he would consider another procedure for hardware removal. *Id.* No such procedure has been recommended or performed. *Id.* On September 7, 2012, Dr. Malek increased Petitioner's restrictions to include sedentary-to-light duty work, no lifting over 10 pounds, and noted that Petitioner should use his cane for ambulation on an as-needed basis. *Id.* On January 10, 2013, Dr. Malek again increased Petitioner's restrictions to include sedentary-to-light duty work, no lifting over 10 pounds, no driving over 30 minutes, and use of a cane for ambulation as-needed. *Id.* reaffirmed the Petitioner's sedentary to light work restriction and 10 pound lifting restriction and he also ordered that the Petitioner was limited to driving no more than 30 minutes at a time. (PX22).

Petitioner testified that he understands his permanent work restrictions from Dr. Malek to include no bending, no standing for a long time, no moving from one side to the other, and no carrying more than 10 pounds. Tr. at 159.

Petitioner testified that he started looking for work within his restrictions after he was released by Dr. Malek. Tr. at 159. His highest level of education is to the second grade obtained in Mexico. Tr. at 157. Petitioner testified that he never had to speak English in order to do his job with Respondent and that everyone employed there was Mexican. Tr. at 157-158.

Petitioner testified that he has been involved with one vocational counselor or another since approximately May of 2011. Tr. at 159-160. Petitioner testified that he met with Ms. Sharkey regularly and she would help him look for jobs. Tr. at 160-161. Petitioner testified that he found potential jobs by talking to friends who were working and going to their places of employment or searching the Spanish language newspapers such as La Raza. Tr. at 161-162. Petitioner testified that he kept records of his job search. *Id.* On cross examination, Petitioner testified that he did not keep a copy of all of his applications because sometimes the prospective employer did not let him make copies so he would copy yellow page advertisements. Tr. at 182-23.

Petitioner testified that he participated in ESL classes during his vocational rehabilitation process and that he speaks English a little better, but that he does not understand many words yet. Tr. at 158-159. Petitioner also testified that he took some classes to learn to use a computer and that he does not know how to use a computer by himself, but would go to a library to get help or get help from his daughters to search for jobs online. Tr. at 162-163. Petitioner testified that he would apply for 15 to 20 jobs per week online, that some of the applications were four to five pages long, and that the applications were all in English. Tr. at 163-164. Petitioner testified that he has not been offered any jobs as a result of his job search. Tr. at 169.

On cross-examination, Petitioner testified that he went door-to-door to approximately three or four employers each week. Tr. at 174-75. Petitioner testified that he applied to various positions including with packing and assembly companies and inquired about inspection, assembly, custodial, janitorial, housekeeping, busser, and dishwasher positions. Tr. at 175-176. Petitioner acknowledged that he looked for work within and outside of Dr. Malek's restrictions. Tr. at 178-179.

On one occasion, Petitioner testified that he went to apply for a job as instructed by Mr. Harmon, but he got lost and went to the wrong location at a temp agency that was not hiring at the time. Tr. at 170-172. He returned to the correct location. *Id.* On another occasion, Petitioner applied for a position with Comfort Keepers and understood that he would be paid $110 for three days of work staying at the home of a gentleman whose leg had been amputated. Tr. at 186-187.

Petitioner testified that when he drives a car for a long time, his foot goes numb and his back hurts. Tr. at 166-167. He also testified that he uses a cane to walk because, if he does not, he gets a burning sensation on the side of his right thigh. Tr. at 164-165. Sometimes he walked about one block without a cane and he would occasionally walk to his ESL classes, which were located close to his home, without a cane. Tr. at 165, 188-190. On cross examination, Petitioner testified that he can only walk a short distance, two or three steps without getting "warm[.]" Tr. at 180-181. He also testified that he goes up and down the 10 to 12 steps in his home with and without using his cane. Tr. at 181-182.

Video Surveillance

Respondent submitted video surveillance and an accompanying investigator report dated July 2, 2012 reflecting video footage of Petitioner at his home. RX7-RX8. The Arbitrator notes that the video footage shows Petitioner ambulating without a cane and in no apparent discomfort, and ascending and descending a metal one-story spiral staircase without a cane between June 11, 2012 and June 14, 2012. *Id.* Petitioner was filmed carrying a backpack over his left shoulder on several occassions. *Id.* Petitioner was also filed on June 14, 2012 standing for approximately 10 minutes in no apparent discomfort then going into his home and returning a minute or so later to stand for another few minutes then going back into his home and returning a couple of minutes later to stand for another few minutes before returning with his backpack on his shoulder, a beverage in his hand, and a garbage bag in the other hand containing unknown contents which he carried down the street and

then disposed of while ambulating in no apparent discomfort. *Id.* Then, Petitioner continued to stand during a conversation with a youth and some other individuals for a few minutes. *Id.* Petitioner also took some steps backward while talking to a youth without use of a cane or any assistive device while he was in no apparent discomfort and was ambulating minutes later through a parking lot at a faster pace without use of a cane and in no apparent discomfort. *Id.*

Vocational Rehabilitation Services
Patrice Sharkey

Petitioner subpoenaed Patrice Sharkey ("Ms. Sharkey") as a witness. Tr. at 11. Ms. Sharkey is a vocational field case manager for Genex Services and has been so employed for two years. Tr. at 12; PX1. Previously, Ms. Sharkey was a vocational rehabilitation counselor on and off with other employers for approximately 20 years. Tr. at 12. Ms. Sharkey testified that she is a licensed social worker, certified disability management specialist, and a certified rehabilitation counselor. Tr. at 12-13.

Ms. Sharkey testified that Intracorp is a company purchased by Genex. Tr. at 13. The Hartford Insurance Company hired Genex to provide vocational rehabilitation services to Petitioner. Tr. at 15. Ms. Sharkey and another counselor at Genex, Ms. Torres, handled Petitioner's file. Tr. at 15-17. Ms. Torres initially met with Petitioner in May of 2011. Tr. at 16. Ms. Sharkey eventually took over Petitioner's file. Tr. at 19-22.

Ms. Sharkey or Ms. Torres authored vocational progress reports throughout Petitioner's vocational rehabilitation program with Genex from June 21, 2011 through July 18, 2012. Tr. at 17-18; PX2-PX14.
Ms. Sharkey acknowledged that she performed no vocational interest or vocational aptitude testing of Petitioner. Tr. at 18-19. She was aware that Petitioner's treating physician restricted him to sedentary-to-light duty work and that he had a second grade education obtained in Mexico. Tr. at 23, 69. Ms. Sharkey was also aware that Petitioner used a cane although she did not know whether it was prescribed and she commented that, based on her experience, injured workers with visible disabilities have less of a chance of getting interviews and those who do not. Tr. at 71-74. Ms. Sharkey testified that Petitioner made a good-faith effort during his vocational rehabilitation with Genex. Tr. at 75-77.

On cross-examination, Ms. Sharkey testified that in her August 19, 2011 report she noted that Petitioner had 308 job search activities, but she was unsure how many job search leads she provided to him; possibly five or 10, not hundreds. Tr. at 83-84. "It was the first time I think I met him. I was surprised that he brought them in for the first meeting. I don't recall. I may have brought in a few, but I don't remember now." Tr. at 83-84. Ms. Sharkey acknowledged that she was not able to follow up with any of those 308 jobs to verify that Petitioner did, in fact, inquire about jobs with those companies. Tr. at 84-85, 90-91. Ms. Sharkey also acknowledged that the majority of Petitioner's self initiated job search activities were in person. Tr. at 85. Ms. Sharkey further acknowledged that she did not know whether any of these positions were within Petitioner's restrictions. Tr. at 89-90. Also, Ms. Sharkey testified that she was not sure whether Petitioner had any interviews for his job leads or whether he used a cane at such interviews. Tr. at 91-92.

On redirect examination, Ms. Sharkey confirmed that she did not "spot check" Petitioner's reported job inquiries or applications; only occasionally did she receive employer responses to his job inquiries as provided by Petitioner. Tr. at 96-98.

Ms. Sharkey did not recall whether Hartford requested that she perform labor market survey. Tr. at 55-56.

She described a labor market survey as a snapshot of the types of jobs in the job seeker's local job market that are open and the wages for those positions. Tr. at 56. Ms. Sharkey also testified that labor market surveys involve a determination of whether the client is capable of performing available jobs in his geographic region. Tr. at 56-57.

On cross-examination, Sharkey testified that when she first met Petitioner she was of the opinion that he could find gainful employment through July of 2012. Tr. at 78-79. She also obtained Petitioner's physical restrictions from a functional capacity evaluation and a note from his attending physician that limited him to sedentary-to-light duty work. Tr. at 79. Ms. Sharkey defined sedentary work as seated work that required occasional lifting up to 10 pounds. Tr. at 79-80. She defined light duty work as occasional lifting up to 20 pounds with some walking and sitting depending on the job. Tr. at 79-80.

Petitioner was expected to do a weekly job search of 25 jobs week on his own and including approximately 5 job leads a week were provided by Genex. Tr. at 80-81. Ms. Sharkey acknowledged that some of the positions to which Petitioner applied on his own were outside of his restrictions including a position as a mechanic. Tr. at 86-89. Ms. Sharkey also testified that certain positions including dishwasher, cook, food runner, busser, and mechanic could be in a heavier or medium physical demand level. Tr. at 92-93. However, even if Petitioner applied to jobs outside of his sedentary-to-light duty job restrictions he would be unqualified to perform them. Tr. at 93-95.

Andrew Patsavas

Petitioner called Andrew Patsavas ("Mr. Patsavas") as a witness. Tr. at 99. Mr. Patsavas is a certified rehabilitation counselor and vocational specialist and has been so employed for approximately 30 years. Tr. at 99-101; PX15. Mr. Patsavas previously worked at Gallagher Bassett and is professionally familiar with Mr. Harmon. Tr. at 116-117.

Mr. Patsavas testified that he did not conduct his own vocational evaluation of Petitioner because he had sufficient materials to review based on Petitioner's work with other vocational rehabilitation counselors. Tr. at 104.

Mr. Patsavas opined that no stable labor market exists for Petitioner based on his limited education, singular work history, educational achievement, language barriers, age, and the current labor market. Tr. at 106, 111. Mr. Patsavas noted that Petitioner's physician, Dr. Malek, opined that Petitioner was unemployable and that Petitioner was deemed disabled and received social security disability benefits. Tr. at 109-110. On cross-examination, Mr. Patsavas testified that Petitioner's language barrier was a factor, but not a major factor preventing him from finding a job; rather it was a combination of his physical restrictions, prior work history and lack of transferable skills, and age. Tr. at 128-29.

With regard to Petitioner's compliance with vocational rehabilitation, Mr. Patsavas testified that from his review of the records there was no indication that Petitioner "had not turned in his employer log sheets, that he had not attended ESL classes, that he had not been fully cooperative." Tr. at 111-112.

Mr. Patsavas also testified that it was not within the standard of practice for vocational rehabilitation specialist to rely solely on the existence of government statistics to determine the existence of the labor market for particular employee because the statistics do not take into consideration individual differences including education level, physical restriction, prior work history, or age and similar factors. Tr. at 114-116.

On cross-examination, Mr. Patsavas testified that one of the purposes of vocational rehabilitation is to place a person back into the workforce, not necessarily into his prior job. Tr. at 118.

On cross-examination, Mr. Patsavas testified that he understood that Petitioner was restricted by Dr. Malek to sedentary-to-light duty work with no lifting over 10 pounds or prolonged standing, and use of a cane where necessary. Tr. at 119. On cross examination, Mr. Patsavas initially defined light duty work to include occasional lifting up to 10 pounds, but after reviewing some documentation defined it as occasional lifting up to 20 pounds over one third of the workday or frequent lifting up to 10 pounds up to two thirds of the workday. Tr. at 119-121, 136-137. Mr. Patsavas also testified that delivery driver, cashier, salad maker, and janitor physicians may be light duty positions depending on the particular physical requirements of the job and the employee's restrictions. Tr. at 121-123, 124-126.

On cross examination, Mr. Patsavas acknowledged that he met with Petitioner only briefly before trial, that he had not otherwise spoken to Petitioner, that he had communicated with Petitioner's attorney on approximately 6 occasions, and that he did not contact any of the companies with which Petitioner purportedly applied for jobs. Tr. at 124, 133-135. He further acknowledged that Petitioner would not qualify for medium or heavy level positions given his sedentary-to-light duty restrictions unless accommodations are made. Tr. at 127. Mr. Patsavas testified that he did not know for certain whether Petitioner ever requested any accommodations when applying or interviewing for positions. Tr. at 127-128. He also testified that he did not personally provide any job leads to Petitioner and that he was not aware that Petitioner had been offered a job as a social companion. Tr. at 132-134.

On redirect examination, Mr. Patsavas added that Petitioner was "more in the sedentary [category]" based on the restrictions provided by Dr. Malek. Tr. at 136. He also testified that if an employee is supposed to make a certain amount of contacts per week, he may run out of positions falling within his physical restrictions. Tr. at 140.

After extensive questioning on redirect and recross examination, Mr. Patsavas testified about certain federal statistics from an unidentified source reflecting available unskilled positions and ultimately indicated that statistics alone are not determinative of a person's employability. Tr. at 142-147.

Brian Harmon

Respondent called Brian Harmon ("Mr. Harmon") as a witness. Tr. at 193. Mr. Harmon is a bilingual, certified rehabilitation counselor and he has been certified since August of 2011. Tr. at 193-196, 233-234. Mr. Harmon previously worked at E.P.S. Rehabilitation with the owner, Mr. Steffan, who was contacted by Petitioner's counsel. Tr. at 193-196. While working at E.P.S., Mr. Harmon was assigned to Petitioner's case. Tr. at 196-197. Mr. Harmon left E.P.S. and is currently self-employed since October of 2012. Tr. at 197-198. He also testified that he used vocational evaluation methodology published by Dr. Rick Robinson at the University of Florida in evaluating Petitioner and his employability. Tr. at 198, 259-260.

Mr. Harmon created a rehabilitation plan, labor market survey and various progress reports for Petitioner from July 2012 through March of 2013. Tr. at 201, 228-229; RX1B-RX1F; RX9; PX16.

Mr. Harmon defined sedentary duty as work involving sitting up to two thirds of the day and occasional standing and walking up to one third the day. Tr. at 210. After extensive questioning on direct and cross

examination, Mr. Harmon testified that he utilizes the Dictionary of Occupational Titles, Volume 2, Fourth Edition Revised published by the Department of Labor, Employment Training Administration to identify the definition of sedentary work, light duty work, medium duty work etc. Tr. at 209-214, 244-245.

Mr. Harmon eventually opined that Petitioner was a good candidate for job placement and that he could earn between $8.49 per hour up to $12.47 per hour. Tr. at 216-217. Mr. Harmon testified that during the time that he provided vocational services to Petitioner, Petitioner was offered to jobs; one at Comfort Keepers within Petitioner's physical capabilities and for which the employer would provide reasonable accommodations and one at United Temps. Tr. at 217-222; Tr2. at 46-49.

Mr. Harmon also opined that Petitioner did not engage in a good-faith, diligent search for work. Tr. at 222-226, 231. He testified that Petitioner appeared at one consultation with a short Mohawk or "fohawk" haircut that Mr. Harmon opined was unprofessional. *Id.* Petitioner did not follow-up or make in-person contact after applying for positions online. *Id.* Petitioner did not follow up with Comfort Keepers for the position until one month later. *Id.* Also, on February 21, 2013, Mr. Harmon testified that he heard arcade games or gambling machines through the phone during a conversation with Petitioner on a date that Petitioner had reported that he was sick and could not go to his ESL class when Petitioner later verified that he did go to a casino with a friend who had invited him on a day when he was supposed to attend ESL class. Tr. at 222-226, 231; Tr2. at 49-53.

Ultimately, Mr. Harmon concluded in his reports and he testified that Petitioner was employable and that a stable labor market exists for him. RX1B-RX1F; RX9; PX16; Tr. at 228-231.

On cross-examination, Mr. Harmon acknowledged that Dr. Malek prescribed a cane for Petitioner's use as needed for ambulation, that he had a second grade education in Mexico, that he went to a library to use a computer, that he reportedly felt numbness in his right foot if he drove over 10 to 15 minutes, that he uses assistive devices for certain activities of daily living due to difficulty bending, and that he has difficulty lifting bags of garbage. Tr. at 247, 250-252, 255-256. Mr. Harmon further acknowledged that he did not perform any aptitude for vocational interest testing with Petitioner. Tr. at 258-259. He also acknowledged that he did not believe that Petitioner could perform a job requiring him to assist a 102 year old man to ambulate by holding his belt. Tr2. at 34-45. On redirect examination, however, he testified that Petitioner was asked by Comfort Keepers in that job if he could go be a companion for an elderly person and explained understood that Petitioner could perform the duties of the position with accommodations. Tr2. at 64-66. He did not understand that Petitioner would have to assist the elderly person in ambulating. *Id.*

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 low back condition of ill-being is related to the injury sustained at work on May 22, 2008. In so finding, the Arbitrator notes that Petitioner's treating physician, Dr. Malek, opined that Petitioner's low back condition was causally related to his injury at work. While a Section 12 report from Dr. Trotter is referred before Dr. Malek's deposition testimony, no contrary evidence was proffered from any other physician thereafter. Thus, the Arbitrator finds that Petitioner's low back condition of ill-being is related to the injury sustained at work on May 22, 2008.

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:

In the parties' request for hearing form, Respondent disputes its liability to pay any unpaid medical bills offered into evidence by Petitioner. As the issue of causal connection has been resolved in favor of Petitioner, and Dr. Malek's opinion that Petitioner's medical treatment was reasonable and necessary to alleviate Petitioner from the effects of his aggravating injury at work is unrebutted, the Arbitrator finds that the unpaid medical bills are inclusive of reasonable and necessary medical treatment. Thus, the Arbitrator awards the unpaid medical bills incurred by Petitioner and submitted into evidence to be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

The record is devoid of any medical evidence to support a permanent and total disability claim. Petitioner asserts that he is permanently, totally disabled under an "odd-lot" theory of recovery. Respondent refutes Petitioner's assertion arguing that Petitioner is able to work within his sedentary restrictions, that a stable labor market exists for him, and that Petitioner is only entitled to wage differential benefits. The parties provided extensive testimonial and documentary evidence from three vocational rehabilitation counselors on this issue presenting an array of circumstances that unnecessarily complicate the issue of whether Petitioner is permanently and totally disabled in an "odd-lot" analysis.

In the absence of medical evidence of permanent and total disability where a claimant's "disability is limited in nature so that he is not obviously unemployable… he may qualify for 'odd-lot' status." *City of Chicago v. Illinois Workers' Compensation Commission*, 373 Ill. App. 3d 1080, 1089, 871 N.E.2d 765 (Ill. App. Ct. 1st Dist. 2007). It is the claimant's burden to establish that he is not altogether incapacitated from work, but nonetheless not regularly employable in any well-known branch of the labor market. *Ceco Corp. v. Industrial Commission*, 95 Ill. 2d 278, 286, 447 N.E.2d 842 (1983); *City of Chicago*, 373 Ill. App. 3d at 1089-90. A claimant can establish that he falls in the odd-lot category by showing either: (1) that he engaged in a diligent, but, unsuccessful job search; or (2) that his age, training, education, experience, and physical condition prevent

him from engaging in stable and continuous employment. *Westin Hotel v. Industrial Commission*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342 (Ill. App. Ct. 1st Dist. 2007). If the claimant meets his burden by a preponderance of the evidence, the burden then shifts to the employer to show that work is actually available for the claimant. *City of Chicago*, 373 Ill. App. 3d at 1091.

Petitioner was 54 years old at the time of his injury at work. He has a second grade education obtained in a foreign country. He is not a native English speaker. He worked for Respondent for approximately 30 years during which he conducted all of his work in Spanish and worked in an environment of predominantly Spanish speaking co-workers and supervisors. Petitioner's only work experience stems from his work for Respondent performing janitorial/cleaning services early in his career and later consisting of heavy fan repair work in a factory setting for 20 years. This evidence is undisputed.

Petitioner also participated in vocational rehabilitation with three providers selected by his counsel, Respondent's workers' compensation insurance carrier, or both. The vocational rehabilitation counselors have varied levels of experience, contact with Petitioner, and opinions about his compliance with vocational rehabilitation efforts and his employability. They agree, however, that Petitioner was released to a higher physical demand level of work by the functional capacity evaluation (i.e., medium level work) than by his treating physician, Dr. Malek (i.e., sedentary-to-light duty work). The dispute between the parties stemming from the vocational rehabilitation evidence centers on whether Petitioner could perform work at two jobs offered to him (or in any job to which he applied) based on his physical restrictions, Petitioner's compliance with vocational rehabilitation efforts, and Petitioner's desire to become employed at all.

The Arbitrator observed Petitioner at trial, viewed the surveillance video provided by Respondent, and has considered all of the evidence provided including the exhaustive testimony and documentation provided by the vocational rehabilitation counselors. In light of the foregoing, the Arbitrator acknowledges that Petitioner is not completely immobile. He does not need a cane to ambulate or ascend/descend stairs consistently. He also does not appear highly motivated, if at all, to find work as reflected in the record as a whole. Certainly, the ability to perform sedentary work and a claimant's failure to search for work within his restrictions are both factors militating against a finding that the claimant is permanently and totally disabled. *Hallenbeck v. Industrial Commission*, 232 Ill. App. 3d 562, 569 (Ill. App. Ct. 1st Dist. 1992) (citations omitted). However, Petitioner does not need to establish both prongs of an "odd-lot" analysis in order to prove that he is permanently and totally disabled under that theory and, in light of the undisputed evidence regarding Petitioner's age, limited training, education, and experience, physical condition (i.e., status post L3-S1 fusion), the Arbitrator finds that Petitioner has established by a preponderance of credible evidence that he these factors prevent him from engaging in stable and continuous employment.

In an "odd-lot" analysis, the burden then shifts to Respondent to show that work is actually available for Petitioner. The Arbitrator finds that Respondent failed to do so. Petitioner received one job offer for a temporary three day position and a second temporary position about which the specific job duties and rate of pay was unspecified. The Arbitrator does not find that these two examples are sufficient to establish that a stable labor market exists for Petitioner.

Based on all of the foregoing and in consideration of the record as a whole, the Arbitrator finds that Petitioner has established that he falls within the odd-lot category and is permanently, totally disabled.

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

Salvador Esquinca,

Petitioner,

vs. NO: 10 WC 46972

14IWCC0903

Romar Transportation,

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, employee/employer relationship, causal connection, average weekly wage, medical expenses, temporary total disability, prospective medical expenses, 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 December 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.

14IWCC0903

The party commencing the 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 20 2014
TJT:yl
o 8/19/14
51

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I write separately from my colleagues because I believe, under the law, that Petitioner has proven that he was an employee of Respondent on the date of accident, April 29. 2010.

In my view, the recent Illinois Supreme decision in and Appellate Court decisions in *Roberson v. Industrial Commission*, 225 Ill.2d 159, 866 N.E.2d 191, 310 Ill.Dec. 380 (2007), and the Appellate court decisions in *Labuz v. Illinois Workers' Compensation Commission*, 2012 IL 113007, 981 N.E.2d 14, 366 Ill.Dec. 949 (2012) and *Ware v. Industrial Commission*, 318 Ill.App.3d 1117, 743 N.E.2d 579, 252 Ill.Dec. 711 (2000), support a finding that Petitioner in this case was an employee of Respondent.

The claimant in *Roberson* signed an Independent Contractor agreement/contract that was very similar to the one executed by Petitioner in this case. In *Roberson*, our Supreme Court reiterated the factors that are of key importance in determining if a worker is an employee or an independent contractor: 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. Additionally, the court noted that the right to control the manner of the work is often called the primary factor to be considered among these factors. Further, the court indicated that evidence of control, exerted or implied, based on a requirement of local or federal regulations is evidence that such control exists, and the motivation of the employer in exerting or implying such control is irrelevant. *Id.*

The Court also noted a more recently recognized factor which holds significant importance in this determination: whether the employer's general business encompasses the person's work. *Roberson* at p. 175, 200. In terms of the nature of the business factor in this case, clearly both Petitioner and Respondent were in the identical "business": the delivery of goods to customers by truck.

The *Roberson* case cites to two prior Appellate decisions, *Earley v. Illinois Industrial Commission*, 197 Ill.App.3d 309, 553 N.E.2d 1112, 143 Ill.Dec. 126 (1990) and *Ware v. Illinois Industrial Commission*. The fact scenarios in both cases are also very similar to this case. In both

cases, as here, the Commission determined that the claimant truck driver was not an employee of the trucking company. In *Earley*, the Appellate court affirmed the Commission; in *Ware*, they reversed, indicating the determination that there was no employer/employee relationship was against the manifest weight of the evidence. It should be noted that this determination is a factual determination, which is why the Appellate court deals with the issue on a manifest weight basis. It is unclear to me why the Appellate court came to different conclusions in these cases despite almost identical facts, but it is instructive to note that in the only one of these cases (*Ware*) where the Commission's determination was found to be against the manifest weight of the evidence, the decision reversed the Commission's finding that there was no employment relationship. Where the Appellate Court reverses despite the onerous nature of the standard of manifest weight, the Commission should heed this guidance and consistently find that truck drivers working with these "independent contractor agreements" are what they are: employees.

It is clear to this Commissioner that "independent contractor agreements", such as those used in *Ware*, *Earley*, and this case, seek to shift the burden of the cost of workers' compensation to truck drivers who happen to own their own trucks, despite that the actual employment tasks performed are virtually identical to employee truck drivers. However, the testimony in this case shows how these agreements may not be at arm's length, and instead are based on "take it or leave it" tactics. It is important to note that, at the time of the accident at issue, the 24 month written agreement between the parties had expired. Therefore, it is at least arguable that the agreement itself is moot in the determination of this issue. Pursuant to the Contractor Service Agreement (Petitioner's Exhibit 13), Petitioner's truck was to be maintained in safe mechanical operating condition and repair. Also pursuant to law, Respondent maintained exclusive possession, control and use of Petitioner's truck during the time it was operated to deliver a load on behalf of Respondent. The agreement did not give Respondent control over Petitioner other than that he timely deliver loads. The Agreement stated that the delivery was to be by manner and means and over routes in accordance with schedules selected and *agreed to* by the contractor, which in this case is the Petitioner. The "agreed to" language implies that a route could be presented by Respondent to Petitioner for agreement.

While the Agreement stated that Petitioner was not obligated to accept every load offered by Respondent, Petitioner's testimony made it clear that there were consequences to Petitioner for refusing a load. Petitioner testified that if he refused a load, Respondent "would leave you off a day or give you a shorter move", i.e. he would be punished with less work. He testified that it was his understanding that he could not drive for any other company. He testified that because he worked full time for Respondent, he would not have had time to drive for other customers anyway. On rebuttal, Petitioner testified that he was not allowed to drive for another trucking company, despite the contract language, because the contract would have been terminated. If the Petitioner were to hire another driver to take a load, he was required by Respondent to be properly licensed and compliant with all laws. Petitioner was required to maintain insurance.

I find it highly relevant that in Addendum C (Respondent's Exhibit 3) to the agreement, titled "Insurance", there are check boxes indicating that Petitioner could choose or not choose to be covered by workers' compensation insurance. Neither box is checked. Importantly, Petitioner testified that he never checked the option in the agreement to waive workers compensation coverage, and that he understood the costs for same were being deducted from his wages. In my

view, this clearly supports Petitioner's testimony that he was not properly informed about workers compensation coverage and which party is responsible for same. This is a contract term that required a "yea" or "nay", and neither was given. The inference is that Respondent did not discuss this with Petitioner, and there was no meeting of the minds in this regard.

Similarly to *Ware*, Petitioner's agreement with Respondent provided that he would lease the truck to Respondent in return for a percentage of the gross revenue from the delivery of a load. Petitioner was required to operate his truck in compliance with all applicable laws and regulations. Pursuant to law, the truck was to be identified as that of Respondent while delivering a load. He was required by law to display the Respondent's signs and DOT number on his truck with an adhesive decal. Respondent arranged for all of his work, and Petitioner testified he never was in direct contact with any customer. Petitioner was required to deliver goods in accordance with the terms and conditions that Respondent agreed to with the customer. In this case, Petitioner used his own tractor but never used his own trailer. Respondent gave him forms to complete, tracked his hours and directed which loads he was to deliver.

Petitioner's testimony in this case makes it very clear that he did not truly understand the difference between being an employee versus being an independent contractor, testifying that he has worked as both, in one case taxes were taken out of his wages, and in the other he paid his own taxes and received a 1099. Petitioner testified that his ability to do what he wanted as a driver, between when he was told to pick up a load and where and when to drop it off, was no different than when he worked for other companies and used their trucks, not his own. He was never told when to go to the restroom or when to stop for gas as a truck driver for any company, and he noted that as a driver you always have to make decisions on which routes to take depending on weather and traffic.

Petitioner testified that when he initially sought treatment after this accident, Concentra did not initially want to provide medical services until Respondent's dispatcher John Prince called the facility. Again, this evidence points to Respondent's exertion of control over the Petitioner.

As the court noted in *Roberson*, citing *Larson*, "there is a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business." (See 3 A. Larson & L. Larson, *Workers' Compensation Law*, Section 61.07(5) at 61—21 (2006)). I agree with Professor Larson, and believe this is very applicable in this case, as the Petitioner has testified unrebutted that he has worked for no other company other than the Respondent since the agreement of September 2007. It is my opinion that Petitioner was, in fact, an employee of Respondent on April 29, 2010, and that this matter should be remanded to the Arbitrator for further findings consistent with this determination.

Thomas J. Tyrrell

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

ESQUINCA, SALVADOR
Employee/Petitioner

Case# **10WC046972**

ROMAR TRANSPORTATION
Employer/Respondent

14IWCC0903

On 12/30/2013, 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 0.09% 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:

2986 PAUL A COGHLAN & ASSOC PC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

0210 GANAN & SHAPIRO PC
COURTNEY QUITTER
210 W ILLINOIS ST
CHICAGO, IL 60654

14IWCC0903

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)

Salvador Esquinca
Employee/Petitioner

v.

Romar Transportation
Employer/Respondent

Case # 10 WC 46972

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **April 15, 2013 and May 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **April 29, 2010**, Respondent *was* 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 the date of accident, Petitioner was **40** years of age, *married* with **1** dependent children.

Respondent shall be given a credit of **$-0-** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$0.00**.

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

ORDER

BENEFITS ARE DENIED AS PETITIONER FAILED TO PROVE THAT AN EMPLOYEE-EMPLOYER RELATIONSHIP EXISTED ON THE ACCIDENT DATE. ALL OTHER ISSUES ARE MOOT.

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

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

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

Signature of Arbitrator

December 27, 2013
Date

ICArbDec19(b)

DEC 30 2013

Salvador Esquinca v. Romar Transportation
10 WC 46972

STATEMENT OF FACTS

On April 29, 2010, Petitioner was a truck driver who was using his own truck to deliver loads for Respondent, Romar Transportation. Petitioner drove for Respondent from 2007 through 2010.

On April 29, 2010, Petitioner was driving northbound on I-55 when he was involved in a multi-vehicle motor vehicle accident. As a result of the collision, Petitioner sustained a low back injury.

On September 28, 2007, Petitioner and Respondent signed a Contractor Service Agreement. Affixed to the Agreement was a provision entitled Addendum "C" Insurance, which allowed that Contractor/Petitioner, Salvador Esquinca/Esquinca Trucking either elect to be covered under the Illinois Workers' Compensation Act or waive coverage under the Act and elect coverage under an Occupational Accident Insurance Policy. Said agreement was in effect for a period of 24 months subsequent to signing of agreement by the parties on September 28, 2007. (Rx.3)

Section 14 of that Agreement indicates that the agreement "represents the entire agreement between the parties with respect to matters contained herein. No amendment or addition to this agreement will be effective unless in writing and signed by both parties." Since the agreement was never amended, it expired some 7 months or so before the vehicular accident. Accordingly, no written agreement characterizing the employment relationship between the parties was in effect on April 29, 2010.

Testimony of Petitioner Regarding Employment Relationship

Petitioner testified he owned his own truck, which he used when driving for Respondent and he was not required to make any modifications to his truck in order to drive for Respondent. When driving for Respondent, Petitioner was required to display Respondent's decal as well as the DOT number on his truck. Petitioner did not wear a uniform when driving for Respondent.

Petitioner admitted the title of the truck was in his own name and he was responsible for paying for the license plate fees, gas, repairs and maintenance for the truck. He was also responsible for any speeding tickets or driving citations which he incurred while driving his truck. Petitioner was responsible for maintaining his own liability and bobtail insurance on the

truck. Petitioner parked his truck in a lot which was owned by a private entity. He paid for the expenses associated for parking the truck and was not reimbursed by Respondent for the parking expenses.

When he drove for Respondent, Petitioner was told where to pick-up the shipment and where to the deliver the shipment. Petitioner chose the route he would travel to make the delivery. Other than the delivery time for the shipment, Petitioner decided his own schedule for transporting the delivery, including when and where to make rest stops and get gas.

Petitioner confirmed he was not required to accept every load that was offered to him by Respondent. He believed if he did not accept a load, he would be left off a day or would get a shorter move. However, Petitioner admitted he had refused loads offered by Respondent and then returned to drive for Respondent. Petitioner testified that he drove five days per week for Respondent. Petitioner further acknowledged that he never inquired as to whether he was precluded from driving for other companies.

Once Petitioner completed a delivery, he would submit paperwork to Respondent. He would then be paid a settlement for the delivery. Petitioner was paid per shipment and not paid by the hour. Respondent did not deduct taxes out of each of Petitioner's paychecks. Rather, Petitioner was responsible for deducting taxes. At the end of the year, Respondent would issue a 1099 to Petitioner for tax purposes. (RX #1).

The premium for the occupational accident policy was deducted from Petitioner's paychecks. (RX #2).

Petitioner testified he is incorporated and his corporation name is Esquinca Trucking. Esquinca Trucking became incorporated on January 9, 2007 and Petitioner is still incorporated. (RX. #8).

Respondent's Testimony Regarding Employment Relationship

Michael Marden testified on behalf of Respondent. Mr. Marden is the President of Respondent and his job duties include oversight of all divisions. He has worked for Respondent since 1982. Mr. Marden described Respondent as a transportation company which does warehousing, yard storage, truck brokering and intermodal movements by rail and trucking. He testified Respondent's workforce is composed of approximately 22 employees and between 30-32 owner-operators. On cross-examination, Mr. Marden stated Respondent has two categories of drivers, which are drivers and owner-operators.

Mr. Marden testified Petitioner began driving for Respondent in 2007. He described the process of how Petitioner would have become a driver for Respondent which included coming in, filling out an application, making a copy of his driver's license, a drug test, watching a video and training. Mr. Marden further testified Petitioner would have been given a lease to execute and paperwork. The lease was the Contractor Service Agreement. (RX #3).

Mr. Marden further explained Petitioner signed a Contractor Service Agreement prior to driving for Respondent. (RX #3). He testified the agreement is created by the safety department and the drivers are required to keep a copy of it in their trucks. Mr. Marden testified if Petitioner was hired as an employee, he would not have been required to sign the Contractor Service Agreement. He admitted the agreement began in 2007 and continued for 24 months thereafter unless terminated earlier. However, he further confirmed Petitioner continued to drive for Respondent after 2009 in the same capacity and that he was not added to the employee schedule, the expenses he was responsible for did not change, the way he was paid did not change and the percentage of shipment he received did not change.

Regarding load assignments, Mr. Marden testified Petitioner would get notice a load was available by either receiving a call or calling into dispatch. The only information given to Petitioner regarding the load was the location, pick-up number, and where and when it was to be delivered. Mr. Marden confirmed Petitioner was not given any other information nor was he given a schedule or route to follow. Further, Mr. Marden testified drivers hired as employees are given a specific schedule. He testified all drivers report to the same dispatch person. Mr. Marden further testified the drivers can pick and choose when they want to drive and the loads are given on a first come first served basis. He stated Petitioner did not have to accept every load that was offered to him and rejection of a load did not have any effect on Petitioner's ability to drive for Respondent. Mr. Marden further explained on cross-examination that drivers hired as employees are required to do the work assigned, while drivers hired as owner-operators can turn the work down.

Mr. Marden testified Petitioner owned his own truck, which he used to make deliveries for Respondent and Petitioner was responsible for all operating expenses of the truck, including tires, fuel, license plates, maintenance, windshields and bumpers and repairs. Mr. Marden confirmed that if Petitioner had been hired as an employee, Respondent would have been responsible for the operating expenses of the truck.

Other than repairs, which were required by the DOT, Respondent did not tell Petitioner any repairs or maintenance that needed to be done to the truck. Additionally, Respondent did not tell Petitioner where to park his truck or pay for any of the associated parking expenses.

Regarding the method of payment for Petitioner, Mr. Marden explained Petitioner was paid on a per shipment basis. Mr. Marden identified the pay stubs for Petitioner, which were kept by Respondent. (RX #5). He explained the Revenue section related to the percentage of shipment per move Petitioner received. Mr. Marden further explained some employees are paid on an hourly basis, while others receive a percentage per shipment. However, the percentage per shipment received by a driver hired as an employee versus a driver who is an owner-operator were different as owner-operators receive 70-75% of shipments, while employees receive only 30-35% of shipments. Mr. Marden explained the Taxes section of the pay stub would identify any taxes which are withheld from employee wages. He indicated if Petitioner was hired as an employee, taxes would have been deducted. Under the Insurance section of the pay stub, Mr. Marden explained the deduction corresponded to the deduction for the premium of the occupational policy. If Petitioner was hired as an employee, Mr. Marden testified there would have been deductions for health insurance and a 401(k). (RX #5).

Mr. Marden testified regarding the differences in insurance offered to drivers hired as employees versus owner-operators. He explained Petitioner was responsible for maintaining his own bobtail, truck, and health insurance. If he was hired as an employee, Petitioner would have been offered health, medical, dental, short-term and long-term disability insurance through Respondent. Mr. Marden further explained Respondent offered occupational accident insurance through U.S. Specialty to the drivers hired as owner-operators. However, Petitioner was not required to get the specific policy offered by Respondent and could opt for a policy through another carrier. Mr. Marden confirmed Respondent contributed nothing towards the premium for the occupational accident policy and Petitioner was responsible for the entire premium. He further testified he had an open door policy and Petitioner never came to him to discuss issues or questions he had regarding the occupational accident policy.

Mr. Marden explained it is typical that drivers for Respondent had the company name on the side of their truck because it is a DOT regulation. He explained Petitioner was required to have the company decal on the side of his truck only when operating in the service of Respondent. He further explained that not all drivers for Respondent own their own trucks and Petitioner could use his truck for anything he wanted, not just for driving for Respondent.

On cross-examination, Mr. Marden testified he believed Petitioner was an independent contractor and not an employee of Respondent. He confirmed Petitioner had deductions coming out of his check for occupational accident insurance which he never questioned. Mr. Marden also testified Petitioner was provided with information from the safety department regarding what the money was being deducted for. Furthermore, Mr. Marden testified that while Respondent was noted as the sponsoring organization for the occupational accident policy, Respondent never signed off on the policy. (Rx.2)

Mr. Marden testified the Respondent's work force is composed of individuals hired as either employees or owner-operators. Mr. Marden confirmed he provides and pays for workers' compensation insurance for employees of Respondent.

CONCLUSIONS OF LAW

In support of his decision with regard to issue (A) "Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?," the Arbitrator makes the following findings of fact and conclusions of law:

The Respondent disputes that they were operating under and subject to the provisions of the Illinois Workers' Compensation Act on the date in question. The Respondent's activity, namely commercial trucking of goods by diesel powered tractor-trailer combination vehicles, is subject to automatic Application of the Act.

Section 3 of the Act (820 ILCS 305/3 *et seq.*) defines various activities that are subject to automatic application of the Act. The Respondent's business activity falls within, at a minimum, several provisions requiring automatic application of the Act: §3(3) since the activity involves carriage by land by motor vehicles, §3(4) since the operation involved use of warehouses and §3(15) since the activity involves use of power driven equipment.

Therefore, based upon the foregoing, the Arbitrator finds that the Respondent was operating under and subject to the provisions of the Illinois Workers' Compensation Act.

In support of his decision with regard to issue (B) "Was there an employee-employer relationship?," the Arbitrator makes the following findings of fact and conclusions of law:

In determining whether an employment relationship exists, or whether the relationship is, in fact, one involving an independent contract, the Illinois Supreme Court in Bauer v. Indus. Comm'n, 51 Ill.2d 169, 282 N.E.2d 448 (1972), defined the criteria for making such a determination as follows:

No single facet of the relationship between the parties is determinative, but many factors, such as the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and the furnishing of tools, materials or equipment have evidentiary value and must be considered . . . Of these factors, the right to control the work is perhaps the most important single factor in determining the relation ... inasmuch as an employee is at all times subject to the control and supervision of

his employer, whereas an independent contractor represents the will of the owner only as to the result and not as to the means by which it is accomplished.

Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities, and whether income tax has been withheld. Wendholdt v. Industrial Commission, 95 Ill.2d 76 (1983).

Right to Control

With respect to the right to control, it is clear Respondent had minimal control over the manner in which Petitioner performed his job duties. Petitioner testified he was not told by Respondent what route to take when making deliveries. Rather, the only information given to Petitioner was where to pick up the shipment and when and where to deliver it. Petitioner testified he otherwise decided his own schedule for transporting the delivery, including when and where to make rest stops and to refuel. Mr. Marden further testified that if Petitioner were hired as an employee driver, he would have had a schedule. Petitioner did not have a schedule.

Petitioner was able to pick and choose when he wanted to drive. Mr. Marden testified Petitioner did not have to accept every load that was offered to him and rejection of a load did not have any effect on his ability to drive for Respondent. In contrast, Mr. Marden testified employee drivers are required to do assigned work, while independent contractors are able to turn down work. Petitioner's testimony differed slightly from that of Mr. Marden in that he stated if he refused a load, it was his impression that he might not be allowed to drive for Respondent on the following day or would be assigned a shorter move. However, Petitioner did not dispute that he could refuse a load and yet continue to drive for Respondent. Mr. Marden also confirmed he has had drivers who have driven for other companies in the past and Petitioner could have driven for another company if he wanted. Petitioner testified that he never asked if he could drive for other companies.

Petitioner owned his own truck, which he used when driving for Respondent. He testified that he did not have to make any modifications to his truck in order to drive for Respondent. Petitioner was responsible for all operating expenses of the truck, including license plate fees, gas, windshields, bumpers, tires, repairs and maintenance as well as any speeding tickets or driving citations he incurred. Additionally, Petitioner was responsible for maintaining liability and bobtail insurance on the truck. Mr. Marden testified if Petitioner had been hired as an employee driver, Respondent would have been responsible for the operating expenses. Respondent also did not tell Petitioner when or what maintenance or repairs needed to be done to the truck.

Petitioner was not told where to park his truck. Rather, Petitioner testified he parked his truck in a private lot and paid the parking expenses associated with parking the truck. Respondent did not reimburse Petitioner for the parking expenses.

It is undisputed that the Contractor Service Agreement had expired approximately 7 months before the vehicular accident of April 29, 2010. However, regardless of the expiration of the agreement, both the testimony of Petitioner and Mr. Marden indicate that there was no change in their actions or behaviors and they continued to conduct their business relationship as if the Contractor Service Agreement was still in effect.

With that in mind, pursuant to Clause 7, Petitioner was responsible for all labor expenses associated with operation and loading/unloading of equipment, including paying any drivers or helpers. Clause 8 provided that all drivers, other employees and helpers used by Petitioner were to be under his sole direction and control. Respondent had no right to direct or control the hiring, firing or manner in which these individuals performed their duties. Furthermore, Petitioner was responsible for paying these individuals, making all tax and payroll deductions and for maintaining applicable insurance on these individuals. Clause 6 provided Petitioner would direct the operation of all equipment in all respects and determines the method, means and manner of performance, including choice of routes, points of servicing equipment and rest stops.

The Arbitrator finds the evidence demonstrates that despite the expiration of the Contractor Service Agreement, the parties continued to operate in a manner consistent with the provisions of the agreement.

Method of Payment

There is no dispute regarding Petitioner's method of payment. Petitioner was paid per shipment. Mr. Marden explained some employee drivers are also paid per shipment. However, the percentage received by employee drivers is less as employees receive only 30-35%, while owner-operators such as Petitioner receive 70-75% of shipments.

At the end of the year, Petitioner would receive a 1099 for tax purposes. No income tax was withheld.

Mr. Marden testified if Petitioner were hired as an employee, taxes would have been deducted from his checks. Additionally, there would have also been deductions for health and dental insurance as well as for a 401(k).

Instrumentalities/Equipment

There is also no dispute Petitioner owned his own truck which he used when making deliveries. The title of the truck was in Petitioner's name and he was responsible for the

maintenance, repairs, liability and bobtail insurance on the truck. When not driving for Respondent, Mr. Marden confirmed Petitioner could use his truck for anything he wanted.

Right to Discharge

Another factor to consider in determining the nature of the employment relationship between the parties is whether Respondent had the right to discharge Petitioner for any reason at any time. Clause 12 of the Agreement provides that the Agreement could be terminated by either party for breach of any duty or responsibility of either party, with termination being at the option of the non-breaching party. Any termination for other than a breach would result in a payment of $250.00 as the sole and exclusive remedy for the termination.

In Earley v. Industrial Commission, 197 Ill. App.3d 309, 316 (4th Dist.1990), the Court found the lease agreement did not appear to give Respondent an absolute right to discharge but instead seemed to be a mutual provision which either party to the agreement could invoke if dissatisfied. This is similar to Clause 12 as it allows the agreement to be terminated by either party for breach of any duty or responsibility by either party and is therefore mutual which either party can invoke. Additionally, the Court in Earley found it significant that there was nothing in the lease which provided for termination for a violation of Respondent's policies and procedures. The Court noted such language would have created a stronger inference that Petitioner was an employee. Similarly, the lease agreement also does not provide for termination if Petitioner violates Respondent's policies and procedures. Therefore, the mutual right to discharge points in favor of independent contractor status.

Nature of the business

Respondent is in the business of warehousing, yard storage, truck brokering and intermodal movements by rail and trucking. Petitioner is a semi-truck driver. This is similar to Earley (supra). In Earley, Respondent was in the business of transporting shipments for profit and Petitioner was a truck driver. The Court found the relationship between Petitioner's work and Respondent's business implied an independent contractor status. The Court relied on two factors in reaching its finding. First, the Court noted Respondent was in the same business Petitioner was employed and Petitioner could operate his business as an independent contractor, which he continued to do after termination of the lease agreement as Petitioner became incorporated and operated under the name of Earley Transportation. The Court also found it significant that Respondent told Petitioner only when and where to pick up and deliver shipments and therefore concluded Respondent was only interested in the end result.

Similar to Earley, Respondent is in the trucking business and Petitioner is a semi-truck driver. However, Petitioner became incorporated as Esquinca Trucking on January 9, 2007, which is long before he began driving for Respondent in September of 2007. Furthermore, Petitioner is still incorporated and works as a truck driver for D.B. Cartage. Additionally, the

evidence also demonstrates that similar to Earley, Respondent was also only concerned with the end result as Petitioner was only told where to pick up and when and where to deliver the shipment. All the details of accomplishing the shipment were left to Petitioner. This factor therefore supports an independent contractor status.

Uniform/Decals

Petitioner testified he was not required to wear a uniform when driving for Respondent.

Petitioner also testified he was required to display Respondent's decal and the DOT number when driving for Respondent. Although one of the more minor factors, the display of the decal does not support an employment relationship in this case. As Mr. Marden explained, the display of the decal is a DOT regulation. Additionally, Petitioner was only required to display the decal when operating in the service of Respondent.

Exclusivity of Relationship

Another factor is the length, exclusivity and continuity of the relationship between the parties. Petitioner testified he drove for Respondent from 2007-2010 and that during this time, he only drove for Respondent, which could support an employee status. However, Petitioner also testified he had no time to drive for other customers. Furthermore, Respondent testified Petitioner could have driven for other companies if he wanted. Nothing barred Petitioner from driving for other companies, Petitioner testified that he never specifically asked if he could drive for other companies and Respondent did not impose a mandatory schedule on Petitioner.

Labeling of Relationship

A factor of lesser weight is the label parties place upon their relationship. Earley v. Industrial Commission, 197 Ill. App.3d 309, 316 (4th Dist.1990)

Petitioner testified he was hired as an owner-operator for Respondent. He did not testify he was hired as an employee. Mr. Marden testified Petitioner was hired as an owner-operator and he therefore believed Petitioner was an independent contractor. Furthermore, Clause 6 of the Contractor Service Agreement stated that it was the intention of the parties that Petitioner would be an independent contractor with respect to Respondent.

The intention of the parties that Petitioner be considered an independent contractor is further supported by the Occupational Insurance Coverage Application that Petitioner completed on September 28, 2007. On the application, Petitioner checked the box indicating he was an owner-operator.

Finally, the Concentra medical records indicate Petitioner reported his employer was Esquinca Company, not Respondent.

Occupational Accident Insurance

A final factor to be considered is that Petitioner purchased occupational accident insurance on his own. Petitioner admitted he applied for occupational accident insurance through U.S. Specialty. Clearly, said policy was still in effect on the accident date as Petitioner testified that he received lost time benefits and some of his medical bills were paid through the occupational accident policy. Although a minor factor, the purchase of the occupational accident insurance also indicates an independent contractor status.

Based on the foregoing analysis, the evidence clearly demonstrates Petitioner's employment status was that of an independent contractor and not an employee of the Respondent on the accident date.

As Petitioner failed to prove that an employee-employer relationship existed, the Arbitrator finds that he is therefore not entitled to workers' compensation benefits under the Act.

All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Pamela Erwin,
Petitioner,

vs. No. 06 WC 15494

14IWCC0904

Quebecor-Petty Printing,
Respondent.

DECISION AND OPINION ON REVIEW

A Petition for Review having been timely filed by Petitioner and notice given to all parties, the Commission, after considering the issues of accident, date, causal connection, temporary total disability, medical expenses, nature and extent of the disability and statute of limitations, and being advised of the facts and law, reverses the finding of Arbitrator Granada that Petitioner had failed to establish a single definable accident or an appropriate date of manifestation, as defined by the Illinois Supreme Court in *Peoria County Belwood Nursing Home*. The Commission finds that Petitioner did identify an appropriate date of accident, her last day of exposure to the repetitive work activity she believed caused her condition o fill-being, but affirms and adopts the remainder of the Arbitrator's Decision, a copy of which is attached hereto and made a part hereof. The Commission further finds that Petitioner also failed to prove that she provided timely notice of her accident to Respondent.

Petitioner alleged that she suffered a repetitive stress injury to her low back from repeatedly bending, twisting and lifting stacks of paper during the performance of her job as a cutter operator at Respondent's printing plant. Arbitrator Granada denied Petitioner's claim for three reasons:

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1. She failed to prove that an accident arose out of and in the course of her employment with Respondent. The Commission affirms this finding.

2. She failed to prove that her current state of ill-being is causally connected to her alleged work accident. The Commission affirms this finding.

3. She failed to establish a single definable accident or an appropriate date of manifestation. The Commission finds that Petitioner did identify an appropriate date of accident, but failed to provide timely notice of her accident to Respondent.

The Commission agrees with Arbitrator Granada that Petitioner failed to prove accident and causal connection by a preponderance of the evidence. Petitioner had a history of low back pain stretching back to the 1990's, but none of Petitioner's treating physicians causally connected Petitioner's lumbar condition to her work activities for Respondent. In fact, Dr. Rudert expressly noted that her condition was not related to her work activities. Not until 2013, when Petitioner's attorney solicited Dr. Feinberg's causation opinion almost 10 years after the alleged accident date, did a doctor provide an opinion causally connecting Petitioner's alleged work accident with her current condition. The Commission agrees with the Arbitrator that Dr. Feinberg's opinion is not persuasive when compared to Petitioner's contemporaneous medical records, in which the physician repeatedly stated that Petitioner's condition was not causally related to her work activities. Petitioner sustained several falls outside of work and clearly suffers from degenerative conditions that affect her entire person, including knee problems that created an antalgic gait which could have aggravated her degenerative lumbar condition. Aside from Dr. Feinberg's solicited opinion provided 10 years after Petitioner had stopped working for Respondent, no doctor provided an opinion linking Petitioner's job to either the creation or aggravation of her lumbar condition. Respondent's §12 examiner, Dr. Sherwyn Wayne, opined that Petitioner's work activities neither caused nor exacerbated her degenerative lumbar condition. The Commission affirms and adopts the Arbitrator's finding that Petitioner failed to prove accident and causal connection.

The Commission disagrees with the Arbitrator regarding the appropriateness of Petitioner's identification of her date of accident. Arbitrator Granada found that Petitioner failed to name an appropriate date of accident under *Belwood*. Petitioner filed her Application for Adjustment of Claim on April 7, 2006, identifying her date of accident as June 12, 2003. On June 21, 2013, the day of the arbitration hearing, she amended her Application to allege a date of accident of May 23, 2003, her last day of work for Respondent and the date of her first appointment with Dr. Raskas. The Commission notes that in repetitive stress claims, several dates might be appropriate as dates of accident, including the last date Petitioner was able to work. The Commission finds that, in addition to failing to prove accident and causal connection, Petitioner failed to prove that she provided notice of her alleged accident to Respondent within 45 days of her date of accident.

In *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 505 N.E. 2d 1026, 106 Ill. Dec. 235 (1987), the Illinois Supreme Court addressed the definition of "date of accident" in repetitive stress fact situations and defined it as the date on which the injury *manifests* itself, that is, the date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would become apparent to a reasonable person. In *Belwood*, the claimant alleged a repetitive stress injury to her shoulder from repeatedly loading and unloading laundry and alleged a manifestation date of the last date she worked. The next day, claimant's doctor advised her that her bilateral carpal tunnel syndrome was causally related to her work activities in the laundry. The Court adopted claimant's choice of accident date and found that her Application was timely filed within three years of the manifestation of her injury for purposes of the statute of limitations. Timely notice to the employer was not at issue in *Belwood*.

Notice was at issue in *White v. Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 873 N.E.2d 388, 313 Ill. Dec. 764 (4th Dist. 2007). There, the claimant alleged that he suffered a repetitive trauma injury from his work as a laborer. He identified his date of accident or manifestation date as his last day of work. The Arbitrator found the claimant permanently and totally disabled and awarded benefits, but the Commission reversed, finding that the claimant had failed to provide his employer with notice of his injury within 45 days of the date of manifestation. The Commission's denial of benefits was affirmed by the Circuit and Appellate Courts.

In *White*, the claimant was initially unaware that his back and shoulder pain were work related. He utilized his group health insurance for his medical care and completed the paperwork necessary to receive short and long term disability benefits attesting that his injury was not work-related. His treating doctor's early reports noted that the condition was not causally related to an incident at work or to his repetitive work activities. In March 2002, the claimant's treating physician responded to a letter from his attorney, for the first time attributing the extensiveness of claimant's complaints to years of hard labor and recurrent traumas related to work activities in coal mining. The claimant then filed his Application for Adjustment of Claim, naming July 17, 2000, his last day of work, as his date of accident. The Commission found that the claimant failed to give his employer notice of his injury within 45 days of his date of accident, reversed the Arbitrator's decision, and denied all benefits. The Circuit and Appellate Courts affirmed the Commission. The Appellate Court noted that the claimant could have chosen October 15, 2002 as his date of accident, even though claimant no longer worked for his employer on that date, as that was the date the claimant actually learned that his condition had been worsened by his work activities. Had he named October 15, 2002, his notice to his employer would have been timely. The Appellate Court held that a claimant cannot allege one date of accident in his Application and Request for Hearing, and then allege another later date for purposes of calculating whether timely notice was provided. Having elected to use July 17, 2000 as his accident date, the claimant was bound to use that date for purposes of determining whether notice to his employer was timely. The claimant failed to provide his employer with notice of the alleged accident within 45 days of July 17, 2000, so notice was untimely and his claim was barred.

14IWCC0904

In this case, Petitioner also alleged her last day of employment as her date of accident. The Commission notes that in cases where the claimant alleges injury from repetitive stress, more than one date may meet the requirements of date of accident, including the last date claimant was able to work or the last day during which the claimant was exposed to the repetitive work conditions she alleges caused or contributed to her condition of ill-being. As in *Belwood* and *White*, Petitioner's alleged date of accident, her last day of work for Respondent, would satisfy the requirements of a date of accident. Although Petitioner had previously suffered some back pain, on that date she was unable to continue working and Dr. Raskas ordered her off work. Therefore, the Commission reverses Arbitrator Granada's finding that Petitioner failed to identify an appropriate date of accident.

However, pursuant to *White*, the Commission finds that the Arbitrator properly denied Petitioner's claim and all benefits, on the basis that Petitioner failed to provide Respondent timely notice of her alleged accident.

The Commission notes that Petitioner had filed incident reports on November 8, 2001, March 19, 2003, and April 15, 2003, complaining of recurrent low back pain shooting into her left hip and both legs, but she did not identify a specific mechanism of injury or relate her complaints to any work activities. The Commission finds that these incident reports were insufficient to provide Respondent with timely notice of an accident that did not occur until May 23, 2003. Not until Petitioner filed her Application for Adjustment on April 7, 2006, almost three years after the alleged accident, did Respondent learn that Petitioner was claiming a work-related injury to her back. Therefore, although Petitioner did name an appropriate date of accident, she did not provide Respondent with notice of the work-related nature of her injury within 45 days of that date. The Arbitrator's finding that Petitioner failed to name an appropriate date of accident is reversed; however, his denial of all benefits is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is reversed as to his finding that Petitioner failed to identify an appropriate date of accident. However, the Commission finds that Petitioner failed to provide timely notice to Respondent within 45 days of her alleged date of accident. All benefits are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator denying all benefits based upon his finding that Petitioner failed to prove accident and causal connection 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 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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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 the Circuit Court.

DATED: OCT 2 0 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-08/26/14
drd/dak
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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

Sherry Burge,
Petitioner,

vs. No. 05 WC 32219

14IWCC0905

Walmart,
Respondent.

DECISION AND OPINION ON REMAND

This case appears on Remand from the Circuit Court, Second Judicial Circuit, Jefferson County, Illinois for reconsideration of Petitioner's request under Sections 8(a) and 19(h) for additional temporary total disability benefits and additional permanency. Petitioner filed her Petition under Section 8(a) and Section 19(h) on March 30, 2011. The Commission entered its Decision, awarding Petitioner additional medical expenses under Section 8(a), but denying her request for additional temporary total disability and permanency under Section 19(h) on August 27, 2013. Petitioner appealed the Commission Decision to the Circuit Court of Jefferson County, which issued its Decision on October 8, 2013, remanding the matter to the Commission for reconsideration of its ruling denying additional temporary total disability and permanency awards.

The underlying matter was tried on April 14, 2009, and Arbitrator Teague issued a decision on May 27, 2009, finding that Petitioner's state of ill-being was causally related to her work accident on October 17, 2003. Arbitrator Teague found that Petitioner was permanently partially disabled by that condition at the level of 40% of the person-as-a-whole. Neither party filed a Petition for Review.

Petitioner filed her Petition under Sections 8(a) and 19(h) on April 4, 2011. The review hearing was held on February 21, 2012 before Commissioner Donohoo. The Commission, after having reviewed the entire record, granted Petitioner's Section 8(a) Petition and found that Petitioner proved that her current condition was causally related to her work accident of October 17, 2003. The Commission further found that the medical treatment Petitioner received from the

time of her arbitration hearing to February 21, 2012 was reasonable and necessary, with the exception of the anti-depressants and antibiotics appearing on the Walgreens Pharmacy bill (Petitioner's Exhibit 4), which Petitioner failed to prove were causally related to her work injury. The Commission also found that Petitioner failed to prove that she is entitled to further temporary total disability or that her permanent partial disability has materially increased since the original arbitration hearing on April 14, 2009.

Permanent Partial Disability. Arbitrator Teague awarded Petitioner 40% loss of use of the person as a whole in the underlying case. The Commission initially denied Petitioner's request for additional permanency under Section 19(h), but has been instructed by the Circuit Court to reconsider that denial. The Court specified three particular pieces of evidence to be considered by the Commission on remand.

1. *Dr. Kovalsky's testimony that Petitioner's spinal condition had worsened.* Dr. Kovalsky continued to treat Petitioner following the arbitration hearing in April 2009, primarily managing her pain with medications and physical therapy. He relied upon his nurse practitioner, Nurse McKee, to provide basic maintenance care, but he personally examined Petitioner in June 2011 due to her complaints of increased pain. Dr. Kovalsky opined that the source of Petitioner's increased discomfort was adjacent level syndrome, with mild degenerative changes at L2-3 and L3-4 and moderate changes at T10-L2. Dr. Kovalsky opined that Petitioner's fusion had accelerated the process of degeneration in the levels adjacent to the fusion. Petitioner required increasing dosages of pain medications and narcotics to achieve a reduction in her worsening pain levels.

   Petitioner's pain complaints at the time of the Section 19(h) hearing before Commissioner Donohoo in February 2012 were remarkably similar to those she expressed at the time of the April 2009 hearing before Arbitrator Teague. At arbitration in 2009, Petitioner's pain levels ran from 4/10 to 10/10; at the review hearing in 2012, she testified her pain ran from 3/10 to 9/10. At both hearings, she testified that she could sit for 30 minutes and stand/walk for 15 minutes. Dr. Kovalsky admitted that Petitioner's symptoms had been relatively consistent since her surgery. Based upon the similarity in symptoms, the Commission found that Petitioner had failed to prove a significant change in her condition and denied her Section 19(h) petition in its August 27, 2013 Decision.

   In her brief on remand, Petitioner urges the Commission to consider that even though her complaints at her 2012 review hearing were similar to those she made during her 2009 arbitration hearing, her pain was worse and her limitations greater. She states that her pain medications were effective at the time of arbitration, but were not sufficient to provide relief at the time of the review hearing. She was working light duty at the time of arbitration in 2009, but required extreme accommodations, including permission to lie down as needed and to take narcotic pain medications while at work, at the time of the review hearing in 2012.

2. *Dr. Kovalsky increased Petitioner's work restrictions from light to sedentary duty and eventually advised her to apply for disability, because he believed she was unable to work on a regular basis.* Prior to Petitioner's arbitration hearing in 2009, Dr. Kovalsky established permanent work restrictions for her of 15 pounds occasional lifting, 10

pounds frequent lifting, and no repetitive bending or lifting. The doctor admitted that nothing on Petitioner's MRI indicated that she could not work at the light duty level, but he based his work restrictions and his recommendation for sedentary work on Petitioner's subjective pain complaints alone. Dr. Kovalsky admitted that her subjective complaints might be in part psychosocial. He opined on June 23, 2011 that she might never again work "on a regular basis" and suggested that she might want to apply for Social Security Disability.

Despite her permanent restrictions and despite Dr. Kovalsky's dire prediction that she might never again return to work, at Petitioner's Section 19(h) hearing on February 21, 2012, she received and accepted a job offer from Respondent. By letter of April 16, 2012, Petitioner's attorney advised Commissioner Donohoo that Petitioner had been working for Respondent with generous accommodations of her work restrictions. At that time, Petitioner was working 40 hours a week and earning the same amount or more than she had before her accident. Her attorney noted that Petitioner was doing "okay" working with the accommodations provided.

3. *Respondent agreed that Petitioner was unable to return to work as a stocker, and she is currently working in a sedentary position with "excessive" accommodations.* The Commission acknowledges that Petitioner is unable to return to her previous position as stocker, given her lifting and bending restrictions. However, Respondent has provided significant accommodations, which she is tolerating. Petitioner is able to work the night shift, so as to avoid most of the customer traffic, has the ability to sit or lie down as needed, and has permission to take her narcotic pain medications, even while working. Her work in the ladies' fitting room requires little physical effort, and the weights lifted are extremely light. The Commission agrees with the Circuit Court that it is unlikely that Petitioner would be able to find such accommodations in the open labor market, but she remains able to work at a reduced physical demand level, without affecting her income.

After considering each of the above factors, as well as those discussed in its August 27, 2012 Decision, the Commission finds that Petitioner has proved that her condition has materially worsened since the 2009 Arbitration Hearing, when Arbitrator Teague awarded her 40% loss of use of the person as a whole. Based upon her increased restrictions and worsening pain, the Commission finds that Petitioner is entitled to an additional award of 10% loss of use of the person as a whole, pursuant to Sections 8(d)2 and 19(h) of the Act.

Temporary Total Disability. Petitioner sought temporary total disability benefits from March 14, 2011 through February 12, 2012, the date of the review hearing, in her Section 19(h) petition. On March 14, 2011, Dr. Kovalsky's nurse practitioner, Nurse McKee, took Petitioner off work, based upon her complaints of incontinence and her report that performing even her light duty job was too painful. Nurse McKee ordered an MRI, which showed Petitioner's prior discectomy and fusion at L4-5 and L5-S1, accentuation of lumbar lordosis, disc bulges at L3-4 and T11-12, and severe degenerative disc disease with no neural encroachment at T12-L1.

Dr. Kovalsky evaluated Petitioner and reviewed her MRI on March 17, 2011. He opined that stress incontinence was the cause of her urinary issue and that this was unrelated to her

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lumbar condition. The doctor also recommended that Petitioner undergo an epidural steroid injection at L3-4. Petitioner returned to Dr. Kovalsky's office on April 14, 2011. The record contains an April 15, 2011 note from the doctor's nurse practitioner advising that Petitioner "will continue with light duty restrictions of 15 pound lifting and 10 pound frequent lifting restriction with no bending or twisting." As the Circuit Court noted, there is nothing in the record to show that Petitioner made an attempt to work within those restrictions. The nurse's May 26, 2011 office record states that "She is going to continue off work since she does not feel she can do her light duty job under my restrictions." The Commission finds that Petitioner elected to remove herself from the workforce rather than follow the light duty work status order from Dr. Kovalsky's nurse practitioner. Petitioner elected to take medical leave from her position from March to July 2011 and then resigned.

In its August 27, 2012 Decision, the Commission denied Petitioner's request for temporary total disability based upon her decision to voluntarily withdraw from the work force by taking medical leave and then resigning her position. The Circuit Court remanded the temporary total disability issue to the Commission for reconsideration with instructions to review the dates when Petitioner was taken off work and to consider the time that she was told by the nurse practitioner that she could work with restrictions. The Court also directed the Commission not to consider Dr. Kovalsky's opinion that Petitioner could have worked sedentary duty rather than being off work because this opinion was not provided until his December 2011 deposition. The Court found that this opinion was not provided to Petitioner within the relevant time period and that it conflicted with his office note for June 23, 2011. In that record, the doctor noted that he suggested to Petitioner that she might apply for disability, because he did not believe she was capable of returning to work on a regular basis.

The Commission notes that Dr. Kovalsky's medical records do show some internal conflict as to Petitioner's work status. Dr. Kovalsky's nurse practitioner had placed light duty restrictions on Petitioner throughout 2010, and they remained in effect into 2011. Nurse McKee renewed the restrictions on January 17, 2011 and February 17, 2011, and Respondent continued to accommodate Petitioner, providing work within her restrictions. At her March 14, 2011 appointment, Petitioner advised Nurse McKee that she had recently had two instances of urinary incontinence and complained that her pain at work was so unbearable she had been unable to complete her shift. Nurse McKee expressed concern that Petitioner's spinal cord might be effacing and took her off work until April 14, 2011. At her April 14 appointment, Nurse McKee advised her to continue her light duty restrictions of 15 pounds lifting, 10 pounds frequent lifting, and no bending or twisting. Petitioner testified at the review hearing that she did not return to work for Respondent, but remained on medical leave until July 2011, when she resigned her position. Petitioner testified that she resigned because Dr. Kovalsky told her she couldn't work. Dr. Kovalsky's office note for June 23, 2011 contains a history that the doctor had suggested that Petitioner might want to apply for disability because he did not believe that she could ever work "on a regular basis." The doctor provided an off work slip effective through August 5, 2011. No later work status slips appear in the record.

At his deposition on December 6, 2011, Dr. Kovalsky testified that in June 2011, Petitioner could have worked at the sedentary physical demand level. He admitted that there was nothing evident in her March 2011 MRI that would indicate she could not work at even the light

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duty capacity. However, Dr. Kovalsky testified that only an FCE could accurately gauge Petitioner's capabilities, and none had been performed in this case. His work restrictions were not based on objective test results, but on Petitioner's subjective pain complaints.

Respondent's assistant manager testified at the review hearing that Petitioner told her that her doctor had advised her that she could no longer work. Petitioner did not tell the manager that she could not perform her job. Had she done so, the manager testified that sedentary jobs, such as the one offered at the review hearing, were available, and Respondent could have accommodated her restrictions. The manager testified, and Petitioner confirmed, that she had never requested sedentary duty.

At the review hearing, Petitioner sought temporary total disability for the entire period between March 14, 2011 and the review hearing date, February 21, 2012. The Commission finds, after reconsidering all of the evidence, including Dr. Kovalsky's office notes and off work slips, that Petitioner is entitled to temporary total disability under Section 19(h) from March 14, 2011 through April 14, 2011 (4-4/7 weeks) and from May 5, 2011 through August 5, 2011 (13-2/7 weeks) for a total of 17-6/7 weeks. Petitioner submitted no off work slips for the period subsequent to August 5, 2011.

The Circuit Court instructed the Commission to consider whether Petitioner had the duty to provide Respondent with the opportunity to provide alternative employment, rather than removing herself from the workforce by choosing not to return to work with the light duty restrictions. The Commission finds that it would be unreasonable to require Petitioner to seek lighter duty work when her doctor had ordered her off work completely. However, if Petitioner's doctor had suggested that she might be able to work at some lighter duty level if her employer were willing and able to accommodate specific restrictions, Petitioner would have the obligation to present those restrictions to the employer and allow the employer the opportunity to offer light duty work. If she elected not to return to work without providing the employer the opportunity to accommodate her restrictions, the Commission finds that she would have forfeited her right to temporary total disability benefits for that period. In this case, Dr. Kovalsky and Nurse Practitioner McKee both provided off work slips for 16-6/7 weeks. If lighter duty work or sedentary work might have been within Petitioner's ability, neither provider advised her and neither provided work status slips detailing the appropriate restrictions. Therefore, whether or not her providers believed she was capable of working at a lighter duty level, Petitioner was not obligated to seek accommodation.

However, the Commission finds that Petitioner did voluntarily remove herself from the workforce when she resigned her position with Respondent in July 2011. Dr. Kovalsky provided an off work slip effective through August 5, 2011. No additional off work or light duty slips appear in the record. Therefore, the Commission finds that Petitioner is not entitled to temporary total disability benefits for the period from August 5, 2011 through February 12, 2012.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses documented in Petitioner's Ex. 4, excluding all costs of antibiotics and anti-depressants, pursuant to Section 8(a) of the Act.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $204.23 per week for a period of 16-6/7 weeks, that being the period of temporary total incapacity for work under Sections 8(b) and 19(h) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $183.80 per week for a period of 50 weeks, as provided in Sections 8(d)2 and 19(h) of the Act, for the reason that the injuries sustained caused the loss of use of an additional 10% of the person-as-a-whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $33,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: OCT 2 0 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-08/26/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Celeste Robinson,

Petitioner,

vs.

NO: 12 WC 7057

Illinois Department of Transportation,

14IWCC0906

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's Decision regarding the issue of extent of temporary total disability. On the Request for Hearing form, Petitioner claimed to be temporarily totally disabled from February 3, 2012 through December 9. 2013. The Arbitrator gave Respondent credit of $29,668.12 paid in TTD benefits, but did not award any TTD period. There cannot be a credit against nothing. MercyWorks records, Px5, show Petitioner saw Dr. Sheth on January 30, 2012 and he released her to light duty work at sitting only. On February 2, 2012, Dr. Sheth kept Petitioner on limited duty work. Dr. Sheth authorized Petitioner off work on April 3, 2012 and kept her off duty on April 26, 2012. There is no evidence that Petitioner

14IWCC0906

did not work from January 31, 2012 through April 2, 2012. Petitioner did not testify concerning her work status for that period. Therefore, the Commission finds that Petitioner's temporary total disability began on April 3, 2012, when she was authorized off work by Dr. Sheth. §12 Dr. Troy performed his evaluation on December 11, 2012. Respondent stopped paying TTD benefits after Dr. Troy's December 11, 2012 evaluation. Petitioner testified she returned to work on December 9, 2013. The Commission finds Petitioner was temporarily totally disabled through December 11, 2012, the date of Dr. Troy's report. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $647.72 per week for a period of 36-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act 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 have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. The Commission notes that Respondent paid $29,668.12 for TTD benefits and this results in an overpayment of $6,257.58 which is to be credited against any future award.

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 this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

DATED: OCT 21 2014
MB/maw
o09/04/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

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

ROBINSON, CELESTE
Employee/Petitioner

Case# **12WC007057**

14IWCC0906

IL DEPT OF TRANSPORTATION
Employer/Respondent

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

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

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

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

5204 ASSISTANT ATTORNEY GENERAL
CHRISTOPHER FLETCHER
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

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

MAR 26 2014

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

14IWCC0906

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)

Celeste Robinson
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **12** WC **07057**

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

DISPUTED ISSUES

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

14IWCC0906

FINDINGS

On the date of accident, **1/30/2012**, 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 right knee condition ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$50,523.20**; the average weekly wage was **$971.60**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **1** dependent child.

Respondent shall be given a credit of **$29,668.12** for TTD benefits, for a total credit of **$29,668.12**.

ORDER

The Arbitrator awards no additional temporary total disability or other benefits.

Respondent is responsible for paying the bill from Dr. Troy, as it is part of Respondent's litigation costs pursuant to section 12 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

3/26/2014
Date

ICArbDec19(b)

MAR 2 6 2014

14IWCC0906

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 27, 2012, Petitioner filed an application for adjustment of claim, alleging that on January 30, 2012, she sustained accidental injuries to her right knee, right wrist and low back that arose out of and in the course of her employment. At the outset of the arbitration hearing pursuant to section 19(b) of the Workers' Compensation Act (the Act), the parties stipulated the scope of the hearing was confined to Petitioner's right knee condition.

Petitioner testified that she worked for Respondent as a temporary highway maintainer, whose job duties included driving a snow plow, removing trash, debris and vegetation, cleaning up after accidents, and patching potholes. On January 30, 2012, Petitioner was assigned to pick up garbage on the sides of the Dan Ryan expressway. While walking along a slope adjacent to the expressway, Petitioner slipped on ice and fell, injuring her right knee, amongst other things.

Petitioner denied having problems with the right knee prior to the work accident. However, the medical records in evidence from Mercy Hospital and Medical Center show Petitioner had previously reported injuring her knees at work on January 13, 2010. In an Employee Incident Report dated January 13, 2010, Petitioner stated she injured her knees and wrist. In an Employee Incident Report dated March 4, 2010, Petitioner characterized the injuries as "reinjury" with "continuous swelling."

The medical records in evidence further show that on March 4, 2010, Petitioner sought emergency care at the University of Chicago Medical Center for complaints of joint pain, including the knees. On March 25, 2010, Petitioner saw Dr. Chohan through the Sinai Health System, with whom she had periodically treated in the past. Petitioner complained of joint pain, including the knees, and gelling in the knees. She reported the knees had been persistently sore since the accident on January 13, 2010. Dr. Chohan noted a history of rheumatoid arthritis. On physical examination, Dr. Chohan noted crepitus, the right knee much worse than the left, without swelling or laxity. Dr. Chohan stated: "She clearly has osteoarthritis in her knees, and this is worsened by her weight. Her symptoms of gelling are very typical of osteoarthritis, and this is probably exacerbated by her occupation." Dr. Chohan noted Petitioner's rheumatoid arthritis was well controlled with medication. Also on March 25, 2010, Petitioner saw Dr. Muhammad at Booker Family Health Center, complaining of pain and swelling in the knees, amongst other things. Dr. Muhammad completed workers' compensation paperwork. Subsequently, on March 31, 2010, Petitioner completed an Employee Incident Report in connection with a work accident on February 4, 2010, alleging injuries to her wrist and back. An Employer's First Report of Injury or Illness in connection with the accident on February 4, 2010, states that Petitioner also complained of symptoms in the knees.

After the accident on January 30, 2012, Petitioner initially treated for her injuries at MercyWorks. The medical records from MercyWorks were copied in such a way that the bottom part of the clinical notes is cut off. They show that on January 30, 2012, Petitioner complained to Dr. Sheth of pain in the right knee and gave a history consistent with her testimony. Additionally, Petitioner gave a history of diabetes mellitus and rheumatoid arthritis. She walked with a normal gait. X-rays showed mild degenerative arthrosis. Dr. Sheth diagnosed contusion and strain of the knee and released Petitioner to return to work on sedentary duty. On

February 2, 2012 and February 13, 2012, Petitioner followed up with Dr. Sheth, complaining of soreness in the right knee. Dr. Sheth apparently prescribed physical therapy and kept Petitioner on restricted duty. In late March and early April of 2012, Petitioner underwent six physical therapy treatments. The physical therapy notes are not in evidence. On April 3, 2012, Petitioner followed up with Dr. Sheth, continuing to complain of pain in the right knee. She ambulated with a normal gait. On physical examination, Dr. Sheth noted diffuse swelling in the right knee, with medial and lateral tenderness. The range of motion was normal, but painful. Dr. Sheth prescribed additional physical therapy, ordered an MRI and took Petitioner off work. Petitioner testified that Respondent did not authorize additional physical therapy. On April 26, 2012, Petitioner followed up with Dr. Sheth, reporting no improvement. She ambulated with a normal gait. Physical examination was unchanged. Dr. Sheth continued to prescribe physical therapy and kept Petitioner off work. A chart note dated June 26, 2012, states: "Case closed. Patient was referred out."

On August 7, 2012, Petitioner returned to MercyWorks and saw Dr. Diadula. She complained of severe right knee pain, "greater than 10/10," worse with movement, and reported that she started using a cane "since last night" when the knee gave out. On physical examination, the right knee was swollen, fluctuant and tender, with limited range of motion. Dr. Diadula ordered an MRI, prescribed crutches and took Petitioner off work. The MRI, performed August 30, 2012, showed moderate to severe degenerative changes, predominantly involving the medial and lateral tibiofemoral joint compartments, extensive maceration of the lateral meniscus, and fraying of the posterior horn of the medial meniscus without tear. On September 4, 2012, Petitioner advised Dr. Diadula she planned to consult an orthopedic surgeon at the University of Illinois. Dr. Diadula kept Petitioner off work.

Petitioner testified she was not any better in April of 2012, when Respondent failed to authorize additional physical therapy. She resumed treating on August 7, 2012. After seeing Dr. Diadula, she consulted Dr. Gonzalez, an orthopedic surgeon at the University of Illinois at Chicago Medical Center. The medical records from Dr. Gonzalez show that on October 24, 2012, Petitioner complained of persistent pain in the right knee, which she attributed to the work accident on January 30, 2012. She also gave a history of rheumatoid arthritis and diabetes. On physical examination, the knee was stable, without effusion. Dr. Gonzalez noted tenderness to palpation around the patella and lateral femoral condyle, with patellar grind. Dr. Gonzalez reviewed the MRI report and opined that Petitioner's right knee was arthritic, and the arthritis had been progressing for a number of years. He recommended an injection into the knee if the pain persisted and kept Petitioner off work. Dr. Gonzalez did not opine as to whether the work accident aggravated Petitioner's preexisting right knee condition. Petitioner testified she did not follow up with Dr. Gonzalez.

On December 11, 2012, Dr. Troy, an orthopedic surgeon, examined Petitioner at Respondent's request. Dr. Troy noted that Petitioner used crutches to ambulate, and reported using crutches for ambulation since August of 2012. On physical examination, Dr. Troy noted an effusion in the right knee and tenderness along the medial and lateral joint lines. The knee was stable, with an almost full range of motion. The Lachman test and anterior and posterior drawer tests were all negative. X-rays showed moderate degenerative joint disease. Dr. Troy noted the initial treatment records from MercyWorks showed Petitioner ambulated normally and

had minimal findings on physical examination, whereas when she returned for treatment in August of 2012, there was significant difference in her complaints of pain, the range of motion in the knee was much worse, and she used a cane for ambulation. Dr. Troy opined the work accident temporarily exacerbated Petitioner's symptoms, which returned to baseline by the end of April of 2012, and her current symptoms were related to her rheumatoid arthritis.

In his evidence deposition, taken December 17, 2013, Dr. Troy testified that Petitioner suffered from degenerative arthrosis, rheumatoid arthritis and pseudogout, and had "profoundly advanced arthritic changes present to the knee." Dr. Troy explained that rheumatoid arthritis is a painful, progressive autoimmune disease, which causes a great deal of damage to the joints. Dr. Troy further explained that he based his opinion—that Petitioner's current symptoms were due to the natural progression of her rheumatoid arthritis—on her fairly benign presentation in February through April of 2012 and the gap in treatment between April and August of 2012. In August of 2012, Petitioner's rheumatoid arthritis symptoms significantly increased to the point where she needed a cane or crutches to help ambulate. Dr. Troy thought Petitioner might have experienced a rheumatoid flare in August of 2012. In terms of treatment, Dr. Troy thought a knee replacement surgery would be curative.

Petitioner testified that Respondent stopped paying workers' compensation benefits after Dr. Troy's examination. In May of 2013, Petitioner consulted Dr. Silver, an orthopedic surgeon, for a second opinion.

Dr. Silver testified via evidence deposition on October 11, 2013, that he first saw Petitioner on May 24, 2013. Petitioner described the accident consistently with her testimony, further giving a history of rheumatoid arthritis, but stating that it had not affected her right knee and denying prior treatment related to the right knee, other than seeing a doctor "a number of years before" after bumping and bruising her knee. Petitioner reported to Dr. Silver having severe pain, clicking and losing much of her ability to walk since the time of the work accident. On physical examination, Dr. Silver noted crepitation on the lateral side of the right knee, with swelling and tenderness over the cartilage areas. The range of motion was limited. X-rays showed complete loss of the joint space in the right knee. Dr. Silver opined that Petitioner had "some degree of preexisting arthritis in her right knee that was asymptomatic prior to the accident and that the accident had severely exacerbated and accelerated that asymptomatic arthritis causing her to have severe pain and lose the ability to walk." Dr. Silver recommended a knee replacement surgery. Petitioner followed up with Dr. Silver on August 7, 2013, and October 4, 2013. Dr. Silver noted that her right knee condition continued to worsen.

On cross-examination, Dr. Silver acknowledged that he had not reviewed the medical records from MercyWorks or the MRI report. He was under the impression Petitioner had difficulty ambulating since the work accident. Regarding the effect of Petitioner's rheumatoid arthritis on her right knee, Dr. Silver stated "[s]he had never had any rheumatoid arthritis issues with regard to her right knee," without explaining the basis for his opinion.

Petitioner testified that on December 9, 2013, she returned to work full duty for Respondent because she could not afford not to work. Since then, the right knee has been very

sore, painful and sensitive. Petitioner takes pain medication three to four times a week. She is ambivalent about knee replacement surgery.

On cross-examination, Petitioner admitted preexisting rheumatoid arthritis. She last saw a doctor for rheumatoid arthritis in October or November of 2013, and had scheduled a follow-up appointment on March 10, 2014. Petitioner agreed the symptoms in the right knee in August of 2012 were much worse than they had been previously. Petitioner further testified that she returned to MercyWorks approximately three times between April and August of 2012, but the doctor told her there was nothing he could do without authorization for treatment from Respondent.

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 is persuaded by Dr. Troy's opinion that the work accident temporarily exacerbated Petitioner's symptoms, which returned to baseline before August of 2012, and her current symptoms are related to her rheumatoid arthritis. Dr. Troy relied on Petitioner's fairly benign presentation in February through April of 2012 and the gap in treatment between April and August of 2012. The Arbitrator finds persuasive Dr. Troy's opinion that Petitioner's much more severe presentation beginning in August of 2012 was due to the natural progression of rheumatoid arthritis or to a rheumatoid flare.

The Arbitrator notes that Petitioner was not forthright regarding her prior injury and problems with the right knee. On March 25, 2010, Petitioner saw Dr. Chohan, complaining of joint pain, including the knees, and gelling in the knees. Dr. Chohan noted the degenerative condition of the right knee was much worse than the left knee.

The Arbitrator does not find credible Petitioner's testimony that she returned to MercyWorks approximately three times between April and August of 2012, but the doctor told her there was nothing he could do without authorization for treatment from Respondent. The Arbitrator has carefully reviewed the medical records from MercyWorks and found no chart notation to that effect.

The Arbitrator gives little weight to the opinion of Dr. Silver, as it is based on inaccurate history and without the benefit of the medical records from MercyWorks. Furthermore, Dr. Silver discounted Petitioner's rheumatoid arthritis as playing any role in her current right knee condition, without offering a basis for his opinion.

In support of the Arbitrator's decision regarding (J), were the medical services that were provided to Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator awards no medical expenses. With the exception of the bill from Dr. Troy, the medical bills in evidence are unrelated to the right knee condition stemming from the work accident or were incurred after 2012.

With respect to the bill from Dr. Troy, the Arbitrator finds it represents Respondent's litigation cost pursuant to section 12 of the Act. Accordingly, Respondent is responsible for paying Dr. Troy's bill.

In support of the Arbitrator's decision regarding (K), is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

Having found that Petitioner's current right knee condition is unrelated to the work accident, the Arbitrator awards no prospective medical care.

In support of the Arbitrator's decision regarding (L), what temporary benefits are in dispute, the Arbitrator finds as follows:

In the request for hearing form, Petitioner claims temporary total disability benefits from February 3, 2012, through December 9, 2013. The parties stipulated Respondent paid $29,668.12 in temporary total disability benefits, which is consistent with Petitioner's testimony that Respondent stopped paying benefits after Dr. Troy's examination. Respondent claims "all entitled benefits have been paid." The Arbitrator awards no additional temporary total disability benefits.

In support of the Arbitrator's decision regarding (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner testified that Respondent terminated workers' compensation benefits after the examination by Dr. Troy. The Arbitrator finds that penalties and attorney fees are not warranted under the circumstances.

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

Randolph Rudd,
Petitioner,

vs.

NO: 02 WC 28594

14IWCC0907

Harris Corporation Broadcast Division,
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, notice, average weekly wage, medical expenses, temporary disability, permanent disability, evidentiary rulings, maintenance and vocational rehabilitation and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof with the exceptions noted below.

The Commission finds that the law of the case doctrine applies in this situation regarding the issue of notice. The Commission notes that on page eight of his decision the Arbitrator stated that the last period of temporary total disability ended on March 31, 2004 and equals 12 weeks when the period actually ended on March 30, 2004 and equals 17 weeks and the Commission corrects the same accordingly. The Commission finds that Petitioner's out of pocket expenses/co-payments are not subject to the medical fee schedule set forth in Section 8.2 of the Act. Lastly, the Commission notes that Petitioner was working without restrictions when he was laid off and the Commission affirms the Arbitrator's finding regarding permanency.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 24, 2013 is hereby affirmed and adopted with the exceptions noted above.

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

14IWCC0907

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 $47,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 1 2014

MB/jm

O: 9/25/14

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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RUDD, RANDOLPH
Employee/Petitioner

Case# **02WC028594**

14IWCC0907

HARRIS CORPORATION BROADCAST DIVISION
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:

0393 THOMAS R LICHTEN LTD
53 W JACKSON BLVD
MONADNOCK BLDG SUITE 1634
CHICAGO, IL 60604

0180 EVANS & DIXON LLC
JAMES M GALLEN
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

14IWCC0907

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

Randolph Rudd
Employee/Petitioner

v.

Case # **02** WC **28594**

Consolidated cases: _____

Harris Corporation, Broadcast Division
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 Jeffery Tobin, Arbitrator of the Commission, in the city of **Quincy**, on **May 19, 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. The case was reviewed and remanded, and is now assigned to the Honorable Douglas McCarthy, Arbitrator of the Commission.

DISPUTED ISSUES

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 _____

14IWCC0907

FINDINGS

On **02-01-2002**, 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 $19,569.16; the average weekly wage was $376.33

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** 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 **$4,166.54** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $250.87/week for 20 6/7 weeks, commencing 04-04-2002 through 04-28-2002, 10-06-2003 through 10-07-2003 and 12-03-2003 through 03-30-2004, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 02-01-2002 through present, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $0 for temporary total disability benefits that have been paid.

Permanent Partial Disability

Respondent shall pay Petitioner **permanent partial disability** $225.80/week for 200 weeks, as the Petitioner sustained disability to the extent of 40% Person as a Whole under Section 8 (d) (2) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $1,369.84, as provided in Section 8(a) and 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.

Signature of Arbitrator

Oct. 23, 2013
Date

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 the Petitioner sustained accidental injuries that arose out of and in the course of his employment on February 1, 2002.

The Arbitrator bases his finding on the Petitioner's testimony, which the Arbitrator finds credible, and on information contained in the medical records.

The Petitioner testified that he had been working for the Respondent since 1997 as a manufacturing test technician. *(TR. 12)* The Petitioner stated that his work duties include lifting power supplies and transformers for low power radio station transmitters. *(TR 12-15)* He stated that on February 1, 2002, he picked up a transformer that weighed 70 pounds to place it on a bench and felt a sharp pain on the left side of his low back. *(TR. 15-16)* He sat down for 20 to 30 minutes and then resumed working. *(TR. 16)* He stated that he had not previously injured his low back. *(TR. 38)*

The Petitioner testified that the back pain waxed and waned for the next two months as he continued to work, until it became more severe in conjunction with some lifting at work and a cough on Wednesday, April 3, 2002, so he left work and went to the ambulatory care clinic at Quincy Medical Group, where he was seen by Dr. Arndt. *(TR. 17-19)* Dr. Arndt recorded a history of low back pain off and on for the past three months that seems to be worse today. Dr. Arndt also stated that the Petitioner appeared to be in moderate distress and appeared "to feel absolutely miserable," though he also diagnosed the Petitioner as having the flu. *(Pet. Ex. 4, Resp. Ex. 4)*

The Petitioner was referred to Dr. Patel at Quincy Medical Group. *(TR. 19)* On April 5, 2002, the Petitioner saw Dr. Patel, who recorded a history that, "About 2 months ago he was lifting a radio transmitter to check the power supply and he started having lower back pain, which actually got somewhat better the next day. Since then he is having lower back pain and discomfort, which was not bad, but on Wednesday he started having severe lower back pain. At the same time he had the flu and every time he coughed he was having an intense amount of lower back pain, which was radiating in both lower extremities up to the knees...." *(Pet. Ex. 4)*

On admission to Blessing Hospital on April 10, 2002, Dr. Patel recorded a similar history. On April 12, 2002, a neurosurgical consultation was done by Kim Matticks, CNP, for Dr. Arden Reynolds, neurosurgeon, which contains a similar history: "Patient is a 47 year old male who complains of low back and bilateral thigh pain. He states that his pain began approximately two to three months ago as he was lifting a power supply and working on radio transmitters at work. He began having low back pain which gradually diminished over time. Then approximately three weeks ago, he began having low back pain and bilateral thigh pain which continues to worsen. Over the past week, it has become more intense and he went to the Ambulatory Care Clinic on 04/03/02...." *(Pet. Ex. 2)*

On April 23, 2002, the Respondent sent the Petitioner to Dr. Dana Windhorst, its industrial physician at Quincy Medical Group, *(TR. 22)* who recorded a similar history: "Mr. Rudd is a 47-year-old employee of Harris Broadcast who had a back injury at work on February 2, 2002. He was lifting a 75-to-100-pound power supply for a transmitter and felt a mild pain across the lower back. He had a sore discomfort for a couple of

days that resolved but recurred off and on. On the 2nd and 3rd of April, he had onset of shortness of breath, cough, sore throat, and chest pain with increasing lower-back pain. He was seen in the ACC by Dr. Arndt. He had a temperature of 102°. Dr. Arndt felt he had a flu-like syndrome and felt the increase in lower-back pain was probably associated with that...." *(Pet. Ex. 4)*

All subsequent histories in the various medical records from Quincy Medical Group, SIU Quincy Family Practice Center, Blessing Physician Services and the Department of Veterans Affairs are similar. *(Pet. Ex. 4, 5, 6, 7 and 8)*

Based upon the Petitioner's testimony, the consistent histories in the various medical records, as well as the lack of any indication in any of the medical records that the Petitioner had injured his low back prior to February 1, 2002, the Arbitrator concludes that the Petitioner proved that he sustained a work-related accident to his low back on February 1, 2002, by the overwhelming preponderance of the evidence.

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

In its Decision and Opinion on Review, dated January 13, 2011, 11 IWCC 0045, the Commission found that the Petitioner gave notice of his alleged February 1, 2002 accident to the Respondent within the statutory time period for the reasons set forth in that decision. The Arbitrator is bound by this finding and finds that the Petitioner gave timely notice of his accident to the Respondent.

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

The Arbitrator finds that a causal connection exists between the Petitioner's accidental work injury of February 1, 2002 and the Petitioner's present condition of ill-being relating to his low back.

This finding is based on several factors, including the Petitioner's testimony and the overwhelming preponderance of the credible medical evidence.

The Arbitrator finds that the Petitioner's testimony that he had not injured his back until he lifted the 75 to 100 pound power supply at work on February 1, 2002, to be credible and consistent with and supported by the various medical records in evidence from Quincy Medical Group, Blessing Hospital, SIU Quincy Family Practice Center, Blessing Physician Services and the Department of Veterans Affairs. *(Pet. Ex. 2-8)*

The Arbitrator notes that the crux of the dispute as to causal connection appears to be whether the annular tear in the Petitioner's L5-S1 disc was caused or aggravated by the Petitioner's work injury as well as whether the Petitioner's degenerative disc disease was aggravated by his work injury. In that regard, the Arbitrator is persuaded by the opinions of Dr. Samuel J. Chmell, the Petitioner's examining orthopedic surgeon, and of Dr. Arden Reynolds, the Petitioner's treating neurosurgeon.

As Dr. Chmell stated, the Petitioner had no back symptoms prior to his work injury. Following the injury the Petitioner had low back symptoms that led to a long multi-year course of treatment. *(Pet. Ex. 1, p. 21)* In Dr. Chmell's opinion the most important pain-producing factor was the radial tear of the L5-S1 disc, which he felt was most likely done while lifting the power supply. *(Pet. Ex. 1, pp. 22-23)* Dr. Chmell stated that it was possible, but less likely, that the radial tear was already present at the time of the work injury. *(Pet. Ex. 1, p. 23)* However, Dr. Chmell stated, in either event the Petitioner became symptomatic from the work occurrence, necessitating all the treatment that the Petitioner has subsequently undergone, including the lumbar fusion that Dr. Reynolds performed on December 3, 2003. Dr. Chmell also opined that the Petitioner had pre-

existing degenerative disc disease that also became symptomatic because of the work injury. *(Pet. Ex. 1, p. 22)* In Dr. Chmell's opinion the work injury was a traumatic aggravation of the pre-existing degenerative disc disease. The work injury was also either the sole cause of the L5-S1 annular tear or it traumatically aggravated any pre-existing asymptomatic tear that may have been present. *(Pet. Ex. 1, pp. 22-23)* The Arbitrator is persuaded by Dr. Chmell's analysis.

The Arbitrator also is persuaded by the opinion of the treating neurosurgeon, Dr. Arden Reynolds that, "...lifting the 75-100 pound power supply across the radial tear caused the pain which subsequently led to Mr. Rudd needing to have surgical intervention." *(Pet. Ex. 5, entry dated September 6, 2006)*

The Arbitrator notes also that the Respondent's examining orthopedic surgeon, Dr. Frank Petkovich, did not state an opinion as to causal connection, stating that, in his opinion it was impossible to tell whether the annular tear shown on the April 11, 2002 MRI was pre-existing or occurred at the time of the work injury.

The Arbitrator notes that the only opinion disputing causal connection in evidence was that of the Respondent's witness, Dr. Marvin Mishkin. The Arbitrator is not persuaded by Dr. Mishkin's opinions. Dr. Mishkin based his opinion in large part on the Petitioner's failure to tell Dr. Arndt the specifics of his accident when he saw him with obvious flu symptoms on April 3, 2002. He gave no explanation as to why that history was more persuasive than the consistent histories of accident the Petitioner provided to his other providers, beginning with Dr. Patel two days later.

The Petitioner did improve post-surgery, and in fact was released by his surgeon to return to work in early 2005. He was not, however, released to full duty. Dr. Reynolds'

notes from 2004 show that he wanted the Petitioner to observe a lifting limit on the job, and the Petitioner testified to observing that restriction. (TR 91)

Finally, as will be shown below in the section dealing with disability, the Petitioner's symptoms and findings to his treating physicians since 2005 reflect a condition consistent with his surgery by Dr. Reynolds.

G. What were Petitioner's earnings?

The Petitioner testified briefly that he worked some overtime, and wage records introduced by the Respondent confirmed that fact. (RX 5) The Petitioner did not, however, provide sufficient evidence from which the Arbitrator could compute the mandatory overtime.

The Petitioner testified that he worked both mandatory and voluntary overtime. He said that during the week, he would occasionally stay over to finish work which he had not completed, but that he was never asked to stay over by his employer. He said that there were certain Saturdays that he was told by his boss that he had to work. He did not provide any reason why a certain Saturday was mandatory, and he did not present any evidence as to how many of those mandatory Saturdays he worked during the year preceding his accident.

The wage records, introduced as Respondent's Exhibit 5, also fail to provide information on the amount of mandatory overtime worked. The records show that in the 52 weeks prior to the accident, the Petitioner was paid for overtime during 22 weeks. The overtime hours worked per week range from 1 to 11.8 hours. There is no pattern of set overtime hours on a weekly basis as one might expect if the Saturday overtime was a regular occurrence.

Since we know that not all of the Petitioner's overtime was mandatory, and since there is no way for the Arbitrator to differentiate mandatory versus voluntary hours, the Arbitrator finds that the Petitioner has failed to meet its burden of proof on the issue.

Accordingly. the Arbitrator finds the average weekly wage to be $376.33.

J. Were 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 Respondent shall pay to the Petitioner the sum of $1,369.84 for necessary medical services, as provided by Sec. 8(a) of the Act, as follows.

Department of Veterans Affairs	(Pet. Ex. 9)	$ 1,174.12
Brown Drug Co.	(Pet. Ex. 11)	105.72
Quincy Medical Group	(Pet. Ex. 12)	90.00
	TOTAL:	$ 1,369.84

The above amounts are for treatment related to the Petitioner's low back injury. In the case of Brown Drug Co. and Quincy Medical Group the amounts awarded are to reimburse the Petitioner for payments or "co-payments" that he made for prescriptions or office visits. In the case of the Department of Veterans Affairs the amount awarded is the total amount on the itemized statements of the Department of Veterans Affairs *(Pet. Ex. 9)* for medical treatment and prescription medication.

There was no dispute as to the reasonableness of the charges nor as to the necessity of the treatment.

The Respondent's liability for the above payments are limited to amounts computed pursuant to the Fee Schedule, Section 8.2 of the Act.

K. Temporary Total Disability

The Arbitrator concludes that the Petitioner is entitled to receive 20 and 6/7 weeks of temporary total disability benefits for the following periods.

1. 3 and 4/7 weeks: 04-04-2002 through 04-28-2002
2. 2/7 week: 10-06-2003 through 10-07-2003
3. 12 weeks: 12-03-2003 through 03-30-2004

The initial period of 04-04-2002 through 04-28-2002 covers the period from the day after the Petitioner's initial medical treatment at the ambulatory care clinic of Quincy Medical Group on April 3, 2002, when the Petitioner was "in moderate distress" and "appeared to be absolutely miserable" according to Dr. Arndt, through Sunday, April 28, 2002, after which the Petitioner returned to light duty work after light duty release by Dr. Windhorst, Respondent's industrial doctor at Quincy Medical Group.

The second TTD period of 10-06-2003 through 10-07-2003 is the two-day period that the Petitioner was incapacitated, documented by the Blessing Hospital records showing that the Petitioner had to undergo an epidural blood patch on October 7, 2003, after developing severe headache following a discogram and lumbar spine CT with contrast at Blessing Hospital on October 3, 2003. *(Pet. Ex. 3)*

The third TTD period begins with the date of the Petitioner's spinal fusion surgery on December 3, 2003, and ends on March 31, 2004, the date that the Petitioner returned to light-duty, part-time work. *(Pet. Ex. 4)*

L. Nature and Extent

By all accounts, the Petitioner's job when he was injured required him to regularly lift items weighing up to 100 pounds. Both Dr. Chmell and Dr. Petkovich opined that the Petitioner should not lift over 30 to 40 pounds. The Petitioner thus is unable to perform his regular job.

His disability in such a case would be an odd-lot permanent and total, as he argues, a wage loss or an award under Section 8 (d) (2), Person As A Whole. No proof was submitted concerning a wage loss. The burden of proof for an odd lot was explained in detail by the Appellate Court in the case of Professional Transportation, Inc. v. Illinois Workers Compensation Commission, 966 N.E. 2d 40 (2012). The Court explained that there were three ways in which the petitioner could meet his burden of establishing such disability. First of all, if the medical evidence on its face establishes that he is obviously unemployable, an odd lot award would follow. If that were not the case, the Petitioner could still meet his burden by showing a diligent, but unsuccessful job search. Finally, the Petitioner could still prove entitlement if his age, education, work experiences and physical condition led to the conclusion that there were no jobs available to him.

The facts in Professional Transportation were very similar to those in the instant case. The Petitioner, a 64 year old driver, had an injury which precluded his performance of his normal job. The doctors testified that he could work lifting 40 pounds with other modifications. Vocational testimony suggested there were jobs the Petitioner could perform. However, the Court agreed with the Arbitrator that looking for nine jobs and reading the Sunday paper did not constitute a diligent job search. (Id at 48)

Dr. Chmell testified that the Petitioner was totally disabled, but a major factor in the doctor's conclusion was his assumption that the Petitioner was taking medications which would prevent him from focusing on a job on a full time basis. (PX 1 at 29, 30) The Petitioner, however, testified that the medications do not interefere with his ability to think clearly. (TR 41) In addition, a review of the office notes of his treating physicians who prescribe his medications, Dr. Dykstra and Dr. Grote, show no indication that the Petitioner has complained of adverse side effects of the medications. Dr. Chmell also did not indicate in his detailed history any complaints from the Petitioner concerning adverse mental side effects. (PX 1 at 11; Dep. Ex 2)

As stated above, both Dr. Chmell and Dr Petkovich agreed that physically the Petitioner could perform work activities. Dr. Chmell said that the Petitioner could lift 30 to 40 pounds on an infrequent basis, with no bending and lifting from the floor, no regular bending and lifting otherwise and no sitting or walking over two to three hours at a time. (PX 1 at 33-35) Dr. Petkovich also suggested a 30 to 40 pound limit on lifting, and suggested no repetitive bending, stooping, kneeling or squatting. (RX 3 at 16)

The Petitioner by the medical evidence was not obviously unemployable. With respect to the job search, the Arbitrator finds the proof lacking. Since his job with the temporary agency ended in 2005, the Petitioner only looked for work in jobs where he had prior experience. He gave no specific examples of any jobs which he persued. He said that he reviewed job listings on the computer and at the employment security office, but did not provide any documentation, such as job search logs, to corroborate his testimony. He also told Dr. Chmell that he was receiving social security disability benefits, which is not consistent with a person actively seeking employment. (PX 1,

Dep. Ex. 2) The evidence is similar to that present in Professional Transportation. It does not show a diligent job search.

Finally, consideration of Petitioner's age, education, work history and condition does not provide the basis for an odd lot award. The Petitioner was 55 years old when the case was arbitrated, and just over 50 when Dr. Reynolds released him at maximum medical improvement in January 2005. He has a GED, and worked a number of jobs during his adult life. He testified that he worked as a computer operator for eight and a half years, and presented no evidence, vocational or otherwise, which would explain why he could not do similar work at the present time. (TR 74)

The above evidence leads the Arbitrator to find that the Petitioner has failed to meet shown significant disability. He is unable to perform his prior job, and he continues to display symptoms and findings consistent with his post fusion status. Dr. Reynolds noted sensitivity on the right side at L4 and S1 in his exam of August 21, 2008. Dr. Dykstra noted swelling in the lumbar spine in the same area where he complained of chronic pain when he saw his on September 17, 2009. (PX 5) While Dr. Chmell's findings were a little excessive when compared with those of the treating doctors, Dr. Petkovich noted a mild restriction of forward flexion and tenderness in the lumbar area, feeling that restrictions were appropriate. (RX 3 at 12-16)

Based on the evidence referenced above, the Arbitrator finds the Petitioner disabled to the extent of 40 % Person As A Whole.

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

ALVIS RUTHERFORD,

Petitioner,

14IWCC0908

vs.

NO: 11 WC 12794

CITY OF PEORIA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, and "8(a)", and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction noted below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission addresses Respondent's argument that the Arbitrator incorrectly found that Respondent's Dr. Moody "referred Petitioner to Midwest Orthopaedic Center [Dr. Roberts] for a consultation." (Dec. at 3). The Commission notes that the Patient History form completed by Petitioner on March 17, 2011, clearly states (bottom of page 3) that he was referred to Midwest by his personal physician, Dr. Gross. Therefore, we hereby correct the decision to reflect this fact. Respondent argues that "this error leads to the impression that the City's doctor felt that Mr. Rutherford's alleged exacerbation was unresolved and warranted further treatment." (R-brief at 12). Respondent claims that "Dr. Moody stated in his March 7, 2011 report that [Petitioner] could request an orthopedic referral from his personal physician if he desired further

14IWCC0908

treatment, not that Dr. Moody recommended it." (Id.). However, Respondent's argument is disingenuous because Dr. Moody had, in fact, recommended a referral to an orthopedist (unspecified) on February 17, 2011, but this was denied by the insurance company. On March 7, 2011, Dr. Moody noted that Petitioner's workers' compensation claim had been denied and that this was the reason he was not able to see an orthopedist. Although Petitioner was returned to regular duty at that time, Dr. Moody noted that Petitioner continued to have pain and his diagnosis remained "probable exacerbation of right knee arthritis." The Commission finds that Petitioner was returned to full duty and discharged from care because his claim was denied and not because Dr. Moody believed that he was at maximum medical improvement since Dr. Moody "advised him to contact his personal physician regarding possible orthopedic referral." Therefore, even though the actual referral to Dr. Roberts came from Dr Gross, it is clear that Dr. Moody is the one who told Petitioner to follow up with Dr. Gross for a referral to an orthopedist.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2013 is hereby affirmed and adopted with the correction noted above.

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

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

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

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

DATED: OCT 2 3 2014

Charles J. DeVriendt

CJD/se
O: 9/23/14
49

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RUTHERFORD, ALVIS
Employee/Petitioner

Case# **11WC012794**

14IWCC0908

CITY OF PEORIA
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:

1004 ROBERT W BACH
110 S W JEFFERSON ST
SUITE 410
PEORIA, IL 61602

0980 HASSELBERG GREBE SNODGRASS
DAVID B WIEST
124 S W ADAMS ST SUITE 360
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 14IWCC0908

ALVIS RUTHERFORD
Employee/Petitioner

v.

CITY OF PEORIA
Employer/Respondent

Case # 11 WC 12794

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 J. MATHIS**, Arbitrator of the Commission, in the city of **Peoria**, on **September 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. ☐ 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 **8(a)**

14IWCC0908

FINDINGS

On **12/10/12**, 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 $; the average weekly wage was $.

On the date of accident, Petitioner was **51** years of age, ***married*** with **1** 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 $ 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

FINDINGS WITH RESPECT TO DISPUTED ISSUES:

With regard to (C) Did an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner testified that on December 10, 2010, he was employed by Respondent as a hazardous material coordinator, an administrative position he took in 2009 after being medically disabled from fire suppression. He stated that as a firefighter, he was contractually obligated to exercise three hours per week. This took place while on the job at the Central Fire House on a schedule set by his supervisor.

On the date in question, Petitioner was using a treadmill provided by Respondent when he twisted his right knee and immediately felt pain. Petitioner did not immediately report the accident because he hoped his knee would get better on its own. When it did not, he reported the accident to his supervisor who filed a report of the accident on January 4, 2011. In that report, the supervisor notes that the treadmill belt shifted, causing Petitioner's foot to slip and resulting in the knee injury (Petitioner Ex. 1).

The Arbitrator finds that Petitioner's testimony regarding the circumstances of his injury are unrefuted and credible. Further, the accident arose out of and in the course of his employment as a firefighter in that he was obligated to exercise pursuant to the union contract on a schedule set by his supervisor for a minimum of

three hours per week while on duty using equipment provided by the Respondent and on Respondent's premises.

With regard to (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner was initially seen by his family physician, Dr. Henry Gross on or about December 30, 2010. Dr. Gross's entire record of treatment going back to 1999 was introduced into evidence at arbitration by Respondent. These records (consisting of 700 pages) do not disclose any prior complaints, injuries or treatment to Petitioner's right knee. Dr. Gross' record for the December 30 office visit states, "this is a new problem". At the December 30th visit, X-rays revealed that Petitioner was suffering from moderate to severe osteoarthritis of the patellofemoral joint and medial and lateral knee compartments.

The Petitioner was sent to the Respondent's doctors at OSF Occupational Health where he was seen by Dr. Moody on January 5, 2011, the day after reporting the accident.

Dr. Moody examined Petitioner and gave a diagnosis of "osteoarthritis exacerbation". Dr. Moody referred Petitioner to physical therapy, which did not reduce his right knee pain.

Dr. Moody saw Petitioner on numerous occasions in February and March, 2011 for follow up. His diagnosis remained code #717.6 "Probable exacerbation of right knee arthritis, particularly patella femoral component..." Dr. Moody noted that Petitioner was on Coumadin therapy so he could not take pain relievers. When physical therapy failed to relieve Petitioner's symptoms, Moody referred Petitioner to Midwest Orthopaedic Center for a consultation.

Petitioner was seen at Midwest Orthopaedic Center by Dr. Brad Roberts who ordered an MRI which showed a small trizonal flap tear of the posterior horn of the medial meniscus, focal Class 3 chondromalacia of the femoral condyle, and Class 3-4 patello femoral chondromalacia.

Dr. Roberts recommended steroid injections and referred Petitioner to his partner, Dr. Merkley for a surgical consultation.

Petitioner testified that the steroid injections provided only temporary relief. Dr. Merkley concluded after examining Petitioner that surgery to repair his torn meniscus would be of no benefit in reducing his knee pain and recommended glucosemine injections.

Petitioner consulted Dr. Richard Driessnack at Great Plains Orthopaedics for a second opinion. Dr. Driessnack prescribed glucosomine injections and when they failed to reduce Petitioner's pain, advised him that only a total knee replacement would be of any benefit in reducing his pain.

Respondent's medical records reviewer, Dr. Richard Lehman, opined that Petitioner's knee was so deteriorated from osteoarthritis that the accident in December 2010 could not have exacerbated the arthritis nor

caused the flap tear of the medial meniscus. He did stated the Petitioner was a candidate for a total knee replacement "...if his symptoms become problematic and recalcitrant..."

Petitioner testified that his knee pain is constant and worse at night or when he sits for long periods of time which he does on a daily basis in his administrative desk job. He further testified that he had no relief from physical therapy, steroid injections, or glucosamine injections. Prior to the accident, he had no problems with his right knee.

The Arbitrator finds that Petitioner has sustained his burden to show by a preponderance of the evidence that the accident of December 10, 2010, when he twisted his right knee while exercising on a treadmill, exacerbated his preexisting arthritis in the right knee such that it became symptomatic. Since then, despite numerous conservative treatment measures, his pain is problematic and recalcitrant in that it has been constant for almost three years.

Respondent's medical records reviewer offers no alternative cause for his right knee pain. Records of treatment in the years prior to the accident from both Dr. Gross, Petitioner's family doctor, and OSF Occupational, show no reports of pain, injury, or treatment to Petitioner's right knee.

Respondent's own doctor, Dr. Moody, initially and consistently diagnosed Petitioner as suffering from an exacerbation of his right knee arthritis which was concurred by his treating doctor, Dr. Driessnack.

The weight of the medical evidence from both Respondent's and Petitioner's treating doctors support the finding that he aggravated his preexisting right knee arthritis in the accident of December 20, 2010, and that a total knee replacement is reasonable and necessary to alleviate the effects of the accidental injury.

With regard 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 (O) Prospective medical under §8(a), the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner offered into evidence the medical bills incurred by Petitioner for treatment by Great Plains Orthopaedics and Midwest Orthopaedics. The exhibit was admitted without objection (Petitioner's Exhibit 2)

A review of the exhibit shows that these bills were for treatment by Drs. Roberts, Merkley and Driessnack. Petitioner testified that he sought treatment from these providers for his knee injury.

For the reasons set forth in Section (C) and (F) above, prospective medical treatment consisting of a total knee replacement is awarded and is to be paid by Respondent. Further, the bills in Petitioner's Exhibit 2 are found to be reasonable and necessary.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARLA JIMERSON,

Petitioner,

14IWCC0909

vs. NO: 13 WC 13879

ST. JOHN'S HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and evidentiary issues, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but adopts the Findings of Fact, with the modifications noted below, that are contained in the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that Petitioner's injuries did not arise out of and in the course of her employment. It is undisputed that Petitioner was on a public street when she was struck by her co-worker's automobile on February 27, 2013. Petitioner testified that, after her shift, she exited from an employee-only entrance and gate, which is the door that "most employees will use to come in and out." (T.25-26). However, there is no evidence that this was the *sole* means of entry/exit. Petitioner testified that she was told by Respondent's management that the parking lot across Ninth Street is where she needed to park, that she was given a parking I.D. to keep in her vehicle for that lot, and that she was not allowed to park in other lots. (T.28-30). We find that Petitioner was required to use the Ninth Street parking lot and that her use of the door and gate on Ninth Street was her usual and customary means of entry/exit. However, we find that crossing a public street twice a day is not a special risk or hazard to which Petitioner was exposed to a greater degree than the general public and that the facts of this case and applicable law do not support a finding that her injuries are compensable.

As support for his decision, the Arbitrator cited Chmelik v. Vana, 201 N.E.2d 434 (1964), and Deal v. IC, 357 N.E.2d 541 (1976). We find that neither of these cases support Petitioner's

claim. Deal, in which the claimant was hit by bicycle immediately upon exiting employer's premises, does not apply because in that case an inference was made that the "concrete apron" was under the employer's control and part of its premises. Furthermore, the claimant was immediately exposed to the hazards of the traffic on the sidewalk. In other words, the claimant had not actually left the employer's premises and that particular door was the only practical means of exit. In Petitioner's case, she was undisputedly on a public street when she was struck by the car and she wasn't hit immediately upon exiting Respondent's premises.

In Chmelik, which involved an increased risk due to the "mass and speedy exodus" of co-workers at the end of a shift, does not apply because the claimant was injured *in the employer's parking lot,* which was part of the employer's premises. In the case at bar, Petitioner was undisputedly *not* on Respondent's premises at the time of her injury. Even if we were to accept that a "mass and speedy exodus" of workers at the end of a shift could create an increased risk *on a public street*, Petitioner only testified that there were at least two other employees leaving at the same time with her and walked out of the same exit. (T.28). This does not rise to the level of the "mass and speedy exodus" that was at issue in Chmelik.

Petitioner cites several cases in support of the Arbitrator's decision but we do not find any of them persuasive. Archer Daniels Midland Co. v. I.C., 91 Ill.2d 210 (1982), involves a slip and fall case that occurred *on the employer's premises* so it is not applicable to the case at bar. In Oscar Mayer Foods Corp. v. I.C., 146 Ill. App. 3d 315 (4th Dist. 1986), the claimant's injuries were found compensable when he was hit on a street by a co-worker's car. However, in stark contrast to the case at bar, the street in Oscar Mayer was *maintained and controlled* by the employer.

Petitioner also cites Suter v IWCC, 998 N.E.2d 971 (2013), but this is not applicable because the slip and fall in that case occurred *in the parking lot* that was provided by the employer and not on a public street. In Metropolitan Water Reclamation Dist. of Greater Chicago v I.C., 272 Ill.App.3d 732 (1st Dist. 1995), the claimant was injured off the employer's premises during an "emergency situation" when he attempted to save a person drowning in the lake after hearing a call for help while he was still on the employer's premises. It isn't clear why Petitioner cites this case, except that it involved a compensable injury that occurred off an employer's premises. Regardless, this case is clearly distinguishable from the case at bar since Petitioner was not reacting to any "emergency situation" when she was struck by the car on a public street.

The only case cited by Petitioner that bears further analysis is Bommarito v. IC, 82 Ill.2d 191 (1980), which involved a claimant who injured her foot when she stepped into a hole in the alley within eight feet of the employer's entrance. Although the alley was not considered part of the employer's premises, the Supreme Court found that the claimant was directed to only use the rear entrance and that the alley presented "special risks or hazards." (Id. at 195). The alley was filled with debris, parked cars, and trucks delivering merchandise to the employer, which the claimant had to navigate in order to reach the door. (Id. at 196).

There are several distinguishing facts between Petitioner's situation and Bommarito. First, the claimant in Bommarito was injured mere steps (eight feet) from the employer's door. Petitioner, on the other hand, testified that the exit she used does not put her directly onto the street (T.69) and she was a significant distance away having nearly crossed the street completely when she was struck by the car. (T.33, 63). Second, Petitioner did not encounter any defect in

the street similar to the hole that was present in Bommarito. Third, there is no evidence that Petitioner's route was the *sole* means of access to Respondent's premises. Fourth, the situation in Bommarito was a confined alley through which the claimant had to travel. In contrast, Petitioner had multiple options as to where she could cross Ninth Street. She testified that there were crosswalks at intersections both north and south of where she crossed (T.70) and that nobody at Respondent ever told her that she should cross where she did. We find that Petitioner's crossing of a public street did not subject her to an increased risk greater than the general public and is not similar to the "obstacle course" that the Court in Bommarito found, through which that claimant "was forced to dodge traffic and debris in order to gain admission to her place of work." (Id. at 198).

Petitioner has cited no cases directly on point that support a finding of accident in circumstances similar to hers on a public street, and we decline to extend the holding in Bommarito to apply to the facts of this case. In contrast, there are many cases which denied accident when the injuries were sustained off the employers' premises on a public street or sidewalk: Doyle v. I.C., 95 Ill. 2d 103 (1983) (no accident or increased risk where claimant was leaving work and was hit by drunk driver who failed to stop at intersection); Hess v. I.C., 79 Ill. 2d 240 (1980) (no accident where claimant was struck by a vehicle while crossing a public street at crosswalk from company parking lot to the plant); Osborn v. I.C., 50 Ill. 2d 150 (1971) (no accident when struck by an automobile crossing the street which separated the factory from the company-owned parking lot); Reed v. I.C., 63 Ill. 2d 247 (1976) (no accident where claimant slipped and fell in a crosswalk on a public street between parking lot and place of employment); Pieprzak v. I.C., 126 Ill. App. 3d 673 (1st Dist., 1984) (no accident where claimant fell on public sidewalk that crossed over employer's driveway); Warner v. I.C., 82 Ill. 2d 188 (1980) (no accident where claimant was hit by a co-worker's car on public street). We also note the previous Commission decision in Noelke v. Memorial Med. Ctr., 07 IWCC 1432 (11/05/07), which found no accident and no greater risk when the claimant was struck by car while crossing a public street from company parking lot.

Based on the above, we find that Petitioner failed to prove that her injuries arose out of and in the course of employment and reverse the Arbitrator's decision on the issue of accident. We note that we come to this conclusion without needing to consider the testimony or written report of the security officer, Michael Crum, or the issue of the destroyed videotape. Therefore, Petitioner's evidentiary objections are moot and we find that any errors made by the Arbitrator regarding the admission of this evidence were harmless.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 8, 2014, is hereby reversed and the awards are vacated.

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

14IWCC0909

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

DATED: OCT 2 3 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

CJD/se
O: 9/24/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JIMERSON, MARLA
Employee/Petitioner

Case# **13WC013879**

14IWCC0909

ST JOHN'S HOSPTIAL
Employer/Respondent

On 4/8/2014, 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 0.05% 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:

2217 SHAY & ASSOCIATES
SARAH NOLL
1030 DURKIN DR
SPRINGFIELD, IL 62704

0265 HEYL ROYSTER VOELKER & ALLEN
BRETT SIEGEL
PO BOX 9678
SPRINGFIELD, IL 62791

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

14IWCC0909

Marla Jimerson
Employee/Petitioner

v.

St. John's Hospital
Employer/Respondent

Case # 13 WC 13879

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 Springfield, on February 14, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0909

FINDINGS

On February 27, 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 $19,753.76; the average weekly wage was $379.88.

On the date of accident, Petitioner was 32 years of age, single with 4 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 11 as provided in Section 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner permanent partial disability benefits of $330.00 per week for 25 weeks because the injury sustained caused the five percent (5%) 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

March 28, 2014
Date

APR 8 - 2014

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on February 27, 2013. According to the Application, Petitioner was struck by a car and sustained injuries to the knee, leg, neck and back. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner worked for Respondent as a part-time cook and, on February 27, 2013, Petitioner worked from 4 PM to 8 PM. Shortly after 8 PM, Petitioner used her employee badge to clock out and proceeded to use a gate provided by Respondent for use by its employees to enter and exit the building. This gate was not available for use by the general public and employees who used it to enter/exit the building had to use either their identification badge or a pin number. A photo of the area of the building where the gate is located was tendered into evidence at trial. Petitioner identified the gate with the letter "A" (Petitioner's Exhibit 14).

Petitioner testified that the employee exit was the closest to the Respondent's employee parking lot. Petitioner stated that she used this lot because she was directed to do so by management. Further, Respondent provided Petitioner with a mandatory parking badge to place in her car so that security would know that her vehicle belonged to an employee.

The employee parking lot in question was located on North 9th Street, a public street between the hospital and the employee parking lot. A satellite photo of the area in question was tendered into evidence at trial (Petitioner's Exhibit 12). The Petitioner identified the parking lot on the exhibit with the letter "A." Petitioner testified that there were other parking lots that were closer to the hospital than the employee lot; however, those lots were reserved primarily for patients and their visitors. She also stated that doctors may have had assigned parking spots in the other lots but that cooks, such as herself, did not.

On February 27, 2013, Petitioner and at least two other employees left through the employee exit and proceeded to cross 9th Street to enter the employee parking lot. Petitioner paused in the southbound turning lane to allow two northbound cars to pass before completing the walk across 9th Street. As Petitioner continued to walk across 9th Street, a car driven by another employee who was exiting the employee parking lot pulled onto 9th Street and struck the Petitioner. A photo of the parking lot was tendered into evidence at trial and Petitioner identified the site of the impact with the letter "B" (Petitioner's Exhibit 13). The same description was used by Petitioner in the satellite photo (Petitioner's Exhibit 12).

The satellite photo reveals Madison Street to the south indicated by the letter "E" (Petitioner's Exhibit 12). Respondent introduced into evidence a "Staff Parking Map" that also included the entire hospital campus. The employee lot in question is indicated as "Block 2" with Madison Street to the south and Carpenter Street to the north (Respondent's Exhibit 3).

Petitioner testified that there was not a crosswalk on 9th street between the employee entrance/exit and the employee parking lot. Further, there is no crosswalk on East Mason Street, between the two parking lots.

Petitioner testified that if she had walked south to the intersection of Madison Street and 9th Street that there would have been a crosswalk available for her to use. However, no crosswalk is observed at that intersection in the satellite photo (Petitioner's Exhibit 12). She also stated that she if she had walked north to the intersection of Carpenter and 9th Street, that another crosswalk was present. This intersection was not included in the satellite photograph. Petitioner testified that she would have had to walk at least one block to reach either of the crosswalks and that the employees who parked in the employee lot usually just walked directly across 9th Street.

Michael Crum testified at trial on behalf of the Respondent. At the time of the trial, Crum was the Respondent's security manager; however, at the time of the accident, Crum was the security officer who investigated the occurrence. Crum arrived at the scene of the accident shortly after its occurrence and, at that time, Petitioner informed him that the vehicle had struck her leg. Crum also observed that Petitioner's cell phone was broken and he asked her if there was anyone he could call on her behalf. An ambulance was called and Petitioner was taken to the ER. When Crum was at the scene of the accident, four to six other employees were also present; however, Crum did not determine their identities nor did he obtain any statements from them.

Crum observed video of the accident which was recorded on Respondent's security camera and, that same evening, he prepared a written report based upon the video that he observed shortly after the accident. Crum testified that the video obtained on February 27, 2013, was subsequently recorded over and no longer existed because a new camera system was installed shortly after the accident. Respondent's counsel tendered Crum's accident report which included his review of the video into evidence at trial (Respondent's Exhibit 2). Petitioner's counsel made a number of objections to its admission into evidence which the Arbitrator overruled, but noted that the exhibit's admissibility was separate and distinct from what weight and probative value would be given to the exhibit. According to the exhibit and Crum's testimony, Crum observed the glow of an electronic object inside of Petitioner's hands. Crum opined the object appeared to be a cellular phone which Petitioner was looking down at during the time she was walking across the street (Respondent's Exhibit 2).

Crum testified that the camera that obtained the video had high definition lenses and provided very clear visability; however, on cross-examination, Crum stated that the camera was secured to the building across the street from the parking lot and was six stories high and that it was not zoomed in on the Petitioner at the time of the accident. Crum agreed that he could not see Petitioner's eyes or face and did not know what direction Petitioner was looking. Petitioner agreed that she was carrying her cell phone at the time of the accident but denied that she was using it at that time.

Crum testified that it was illegal for Petitioner to cross the street without a crosswalk. He further stated that the intersection of Madison Street and 9th Street was approximately 15 to 20 yards south of the employee's exit and that the intersection of Carpenter and 9th Street was 25 to 30 yards north of the gate. On cross-examination, Crum agreed that the distances were his estimates and that they could have both been more than 90 feet.

Petitioner was seen in the ER shortly after the accident and complained of right thigh pain. X-rays were obtained of the right femur which were negative for fractures. Petitioner was given pain medication and advised to follow up with her primary care physician (Petitioner's Exhibit 1).

On February 28, 2013, Petitioner was seen by Dr. Paul Phillips and, at that time, Petitioner complained of neck, low back and right knee pain. When Dr. Phillips saw Petitioner on March 7, 2013, she also had complaints of right hip and left shoulder pain. Dr. Phillips referred Petitioner to Dr. Rishi Sharma, an orthopedic specialist, who saw Petitioner on March 14, 2013. Dr. Sharma opined Petitioner sustained contusions to the left shoulder and right hip. He ordered physical therapy (Petitioner's Exhibit 3).

Petitioner received physical therapy at Springfield Clinic between April 16, 2013, and July 31, 2013. Petitioner's symptoms improved during the course of physical therapy. When Dr. Sharma saw Petitioner on June 4, 2013, Petitioner informed him that physical therapy had helped her substantially with her neck and right hip pain but that she still had some low back symptoms. By June 14, 2013, Petitioner's left shoulder symptoms had resolved (Petitioner's Exhibits 3 and 5).

Dr. Sharma saw Petitioner on July 30, 2013, and she informed him that the low back pain was much better but that she still had some right hip and knee pain, but that physical therapy had helped. When seen at physical therapy on July 31, 2013, it was noted that Petitioner was back to 80% pre-accident activities, but that she could still not jog or cross her legs when sitting (Petitioner's Exhibits 3 and 5).

At trial, Petitioner testified that she had no ongoing symptoms in regard to her left shoulder, right leg or knee, but that she still had low back symptoms. She stated that the low back symptoms affected her most when she had to sit or stand for long periods of time. Petitioner denied having any low back symptoms or problems prior to the accident of February 27, 2013.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on February 27, 2013.

In support of this conclusion the Arbitrator notes the following:

The circumstances that preceded the Petitioner having been struck by the car exiting the employee parking lot are, in large part, undisputed. The primary exception to this is the testimony of Respondent's witness, Michael Crum, especially in regard to the video of the accident that was obtained but no longer in existence at the time of trial.

While the Arbitrator ruled that the accident report prepared by Crum and his description of what the video revealed to him were admissible, the Arbitrator also stated that this was not a ruling on the weight and probative value of same.

Without having the video available for review, Crum's testimony that it purportedly revealed a glowing object in Petitioner's hand that he opined was a cell phone is difficult, if not impossible, to evaluate. Further, the camera in question was six stories high and not zoomed in on the Petitioner at the time of the accident. The Arbitrator finds that Crum's testimony regarding his review of the video and opinions derived therefrom, is, at best, of minimal probative value and assigns no weight to same.

Crum's testimony that crossing 9th Street at a point other than a crosswalk was illegal is nothing more than an opinion of a layperson. Further, Respondent cited no legal authority for this position.

Crum also testified as to his estimates of how far the intersection of Madison and 9th Street and Carpenter and 9th Street were; however, on cross-examination, he admitted that his estimates were not precise and that the actual distance could have been greater than his estimates. The Arbitrator likewise gives little weight to this testimony as well.

Petitioner left the employee's premises through a gate that was only accessible by employees and proceeded to walk across the street to a parking lot designated for the use of employees by Respondent.

At the time Petitioner was leaving the employer's premises, it was at the end of a shift and other employees were leaving at that same time. The fact that there was an exodus of other employees departing from the premises at that same time as Petitioner presents a risk of injury to Petitioner greater than that to which the general public is exposed. See Chmelik v. Vana, 201 N.E.2d 434 (Ill. 1964); Deal v. Industrial Commission, 357 N.E.2d 541 (Ill. 1976). This greater risk of injury that Petitioner was subjected to was amplified by the fact that she was struck by a car exiting the employee parking lot driven by another employee.

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of February 27, 2013.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding the injuries she received as result of the accident of February 27, 2013, was unrebutted.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 11 as provided in Section 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner sustained permanent partial disability to the extent of five percent (5%) loss of use of the body as a whole.

In support of this of this conclusion the Arbitrator notes the following:

As a result of the accident of February 27, 2013, Petitioner sustained injuries to the neck, left shoulder, right hip, right knee and low back; however, Petitioner recovered from all of the injuries with the exception of the low back.

In regard to the low back injury, Petitioner still has complaints of low back symptoms, in particular, when she has to stand or sit for an extended period of time.

William R. Gallagher, Arbitrator

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

Gilberto Mendez,

Petitioner,

vs.

No. 12 WC 07255

Rock Valley Culligan,

14IWCC0910

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission strikes the references to medical records from Dr. Phasouk at Swedish Immediate Care, which are not in evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 10, 2014, is hereby corrected as stated herein and otherwise affirmed and adopted.

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

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

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

DATED:
SM/sk
o-10/02/2014
44

OCT 24 2014

Stephen J. Mathis

Mario Basurto

David L. Gore

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

MENDEZ, GILBERTO
Employee/Petitioner

Case# **12WC007255**

ROCK VALLEY CULLIGAN
Employer/Respondent

14IWCC0910

On 1/10/2014, 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:

2489 LAW OFFICE JIM BLACK & ASSOC
BRAD A REYNOLDS
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JIGAR S DESAI
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

14IWCC0910

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)

Gilberto Mendez
Employee/Petitioner

v.

Rock Valley Culligan
Employer/Respondent

Case # **12** WC **7255**

An *Application for Adjustment 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 **Woodstock**, on **September 5, 2013** and in the city of **Rockford**, on **November 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 alleged accident, **February 13, 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 **$41,600.00**; the average weekly wage was **$800.00**.

On the date of alleged accident, Petitioner was **33** years of age, ***married*** with **4** dependent children.

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

ORDER

As the Arbitrator has found that the Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment with the Respondent and failed to prove that his current condition of ill-being is causally related to his alleged injury on February 13, 2012, the Petitioner's claim for compensation is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of 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.

Arbitrator Anthony C. Erbacci

January 7, 2014
Date

12 WC 7255
ICArbDec19(b)

JAN 10 2014

14IWCC0910

FACTS:

The Petitioner testified that on February 13, 2012 he was employed by the Respondent as a delivery driver and that he had been so employed for ten years. The Petitioner described the duties of his employment as including the delivery of 50 pound bags of salt, 5 gallon bottles of water, and water softeners. The Petitioner testified that he made an average of 60 to 70 deliveries per day and that the deliveries were to residential as well as commercial customers. He testified that residential deliveries would typically consist of 5 to 6 bags of salt, which he carried over his shoulder two at a time, and 3 to 4 bottles of water. He described the commercial deliveries as typically consisting of 20 to 30 bags of salt, which he loaded onto a cart 9 bags at a time, and 30 to 40 bottles of water which he also loaded onto a cart 6 bottles at a time. The Petitioner testified that he also delivered 12 to 15, 180 pound, replacement "P.E. Tanks" per day, using a cart to carry the new tank in and the old tank out. He also testified that for about six months prior to February of 2012, he additionally performed some construction type activities for the Respondent which included loading metal and construction debris into a dumpster and moving dirt and gravel.

The Petitioner testified that he began to experience low back pain while he was working on February 13, 2012 but he continued working and completed his shift. The Petitioner testified that when he awoke the next day, he had difficulty getting out of bed due to low back pain as well as pain and weakness in his left leg. He testified that while he had experienced low back pain "off and on" in the past, he had never before had the type of pain he experienced at that time. The Petitioner testified that he then sought medical treatment from Dr. Everson.

The records of Dr. Ralph Everson demonstrate that he saw the Petitioner on February 14, 2012. Dr. Everson noted that the Petitioner complained of "pain in back since last week while lifting salt at work" that was now radiating into his left groin and causing him difficulty walking. Examination revealed a positive straight leg raise on the left at 45 degrees and the Petitioner was diagnosed with low back pain "likely radiculopathy". He was prescribed medications and advised to avoid heavy lifting and to return if his symptoms worsened or failed to improve. Dr. Everson authored an off work slip for the Petitioner excusing him from work on February 14 and 15 "Due to injury".

The Petitioner testified that he called his supervisor at the Respondent on February 16, 2012 and was told to take the remainder of the week off. He also testified that February 17, 2012 was a scheduled vacation day.

On February 17, 2012, Dr. Everson authored a return to work slip for the Petitioner which released him to return to work on February 20, 2012 with no limitations.

The Petitioner testified that he did return to work on February 20, 2012 and that he talked to his supervisor, Jeff Larsen, about getting a helper. He testified that he was then called into a meeting where he was confronted with allegations that he had given away bags of salt and sold bags of salt for personal profit to one of the Respondent's customers. The

Petitioner testified that he admitted, at that time, that he had given 2 to 4 broken bags of salt to the owner of Napoli Pizzeria over the years he was employed by the Respondent. The Petitioner testified that broken bags of salt were normally thrown out when he returned to the Respondent's facility at the end of the day, so he saw no harm in giving them to a customer. On cross examination, the Petitioner testified that he did not sell any bags of salt to the owner of Napoli Pizzeria. He also acknowledged that there were no restrictions indicated on the return to work note provided by Dr. Everson.

Alan Inglima testified that he was the Respondent's Delivery Manager and that he was the Petitioner's supervisor at the time of his alleged injury. Mr. Inglima testified that the Petitioner made an average of 45 to 50 deliveries per day and that the average commercial customer received about 10, 5 gallon water bottles each. He testified that the replacement "P.E. Tanks" weighed 110 to 120 pounds and that the Petitioner would deliver an average of 5 to 7 tanks per day. Mr. Inglima testified that the broken bags of salt that were returned to the Respondent were either sold or put into the plant water softener. He testified that while it was possible that some broken bags of salt may have been dumped on occasion, employees were not allowed to give salt away.

Mr. Inglima testified that February 13, 2012 was the last day the Petitioner actually worked his regular job. He testified that the Petitioner worked his entire shift that day and made no complaints of back pain. Mr. Inglima testified that on February 14, 2012 the Petitioner sent him a text message indicating that he had no strength in his leg and that he would not be coming to work. Mr. Inglima testified that when the Petitioner returned to work on February 20, 2012 he briefly spoke about his back problem but he did not request an injury report and he did not provide any work restrictions. Mr. Inglima testified that following a meeting with the Petitioner regarding the allegations that he was giving away and selling salt, the Petitioner's employment was suspended. Mr. Inglima testified that, during that meeting, the Petitioner did not admit the alleged misconduct and he did not make mention of his back condition.

Mr. Inglima testified that the meeting that took place on February 20, 2012 was the result of information that came to light while the Petitioner was off work between February 13 and 20, 2012. Mr. Inglima testified that another driver covered the Petitioner's routes while he was off, including the deliveries to Napoli Pizzeria. Mr. Inglima testified that he learned from the substitute driver that when he gave Napoli Pizzeria the price for bags of salt, the owner of Napoli Pizzeria, Mr. Johnson, indicated that it was a lot more than he had paid in the past. Mr. Inglima testified that this information subsequently led to the allegations of misconduct against the Petitioner and his subsequent termination on February 22, 2012.

Sharon Robertson, nee Hendrix, also testified regarding the February 20, 2012 meeting and the Petitioner's subsequent termination on February 22, 2012. She testified that Petitioner did not report that his low back problems were work-related on February 20 or 22, 2012 nor did the Petitioner ask to fill out an injury report on February 20 or 22, 2012. She also confirmed that the Petitioner was terminated for selling salt to a customer for personal gain.

Jeff Johnson testified that he was the owner of Napoli Pizzeria and that the Petitioner delivered water and salt to his pizza parlor. He testified that the Petitioner would deliver water once each month and salt as needed. Mr. Johnson testified that he used the salt to melt ice at the pizza parlor as well as at his personal residence. Mr. Johnson testified that the first time he got salt from the Petitioner; the Petitioner gave him a bag that was opened. He testified that after November of 2008 he began to purchase bags of salt directly from the Petitioner. He testified that he bought salt from the Petitioner in 10 bag increments for $3.00 per bag and that he purchased approximately 30-50 bags of salt from the Petitioner from November of 2008 through the time of the Petitioner's termination. Mr. Johnson also testified that he prepared an affidavit consistent with his testimony which was submitted as Respondent's Exhibit 3. Mr. Johnson testified that he did not purchase salt from any other employees of the Respondent and that he paid the Petitioner directly, in cash, for the bags of salt he purchased.

On February 28, 2012 the Petitioner was seen at Swedish Immediate Care by Dr. Ryan Phasouk. His primary complaints were of a sore throat and fever, but the Petitioner also reported complaints of continued unresolved back pain. The Petitioner reported injuring his back at work on February 13, 2012 when he was lifting something heavy and felt his back "twist or turn the wrong way." Examination of the back was positive for midline spinal tenderness at L3-4 with left paraspinal tenderness. He was diagnosed with a backache, pharyngitis, and a fever.

On March 16, 2012, the Petitioner underwent an MRI of his lumbar spine on the referral of Dr. Thomas Schiller. The MRI was reported to reveal a mild diffuse disc bulge with mild disc space narrowing at L5-S1. No central canal stenosis, focal disc herniations, or neuroforaminal narrowing was seen at any level.

On March 23, 2012, Petitioner was seen by Dr. Thomas Schiller of Swedish American Medical Group. He complained of worsening back pain. Petitioner also complained of a headache, fever, chills and right flank pain. Dr. Schiller diagnosed a fever, cough, abdominal/flank pain, and lumbar degenerative joint disease. He advised Petitioner to follow-up in 1-2 weeks. On March 24, 2012, the Petitioner was seen in the emergency room at Swedish American Hospital with complaints of a fever and altered mental status. The Petitioner also complained of abdominal pain, a back ache, chills, headaches, and night sweats. He complained of leg weakness, left greater than right, and he reported that he had been suffering from back pain with left leg weakness since February 13, 2012. He indicated he was on steroids and was receiving physical therapy. Following his initial examination, the Petitioner was preliminarily diagnosed with a fever. He was also diagnosed with an altered mental status and acute back pain. Petitioner was admitted as an inpatient.

On March 24, 2012, Petitioner was evaluated by Dr. Ziad Alnadjim, a rheumatologist, with Swedish American Medical Center. The Petitioner reported a history of "probably" injuring his back at work. He reported his job required a lot of heavy lifting. Petitioner reported that his fever started over the last week and that he thought it may have been due to taking Prednisone. Dr. Alnadjim noted a CT scan of the Petitioner's brain was negative and that the Petitioner's urine test was negative for any infectious process. He noted the Petitioner most

likely had radiculopathy and he recommended a repeat MRI. He also diagnosed a fever, most likely secondary to an upper respiratory infection and he noted that the Petitioner's chest x-rays were suggestive of possible pneumonia. He started the Petitioner on Rocephin and Vancomycin and he recommended an infectious disease consultation.

The Petitioner was also evaluated by Dr. Geoffrey Tsaras, an infectious disease specialist with Swedish American Hospital. The Petitioner reported that he had a sudden onset of a fever of 103 degrees with a headache two days prior to March 24, 2012. Due to the Petitioner's complaints of low back pain and his fever, there was a concern for a possible diskitis or epidural abscess. Dr. Tsaras noted that the Petitioner underwent a repeat MRI and that it demonstrated the same findings but no evidence of an epidural collection or any disc space infection. Dr. Tsaras diagnosed spondylolisthesis at L5-S1 with radiculopathy and a lower respiratory tract infection and he referred the Petitioner for an evaluation with an orthopedic surgeon.

During the Petitioner's admission at Swedish American Hospital, he was also evaluated by a neurologist, Dr. Madhav Srivastava. Dr. Srivastava diagnosed headaches and chronic low back pain without any evidence of an acute disc herniation. Dr. Srivastava recommended conservative treatment and indicated the Petitioner might be a candidate for a pain evaluation.

On April 13, 2012, the Petitioner was seen again by Dr. Schiller. He complained of left leg weakness and low back pain as well as left knee pain. The Petitioner reported that he had pain in the patella of his left knee and he requested an MRI of his left leg. Examination of the back revealed minimal LS tenderness. Dr. Schiller diagnosed worsening knee pain and low back pain aggravated with even a little physical activity. He referred the Petitioner for an MRI of the left knee and to pain management for his low back.

On April 20, 2012, the Petitioner underwent an MRI of his left knee on the referral of Dr. Schiller. The MRI revealed mild articular cartilage thinning. The Arbitrator notes that there was no indication in the medical records that the Petitioner's complaints of left knee pain were in any way related to his alleged February 13, 2012 accident.

The Petitioner was next seen at Swedish American Medical Group, by Dr. Bruce Stiles, on June 11, 2012. The Petitioner reported a history of low back pain for several months but denied any radiating pain down his legs. The Petitioner was noted to have reported that he thought he hurt his back at work carrying water jugs and salt bags. The Petitioner also reported anxiety and depression for the last several months. On examination, the Petitioner was noted to have reduced lumbar range of motion without any local tenderness. Straight leg raising was negative to 90 degrees on both sides and the Petitioner's neurological exam was negative. Dr. Stiles also noted that the Petitioner's lumbar MRI was normal. He referred Petitioner for physical therapy.

At the request of the Respondent, the Petitioner was examined by Dr. J.S. Player on June 28, 2012. The Petitioner reported a history of waking up on February 13, 2012 with an

inability to walk on his left leg. Petitioner reported that in the weeks and months prior to February 13, 2012, he worked seven days per week delivering 100 pound bags of salt, 50 pound water bottles, and water softeners that weighed over 100 pounds. Petitioner also reported working weekends at a new shop breaking awnings, digging trenches and doing different miscellaneous work. The Petitioner denied any specific injury or event that caused an injury to his lower back or left knee and he denied any specific work activity that caused an increase in his low back pain or left knee symptoms. On examination, the Petitioner manifested no low back or leg pain behaviors and offered no complaints of low back pain or leg pain after provocative testing. Petitioner had normal range of motion of his lumbar spine and bilateral knees. He did not have any tenderness to any palpation in the lumbar spine. Petitioner reported total perceived disability of approximately 6%. Straight leg raising was negative.

Dr. Player diagnosed the Petitioner with lumbar spine and interior left knee subjective complaints that were not supported with positive objective neurologic findings and not supported with positive objective physical findings. Dr. Player concluded that the Petitioner did not sustain any work injury on February 13, 2012. He noted that the Petitioner described rigorous work activities in the weeks or months prior to February 13, 2012, but concluded that there was no causal relationship between those work activities and the Petitioner's inability to walk on February 14, 2012. He noted that the Petitioner's lumbar spine and left knee did not have any positive objective physical findings and demonstrated no pathology.

It was Dr. Player's opinion that the Petitioner's admission to Swedish American Hospital may have been appropriate and indicated but was not the result of or related to any work-related injury, event, or accident. The same was true with respect to Petitioner's other low back and left knee treatments. Dr. Player indicated that the Petitioner was capable of returning to full and regular duty work without restrictions given that he did not manifest any low back or left knee pathology during his examination. He opined that the Petitioner did not require any further treatment.

On July 11, 2012, the Petitioner was seen by Dr. Everson for a follow up regarding his left knee pain. Examination of Petitioner's left knee was negative. Petitioner was diagnosed with mild arthritis. Petitioner was seen again by Dr. Everson on September 6, 2012. He had continued complaints of left knee pain. Dr. Everson performed an injection.

On the referral of his attorney, the Petitioner was examined by Dr. Stephen Heim on September 19, 2012. Dr, Heim noted that the Petitioner reported that he had no ongoing or persistent low back symptoms until being injured at work on February 13, 2012.The Petitioner reported that he had been working extensive hours for several months and that in a typical day he would deliver up to 140 80-pound salt bags and more than 100 5-gallon bottles of water. He reported that he developed pain on February 13, 2012 in his anterior left thigh and anterior left knee region as well as some achiness and stiffness in his lumbosacral junction. The Petitioner reported that the following day he awoke and had some severe pain in his left anterior knee region and increased low back pain. He reported follow up treatment with his primary care physician which improved his left anterior knee pain and he reported that his left

anterior thigh pain had resolved without any residual numbness or tingling in the left lower extremity. The Petitioner reported continued pain in the anterior left knee which was aggravated by any movement as well as back pain which was aggravated by bending or twisting. He also reported that lifting provoked significant back pain.

Examination of the Petitioner's lumbar spine revealed tenderness at the midline of the lumbosacral junction. Petitioner had severe pain on extension of his lumbar spine. Examination of the Petitioner's left knee revealed a positive patellar compression sign. Straight leg raising was negative. Dr. Heim noted that the Petitioner's March 16, 2012 MRI and the repeat MRI that was completed on March 24, 2012 revealed mild broad-based disc bulging at L5-S1. Dr. Heim suspected right L5 spondylolysis but he noted there was no evidence of a focal disc herniation.

Dr. Heim diagnosed the Petitioner with lumbar disc degeneration, lumbar pain, and chondromalacia of the left knee patella. He opined that the Petitioner's low back and left knee symptoms were related to the injury on February 13, 2012 and he opined that the Petitioner was not capable of working in a position that required repetitive bending, twisting, and lifting. Dr. Heim recommended an orthopedic consultation for the Petitioner's left knee and a lumbar spine CT scan.

Dr. Player prepared an addendum report at Respondent's request on January 11, 2013. He confirmed that the Petitioner reported a history to him of not experiencing any acute specific work injury accident on February 13, 2012 and he noted that Dr. Heim's evaluation was silent as to the circumstances surrounding the onset of the Petitioner's symptoms on February 13, 2012. He noted that his primary disagreement with Dr. Heim concerned causal connection. He noted that none of his prior opinions, which were rendered in his June 28, 2012 report, had changed and he continued to believe there was no causal connection between the Petitioner's complaints and his work activities that occurred on February 13, 2012 or prior to that date. He concluded that, based upon the physical examination he performed on June 28 as well as the examination that Dr. Heim performed on September 19, 2012, the Petitioner was capable of working full and regular duty without restrictions and that the Petitioner had previously reached maximum medical improvement.

Dr. Heim testified consistent with his narrative report of September 19, 2012. He noted that the Petitioner's examination findings of painful extension were suggestive that Petitioner's pain was aggravated by the posterior structures of the spine, and specifically the facet joint complexes. He testified this was a significant clinical examination finding. He testified that the Petitioner's diagnostic x-ray revealed spondylosis (a pars interarticularis defect), and that his diagnosis was right L5 spondylosis with a degenerative L5-S1 disc, and left patellofemoral pain. Dr. Heim opined that the Petitioner's condition was causally connected to the Petitioner's work injury of February 13, 2012 and he recommended that the Petitioner remain off work. Dr. Heim indicated that the Petitioner should undergo a left knee orthopedic consult as well as undergo a CT scan of his back with a possible injection or surgical recommendation following same.

On cross-examination, Dr. Heim confirmed that Petitioner reported to him a history of developing predominately left knee anterior pain with increased low back pain while at work on February 13, 2012. He acknowledged that if the Petitioner's earlier medical records did not document the same history then that would be inconsistent with what Petitioner reported to him. Dr. Heim also acknowledged that the findings on Petitioner's MRI and x-ray could be degenerative. Dr. Heim confirmed that he did not expect that the findings on the Petitioner's MRI or x-rays would cause a fever, cough, or headache and he testified that if the Petitioner was admitted to the hospital with a 103 degree fever he would not have any basis for causally relating that to his alleged work accident.

Dr. Player testified consistent with his prior narrative reports at his deposition, and the narrative reports were admitted into evidence and attached to the deposition transcript as deposition exhibits 2 and 3. Dr. Player testified that the Petitioner did not require any further treatment. He testified that Petitioner spontaneously woke up with back pain based on Petitioner's own reporting, and therefore Petitioner's back pain was unrelated to Petitioner's work duties for the Respondent.

The Petitioner testified that he currently continues to experience low back problems as well as left leg problems and that he continues to have back pain and pain going into his left leg. He testified that he can only lift up to a maximum of 25 pounds without discomfort.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here.

Initially, the Arbitrator notes that the records of the Petitioner's initial medical treatment with Dr. Everson on February 14, 2012 demonstrate that the Petitioner reported that his back pain started "last week while lifting salt at work". The history noted in the records of the Petitioner's treatment at Swedish Immediate care on February 28, 2012 reflect that the Petitioner reported a specific injury on February 13, 2012 when he was lifting something heavy and "felt his back twist or turn the wrong way". The Petitioner testified that he began to have low back pain while he was working on February 13, 2012 and that he woke up with increased back pain and left leg weakness the next day. The Petitioner did not testify to an onset of pain a week earlier and he did not testify that his pain began with a specific lifting incident. When the Petitioner was seen by Dr. Player, he denied any specific incident. When he was seen by Dr. Heim, he reported that he developed pain in his anterior left thigh and

anterior left knee region as well as some achiness and stiffness in his lumbosacral junction after being injured at work on February 13, 2012, and that the following day he awoke and had severe pain in his left anterior knee region and increased low back pain. The Arbitrator also notes that the first time the Petitioner specifically complained of left knee pain was when he saw Dr. Schiller on April 13, 2012, two months after his alleged injury.

The Arbitrator also notes that the Petitioner's testimony was directly contradicted by the testimony of Jeffrey Johnson, the owner of Napoli Pizzeria. The Petitioner testified that while he had given 2 to 4 broken bags of salt to Jeffery Johnson over the years, he never sold any bags of salt to anyone for personal profit. Jeffrey Johnson testified that the Petitioner gave him one bag of broken salt and then, over the years, sold him approximately 30 to 50 bags of salt, in10 bag increments, for $3.00 per bag. The Arbitrator notes that Mr. Johnson has no apparent financial or personal stake in the outcome of these proceedings or the Petitioner's claim for benefits. Not only did Mr. Johnson's testimony raise questions as to the reliability of the Petitioner's testimony, it raised questions as to the Petitioner's willingness to be dishonest in order to obtain personal financial gain. The Arbitrator finds that the Petitioner's testimony is, at best, unreliable and, at worst, deliberately false.

The Arbitrator further notes that none of the Petitioner's treating physicians opined as to any causation between the Petitioner's work activities and his alleged condition of ill-being. Dr. Player opined that there was no causal relation between the Petitioner's work activities and the Petitioner's inability to walk on February 14, 2012. He noted that the Petitioner's lumbar spine and left knee did not have any positive objective physical findings and demonstrated no pathology. Dr. Player further opined that the Petitioner's admission to Swedish American Hospital may have been appropriate and indicated but was not the result of or related to any work-related injury, event, or accident. The same was true with respect to Petitioner's other low back and left knee treatments. Dr. Player indicated that the Petitioner was capable of returning to full and regular duty work without restrictions and that the Petitioner did not require any further treatment.

Dr. Heim opined that the Petitioner's low back and left knee symptoms were related to the injury on February 13, 2012 and he opined that the Petitioner was not capable of working in a position that required repetitive bending, twisting, and lifting. Dr. Heim recommended an orthopedic consultation for the Petitioner's left knee and a lumbar spine CT scan. The Arbitrator notes that it is not clear from Dr. Heim's report or his testimony what he understood the injury on February 13, 2012 to have been and Dr. Heim acknowledged that if the Petitioner's earlier medical records did not document a history of predominantly knee pain with some associated low back pain, then that would be inconsistent with what Petitioner reported to him. The medical records demonstrate that the Petitioner did not specifically complain of left knee pain until April 13, 2012, two months after his alleged injury. Further, Dr. Heim opined that if the Petitioner was admitted to the hospital with a 103 degree fever he would not have any basis for causally relating that to his alleged work accident. While the Arbitrator acknowledges the credentials and expertise of Dr. Heim, the Arbitrator finds his opinions in the instant matter to be less persuasive than the opinions of Dr. Player.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment with the Respondent. The Arbitrator further finds that the Petitioner failed to prove that his current condition of ill-being is causally related to his alleged injury on February 13, 2012.

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, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

As the Arbitrator has found that the Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment with the Respondent and failed to prove that his current condition of ill-being is causally related to his alleged injury on February 13, 2012, the Arbitrator finds that no medical expenses or prospective medical treatment are appropriately awarded herein.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

As the Arbitrator has found that the Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment with the Respondent and failed to prove that his current condition of ill-being is causally related to his alleged injury on February 13, 2012, the Arbitrator finds that no Temporary Total Disability benefits are appropriately awarded herein.

Even assuming, arguendo, that the Petitioner did suffer a compensable injury on February 13, 2012, the Arbitrator finds that the Petitioner was not under any medically imposed work restrictions at the time of his termination for cause on February 22, 2012. The Arbitrator notes that Dr. Everson released the Petitioner to return to work with no limitations or restrictions on February 20, 2012, and finds that the Petitioner was terminated for cause on February 22, 2012. There is no evidence that the Petitioner was specifically prescribed off work by any of the other physicians with whom he treated after Dr. Everson released him to unrestricted work as of February 20, 2012. While Dr. Heim opined that the Petitioner should be off work as of the date of his examination, Dr. Heim offered no opinion as to the Petitioner's ability to work prior to that time. Dr. Player opined that the Petitioner had previously reached maximum medical improvement and was capable of working full and regular duty without restrictions. Thus, even if the Petitioner did suffer a compensable injury on February 13, 2012, the Arbitrator finds that the Petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of that injury.

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

Wanda Morris,

Petitioner,

vs.

No. 12 WC 10617

Chicago Transit Authority,

14IWCC0911

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and prospective medical care, and being advised of the facts and law, expands, 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).

Petitioner, a city bus driver, testified she sustained psychological and psychiatric injuries as a result of witnessing a shooting during her lunch break. Petitioner explained that after eating lunch, she was standing at the bus stop at the southeast corner of Ashland Avenue and Garfield Boulevard, a high crime area. She was waiting for her bus to arrive, at which point she would take over driving the bus. The bus was not due for another 20 minutes when the shooting took place. Petitioner witnessed four men being shot. After the shooting, she comforted one of the victims while they waited for an ambulance.

The Arbitrator found Petitioner sustained "mental-mental" injuries as a result of the incident, which arose out of and in the course of her employment. The Arbitrator relied on the personal comfort doctrine to find Petitioner was in the course of her employment when she was waiting for the relief bus to arrive.

Respondent contends the claim is not compensable. Respondent characterizes Petitioner's risk of injury as a personal risk, yet asserts the shooting could have occurred "anywhere at any time."[1] Respondent states:

> "Here, it cannot even be argued that Respondent placed Petitioner in a position to witness a shooting. She was not at her employers' [*sic*] facility. She was not on a bus. She was not at the bus garage. She was not engaging in work. [Petitioner] was on a public street 20 minutes prior to the time she was supposed to be there. It was her voluntary action done solely for her convenience that placed her in the proximity of this shooting. There was nothing related to her employment that placed her there at that time. It was purely a personal risk."

In the same vein, Respondent asserts: "Petitioner was at no greater risk than any person utilizing public transportation or walking down a public street. *** [The shooting] occurred on a public street where Petitioner voluntarily chose to stand. *** Respondent did not require that Petitioner stand at the corner of Ashland and Garfield. This was not part of her job functions. This was Petitioner's personal choice." Further, Respondent faults Petitioner for not staying at "her lunch location" or going to "a different location."

As Petitioner points out, she was a traveling employee. Another driver relieved her at Ashland and Garfield so she could take her lunch break. Petitioner, in turn, was responsible for relieving the next driver at 1:58 p.m. Her employment put her in a high crime area, without the protection of the bus, for the duration of her lunch break. The record is silent as to what public accommodations, if any, were available to Petitioner near the intersection of Ashland and Garfield. The shooting took place while Petitioner was waiting at the designated relief point to relieve the next driver. It is entirely reasonable, foreseeable and of benefit to Respondent that Petitioner arrived at the relief point early. Petitioner's claim is clearly compensable. See Chicago Transit Authority v. Industrial Comm'n, 61 Ill. 2d 78 (1975); Wright v. Industrial Comm'n, 62 Ill. 2d 65 (1975); Metropolitan Water Reclamation District of Greater Chicago v. Workers' Compensation Comm'n, 407 Ill. App. 3d 1010, 1014 (2011), citing C. A. Dunham Co. v. Industrial Comm'n, 16 Ill. 2d 102, 108 (1959) ("Under the 'street risk' doctrine, where the evidence establishes that the claimant's job requires that she be on the street to perform the duties of her employment, the risks of the street become one of risks of the employment, and an injury sustained while performing that duty has a causal relation to her employment"); accord Potenzo v. Workers' Compensation Comm'n, 378 Ill. App. 3d 113 (2007).

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[1] Since the shooter was not targeting Petitioner, the risk was neutral. See Potenzo v. Workers' Compensation Comm'n, 378 Ill. App. 3d 113 (2007).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 30, 2012, is hereby expanded, affirmed and adopted.

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

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

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

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

DATED: OCT 24 2014
SM/sk
o-10/02/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

MORRIS, WANDA
Employee/Petitioner

Case# **12WC010617**

14IWCC0911

CTA
Employer/Respondent

On 11/30/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4698 LAW OFFICES OF CHRISTOPHER FREEMAN
899 S WEBER RD
SUITE A
BOLINGBROOK, IL 60490

0515 CHICAGO TRANSIT AUTHORITY
J BARRETT LONG
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

14IWCC0911

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)

Wanda Morris,
Employee/Petitioner

v.

CTA,
Employer/Respondent

Case # **12** WC **10617**

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 **9/19/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **3/11/12**, 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 **$61,672.00**; the average weekly wage was **$1,186.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of **$2,500.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$360.00** for other benefits, for a total credit of **$2,860.00**.

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 $790.67 per week for 27-3/7 weeks, commencing 3/12/12 through 9/19/12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 3/12/12 through 9/19/12, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $2,500.00 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $5,273.64, as provided in §8(a) and §8.2 of the Act.

Petitioner is entitled to prospective medical treatment in the form of ongoing care recommended by Drs. Kelley and Beck, and Respondent shall pay reasonable and necessary medical services associated therewith pursuant §8(a) and the fee schedule provisions of §8.2 of the Act.

Respondent shall pay to Petitioner penalties of **$0.00**, as provided in Section 16 of the Act; **$0.00**, as provided in Section 19(k) of the Act; and **$0.00**, as provided in Section 19(l) of the Act.

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

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

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

Peter M. O'Reilly

Signature of Arbitrator

11/29/12
Date

ICArbDec19(b)

14IWCC0911

STATEMENT OF FACTS:

Petitioner, a 47 year-old, female bus operator for Respondent, testified that she had worked as a driver for roughly 7 years as of the date of accident. Petitioner stated that she drove out of the 74th Street garage and that her route generally required her to drive east and west on Garfield Boulevard from 8:00 am to 4:00 pm.

Petitioner testified that on the date of the incident, March 11, 2012, her day started normally -- she reported for work promptly, picked up her bus, and had been driving for several hours before it was time for her afternoon meal break. Petitioner explained that she would drive the bus to a specific intersection on her route, trade places with a relief driver who was already waiting on the street, and then go where she wanted for lunch. An hour later, Petitioner would then report back to the intersection, wait, and relieve another driver.

Petitioner testified that on the date of accident, after eating lunch, she reported to her designated street corner roughly 20 minutes in advance of the scheduled pickup time. The designated intersection was Garfield Boulevard and Ashland. Petitioner testified that Garfield Boulevard ran east and west, with the eastbound and westbound lanes divided by a grassy parkway. Petitioner specifically testified that she reported to the bus stop at the far southeast corner of the intersection, to relieve the eastbound driver.

Petitioner stated that while waiting on the corner she was wearing the standard dark blue uniform of a CTA bus driver, which clearly identified her as a CTA employee. As Petitioner waited to provide relief, 4 young males—teenagers, according to Petitioner's testimony—whom she recognized as regular passengers, walked by her at the bus stop. As they walked by they directed good-natured comments toward Petitioner. The four males then proceeded eastbound on Garfield, crossing Ashland to the far southwest corner of Garfield Blvd. and Ashland.

Petitioners testified that as the four males reached the far southwest corner another unknown male, dressed in dark clothing, approached the four males from the east. Petitioner testified that at that point she witnessed the unknown male shoot all four males with a pistol, including one in the head. Petitioner testified that the scene on the corner became chaotic and the unknown male fled the scene. She noted that after the shooting, she crossed Ashland eastbound and went over to the scene where the victims lay. Petitioner testified that she specifically told the victim who had been shot in the head not to move.

Respondent introduced a surveillance video from a passing bus, purported to be around the time of the accident. Petitioner testified that the video depicted the intersection where the incident occurred, but appeared to depict a time either before or after the actual incident. In the video, a male is seen dragging another male away from the corner where the shooting occurred, and another male is seen limping.

Petitioner testified that the Chicago Police arrived at the scene shortly thereafter, as did a CTA manager. Petitioner stated that she described the incident to the manager in a manner consistent with her testimony. Petitioner further testified that she discussed the incident with police at the scene on the street, but that she was both reluctant and fearful to do so, instead preferring to do so in private in case anyone was watching.

Petitioner testified that the sudden, shocking and horrible nature of the shooting that she witnessed immediately caused her great distress, and that it caused her feel nervous, shaky and sick.

Petitioner testified that she was then brought back to her garage for roughly six hours where she submitted to a drug test and completed internal CTA reports. Those reports were admitted as Respondent's Exhibits 1 and 2.

Petitioner additionally testified that her manager directed her to contact an outfit called ComPsych for a psychological consultation. Petitioner did so, and the records from ComPsych were admitted as PX4. Said report states that Petitioner called on March 12, 2012, at 3:38 am, and stated as follows: "Caller is an adult female seeking help for anxiety regarding witnessing a shooting this morning which involved 5 or 6 young people who she had been talking to just prior to the incident. Caller reports that she is terrified that she could have been shot and she has been crying inconsolably ever since." (PX4). Petitioner testified that she had never sought psychological treatment before this incident.

Following the incident, Petitioner sought treatment with Dr. Daniel Kelley, a clinical psychologist. Petitioner first saw Dr. Kelley later that same day, on March 12. Dr. Kelley's records and bills were admitted as PX3. The "Clinical Interview" section of Dr. Kelley's Report of Psychological Examination states as follows: "Ms. Morris was tearful as she recounted the 3/11/12 work incident. She stated that, while working as a CTA bus operator on 3/11/12 'I was waiting on my relief at 55th and Ashland. Four young men walked past me. They said hi. They were like flirting. They crossed the street westbound on 55th. They stood in front of a store directly across the street from me. Then I saw a black man cross the street. He pulled out a gun from his front pocket. He pointed the gun and started shooting the four guys. One guy he shot right in the head. He immediately fell. There was a big pool of blood. Then two others hit the ground. They were shot and were screaming 'we've been hit. Call for help.' The fourth guy was running away but he fell maybe a block down the street. He was shot. I was crying and screaming as I watched this whole thing. The police arrived and started asking me what I saw. I was so scared to say anything. I told them not to talk to me with all these people out there. I didn't want them to think I'm talking to the police or they will come after me. I told the police if they have to talk to me to call the garage.'" (PX3).

At the initial consultation with Dr. Kelley, Petitioner reported experiencing sleep disturbance, fatigue, headaches, agitation, nightmares, tremors and crying. His diagnosis was Acute Stress Disorder based on the severe levels of depressive and anxiety symptoms she demonstrated, as well as emotional, thought and behavioral dysfunction. (PX3). He removed Ms. Morris from all work.

Petitioner was also referred to a psychiatrist, Dr. Joseph Beck. Dr. Beck prescribed a medication regimen of Clonazepam and Zoloft. (PX3).

Petitioner stated that she continued to treat with Dr. Kelley two to three times per week through the date of hearing, and that his treatment consisted of counseling, and eventually a gradual exposure back to busses and public places in general. (PX3).

Currently, Petitioner noted that she notices that she is "very scared inside" and that she experiences flashbacks involving the incident, including the kid who spoke to her before he was shot. She also noted that she feels scared sometimes because she doesn't know the shooter and is still on the same route. Petitioner testified that she had never been treated for any psychological condition, including depression, prior to the incident. She also noted that she is still treating with Dr. Kelly, and that her next appointment is Thursday September 20, 2012.

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:

In Illinois, psychological injuries are compensable under one of two theories, either (1) physical-mental, when the injuries are related to and caused by a physical trauma or injury, or (2) mental-mental, when the injures are caused by sudden severe emotional shock traceable to a definite time and place and cause even

though no physical trauma or injury was sustained. *Matlock v. Industrial Commission*, 746 N.E.2d 751, 755, 253 Ill.Dec.930, 934 (2001); citing *City of Springfield v. Industrial Commission*, 291 Ill.App.3d 734, 738, 226 Ill.Dec. 198, 685 N.E.2d 12, 14 (1997). Recovery for non-traumatically-induced mental disability is limited to those employees who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the nonemployment conditions, were the major contributing cause of mental disorder. *Matlock*, 746 N.E.2d at 755.

In *Matlock*, supra, the claimant was a flight attendant on a flight from Chicago to London who was forced to deal with an unruly passenger – specifically, a woman who claimed that the FBI was trying to kill her, claimed she couldn't breathe and demanded oxygen only to try to ignite the container using a cigarette lighter, and eventually sprayed a chemical on herself which turned out to be a topical anesthetic used by dentists. *Matlock*, 746 N.E.2d at 753. The fumes of the chemical eventually permeated the galley where the claimant was working and she began to feel nauseated and dizzy and experienced heart palpitations. *Id.*, at 753. She also subsequently sought treatment from a psychologist who diagnosed her with post-traumatic stress disorder stemming from the incident. *Id.*, at 754. The court ruled that the claimant could recover under both a mental-mental as well as a physical-mental theory, noting that the claimant's psychological disability arose from a situation of greater dimensions than the day-to-day emotional strain and tension to which all employees, including flight attendants, are subjected to in their employment, and that it was reasonable to infer claimant's illness was brought on by the sudden events and emotional shock she experienced on the date in question. *Id.*, at 756.

In the present case, the evidence shows that Petitioner did not suffer from and did not receive treatment for any psychological problems prior to the shooting incident on March 11, 2012. Furthermore, with respect to the three (3) factors necessary for recovery for non-traumatically-induced mental disability, the medical and testimonial evidence reveals that Petitioner's mental disorder was precipitated by an event that most assuredly was beyond the normal, day-to-day stresses that all employees are asked to deal with. Along these lines, it is safe to say that most of us are not forced to witness a gangland style shooting of four youths as part of our daily work activities. Indeed, even as a bus driver, one would not expect Petitioner to be subjected to such a traumatic set of circumstances on a regular basis. Thus, the first part of the analysis is satisfied.

Secondly, the record shows that Petitioner has been diagnosed with chronic post traumatic stress disorder, and that the circumstances under which this condition arose had a definite basis in reality – namely, the witnessing of four young men being gunned down by a would be assailant. Thus, the second part of the analysis is also satisfied.

Finally, with respect to the third prong of the analysis, the evidence clearly shows that the employment conditions, when compared with the nonemployment conditions, were the major contributing cause of mental disorder. More to the point, there was absolutely no evidence to suggest that Petitioner had any personal or other problems that may have contributed to her current emotional state. To the contrary, the histories of the various care givers to a person all relate Petitioner's PTSD to the event that Ms. Morris witnessed while waiting to relieve a fellow bus driver after having finished her lunch break. Thus, the third and final aspect of the analysis is likewise satisfied.

With respect to that lunch break, the Arbitrator also wishes to point out that at the time of the incident Petitioner was engaged in a reasonably necessary act of personal comfort (i.e. taking a lunch break),

which she had actually finished, and as such was decidedly "in the course of" her employment as she waited for her relief bus to arrive.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered a sudden severe emotional shock traceable to a definite time and place when she witnessed the shooting in question, and that as a result she sustained accidental psychological injuries arising out of and in the course of her employment on March 11, 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:

Petitioner credibly testified that she was not actively treating with a psychologist as of the date of accident, and that she was able to perform her job duties to her full capability. Respondent presented no evidence to the contrary. The histories Petitioner offered to CTA personnel, ComPsyc3, and Dr. Kelley were consistent with Petitioner's testimony, the medical records and internal CTA incident reports.

Therefore, based on the above, and the record taken as a whole, including the records of Dr. Kelley, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident on March 11, 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:

Petitioner is requesting the following medical bills, pursuant to the fee schedule:

Dr. Joseph Beck (PX1):	$620.00
Prescription Partners (PX2):	$328.34
Dr. Daniel Kelley (PX3):	$4,325.30

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 $5,273.64 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

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

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 prospective medical treatment in the form of continued cognitive behavioral therapy, as prescribed by psychologist Dr. Kelley, as well as the medication regime implemented by psychiatrist Dr. Beck. Respondent is hereby liable for the reasonable and necessary medical expenses associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

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

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 was temporarily totally disabled from March 12, 2012, through September 19, 2012, for a period of 27-3/7 weeks.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that issues of law and fact existed between the parties, and that as a result Respondent's conduct in the defense of this claim was neither unreasonable nor vexatious so as to warrant the imposition of penalties. Accordingly, Petitioner's claim for additional compensation pursuant to§19(k) and §19(l) as well as attorneys' fees pursuant to §16 of the Act is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF Sangamon)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terina Green,

Petitioner,

vs.

NO: 12 WC 35460

PPG Industries,

14IWCC0912

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 benefit rates,temporary disability and permanent disability, and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the permanent partial disability benefit rate to $695.78 per week, the maximum rate for the date of the accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $791.32 per week for a period of 22 2/7ths 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 $695.78 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability to 17.5% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $50.00 for medical expenses under §8(a) and 8.2 of the Act.

14IWCC0912

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 $72,000.00. 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:
SJM/msb OCT 2 4 2014
o: 9-25-14
44

Stephen Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GREEN, TERINA
Employee/Petitioner

Case# **12WC035460**

PPG INDUSTRIES INC
Employer/Respondent

14IWCC0912

On 1/21/2014, 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:

0333 SHAY & ASSOC LAW FIRM LLC
TIMOTHY M SHAY
260 E WOOD ST
DECATUR, IL 62523

0481 MACIOROWSKI SACKMANN & ULRICH LLP
ROBERT B ULRICH
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

14IWCC0912

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

Terina Green
Employee/Petitioner

v.

PPG Industries, Inc.
Employer/Respondent

Case # **12** WC **35460**

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 **November 22, 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 _____

14IWCC0912

FINDINGS

On **February 6, 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 **$61,722.96**; the average weekly wage was **$1,186.98**.

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 **$15,826.40** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$15,826.40**.

Respondent is entitled to a credit of **$0** for any medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $791.32 per week for 22 2/7 weeks, commencing September 26, 2012 through February 28, 2013, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $15,826.40 for temporary total disability benefits previously paid.

Respondent shall pay Petitioner $712.19 per week for a period of 87.5 weeks representing 17.5 % loss of the person as a whole, pursuant to Section 8(d) 2 of the Act.

Respondent shall pay the outstanding medical bill to Dr. Jones in the amount of $50.00, as set forth in Petitioner's Exhibit 7, directly to the medical provider pursuant to the Medical Fee Schedule as set forth 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

January 15, 2014
Date

JAN 21 2014

Terina Green v. PPG Industries, Inc., 12 WC 035460

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner testified she worked for Respondent from June 2, 2010 through May 30, 2012. Petitioner worked as a lead person and her job duties included cross-training herself to be able to do any of Respondent's jobs involving glass or containers and supervising inventory. Petitioner testified that when she injured her left shoulder on February 6, 2012, she was performing a job other than one normally assigned to her. Petitioner testified that on February 6, 2012, she was assisting with emptying dross boxes for the glass bath rack. Petitioner testified she was required to use a ten to fifteen pound iron hook and pull tin and other materials from the liquid molten glass bath. Petitioner testified that the liquid glass was really thick, and required significant manual labor to physically remove items. Petitioner testified that this required above shoulder level activity for approximately six hours.

Petitioner testified that after the job was performed, she noticed that her left shoulder was sore, painful, and uncomfortable. Petitioner is left hand dominant and had never hurt her left shoulder prior to this accident.

Petitioner reported the accident to Respondent's first aid department on February 22, 2012. (RX 1) She was then seen by Dr. Murtuza Bahrainwala, Respondent's physician, who put her on Naproxen for two days.

Petitioner underwent a left shoulder x-ray on February 23, 2012 at Decatur Memorial Hospital, as ordered by Dr. Bahrainwala of DMH Corporate Health Services. It was unremarkable. (PX 1, 2)

When the Naproxen proved unhelpful, Dr. Bahrainwala ordered an MRI. That was done on March 5, 2012. The MRI revealed degenerative changes of Petitioner's acromioclavicular joint without significant impingement and an abnormal signal within the rotator cuff tendon consistent with tendonopathy and a partial tear. In addition, fluid was seen within the subacromial/subdeltoid bursa with suspected full-thickness, and a partial width tear without evidence of retraction. An apparent split thickness tear of the biceps tendon within the groove was also noted. (PX 1, 2, 5) Upon review of the MRI, Dr. Bahrainwala referred Petitioner to Dr. Tyler Jones, an orthopedic surgeon. (PX 5)

On March 13, 2012, Petitioner presented to Dr. Tyler Jones, a board certified orthopedic surgeon, with complaints of left anterior shoulder and upper arm pain after pulling and lifting with machinery for about six hours on February 6, 2012, a work activity she had never performed before. (PX 5) Petitioner described her pain as dull, throbbing, and worsening. (PX 5)

Upon physical examination, Dr. Jones noted Petitioner was weak with pain in the supraspinatus area. Dr. Jones further noted upon review of the MRI and physical examination that Petitioner had a possible partial thickness tear and long head biceps tear. Dr. Jones diagnosed Petitioner with left shoulder pain and traumatic shoulder arthritis. Petitioner underwent a steroid injection as recommended by Dr. Jones. He also ordered physical therapy to treat Petitioner's partial thickness tear and left shoulder pain. (PX 5) Dr. Jones placed Petitioner on light work duty of no lifting, pulling, or pushing of ten pounds or more with her left arm, and no overhead work. (PX 5)

Petitioner testified that the injection provided no relief. She was able to work within the restrictions.

Petitioner then underwent eight physical therapy sessions from March 20, 2012 through April 9, 2012 at Decatur Memorial Hospital. At her last session Petitioner reported increased pain and the therapist recommended continued therapy to address unmet goals. (PX 3)

Petitioner was re-examined by Dr. Jones on April 10, 2012 reporting ongoing pain primarily between her left elbow and shoulder. Petitioner stated that the physical therapy made her symptoms worse. Upon physical examination, Dr. Jones noted that the pain was likely from the bicep tendon, and discussed a possible diagnostic scope with Petitioner. Dr. Jones diagnosed Petitioner with a left bicep tendon rupture, and left shoulder pain. Petitioner's work restrictions were removed and she was assigned to regular duty. (PX 5)

Petitioner testified that sometime in late March/early April or late April/early May she received a pay demotion from $19.50/hour to $11.50/hour. Petitioner testified that she continued performing the same job just at a lower rate of pay and without the title of "team leader." Petitioner further testified that while the demotion was to be plant-wide, it wasn't.

Thereafter Petitioner wished to obtain a second opinion and asked Dr. Jones to provide her with a copy of her records. The doctor did so and Petitioner scheduled an appointment with Dr. Jeffery Smith. (PX 5, 6)

Petitioner presented to Dr. Smith of the Central Illinois Hand Center on May 10, 2012. Petitioner provided a history of her undisputed accident as well as a summary of her treatment with Dr. Jones. On examination, Dr. Smith noted limited forward elevation and lateral abduction of Petitioner's left shoulder. Petitioner had positive impingement signs and pain with resisted elbow flexion and tenderness directly over her biceps tendon. Dr. Smith's diagnosis was left shoulder partial rotator cuff tear and proximal biceps tear. Petitioner reported she had been in therapy which she felt might have aggravated her shoulder. Dr. Smith recommended a trial of a second steroid injection and a home exercise program; however, if that did not help he also believed surgery might be necessary. (PX 5)

Petitioner testified that neither the second cortisone injection nor her home exercise program had provided any relief.

Petitioner voluntarily terminated her employment with Respondent on May 30, 2012 as she had a better employment opportunity with G & D Integrated and chose to take it. Petitioner began working as a production supervisor with G & D earning an annual salary of $41, 500.00.

On May 31, 2012, Petitioner returned to Dr. Smith for a follow-up evaluation of her left shoulder. Petitioner was doing pretty well and her pain and function had improved. Biceps strength was strong. Dr. Smith noted that Petitioner had some discomfort with overhead elevation but could easily forward elevate and abduct her shoulder to 120-130°. According to Dr. Smith's office note, "We discussed this, the issue of w/c and job changes. I told her to seek legal counsel for policies regarding her ability to obtain w/c for treatment if she changes jobs or declines to pursue surgery at this time. We will wait to hear from her in the future." (PX 6)

On July 9, 2012, Petitioner was examined by Dr. Atluri at Respondent's request for purposes of issuing an impairment rating. Thereafter, Dr. Atluri issued a report. (RX 5, dep. ex. 2) In his report Dr. Atluri reviewed Petitioner's history of the accident, current symptoms, work history, physical examination and records (including an MRI of Petitioner's left shoulder). His impression was that Petitioner had a left rotator cuff tear and adhesive capsulitis which had plateaued in terms of conservative treatment. He noted surgery might improve her symptoms but Petitioner had refused it, to date. Dr. Atluri based his impairment rating on a diagnosis of a full thickness rotator cuff tear with residual symptoms unsupported by consistent objective findings (the doctor noting inconsistent range of motion and strength testing during the exam). The doctor ultimately provided an impairment rating of 5% of the upper extremity and 3% of the whole person. (RX 5, dep. ex. 2)

On September 20, 2012, Petitioner returned to Dr. Smith for a follow-up evaluation of her left shoulder. (PX 6) Dr. Smith reported that Petitioner was "really unable to continue doing her work. She has quite a bit of trouble with the left shoulder." (PX 6) Dr. Smith reported that Petitioner's biceps area was most painful. Specifically, compression over the biceps tendon in the bicipital groove caused Petitioner significant pain and discomfort. Dr. Smith diagnosed Petitioner with left shoulder pain and recommended that Petitioner proceed with an arthroscopic evaluation of the left shoulder including a possible subacromial decompression, partial distal clavicle excision, repair of the rotator cuff if necessary, and subpectoral proximal biceps tenodesis. (PX 6)

On September 26, 2012, Dr. Jeffrey Smith performed a left shoulder arthroscopy with subacromial decompression, a rotator cuff repair, intra-articular evaluation, debridement, and removal of loose bodies, and a proximal biceps tenodesis. (PX 4; 6) Intra-operatively, Dr. Smith noted that Petitioner "had no full thickness rotator cuff tear, but there was an impingement area where it was hitting the anterolateral corner of the acromion and it was being gouged." He added that "there was an 80% tear." Petitioner was also noted to have a slight SLAP lesion tear. (PX 4)

On October 11, 2012, Petitioner presented to Dr. Smith for a follow-up examination of her left shoulder. (PX 6) Petitioner complained of significant pain and stiffness. Dr. Smith noted therapy should begin and Petitioner remained unable to return to work. (PX 6)

On October 15, 2012, Petitioner underwent a shoulder evaluation at the Central Illinois Hand Center. (PX 6) Petitioner described her left shoulder as "cannot lift, feels like a t-rex arm". (PX 6) Petitioner was prescribed physical therapy and a CPM machine to improve her left shoulder range of motion. (PX 6)

Petitioner underwent physical therapy at the Central Illinois Hand Center, as ordered by Dr. Smith, from October 11, 2012 through February 4, 2013. (PX 6)

On October 23, 2012, Petitioner presented to Dr. Smith for a follow-up of her left shoulder. (PX 6) On exam, Petitioner was doing "really well." She had good passive range of motion; however, she did not yet have "great motion." Dr. Smith instructed Petitioner to continue with therapy and remain off work. (PX 6) It was also noted that Petitioner had very slow progress with her left upper extremity in physical therapy. (PX 6) Therapy records confirm this. (PX 6)

On November 20, 2012, Petitioner again presented to Dr. Smith for follow-up. Dr. Smith noted that Petitioner still had difficulty with active full range of motion, particularly overhead. Dr. Smith recommended Petitioner continue therapy, placed Petitioner on a five pound weight limit, continued her restriction from work, and noted concerns regarding the development of some adhesions and scar tissue. (PX 6)

Petitioner testified that she could have returned to work for G & D after her surgery but she didn't because the company went out of business having lost a contract with ADM. Therefore, she had no job to return to.

On December 13, 2012, Petitioner returned to Dr. Smith for another visit reporting left shoulder stiffness and persistent pain. Dr. Smith noted it should improve with range of motion. Dr. Smith recommended Petitioner continue therapy and a home exercise program, and continued her restriction from work as she should not be lifting with her arm. (PX 6)

As of January 10, 2013 Dr. Smith noted Petitioner still had some tightness in her left shoulder and the possible presence of scar tissue. Dr. Smith reported concern regarding Petitioner's biceps tenodesis incision, as it had a "ropey red hypertrophic scar." Dr. Smith recommended Petitioner use a hydrocortisone cream, and he continued her work restriction of no lifting. (PX 6)

Dr. Atluri re-examined Petitioner on January 21, 2013.

At her February 7, 2013 visit with Dr. Smith Petitioner still had some pain in her arm; however, she reported she was doing better and continuing to improve. He recommended Petitioner continue to work on strengthening her arm. No other treatment or therapy was recommended. Dr. Smith noted Petitioner could return to work, at regular duty, on March 1, 2013 and that he anticipated Petitioner would reach maximum medical improvement on March 15, 2013. He discharged Petitioner from his care. (PX 6)

In his report dated February 12, 2013, Dr. Atluri noted Petitioner's symptoms (as of their January 21st visit) had progressively worsened since July 9, 2012 (their earlier visit) and Petitioner had ultimately undergone surgery which helped, although post-operatively Petitioner developed a constant pain extending from her lateral arm to her elbow. Petitioner was still off work. Dr. Atluri reviewed additional records, examined Petitioner, and concluded that she had some ongoing stiffness and weakness in her shoulder post-surgery. He did not believe she was yet at maximum medical improvement (MMI) and, therefore, an impairment rating was premature. When Petitioner did reach MMI, he expected some persistent stiffness and weakness to result but nothing that should interfere with Petitioner's work duties as she described them. Dr. Atluri was also of the opinion that Petitioner was currently capable of working at her usual job without any restrictions as Petitioner reported to him that her job was that of a supervisor and didn't involve any significant lifting or reaching on a routine basis. (RX 5, dep. ex. 3)

The parties agree that Petitioner's temporary total disability benefits were terminated on February 12, 2013. (AX 1; Petitioner's unrebutted testimony)

Dr. Atluri re-examined Petitioner on March 18, 2013 (thereafter issuing his report on April 3, 2013) for the purpose of determining an impairment rating in light of Petitioner having reached MMI. (RX 5, dep. ex. 4)[1]

Petitioner testified that she returned to Dr. Smith on June 4, 2013 for a laser procedure to try to disintegrate a keloid scar located on her left anterior shoulder. Petitioner testified that the injection broke down the scar "a little."

The evidence deposition of Dr. Prasant Atluri was taken on August 28, 2013. Dr. Atluri is board certified in orthopedic surgery with a certificate of added qualification in surgery of the hand. (RX 5, p. 6) Dr. Atluri performed an Independent Medical Examination of Petitioner on July 9, 2012. Dr. Atluri testified that at the time of his examination, Petitioner complained of weakness, numbness, and tingling of her left shoulder that occasionally extended into her left hand. (RX 5, pp. 9-10) Petitioner also complained of limited range of motion in her left shoulder. (RX 5, p. 10) Petitioner described her pain as severe and continuous, and added that her symptoms interfered with her sleep. (RX 5, p. 10) Petitioner complained that she had difficulty washing her hair and reaching for her bra. (RX 5, Ex 2)

[1] The results will be discussed in his deposition summary which follows.

Dr. Atluri testified that based upon her history and his physical examination, he diagnosed Petitioner with a left shoulder rotator cuff tear, and left shoulder adhesive capsulitis. (RX 5, p. 10) Dr. Atluri testified that he thought surgical intervention would be beneficial. (RX 5, pp. 10-11) Dr. Atluri testified that based upon Petitioner's lack of interest in surgery, he felt she had reached maximum medical improvement at that time. (RX 5, p. 11) Dr. Atluri also performed an AMA evaluation, which revealed a five percent upper extremity impairment, and a three percent whole person impairment. (RX 5, p. 11) X-rays of the left shoulder performed that day revealed some thickening of the anterior capsule, as well as signal changes in the superior labrum. (RX 5, Ex 2)

Dr. Atluri testified that Petitioner returned for a re-examination on January 21, 2013. (RX 5, p. 11) Petitioner complained that her symptoms had progressively worsened. (RX 5, Ex 3) Petitioner's Quick-Dash Disability score was 61.36. (RX 5, Ex 3) X-rays of the left shoulder revealed a slightly type two acromion. (RX 5, Ex 3) Dr. Atluri testified he diagnosed Petitioner with a left shoulder rotator cuff tear, status post open rotator cuff repair, status post left shoulder arthroscopy with open biceps long head tenodesis, and left shoulder adhesive capsulitis. (RX 5, pp. 12-13) Dr. Atluri testified that Petitioner had not reached maximum medical improvement at that point. (RX 5, p. 13)

According to Dr. Atluri, Petitioner returned to see him on March 18, 2013 for another evaluation. (RX 5, p. 13) Petitioner complained of pain in her left shoulder and arm. (RX 5, Ex 4) She stated that her left shoulder motion was worse than her pre-operative motion. (RX 5, Ex 4) Petitioner further added that she had pain when lifting a gallon of milk as well as when she tried to move her shoulder. (RX 5, Ex 4) Petitioner stated that she had constant pain radiating into her left elbow and occasionally into her hand. (RX 5, Ex 4) Petitioner reported occasional tingling involving the left small and ring fingers as well as persistent weakness. (RX 5, Ex 4) Petitioner stated that she altered how she dressed herself, as well as her daily activities such as cleaning and showering. (RX 5, Ex 4) Petitioner stated she could not sleep on her side due to pain. (RX 5, Ex 4)

Dr. Atluri testified that he authored an April 3, 2013 report following this examination. (RX 5, p. 14) Dr. Atluri assessed a Quick-Dash Disability score of 56.8. (RX 5, p. 15) Dr. Atluri testified that this score was at the higher end of moderate in terms of severity of residual symptoms. (RX 5, p. 16) Dr. Atluri testified that it was significant that on March 18, 2013, Petitioner still had a bit of residual tenderness in her left shoulder, her left shoulder motion was not normal, she had some stiffness, and loss of rotation as well as loss of elevation. (RX 5, p. 17)

Dr. Atluri testified that while a normal rotation is between sixty-five to ninety degrees, her external and internal rotation was about forty degrees. (RX 5, p. 17) Dr. Atluri added that an elevation or flexion of the arm is typically 165 degrees, but her score was 125 degrees. (RX 5, pp. 17-18) Dr. Atluri testified that she had loss of motion in those three ranges. (RX 5, p. 18) Dr. Atluri testified Petitioner also had some weakness secondary to some pain or discomfort, as well as some pain with a cross arm maneuver. (RX 5, p. 18)

Dr. Atluri diagnosed a left shoulder rotator cuff tear, status post open rotator cuff repair, status post left shoulder arthroscopy, with open biceps long head tenodesis, and left shoulder adhesive capsulitis. (RX 5, Ex 4) Dr. Atluri testified that he opined Petitioner had reached maximum medical improvement at this time. (RX 5, p. 19) Dr. Atluri testified that he assessed Petitioner's final impairment rating to be 9% upper extremity impairment and a whole person impairment value of 5%. (RX 5, p. 27)

Dr. Atluri testified that Petitioner may have some minor improvements in her motion, but that he did not expect significant improvement in the future. (RX 5, p. 35) Dr. Atluri added that Petitioner has deficits in all ranges of motion and will continue to have deficits on a permanent or indefinite basis. (RX 5, pp. 35, 36)

Dr. Atluri testified that the pain Petitioner experienced was consistent with the type of injuries she sustained as well as the type of surgical procedure she underwent. (RX 5, pp. 35-36)

Dr. Atluri testified that the surgical procedure Dr. Smith performed was reasonable and necessary. (RX 5, p. 39) Dr. Atluri testified that the history Petitioner gave him was suggestive of a temporal relationship to her workplace injury. (PX 6, pp. 41-43) Dr. Atluri testified that if Petitioner was performing overhead work on the date of her workplace accident that would be the type of activity that could cause the symptoms of which she complained. (RX 5, p. 45) Dr. Atluri testified that "the symptoms that she described and attributed to her work activities are those which led to the need for surgery." (RX 5, p. 52) Dr. Atluri testified that he was not provided with any records showing Petitioner had any prior problems with her left shoulder. (RX 5, p. 45)

Dr. Atluri testified that ten percent of his time is spent doing medical/ legal work. (RX 5, p. 46) He testified that he has cases with Respondent's attorney six times a year for the past five years. (RX 5, p. 46) Dr. Atluri testified that he performs about seventy percent work for respondents and thirty percent for plaintiffs. (RX 5, p. 47) Dr. Atluri estimated he earns about $100,000.00 a year doing medical/ legal work. (RX 5, pp. 47-48) Dr. Atluri testified he charges $1,000.00 an hour, with a two hour minimum, for a deposition and $1,200.00 for an IME as well as an impairment rating. (RX 5, p. 49)

At the November 22, 2013 Petitioner testified that her last day of work with G & D Integrated was September 25, 2012. Petitioner could not recall if she underwent a post-offer physical examination with G & D. She did acknowledge that the job with G & D was supervisory in nature and required no lifting.

Petitioner further testified that she continues to do what she is able to do with her left arm as recommended by Dr. Smith. She testified that she tries to do something new each day and uses Thera-bands and weights.

Petitioner testified that the scar is very easily irritated and constantly itches. Petitioner added that the scar is tender to the touch, specifically with clothing and shower water. Petitioner testified that whenever she tries to reach across or move in a similar motion, she "feels the bend in it." Petitioner added that she feels discomfort from the scar when she raises her left shoulder and that it "reminds" her all the time that it is there.

During the hearing the Arbitrator was afforded the opportunity to examine Petitioner's scar. She noted that while sitting about four feet away from Petitioner the scar was clearly apparent and was probably four inches in length right above Petitioner's armpit, and about half to three-quarters of an inch wide. Petitioner's scar was noted to have a deep pink to red border on the bottom, and then a fainter pink for the majority of the scar. Petitioner was also noted to be fair skinned, and one could readily see about half of it extending beyond the edge of her top.

Petitioner testified that she also has a scar on the upper portion of her left shoulder. The Arbitrator noted that this scar was far fainter in appearance and about two and a half inches in length. It did not have the redness that made the other scar as apparent, and it blended in a little more, but there was a scar there. The Arbitrator further recalls that when Petitioner turned in the witness chair the light hit the scar in a different way and there was a more visible scar about three inches long. With a sleeveless top, it was visible.

Petitioner testified that she still experiences pain in her left shoulder, mostly on the outside, and radiating down her left arm to her elbow and occasionally to her hand. Petitioner added that in relation to pain radiating down her arm, "I can just be sitting there, and all of a sudden it will come on." Petitioner described the pain as a "kind of tingling when it gets to my hand, and I clinch my hand open and close, and it eventually goes away". Petitioner described her left shoulder pain as intermittent and a 6-7/10 on the pain scale. Petitioner testified that she notices her left shoulder pain when she uses the lawn mower, adding that after it is very sore and tingles. Petitioner testified that she experiences left shoulder pain when cleaning her house, driving, and sitting. Petitioner testified that her shoulder will pop when she tries to use her arm.

Petitioner testified that she has issues with range of motion. While she can straighten her arm to about a forty-five degree angle, it then becomes more difficult to move. Furthermore, when she reaches for something, she has to lean over or assist herself with her other arm.

The Arbitrator had the opportunity to observe Petitioner's arm movement, noting she could raise her left arm to her side and reach a horizontal plane and then go about another forty-five degrees. Petitioner could not extend her left arm straight (parallel) with her head.

The Arbitrator further noticed that when Petitioner put her left arm behind her back she could get it to the waist level, as if a gentleman was putting a wallet in his back pocket, but then she was unable to raise it any higher. It further appeared that Petitioner was unable to raise her arm above her waist and would not be able to fasten her bra from the back.

Petitioner testified that since she is left hand dominant, she cannot perform cleaning, washing dishes, cleaning the bathroom, or carrying a bucket of water very well. Petitioner added that she either has to get assistance from her family, use both hands, or attempt to use her right hand if no one is available.

Petitioner's medical bills are found in PX 7. The only unpaid medical bill is for services rendered by Dr. Jones on June 4, 2013 in the amount of $50.00.

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being causally connected to a work-related accident?

Relying on a chain of events, the records, reports, examinations, and diagnoses of all the doctors who examined or treated Petitioner, including Dr. Jones, Dr. Smith, and Dr. Atluri, the Arbitrator concludes that Petitioner's condition of ill-being in her left shoulder is causally connected to her February 6, 2012 accident. (PX 4; RX 5) The Arbitrator finds Dr. Atluri's August 28, 2013 testimony credible, particularly his opinion that "the symptoms that she described and attributed to her work activities are those which led to the need for surgery." (RX 5, p. 52) Dr. Atluri also testified that the history Petitioner gave him was suggestive of a temporal relationship to her workplace injury. (PX 6, pp. 41-43) Dr. Atluri testified that if Petitioner was performing overhead work on the date of her workplace accident that would be the type of activity that could cause the symptoms of which she complained. (RX 5, p. 45)

Issue (J): Has Respondent paid all appropriate charges for reasonable and necessary medical treatment?

Dr. Atluri testified that the surgical procedure Dr. Smith performed was reasonable and necessary. (RX 5, p. 39) Dr. Atluri testified that he thought surgical intervention would be beneficial. (RX 5, pp. 10-11) Furthermore, the records of Dr. Jones and Dr. Smith indicate Petitioner's treatment subsequent to February 6, 2012 was related to her left shoulder workplace injury. Petitioner also testified and the records reflect that treatment for her left shoulder injury moderately alleviated her symptoms. Therefore, the Arbitrator concludes that all of Petitioner's treatment has been reasonable and necessary. The parties agreed that the only outstanding charge was for Dr. Jones' June 4, 2013 office visit.

Respondent shall pay the outstanding medical bill of $50.00, as set forth in Petitioner's Exhibit 7, directly to the medical provider pursuant to the Medical Fee Schedule as set forth in Section 8(a) of the Act.

Issue (K): Is Petitioner entitled to temporary total disability benefits?

Petitioner and Respondent agree on the period of temporary total disability from September 26, 2012 through February 12, 2013. (AX 1) Petitioner testified that her TTD benefits were terminated on February 12, 2013 abased upon Dr. Atluri's report of the same date. Petitioner contends she is entitled to TTD benefits for an additional 17 days (through February 28, 2013) as Dr. Smith did not release her to return to work until March 1, 2013.

Dr. Atluri's return to work opinion as set forth in his February 12, 2013 report was based upon his examination of January 21, 2013. During that examination he mistakenly believed Petitioner could raise her arm all the way.[2] Additionally, while Petitioner's job required no lifting Dr. Smith's concerns during this time centered around Petitioner's poor endurance and strength and he continued her with physical therapy in January and February to address those concerns. Dr. Atluri did not ask Petitioner about how her ability to perform her job might be affected by persistent stiffness and weakness, limitations he noted in his exam and report. Dr. Smith's decision to keep Petitioner off work through February 28, 2013 is given more deference. Petitioner's condition had no stabilized nor had she reached maximum medical improvement.

Therefore, the Arbitrator concludes that Petitioner was temporarily and totally disabled from September 26, 2012 to February 28, 2013. Respondent is therefore ordered to pay Petitioner $791.32 per week for 22 2/7 weeks in temporary total disability benefits. Respondent shall be given a credit of $15,826.40 for temporary total disability paid.

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

For accidental injuries occurring on or after September 1, 2011, Section 8.1b of the Act lists the following criteria to be weighed in determining the level of permanent partial disability:

1) **The reported level of impairment** - 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.

2) **The occupation of the injured employee;**

3) **The age of the employee at the time of the injury;**

4) **The employee's future earning capacity; and**

[2] A mistake Petitioner corrected when she was next examined by the doctor in March of 2013.

5) Evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability.

1. The level of impairment: Dr. Atluri furnished multiple impairment evaluation reports. Most important is his last one which was based upon Petitioner having finally reached maximum medical improvement. Dr. Atluri found Petitioner's complaints to be credible at that time and he concluded her impairment was nine percent of the upper extremity or five percent of a whole person. Petitioner's Quick Dash score was 56.8 which he testified was at the higher end of moderate in terms of severity. (RX 5, p. 27) Dr. Atluri testified that while a normal rotation is between sixty-five to ninety degrees, Petitioner's external and internal rotation was about forty degrees. (RX 5, p. 17) Dr. Atluri added that an elevation or flexion of the arm is typically 165 degrees, but Petitioner's score was 125 degrees. (RX 5, pp. 17-18) Dr. Atluri also testified that Petitioner had loss of motion in those three ranges (RX 5, p. 18) and that Petitioner also had some weakness secondary to some pain or discomfort, as well as some pain with a cross arm maneuver. (RX 5, p. 18) Dr. Atluri testified that it was significant that on March 18, 2013, Petitioner still had a bit of residual tenderness in her left shoulder, her left shoulder motion was not normal, she had some stiffness, and loss of rotation as well as loss of elevation. Dr. Atluri testified that Petitioner may have some minor improvements in her motion, but that he did not expect significant improvement in the future. (RX 5, p. 35) Finall y, Dr. Atluri added that Petitioner has deficits in all ranges of motion and will continue to have deficits on a permanent or indefinite basis. (RX 5, pp. 35, 36) The Arbitrator gives considerable weight to this factor.

2. Petitioner's Occupation: Petitioner's occupation at the time of the accident was that of a factory worker. She had performed those duties for approximately six years prior to her accident. At the time of arbitration Petitioner was unemployed as her last employer, G & D Integrated, had shut down. Petitioner voluntarily left her employment with Respondent to work for G & D. The job for G & D was supervisory in nature and, by Petitioner's description, less physical than her job for Respondent. Petitioner is left hand dominant. No direct evidence was presented to show that Petitioner's current unemployment status is attributable to her work injury. How ever, based upon Petitioner's credible explanation of her former job duties for Respondent, the Arbitrator reasonably infers that it would be challenging for Petitioner to engage in that type of factory work in light of her injury.

3. Petitioner's Age: Petitioner was thirty-nine years old at the time of her accident. No direct evidence was presented by either party as to how Petitioner's age impacts any disability. However, the Arbitrator notes that Petitioner may reasonably be expected to live and work with the effects of her injury for a longer time than an older individual and, therefore, her permanent partial disability may be greater than that of an older individual.

4. Future Earning Capacity: No evidence was presented as to how Petitioner's future earning capacity was affected by her injury. While Petitioner testified to a reduction in pay after her accident, she did not prove by a preponderance of the evidence that the reduction was related to her injury.

5. Evidence of Disability Corroborated in the Treating Records: Petitioner's records from her treating physicians have demonstrated evidence of disability. Petitioner underwent surgery to her left shoulder which included a subacromial decompression, rotator cuff repair (for an 80% tear), a proximal biceps tenodesis, and intra-articular evaluation, debridement, and removal of loose bodies. While surgery improved Petitioner's condition a nd s he w as rele ased w ith n o restrictions, she has continued to notice limitations in her left arm and shoulder. Post-operatively the records of Dr. Smith and the physical therapist show ongoing pain and stiffness in Petitioner's left arm and shoulder. Additionally, while there is no treating record to corroborate Petitioner's testimony regarding her visit and procedure with Dr. Smith on June 4, 2013, the Arbitrator notes Dr. Smith's multiple notations and comments concerning scar tissue and adhesions in earlier visits.

Petitioner's testimony concerning her injury and her ongoing symptoms and complaints was credible. Even Respondent's impairment rating physician, Dr. Atluri, found her complaints and responses during their last examination credible.

In light of Section 8(b)1 of the Act and after considering the foregoing factors, the Arbitrator concludes that Petitioner has suffered a loss of 17.5% of a person as a whole as a result of her work accident. As Petitioner's injury is primarily to her left shoulder, an award under 8(d)1 is appropriate pursuant to *Will County*.

****

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

Martha Aragon,

Petitioner,

vs.

No. 00 WC 02595

14IWCC0913

University of Illinois Hospital,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the appellate court. The appellate court found the Commission's decision was not final, precluding judicial review. The procedural history of the case is as follows:

On January 18, 2000, Petitioner filed an application for adjustment of claim alleging unspecified injuries to both hands, with the accident date of October 21, 1999. On January 30, 2009, the Arbitrator filed a decision finding that Petitioner proved a repetitive trauma claim (bilateral carpal tunnel syndrome) and awarding temporary total disability benefits, medical expenses and permanent partial disability benefits representing a 25 percent loss of use of the right hand and a 22.5 percent loss of use of the left hand.

On May 26, 2010, the Commission issued a decision and opinion on review, with Commissioners Dauphin and Mason finding the claim compensable and Commissioner Lindsay dissenting. However, Commissioners Dauphin and Mason disagreed as to the proper permanency award. Commissioner Dauphin, writing for the majority, corrected, clarified and otherwise affirmed and adopted the Arbitrator's decision, while Commissioner Mason found the record supported an award of "odd lot" permanent total disability benefits.

On judicial review, the circuit court confirmed the Commission's decision. However, the appellate court found the Commission's decision was not final, precluding judicial review. The

14IWCC0913

appellate court explained: "In light of the fact that a majority of the commissioners did not approve the PPD award, the decision issued by the Commission is not final because it does not dispose of the claimant's request for permanent disability benefits in accordance with the unambiguous language of section 19(e)." University of Illinois Hospital v. Workers' Compensation Comm'n, 2012 IL App (1st) 113130WC, ¶ 11. The appellate court vacated the judgment of the circuit court and remanded the matter to the Commission "for entry of a final decision with regard to the claimant's request for permanent disability benefits."

Thus, the only issue on remand is permanent disability. Having carefully considered the record and being advised of the facts and law, the Commission corrects and otherwise affirms and adopts the decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission affirms the Arbitrator's permanency determination and corrects the Arbitrator's decision on page 10 to reflect Respondent made only one post-accident offer of employment to Petitioner, rather than repeated offers. Further, the Commission corrects the Arbitrator's decision to reflect the permanency award corresponds to 90.25 weeks, rather than 73.625 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed January 30, 2009, is hereby corrected as stated herein and otherwise affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.[1]

DATED:
SM/sk
o-09/25/20 OCT 24 2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

[1] The Commission is not unmindful that pursuant to §19(f)(1) of the Act, the decision of the Commission in a case brought against the State of Illinois is not subject to judicial review. However, given the appellate court's decision in this matter, as well as the appellate court's decision in University of Illinois v. Industrial Comm'n, 365 Ill. App. 3d 906 (2006), confirming the Commission's award of benefits, it appears a claim brought against the University of Illinois Hospital is not considered to be a claim against the State of Illinois for the purposes of §19(f)(1).

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ARAGON, MARTHA
Employee/Petitioner

Case# **00WC002595**

UNIVERSITY OF ILLINOIS-CHICAGO
Employer/Respondent

14IWCC0913

On 01/30/2009, 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 0.34% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

CORTI ALEKSY & CASTANEDA
180 N LASALLE ST
SUITE 2910
CHICAGO, IL 60601

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

1685 KOPKA, PINKUS & DOLIN, PC
200 N LASALLE ST
SUITE 2850
CHICAGO, IL 60601

0902 UNIVERSITY OF IL/CLAIMS MGMT
CHUCK HUTCHISON
1737 W. POLK - M/C 940 SUITE B
CHICAGO, IL 60612

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

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

JAN 30 2009

BERTHA E. PARKER, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
) 14IWCC0913
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

Martha Aragon
Employee/Petitioner

v.

University of Illinois - Chicago
Employer/Respondent

Case #**00**WC0**02595**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Richard A. Peterson**, arbitrator of the Commission, in the city of **Chicago**, on **September 2 and 23, 2008**. After reviewing all of the 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. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Other ____

FINDINGS

- On **October 21, 1999**, the respondent, **University of Illinois - Chicago**, *was* operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.
- On this date, the petitioner ***did*** sustain 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 $**25,229.88**; the average weekly wage was $**485.19**.
- At the time of injury, the petitioner was **45** years of age, ***single*** with **-1-** children under 18.
- Necessary medical services ***have*** been provided in part by the respondent.
- To date, $**117,618.17** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ **323.46**/week for **179 4/7ths** weeks, from **February 14, 2000** through **July 29, 2003**, which is the period of temporary total disability for which compensation is payable. Respondent shall be entitled to a credit for for all amounts heretofore paid.
- The respondent shall pay the petitioner the sum of $**291.11**/week for a further period of **73.625** weeks, as provided in Section **8(e)(9)** of the Act, because the injuries sustained caused **Petitioner to suffer the loss of use of her right hand to the extent of 25% thereof and to her left hand to the extent of 22.5% thereof**.
- The respondent shall pay the petitioner compensation that has accrued from **July 30, 2003** through **the present**, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $**4,912.67** for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay $**-0-** in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $**-0-** in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $**-0-** 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.

Signature of arbitrator

January 29, 2009
Date

ICArbDec p. 2

JAN 30 2009

FINDINGS OF FACT

Petitioner testified through a Spanish interpreter that at the time of the hearing she was 54 years of age, approximately 5 feet 2 inches tall and weighed 210 pounds. Petitioner started working for Respondent on November 24, 1989; her last day of work was February 13, 2000. Petitioner performed various job duties during this period of employment but all of them involved cleaning. She normally worked the third shift or night shift until she was moved to a building entitled "912" where she worked just prior to her alleged injury date of October 21, 1999. Petitioner testified that when she worked at Building "912," she worked the day shift from 7:30 a.m. to 4:30 p.m. with two 15 minute breaks and one 30 minute break.

Petitioner described the various cleaning duties she was required to do while working at Building "912": there were a lot of offices and she would remove a lot of garbage and take it out to the dumpster. In addition, Petitioner had to clean both public and private bathrooms; empty trash; dust windows; vacuum and mop both the floors of the building as well as mop the bathrooms. While mopping, Petitioner had to dump her mop bucket twice – once while cleaning the floors and once while rinsing the floors. She also had to clean the bathrooms using a smaller bucket wiping things with her right hand while she held onto the bucket with her left hand. She used a large mop to do the corridors of the building and used both hands to move the mop. Petitioner testified that she would usually throw out the garbage bags into the dumpster twice a day and that the bags could weigh up to 50lbs. During her last hour of work, Petitioner would have to take out and dump carts of water. Respondent submitted into evidence a job description which purported to indicate information regarding the job of "Building Service Worker." RespEx10. The work activities of a building service worker included 25% of the time doing sweeping, stripping and refinishing floors using automatic waxers, buffers and single disc machines; 25% of the time cleaning and servicing lavatory and restrooms on a daily basis; 25% of the time gathering and dumping waste, washing walls, and dusting furniture and fixtures routinely; 15% other miscellaneous duties. RespEx10.

Petitioner testified that on October 21, 1999, while performing her job duties, she noticed pain in her hands. She had never had this type of pain before and had suffered no prior accidents or injuries to her hands prior to October 21, 1999. She notified her supervisor, Jesse, informing him that she couldn't move her hands any longer and that her hands were very tired. After reporting these complaints, Petitioner was referred to Respondent's medical clinic.

The Industrial Clinic triage note reads as follows: "Patient states numbness in hands with pain for past 6 months....tingling and numbness in hands and forearms for three weeks. Fatigue in shoulders and neck. Works as a janitor cleaning all day." PetEx6. The physician at Respondent's clinic diagnosed Petitioner with bilateral hand paresthesias; the doctor prescribed occupational therapy and placed Claimant on limited work activities with no lifting/carrying over five pounds and limit mopping to 10 minutes every hours. PetEx6. Petitioner continued to work and started occupational therapy as directed. The initial therapy note indicated: "Maintenance worker whose duties include mopping, sweeping and general cleaning reports sudden onset of extreme pain and numbness in bilateral hands on 10/20/1999." PetEx6. The records show that Petitioner participated in occupational therapy from October 25, 1999, through November 19, 1999. PetEx6.
An Injury Report contained within Respondent's records indicate the date of accident as October 21, 1999 wherein Petitioner reported "(w)hile mopping the floor my hands closed up." PetEx6. Petitioner underwent an EMG on November 18, 1999, which revealed bilateral carpal tunnel syndrome to a moderate degree. PetEx6. During a November 29, 1999, follow-up visit with Respondent's clinic, Petitioner was referred to Dr. Gonzales. The initial evaluation with Dr. Gonzales took place on December 15, 1999; upon examination, the doctor diagnosed Petitioner with bilateral carpal tunnel syndrome related to her work as a janitor and placed her on a surgery schedule. PetEx6. In a letter dated December 15, 1999, Dr. Gonzales stated: "(i)t is my feeling that although carpal tunnel syndrome may not, per se, be caused by work activities, it is exacerbated by repetitive work activity and thus covered by WC." PetEx6.

Petitioner sought a second opinion on the surgical recommendation from Dr. John Fernandez. This evaluation took place on January 27, 2000. Dr. Fernandez testified via deposition that he is fluent in Spanish and communicated in Spanish with Petitioner at his consultations. PetEx11, p. 7. Dr. Fernandez testified that Petitioner described her work activities to him in great detail. PetEx11, p. 8. The doctor also noted that she did not have any contributory past medical history to her problem. PetEx11, p. 9. Dr. Fernandez diagnosed Petitioner with bilateral wrist carpal tunnel syndrome of moderate severity with recalcitrant to conservative treatment. PetEx11, p.11. He also concluded that there was a causal relationship between her occupational history over the previous ten years and the development of her carpal tunnel syndrome. PetEx11, p.12. Dr. Fernandez agreed that Petitioner required surgical intervention and referred her back to Dr. Gonzales for that treatment. PetEx11, p.12.

Petitioner returned to see Dr. Fernandez on February 8, 2000 requesting that he take over her care. PetEx7 (visit of 2/8/2000). Petitioner also returned to the University Health Services at which time she was placed on work restrictions of the right arm limited to 10 pounds for lifting, carrying, pushing and pulling. PetEx6. Dr. Fernandez also placed restrictions on Petitioner as of February 14, 2000. PetEx7. Petitioner's unrebutted testimony was that her restrictions could no longer be accommodated as of February 14, 2000.

Respondent sent Claimant for a Section 12 examination with Dr. Paul Papierski. RespEx1. Dr. Papierski noted in his history that Petitioner bilateral hand pain and numbness and tingling which began gradually but became worse in October, 1999. RespEx1. Dr. Papierski reviewed a job evaluation and determined that "Building Service Worker" does not indicate anything considered to contribute to development of carpal tunnel syndrome. RespEx1.

Petitioner saw her family physician, Dr. Cavero, to be cleared for surgery. Dr. Cavero referred her to a hand surgeon, Dr. Bittar at a visit on May 26, 2000. PetEx10. Dr. Bittar consulted with Petitioner on May 31, 2000, and administered two cortisone injections into her wrist. PetEx8. Dr. Bittar eventually performed bilateral carpal tunnel releases on Petitioner. The first surgery, to the right hand, occurred on July 19, 2000. PetEx9. The second surgery, performed to her left hand, occurred on June 7, 2001. PetEx9. Dr. Cavero also referred Petitioner to Dr. Daniel Hirsen for consultation for a rheumatoid evaluation. PetEx10 (1/3/2002 consult).

Petitioner consulted with Dr. Hirsen on January 3, 2002. Dr. Hirsen opined that Petitioner's surgeries prevented progression of her bilateral condition but "she may still have abnormal and even necrotic nerve fibers that no longer function properly and cause paresthesias and difficulty with fine movement." PetEx1. On January 31, 2002, Dr. Hirsen opined that Petitioner is disabled as far as the heavy manual labor requiring hand dexterity because of the carpal tunnel syndrome. PetEx1. Petitioner underwent another EMG on June 20, 2002 which indicated mild bilateral carpal tunnel syndrome. PetEx4. On June 23, 2003, Dr. Hirsen performed an injection under each flexor retinaculum and opined that her current symptoms were largely due to carpal tunnel syndrome. PetEx1.

On July 29, 2003, Dr. Fernandez performed another evaluation of Petitioner; he determined that, as of that date, she had reached maximum medical improvement. PetEx7. Dr. Fernandez diagnosed Petitioner with incomplete recovery post bilateral carpal tunnel releases and residual pain and numbness. PetEx7. Petitioner testified that she continues to consume medication for pain as well for other illnesses. She takes her medication in the morning and usually wears hand splints in the evening.

Petitioner testified that, in 2005, a job offer was extended to her from Respondent. She was advised that the job would require her to go to school and obtain training and use a computer and answer telephones and make appointments for people and work with files and folders. Petitioner testified she turned down the position because she doesn't have a lot of education; she doesn't know how to use a computer; she doesn't know how to type; and she has difficulty speaking English, cannot write in the English language and cannot read in the English language. Petitioner testified that she only completed the 6th Grade in Mexico. Petitioner testified that she had a friend help her complete the job application when she applied to Respondent.

Petitioner testified that her two prior employers before working with Respondent were the Hyatt Hotel chain working for three years in the laundry department and three years working for a beauty parlor. Petitioner stated she has had no experience answering phones; making appointments; arranging files or folders or using a computer.

On cross-examination, Petitioner testified that she worked as a beautician for three years part-time; having went to school, received a license and training. Petitioner admitted that the job offer from Respondent indicated there was a 12-month training program. Petitioner stated she performed her job as a building service worker successfully and followed procedures and instructions. Petitioner also stated that half of the communication with her supervisor was in Spanish. Petitioner stated that she was a lot of pain which explained why she did not respond to the job offer of Respondent.

Petitioner testified that she never looked for work after she saw Dr. Fernandez. She also stated she never completed any job applications or did any job search or job contacts. Petitioner came to the United States in 1970 at age 15; she is a U.S. citizen, having passed the examination for citizenship on the third try, and she has had a valid driver's license since 1981.

Petitioner testified on cross-examination that for the first ten years of her employment with Respondent she worked in all of the buildings (more than ten) but that sometimes she would be in one building for a whole week. She described the broom she used as larger in size than her height and about four feet in width. The sweeper at the end of the broom was made of metal and was three feet in length and one foot wide. The broom weighed about 3lbs and she always pushed it. Petitioner also stated she would change which hand she used with the broom when she would turn around. She also testified she used three different sizes of mops. The largest one was two feet wide with a long handle. A second-sized mop was used for the bathrooms. In addition, there were different sizes of buckets used. Petitioner also had to clean the toilets, mirrors and the walls: she used a special brush for toilets and a brush to clean the walls. Petitioner testified she was right-handed but used both hands to clean the walls.

Petitioner testified she uses a cane to support her hand which incurs a different type of pain as opposed to symptoms from her diagnosed arthritis. She lives in a Spanish neighborhood; doesn't drive a vehicle; and she doesn't take public transportation. She testified she has had no contact with Respondent since she was released by Dr. Fernandez.

CONCLUSIONS OF LAW

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 CONCLUDES AS FOLLOWS:

The Arbitrator has concluded, in F below, that Petitioner suffered an aggravation of her bilateral carpal tunnel syndrome causally related to her work activities for Respondent. The Arbitrator has further concluded, in D below, that such aggravation manifested itself to Petitioner on October 21, 1999. Based on the foregoing, the Arbitrator concludes that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO D, WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that on October 21, 1999, while performing her job duties, she noticed pain in her hands. She had never had this type of pain before and had suffered no prior accidents or injuries to her hands prior to October 21, 1999. She notified her supervisor, Jesse, informing him that she couldn't move her hands any longer and that her hands were very tired. After reporting these complaints, Petitioner was referred to Respondent's medical clinic.

The Industrial Clinic triage note reads as follows: "Patient states numbness in hands with pain for past 6 months....tingling and numbness in hands and forearms for three weeks. Fatigue in shoulders and neck. Works as a janitor cleaning all day." PetEx6. The physician at Respondent's clinic diagnosed Petitioner with bilateral hand paresthesias; the doctor prescribed occupational therapy and placed Claimant on limited work activities with no lifting/carrying over five pounds and limit mopping to 10 minutes every hours. PetEx6. Petitioner continued to work and started occupational therapy as directed. The initial therapy note indicated: "Maintenance worker whose duties include mopping, sweeping and general cleaning reports sudden onset of extreme pain and numbness in bilateral hands on 10/20/1999." PetEx6. The records show that Petitioner participated in occupational therapy from October 25, 1999 through November 19, 1999. PetEx6.
An Injury Report contained within Respondent's records indicate the date of accident as October 21, 1999 wherein Petitioner reported "(w)hile mopping the floor my hands closed up." PetEx6. Petitioner underwent an EMG on November 18, 1999 which revealed bilateral carpal tunnel syndrome to a moderate degree. PetEx6. During a November 29, 1999 follow-up visit with Respondent's clinic, Petitioner was referred to Dr. Gonzales. The initial evaluation with Dr. Gonzales took place on December 15, 1999; upon examination, the doctor diagnosed Petitioner with bilateral carpal tunnel syndrome related to her work as a janitor and placed her on a surgery schedule. PetEx6. In a letter dated December 15, 1999, Dr. Gonzales stated: "(i)t is my feeling that although carpal tunnel syndrome may not, per se, be caused by work activities, it is exacerbated by repetitive work activity and thus covered by WC." PetEx6.

Based on the foregoing, the Arbitrator concludes that Petitioner, on October 21, 1999, while performing her job duties, suffered increased symptoms greater than she had theretofore experienced. She reported her increased symptoms to her supervisor and was sent for medical treatment. The Arbitrator concludes that October 21, 1999, is an appropriate date of manifestation for Petitioner's aggravation of her bilateral carpal tunnel syndrome; and, therefore, that the date of Petitioner's accident was October 21, 1999.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO F, IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that on October 21, 1999, while performing her job duties, she noticed pain in her hands. She had never had this type of pain before and had suffered no prior accidents or injuries to her hands prior to October 21, 1999. She notified her supervisor, Jesse, informing him that she couldn't move her hands any longer and that her hands were very tired. After reporting these complaints, Petitioner was referred to Respondent's medical clinic.

Dr. Fernandez performed an independent medical examination at the request of Petitioner. He opined that "...there was a significant contributory effect from her work history to the development of her carpal tunnel syndrome." (PetEx11,DepEx3,p4)

The causal opinion of Dr. Fernandez is however impaired by other evidence in the record. Petitioner was referred to Dr. Hirsan by her family doctor. Dr. Hirsan found that Petitioner suffered from "polyarthritisis" which was causing much of her symptoms. In addition, Petitioner was examined at the request of Respondent by Dr. Goldberg and Dr. Papierski. They both found significant systemic problems suffered by Petitioner. Dr. Fernandez stated unequivocally that Petitioner did not have any systemic causes to her carpal tunnel syndrome. Petitioner offered no dispositive rebuttal to the evidence of Dr. Hirsan, Dr. Goldberg and Dr. Papierski. This reduces the credibility and weight of Dr. Fernandez' causal opinion. However, it does not totally eliminate the credibility and weight that Petitioner's carpal tunnel syndrome was aggravated by her work activities.

More troubling is the reliance by Dr. Fernandez solely on the description given to him by Petitioner of her work activities, which description was not recorded and preserved by Dr. Fernandez. Petitioner testified to a large range of work activities which she was required to perform throughout the day. She was required to use two different mops. These mops required her to exert significant stress on her hands and wrists; however, she used these mops only in a limited portion of her day and therefore those forces were experienced by her only sporadically. Similarly, she was required to clean. That required her to exert significant but different stress on her hands and wrists; however, she performed this cleaning only in a limited portion of her day and therefore those different forces were experienced by her only sporadically. A number of other activities and stresses were also explained in her testimony. In Dr. Fernandez's reports, opinions and deposition, it is clear that he was not aware of the wide variance in the exertions required of Petitioner throughout the day or of the sporadic nature of each of those variations. Accordingly, his opinion on causation is further compromised regarding causation of her carpal tunnel syndrome complaints.

Based on the foregoing, the Arbitrator concludes that the credibility of Dr. Fernandez's opinion that Petitioner's work activities caused her carpal tunnel syndrome complaints is severely compromised and the weight entitled thereto is greatly reduced. However, those factors are of considerably less importance with regard to the causal connection of her work activities to an aggravation of her pre-existing carpal tunnel syndrome. Therefore, the Arbitrator concludes that Petitioner's carpal tunnel syndrome complaints are causally connected to an aggravation of her carpal tunnel syndrome by her work activities over the years of her service with Respondent.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO J, WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator, found above that Petitioner's condition of ill-being of her bilateral carpal tunnel syndrome was causally related to her an aggravation of her carpal tunnel syndrome of October 21, 1999. Petitioner submitted into the record evidence of medical bills, in accordance with the Medical Fee Schedule where applicable, as follows:

CAVERO CLINIC

CODES	DATE	PROVIDER FEE	IWCC FEE

99213	1/22/08	$110.00	$96.98
99213	2/19/08	$110.00	$96.98
99212	4/16/08	$90.00	$73.99
99213	5/20/08	$110.00	$96.98
99213	6/17/08	$110.00	$96.98

DANIEL J. HIRSEN, M.D.

CODES	DATE	PROVIDER FEE	IWCC FEE
99242	3/27/07	$125.00	$161.79
99243	7/19/07	$155.00	$210.82
73130	7/24/07	$30.00	$99.04
73130	7/24/07	$30.00	$99.04
73562	7/24/07	$30.00	$112.76
73562	7/24/07	$30.00	$112.76
73562	7/24/07	$30.00	$112.76
99242	8/16/07	$125.00	$161.79
99242	12/6/07	$125.00	$161.79
99242	3/6/08	$125.00	$164.98
99242	6/5/08	$125.00	$164.98

HOLY CROSS HOSPITAL

CODES	DATE	PROVIDER FEE	IWCC FEE
J2001	5/14/06	$11.00	$21.25
90718	5/14/06	$46.00	$31.17
90718	5/14/06	$30.50	$31.17
9928325	5/14/06	$341.00	$259.16(76%)
CODER	5/14/06	$667.00	$506.92(76%)

MACNEAL HOSPITAL

CODES	DATE	PROVIDER FEE	IWCC FEE
2507721	11/5/07	$49.62	$37.71(76%)
4200176	11/5/07	$515.46	$391.74(76%)
4200531	11/8/07	$182.26	$138.51(76%)
4200531	11/12/07	$182.26	$138.51(76%)
4200531	11/14/07	$182.26	$138.51(76%)
4200531	11/16/07	$182.26	$138.51(76%)
4200531	11/19/07	$182.26	$138.51(76%)
4200531	11/21/07	$182.26	$138.51(76%)
4200531	11/26/07	$182.26	$138.51(76%)
4200531	11/28/07	$182.26	$138.51(76%)
3620135	2/15/08	$307.16	$233.44(76%)

RAYMOND H. NOOTENS, M.D./RONALD R. WEISS, M.D.

CODES	DATE	PROVIDER FEE	IWCC FEE
92014	2/1/06	$160.00	$105.80
92015	2/1/06	$25.00	$25.51
92014	12/3/07	$160.00	$109.82
92015	12/3/07	$30.00	$26.48

TOTALS

PROVIDER FEE	IWCC FEE
$5,260.82	$4,912.67

Based on the foregoing, the Arbitrator concludes that Respondent is liable for medical bills in the amount of $4,912.67 in 8(a) medical expenses.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO K, WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that she has not worked anywhere since February 13, 2000. The medical records indicated that the University Health Services physician restricted her from her regular work activities on February 1, 2000, and February 3, 2000. PetEx6. The February 9, 2000, records from the University Health Services document that Respondent "cannot accommodate these restrictions." PetEx6. The physician at that visit indicated that Petitioner should return to her primary care doctor or treating doctor. Otherwise she was disabled. PetEx6.

On February 14, 2000, Dr. Fernandez noted that Petitioner could not return to her regular employment and restricted her to no use of her left arm. Dr. Fernandez explained in his deposition why, if Petitioner was right-hand dominant, the left hand carpal tunnel was worse: "Curiously enough, dominance has never been shown to be a significant risk factor in the development of carpal tunnel syndrome . . . the left hand becomes weaker, so to speak, or it is weaker to begin with, and then they'll have more symptoms...." PetEx11, pp. 44-45. The unrebutted testimony of Petitioner was that Respondent could not or would not accommodate her restrictions at that time.

Based upon the above opinions of the University Health Service and Dr. Fernandez, at a minimum, Petitioner was restricted from performing the full capacities of her job since February 14, 2000, through the date that Dr. Fernandez opined she had reached maximum medical improvement on July 29, 2003. PetEx7. No other physician, during this time period ever released her to full duty work since February 14, 2000.

Respondent did not offer Petitioner work within her restrictions. The dispositive question is whether the claimant's condition had 'stabilized'. Here, Dr. Fernandez opined that Petitioner had not reached maximum medical improvement until July 29, 2003. PetEx7. Thus, the Arbitrator concludes that Respondent was unable or unwilling to accommodate the restrictions of Petitioner after February 14, 2000, and before she reached maximum improvement on July 29, 2003. Therefore, the Arbitrator concludes that Petitioner is entitled to Temporary Total Disability benefits from February 14, 2000, through July 29, 2003, a period of 179 and 4/7ths weeks, at the rate of $323.36 per week. Respondent shall be entitled to a credit for this period up to $58,066.23.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO L, WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Dr. Fernandez opined that Petitioner had not reached maximum medical improvement until July 29, 2003. PetEx7. On that date, he released Petitioner to work with restrictions. However, Petitioner never sought to find a job. In fact, Respondent repeatedly offered her employment within her restrictions. Dr. Fernandez found that Petitioner could perform the duties offered her by Respondent. In spite of those offers, Petitioner chose to stay off work and continue to receive her benefits from State Employee Retirement System(SERS). Therefore, the Arbitrator concludes that Petitioner took herself out of the job market and chose to no longer work. Based on the foregoing, the Arbitrator concludes that Petitioner is not entitled to permanency benefits as a permanent total or for a wage differential; rather, she is entitled to benefits for partial loss of use of her bilateral hands.

On July 29, 2003, Dr. Fernandez performed another evaluation of Petitioner; he determined that, as of that date, she had reached maximum medical improvement. PetEx7. Dr. Fernandez diagnosed Petitioner with incomplete recovery post bilateral carpal tunnel releases and residual pain and numbness. PetEx7. Petitioner testified that she continues to consume medication for pain as well for other illnesses. She takes her medication in the morning and usually wears hand splints in the evening. Upon her release, Dr. Fernandez imposed permanent restrictions on Petitioner. Petitioner chose to retire on her SERS benefits. Based on the foregoing, the Arbitrator concludes that Petitioner suffered the loss of use of her right hand to the extent of 25% thereof and to her left hand to the extent of 22.5% thereof.

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

Lisa Critchfield,

Petitioner,

vs.

No. 10 WC 32031

Jersey Community Hospital,

14IWCC0914

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the circuit court. The circuit court found against the manifest weight of the evidence the Commission's decision affirming the Arbitrator's decision to deny Petitioner's claim due to the running of the statute of limitations. The circuit court remanded the matter to the Commission to consider the merits of Petitioner's claim. The Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care and permanent disability, and being advised of the facts and law, denies the claim on the merits for the reasons stated below.

On August 19, 2010, Petitioner filed an application for adjustment of claim alleging repetitive trauma to the right shoulder, with the manifestation date of January 4, 2010. Following a hearing on October 24, 2011, the Arbitrator filed a decision on November 10, 2011, finding the manifestation date to be April 4, 2006, and denying the claim as untimely filed. On December 4, 2012, the Commission affirmed and adopted the Arbitrator's decision.

On review, the circuit court issued an order on August 16, 2013, finding the Commission's decision against the manifest weight of the evidence. The circuit court found the manifestation date to be January 4, 2010, and remanded the matter to the Commission "for determination as to whether or not the injuries the plaintiff sustained are causally related to her

employment." Respondent appealed the circuit court's order to the appellate court. On October 10, 2013, the appellate court dismissed the appeal.[1]

Turning to the merits of Petitioner's claim, Petitioner, who is right hand dominant, was a medical sonographer, and the claim is for repetitive trauma to the right shoulder. Petitioner testified when she started working for Respondent in 2000, she worked eight hours a day, three days a week. At some point, her hours went up to eight hours a day, four days a week. In April of 2006, Petitioner consulted Dr. Michael McNear about problems with her right shoulder and underwent an X-ray, but no treatment. She continued to work as a sonographer for Respondent, and her symptoms continued to worsen. On January 4, 2010, Petitioner felt the pain in her right shoulder had become severe enough that she needed treatment. Petitioner also alluded to having pain in the right elbow with tingling in the fourth and fifth fingers. On January 5, 2010, Petitioner reported repetitive trauma to her supervisor, who eventually authorized a visit to an orthopedic surgeon. On cross-examination, Petitioner admitted she had "always exercised" and lifted weights as part of her exercise routine. Petitioner further admitted exercising with weights caused shoulder pain.

The medical records in evidence show that on April 4, 2006, Petitioner consulted Dr. McNear, reporting increasing right shoulder pain over the course of several years. The pain seemed worse "since changing procedures" at work. Amongst other things, Dr. McNear noted Petitioner lifted weights. He diagnosed tendinitis and advised Petitioner to rest the shoulder and stop lifting weights.

On April 6, 2010, Petitioner consulted Dr. Craig Beyer, an orthopedic surgeon, complaining of right shoulder pain, as well as numbness and tingling in the ulnar nerve distribution. She reported having right shoulder symptoms on and off for several years. Dr. Beyer noted Petitioner was an avid runner. He diagnosed rotator cuff tendinitis and "coexisting ulnar nerve symptoms of cubital tunnel," and performed an injection into the right shoulder. On May 24, 2010, Petitioner followed up with Dr. Beyer, complaining of persistent shoulder and ulnar nerve symptoms, reporting having the symptoms for six years. Dr. Beyer ordered diagnostic studies. An MRI of the right shoulder performed June 7, 2010, showed a partial tear at the myotendinous junction of the supraspinatus, with mild impingement on the supraspinatus muscle and tendon secondary to hypertrophic changes of the AC joint. An EMG performed June 17, 2010, showed bilateral median sensory entrapment neuropathy (carpal tunnel syndrome) and mildly abnormal left ulnar sensory study. On June 28, 2010, Dr. Beyer recommended arthroscopic acromioplasty. He did not think the EMG showed any ulnar nerve compromise.

On September 13, 2010, Petitioner consulted a second orthopedic surgeon, Dr. George Paletta, reporting gradual onset of right shoulder pain and intermittent numbness and tingling into the right fourth and fifth fingers. Petitioner related a several year history of right shoulder pain, which worsened a year ago when she started doing a lot of echocardiograms. Dr. Paletta diagnosed chronic AC joint pain with hypertrophic changes and secondary impingement, opining that Petitioner's "hypertrophic changes are longstanding and preexisting, but her work activities, particularly with the new responsibilities of echocardiography, are serving as an aggravating

[1] The circuit court's order was interlocutory and not immediately appealable.

factor and resulting in increased symptoms related to her AC joint." He recommended medication and an injection into the AC joint. With respect to the elbows, Dr. Paletta diagnosed a type I hypermobile ulnar nerve bilaterally, a preexisting condition related to Petitioner's anatomy. Dr. Paletta opined Petitioner's job duties caused intermittent irritation of the ulnar nerve with intermittent ulnar neuritis-type symptoms. In his deposition testimony, Dr. Paletta admitted he did not know the specifics of Petitioner's job duties. Dr. Paletta also did not know of Petitioner's running and weightlifting activities. Dr. Paletta admitted that "[y]ou can certainly see AC joint irritation in recreational athletes."

Dr. James Emanuel, an orthopedic surgeon and Respondent's section 12 examiner, testified that he examined Petitioner on December 20, 2010. Petitioner reported developing right shoulder pain three or four years earlier and noticing discomfort in the shoulder and numbness and tingling in the ulnar nerve distribution while performing ultrasounds and echocardiograms, as well as with activities of daily living. Petitioner also reported she was an avid runner who trained for half marathons and lifted weights until right shoulder pain prevented her from continuing with weightlifting. Dr. Emanuel diagnosed right AC joint arthritis, subacromial bursitis with impingement, and right ulnar neuritis. Dr. Emanuel noted the video of Petitioner's job activities showed very little repetitive motion of the right shoulder or right elbow, whereas Petitioner reported her exercise activities included long distance running and lifting weights. Dr. Emanuel therefore opined the work activities did not cause or aggravate Petitioner's right shoulder or right elbow conditions.

In her application for adjustment of claim, Petitioner alleges repetitive trauma to the right shoulder. In her brief on review, Petitioner also claims repetitive trauma to the right elbow. The Commission adopts the opinion of Dr. Emanuel and finds that Petitioner failed to prove her right shoulder or right elbow conditions are work-related. The Commission gives little weight to the opinion of Dr. Paletta because he did not know of Petitioner's running and weightlifting activities. Furthermore, Dr. Paletta testified it is not uncommon to see AC joint irritation in recreational athletes.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim is denied on the merits, rather than the running of the statute of limitations.

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.

14IWCC0914

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

DATED: OCT 2 4 2014
SM/sk
o-09/24/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRITCHFIELD, LISA
Employee/Petitioner

Case# **10WC032031**

14IWCC0914

JERSEY COMMUNITY HOSPITAL
Employer/Respondent

On 11/10/2011, an arbitration decision on this case 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:

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

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

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

14IWCC0914

- ☐ 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

Lisa Critchfield
Employee/Petitioner

v.

Jersey Community Hospital
Employer/Respondent

Case # **10** WC **32031**

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 **Ruth White**, Arbitrator of the Commission, in the city of **Collinsville**, on **10/24/2011**. 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. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What 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 **Statute of limitations**

14IWCC0914

FINDINGS

On the date of accident, **4/4/2006**, 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.

Petitioner failed to timely file an Application for Adjustment for this accident date.

ORDER

Claim Denied, benefits not awarded. The Statue of Limitations has run.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 6, 2011
Date

ICArbDec19(b)

NOV 10 2011

14IWCC0914

FINDINGS OF FACT

In support of the arbitrator's decision relating to "D. What is the date of the accident?" and "O. Whether the claim is barred by the Statute of Limitations?" the arbitrator finds the following facts and arrives at the following conclusions:

The petitioner, LISA CRITCHFIELD, worked as a medical sonographer for the respondent, JERSEY COMMUNITY HOSPITAL. She began work for the respondent in 2000. Her duties include performing sonograms and echocardiograms of patients of the respondent. She estimated that she would perform between eight to ten diagnostic procedure per eight hour shift, usually between three to four echocardiogram and the remaining procedures ultrasounds.

In order to perform echocardiograms, she testified she had to reach around and push up and in on the patient's body. She testified that she would perform echocardiograms on a wide range of patients, and with heavier patients you have to push harder in order to obtain an image. She further indicated that echocardiograms took about twenty minutes, and that she was not pushing or holding the device the whole time.

Beyond performing echocardiograms, the petitioner would perform sonograms on various parts of patients' bodies. This would include abdominal sonograms for pregnancy, could also include various other body parts as required by physicians. She reiterated on cross-examination that she would perform ultrasounds on a wide range of patients in terms of their size. The remainder of her job duties included preparing reports or completing forms related to her findings from the diagnostic testing she conducting. She was allotted thirty minutes for lunch and unscheduled breaks. She noted that she worked thirty-two hours per week, or eight hours per day over four days.

The petitioner testified that she began experiencing pain in her right shoulder in 2006, and she saw Dr. Michael McNeer. Px.1. Dr. McNeer's April 4, 2006 report states the petitioner was experiencing right shoulder pain, and indicated she does ultrasound at work and that it seemed worse since change of procedures. She noted that she had zero prior partial or injuries, but had noted increased shoulder pain over the last couple years. The handwritten notes also indicate the petitioner engaged in weight training or weight lifting as well. Dr. McNeer diagnosed right shoulder tendonitis and recommended rest of the shoulder. This included zero weight lifting with the shoulder and try utilizing her left hand with the ultrasound machine. She was prescribed an x-ray and given prescription medications.

The petitioner's next medical treatment was with Dr. Craig Beyer of Illinois SW Orthopaedics, Ltd. on April 6, 2010. Px.2. The petitioner presented for evaluation of two problems, right shoulder pain as well as numbness and tingling in her ulnar nerve distribution. Dr. Beyer noted that she was an avid runner and that she had had on again off again shoulder symptoms for several years.

Section 6(d) of the Illinois Workers' Compensation Act provides that unless an Application for Compensation is filed with the Illinois Workers' Compensation Commission within three years after the date of accident where no compensation has been paid, or within two years after the date of the last payment of compensation, whichever is later, the right to file an

Application shall be barred. 820 ILCS 305/6(d). Furthermore, Section 6(c) of the Act provides that notice of an accident shall be given to an employer as soon as practical, but not later than forty-five days after the accident. 820 ILCS 305/6(c).

By the testimony of the petitioner and the information contained in the medical records, it is clear the petitioner is not alleging a specific or single traumatic accident and injury, but rather a cumulative or repetitive trauma type of claim. Where a claimant alleges a repetitive trauma type of injury, the date of the accidental injury has been held to be when the injury "manifests itself" to the claimant. "Manifest itself" is defined as 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 v. Industrial Commission*, 115 Ill.2d 524, 505 N.E. 2d 1026 (Il.Sup.Ct. 1987).

The petitioner alleges an accidental injury occurring on January 4, 2010, and that she provided notice to her employer on January 5, 2010. The medical records of Dr. McNeer, however, establish the petitioner sought medical treatment on April 4, 2006 for pain in her right shoulder. Furthermore, the doctor's records clearly state that she was experiencing pain while performing ultrasound examinations at work. Dr. McNeer informed her to try to perform ultrasound examinations with her opposite arm in the course of her employment. Based upon the manifestation date analysis established by the Illinois Supreme Court in *Peoria County*, the Arbitrator finds that the petitioner's injury manifested itself on April 4, 2006 when she noticed pain while performing ultrasounds in the course of her employment and sought medical treatment. The Arbitrator finds that this is the date when the relationship between the conditions in the petitioner's right arm and her job duties were to become plainly apparent to a reasonable person.

Having found the manifestation date to be April 4, 2006, the petitioner would have to have filed her application with the Commission by April 4, 2009 to satisfy Section 6(d) of the Act. According to the Commission file, the petitioner did not file her Application until August 20, 2010, well past the three years required by Section 6(d). Furthermore, no evidence was provided of payment of compensation on behalf of the petitioner by the employer, which would have potentially have extended the filing period for two years after the last date of payment of compensation. Therefore, the Arbitrator finds that the petitioner's Application is barred pursuant to Section 6(d) 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

MICHAEL CHAMBERS,

Petitioner,

14IWCC0915

vs.

NO: 09 WC 36603

CASE FOUNDATION,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of DuPage County. Previously, the action was arbitrated pursuant to Sections 8(a) and 19(b) of the Act. The Arbitrator found Petitioner sustained his burden of proving his undisputed accident on October 12, 2006, caused a current condition of ill-being of his left knee and awarded him temporary total disability and maintenance benefits, medical expenses, and ordered Respondent to authorize and pay for vocational rehabilitation services. Respondent sought review by the Commission. The Commission corrected and modified the Decision of the Arbitrator "so as to award Respondent credit for any and all payments it has made for medical services to, or on behalf of, Petitioner." Besides the modification noted above and clerical corrections, the Commission affirmed and adopted the Decision of the Arbitrator.

Respondent appealed to the Circuit Court of DuPage County. The Circuit Court confirmed the Decision of the Commission on the issues of causal connection, determination of average weekly wage, award of maintenance, and requiring vocational rehabilitative services. However, the Circuit Court remanded the case to the Commission for "clarification and computation" of the award of medical expenses, and clarification of the date of termination of temporary total disability benefits so that the Court can assess the propriety of those awards.

Initially, the Commission notes that as specified above, the Commission affirmed and adopted the Decision of the Arbitrator on the issues of the award of medical expenses, and the award specifying the period of temporary total disability benefits. Regarding medical expenses the Arbitrator awarded all medical expenses submitted into evidence except for the bill for preparation of the vocational rehabilitation plan, which he considered premature. Although the Arbitrator did not specifically write in his decision that he found all such medical expenses were reasonable and represented necessary medical treatment for the condition of ill-being caused by the work-related accident, that was obviously his conclusion. The Commission concurred with that assessment and affirmed the award of medical expenses.

In its brief in the review before the Commission, Respondent argued that the award of medical expenses was erroneous because it included medical expenses which it had already paid and was not reduced by the appropriate medical fee schedule. The Commission found then, and finds now, such an argument spurious.

In its Opinion and Decision on Review, the Commission actually modified the Decision of the Arbitrator to specifically award Respondent credit for all medical expenses it had already paid. In addition, all medical expenses are subject to reduction pursuant to the medical fee schedule in effect at the time the medical services were provided by operation of law even absent inclusion of such language in the award. Nevertheless, here the Decision of the Commission specifically included the provision that the medical expenses are subject to Section 8.2 of the Act, which is the medical fee schedule. Finally, it is not the Commission that reduces medical expenses pursuant to the fee schedule, that task is done by the payors in conjunction with the medical providers. The Worker's Compensation Act specifies that medical fees are based either on the medical fee schedule or a negotiated rate, when applicable. *See*, 820 ILCS 305 §8(a). Many payors have such negotiated rates with many medical providers, which would be unbeknownst to the Commission and would likely be confidential in nature.

Regarding the issue of temporary total disability benefits, the Arbitrator found that June 29, 2010 was the appropriate date of termination of those benefits. In his decision, the Arbitrator indicted that Dr. Bush-Joseph, Petitioner's treating doctor, "opined in a note dated June 29, 2010 that Claimant had finally achieved maximum medical improvement and that he could work with very significant restrictions."

The Commission acknowledges that in a previous treatment note dated May 25 2010, Dr. Bush-Joseph indicated that Petitioner had clearly plateaued and, in his opinion, had achieved maximum medical improvement. However, he did not release him from treatment or to work at his current job until he received a description of Petitioner's job duties. At that time, Dr. Bush-Joseph did release Petitioner with a 20-pound maximum lifting restriction. In his June 29, 2010 treatment note, Dr. Bush-Joseph again indicted that Petitioner had achieved maximum medical improvement, released him to work at a medium physical demand level with occasional 50-pound, and frequent 25-pound, lifting restrictions, and released him from treatment.

14IWCC0915

It certainly could be argued that May 28th may have been an appropriate date to terminate temporary total disability benefits. Nevertheless, that does not necessarily mean that June 29th, 2010 was an inappropriate date to terminate temporary total disability benefits. The Commission notes that Petitioner was not released from treatment on May 28th but rather on June 29th. In addition, Dr. Bush-Joseph placed a considerably lower restriction on Petitioner on June 29th than he had on May 28th. That difference at least suggests that Petitioner exhibited improvement between the two visits implying he was not really at maximum medical improvement on May 28th.

In any event in reality the issue is completely irrelevant in practical terms. The Arbitrator awarded maintenance beginning on the date after temporary total disability benefits were terminated because Respondent could not accommodate Petitioner's restrictions and Petitioner was looking for alternative employment. The Commission affirmed the Arbitrator's award of maintenance and the Circuit Court of DuPage County confirmed that aspect of the Decision of the Commission. The award of temporary total disability and maintenance are both 66 & 2/3% of the average weekly wage; they are therefore identical in dollar amount. *See*, 820 ILCS 305 §8(a), 820 ILCS 305 §8(b). Even if the temporary total disability benefits had been terminated as of May 28, 2010, that termination would simply have resulted in Petitioner's maintenance award beginning on the earlier date; the actual amount of the benefit would have been identical either way.

DATED: OCT 27 2014

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-10/22/14
46

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Hagan,

Petitioner,

vs.

No: 09 WC 45124

14IWCC0916

Menard, Inc.,

Respondent.

DECISION AND OPINION ON REMAND
FROM THE CIRCUIT COURT OF COOK COUNTY

This matter comes back before the Commission pursuant to an Order of remand from the Circuit Court of Cook County under its case number 13 L 50734. This matter was previously remanded to the Commission under Circuit Court of Cook County Case Number 12 L 51085, a new Decision was entered and the matter was again appealed.

The Arbitrator issued an initial Decision on August 8, 2011, finding that Petitioner's condition in his lumbar spine was not causally related to his undisputed work accident of August 10, 2009. By said Decision, the Arbitrator denied medical expenses, prospective medical treatment, and temporary total disability benefits after November 5, 2009. On Review, the Commission majority reversed the Arbitrator's decision and found that Petitioner met his burden in proving that his lumbar condition is causally related to his work accident. The Commission awarded Petitioner medical expenses incurred after November 5, 2009, prospective medical treatment, and additional temporary total disability benefits representing a period from November 16, 2009, through March 15, 2011.

14IWCC0916

Respondent/Employer appealed the Commission's decision to the Circuit Court. The Circuit Court issued an order dated February 20, 2012, remanding the case to the Commission, and ordering the following:

> "This matter matter [sic] coming before the Court on Plaintiff's Petition for Review, it is hereby ordered:
>
> The Commission cannot avoid the central issue involving credibility determination in negating the Arbitrator's (Trial Judge) decision. The credibility determination must be specific to a sufficient degree such that the net affect [sic] of its decision is not insulated from judicial review.
>
> This decision does not even come close to meeting the minimum standards to support such a determination, given a most cursory review of the evidence. There are four doctors in this case and the Commission's decision is completely silent to the three that reached the opposite conclusions to the one.
>
> This case is remanded to the Commission. This court retains jurisdiction."

In light of the Circuit Court's Order, the Commission issued its decision on remand on July 12, 2013. That Decision was appealed to the Circuit Court and the Circuit Court issued a subsequent Order dated March 25, 2014. By that Order the Court directed the Commission to do the following:

> "This matter is remanded to the Commission for a supplemental decision that articulates the weight it is affording to all of the credible evidence. Where two opposing opinions of causation have been rendered, the Commission must explicitly state the reasons why one opinion is believed to be more credible than the other. A credibility determination requires an express weighing of the evidence, not merely a conclusion. This was addressed inadequately in both of the Commission's prior decisions. The Commission must articulate the weight it is assigning to all evidence in order for proper judicial review."

The Circuit Court further indicated that it retained jurisdiction over this matter.

In light of the second remand Order of the Circuit Court, the Commission has again visited the record of proceedings made by the parties and reviewed the appropriate case law regarding the Commission's role, responsibilities and powers. In a significant decision, the Appellate Court stated: "It is the function of the Commission to determine the facts, judge the credibility of the witnesses, and draw reasonable inferences from competent evidence." *City of Springfield, Illinois Police Department v. Industrial Commission*, 328 Ill.App.3d 448, 452, 766 N.E.2d 261, 264 (2002).

City of Springfield amplified the holding of the Supreme Court in *Durand v. Industrial Commission*, which stated that in workers compensation matters, a reviewing court "should not reweigh evidence, or reject reasonable inferences drawn from it by the Commission, simply

because other reasonable inferences cold have been drawn.", 224 Ill.2d 53, 64, 862 N.E.2d 918, 924. Additionally, the appropriate test for a reviewing court is not whether it would have reached the same conclusion as the Commission, but rather whether there is sufficient evidence in the record to support the determinations of the Commission. *Kawa v. Illinois Workers' Compensation Commission*, 2013 Ill.App.1st 120469WC, paragraph 78, 991 N.E.2d 430. The Court in *Swift & Co. v. Industrial Commission*, 130 Ill.App.3d 216, 501 N.E.2d 752 (1986) noted that the Commission's findings with regard to the evidence may be implied from the Commission's decision, and that "the effect of the Commission's failure to expressly find claimant's evidence to be more credible than employer's evidence does not require reversal here."

In the case at bar, the Commission has explicitly stated the reasons why it found one doctor more credible than the other, and has expressly explained it's weighing of such credibility. In fact, with all due respect to the reviewing court, the Commission has now done so twice.

Now, confronted with another Remand Order, we simply do not know what else the Circuit Court is looking for us to do. The Circuit Court's demand for a "...supplemental decision that articulates the weight it is affording to all of the credible evidence." creates a burden upon the Commission that is neither required by statue nor the interpretive case law of the Appellate or Supreme Court. The holdings of the Commission in its two previous decisions amply explain its factual findings and the basis for its determinations.

The Commission's original decision on review was issued on July 13, 2012, over two years ago. That Decision reversed the Arbitrator's decision and ordered additional medical care. Additionally, the Commission validated the treating physician's surgical recommendation, which remains pending today.

The Commission's main role is to determine facts based on the evidence in the record, and to then make conclusions of law based on said facts. It has done so in this case, and has explained the basis for its findings of fact and determinations of credibility, ad nauseam. We decline to explain ourselves further. The role of the Circuit Court, which has the same exact record of evidence before it as the Commission, is to determine if such factual findings are against the manifest weight of the evidence in that record or not. We are hopeful that the Circuit Court will do so and avoid further delay and punishment of the Petitioner in the appeal of this case.

Here again is our last, fully expressed and explained decision in this matter, and it is adopted as our decision on remand in response to the Circuit Court's order of March 25, 2014:

> It is unclear what the court's directive is to the Commission. The Commission speculates that the court is ordering us to state why we find Petitioner credible in light of the records from four doctors. While the court's order does not indicate who the four doctors are, we

presume that one of the four doctors that the court was referencing was Dr. Michael, as Dr. Michael was Petitioner's treating physician and he provided a causal connection opinion. The court did not identify the other three doctors it was referencing; as such, we turn to Respondent's brief that was presented to the court. Respondent cited in its brief that Petitioner's providers were Concentra, Parkview Orthopedics, Dr. Michael, and Dr. Fardon.

First, we address Petitioner's testimony and state explicitly that we find Petitioner's testimony credible, and that the medical records support his testimony. Petitioner testified that in the accident, the "whole front of [his] body minus part of [his] neck to the left side of [his] head" came in contact with the pallet of cabinets, and "the whole back of [his] body was against the wall, with the exception of [his] right arm." Petitioner also testified that he had never injured his mid or low back before the work accident.

Petitioner also testified that Dr. Mekhail, Dr. Glantz, and the doctors from Concentra did not ever ask him to show them where he was experiencing his back pain. When Petitioner was asked where he considered his back pain to be located, Petitioner testified, "I would consider it mid back pain." Petitioner also stated that he has never taken any anatomy classes. Though Petitioner is seeking treatment for his lumbar spine, it is apparent that he still believes that his symptoms are considered to be located in his mid back. It is evident that Petitioner is not versed in the anatomy of the human spine, and we do not hold him to a precise standard of reporting. Moreover, Petitioner's early treating records document complaints in his thoracic spine, thoracolumbar spine, and lumbar spine.

The medical records support Petitioner's claim that the accident caused injury to his thoracic as well as his lumbar spine. The Commission has identified the early treating records that show that Petitioner complained of symptoms in the lumbar spine in our original decision on pages four and five. The doctors' records and the physical therapy records from Concentra reflect that Petitioner complained of symptoms in his lumbar spine. We also cited the emergency room records from Advocate Christ Medical Center dated September 4, 2009, in our original decision. Petitioner testified that he went to the ER because he was having severe muscle spasms in his back that were "radiating from [his] lower back to [his] upper back into [his] neck." The ER records reflect that on physical examination, Petitioner was found to have weakness in his right lower extremity and tingling in his right foot. The ER doctor diagnosed Petitioner with back pain and L4 radiculopathy and referred him to Parkview Orthopedics.

When Petitioner saw Dr. Mekhail at Parkview Orthopedics for the first time on September 18, 2009, Dr. Mekhail documented that Petitioner complained of mid back pain with spasms and right leg weakness, and diagnosed Petitioner with a back strain/contusion. Dr. Mekhail referred Petitioner to a neurologist because he was concerned that Petitioner's symptoms appeared to be "stroke like." On October 5, 2009,

Petitioner saw Dr. Glantz for a neurological evaluation, at Dr. Mekhail's referral. Dr. Glantz, whom Petitioner saw only once, indicated that Petitioner was experiencing pain in his mid-thoracic spine area, headaches and migraines, and right leg and right foot symptoms. Dr. Glantz ordered a brain MRI for evaluation of Petitioner's migraines and did not treat Petitioner for his back. Drs. Mekhail and Glantz did not mention any kind of causal link or lack thereof concerning Petitioner's mid or low back.

The only doctors who issued an opinion about whether Petitioner's lumbar symptoms are causally related to the work accident were Dr. Michael and Dr. Fardon. Dr. Fardon, Respondent's Section 12 examining doctor, diagnosed Petitioner only with a thoracic sprain and contusion as a result of the work injury. It is well established that the Commission may find the opinions of a treating doctor more persuasive than those of a Section 12 doctor. We find that the opinions from Dr. Michael, which were addressed in our original decision, are more persuasive than those from Dr. Fardon. We do not believe that Petitioner sustained merely a contusion or a strain in his thoracic spine only.

The Commission finds that the chain of events further support our decision. Petitioner testified that at the time of his work injury, he had been working with Respondent for over five months. His job duties were to unload trucks with a forklift and break down freight. Petitioner was able to perform his full duty position before the accident for five months, and then he was not able to perform his job after the work accident.

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 hereby reiterates its orders from our original decision, which are stated below.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision, filed on August 8, 2011, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $261.97 per week for a period of 76-1/7 weeks, that having been 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. Respondent shall have credit for all temporary total disability benefits it paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $75,605.17 for medical expenses, subject to the medical fee schedule, under §8(a) of the Act.

14IWCC0916

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: OCT 27 2014
TJT: pvc
O 10/7/14
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I continue to respectfully dissent from the Majority's opinion reversing the Arbitrator's decision. I find Arbitrator Lammie's decision to be thorough and well reasoned. Particularly persuasive are the arbitrator's numerous and detailed findings regarding Petitioner's credibility. I give great weight to Arbitrator Lammie's contemporaneous observations of Petitioner at trial and his analysis based on Petitioner's numerous conflicting medical records and histories. I would affirm and adopt this decision.

Kevin W. Lamborn

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

Robert W. Smith,

Petitioner,

vs.

NO: 11 WC 37913
12 WC 22898

14IWCC0917

Continental Tire of North Americas, 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.

The Petitioner has submitted bills totaling $98,362.03, and indicates in Petitioner's Exhibit 1 that this is "not final". The Respondent has submitted records of medical bills paid in Respondent's Exhibit 2, however the payment appear to be based on the fee schedule, and the exhibit also appears to indicate payments to parties who are not medical providers. Neither party has submitted calculations of the fee schedule reductions for the submitted bills. Because the Commission has no way to determine what specifically has or has not been paid, or if there are any balances, the bond has been calculated based on the full amount of the bills awarded, which results in the use of the maximum bond of $75,000.00. Note this is only for bond purposes, as the bills themselves have been awarded, but only pursuant to the fee schedule, and with Respondent receiving credit for any bills that were previously paid.

14IWCC0917

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 9, 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.

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

DATED: OCT 27 2014
TJT:yl
o 10/7/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, ROBERT W
Employee/Petitioner

Case# **11WC037913**

12WC022898

CONTINENTAL TIRE OF THE NORTH AMERICAS INC
Employer/Respondent

14IWCC0917

On 4/9/2014, 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:

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

0299 KEEFE & DePAULI PC
NEIL A GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

14IWCC0917

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

Robert W. Smith
Employee/Petitioner

v.

Continental Tire of the Americas, Inc.
Employer/Respondent

Case # **11** WC **37913**

Consolidated cases: **12 WC 22898**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **February 11, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 14, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$44,629.00**; the average weekly wage was **$858.25**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services and temporary compensation benefits (16 weeks as stipulated - AX 1).

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

Respondent has paid **$9,602.76** for TTD, $- for TPD, $- for maintenance, and shall be given a credit of **$21,627.90 as an advance of permanency (PPD)** benefits, for a total credit of **$31,230.66**.

Respondent is entitled to a credit for any medical bills it has paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent, as agreed, shall pay the reasonable, necessary, and causally related medical bills found in Petitioner's Exhibit #2 pursuant to the Medical Fee Schedule as set forth in the Act. Respondent shall be given a credit for any medical bills it has paid.

Petitioner is now permanently and partially disabled to the extent of 50% loss of use of the left leg as provided in Section 8(e) of the Act. Petitioner has sustained serious and permanent injuries in this case that have resulted in an additional 31.39% (67.5 weeks) loss of use of his left leg above and beyond his 2006 injuries (which was 40 weeks of PPD pursuant to the Act in effect on Petitioner's date of accident therein). Petitioner was also paid $21,627.90 by Respondent as an advance in Permanent Partial Disability (equal to 42 weeks at a PPD rate of $514.95) on this claim. After applying both credits Respondent shall pay Petitioner an additional $514.95/week for 25.5 weeks on account of the current claim.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 4, 2014
Date

APR 9 - 2014

Robert W. Smith v. Continental Tire of The Americas, Inc., 11 WC 37913 and 12 WC 22898

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has two claims pending against Respondent. Case #11 WC 37913 references a settlement contract that was filed on September 11, 2011 when Petitioner was pro se and the parties were discussing settlement. No settlement was ever agreed to. Case #12 WC 22898 was filed on July 3, 2012 after Petitioner retained counsel. Both claims involve the same date of accident (July 14, 2010) and the same alleged injury (Petitioner's left knee). At the time of arbitration both parties jointly and orally requested consolidation of both cases with one decision being rendered by the Arbitrator. The request was granted.

At the time of arbitration both parties were present - Petitioner in his own person and Respondent through its representative, Melody Cravens. While the Request for Hearing (AX 1) identifies two issues in dispute (nature and extent of Petitioner's injuries and a credit for a prior award to Petitioner's left leg) the parties subsequently represented to the Arbitrator that they agreed Respondent should receive a credit for the permanency award entered in Case #06 WC 1664 -- namely 20% loss of use of Petitioner's left leg. (See RX 2 for documentation thereof.)

The Arbitrator finds as follows:

Petitioner has worked for Respondent almost 39 years. Prior to July 14, 2010 Petitioner was working full duty and was not requiring any medication for his left knee, nor was he wearing a brace for his knee, seeing any doctors for left knee problems, nor had he missed any time from work due to left knee problems. On July 14, 2010, Petitioner, a truck tire builder, was moving around a machine when he tripped over its base, "slammed" his left foot down to catch himself and injured his left knee.

Following the undisputed accident on July 14, 2010, Petitioner initially came under the care of Dr. Houle. Dr. Houle performed arthroscopic surgery on November 4, 2010, noting degenerative changes of Petitioner's patella, the medial femoral condyle, and a medial meniscus tear. (PX3, PX 4) Dr. Houle released Petitioner to return to full duty work on November 29, 2010, but problems persisted and Petitioner was evaluated by Dr. Collard on March 28, 2012 at the request of Respondent. (PX3, PX6)

Dr. Collard ordered new MRI studies and noting that they demonstrated continued undersurface tearing over Petitioner's medial meniscus, he ultimately decided that a second arthroscopic procedure was warranted. (PX6, PX 7) On April 19, 2012, Dr. Collard performed a second left knee arthroscopy with a partial medial meniscectomy with abrasion chondroplasty of the patella and medial femoral condyle along with the removal of a loose body. (PX6, PX 8) Petitioner testified that this surgery made his knee worse prompting his consultation with an attorney. Due to continued complaints following that procedure, on October 19, 2012, Dr. Collard recommended that Petitioner undergo a knee replacement. (PX6)

At the direction of his attorney Petitioner presented to Dr. Paul Lux on December 7, 2012. Dr. Lux noted Petitioner had failed conservative treatment and believed he would benefit from a total knee replacement. (PX9) A total knee replacement was performed by Dr. Lux on February 25, 2013. (PX9, PX 10) Following the surgery, Dr. Lux provided Petitioner with follow-up care. On May 24, 2013, Dr. Lux examined Petitioner and released him to light duty work on June 2, 2013, with a full duty release on July 1, 2013. Dr. Lux noted at this time that Petitioner was doing very well and the extended work-hardening was beneficial to him. Petitioner has not returned to see Dr. Lux since May 24, 2013. (PX9)

Petitioner did return to full duty work on July 1, 2013.

Petitioner testified the surgery improved his condition and it is his understanding that he is to return to see Dr. Lux annually for the foreseeable future in order to monitor his knee replacement and its wear and tear and any difficulties Petitioner might be having. Petitioner added that he wasn't having any problems.

Petitioner testified that he continues to work full duty as a truck tire builder. Petitioner's job requires him to do a lot of walking, twisting, turning, and some bending over. He may have to lift between 25 and 50 pounds on occasion. All of his activities require him to constantly use his legs. Petitioner testified that this is the same job he had worked prior to his injury although now he is earning a higher wage. Petitioner testified that after being on his feet for a long period of time he notices swelling and stiffness in his leg and the muscles below and above his left knee will tighten up and get stiff and painful. Petitioner stands on concrete wearing tennis shoes with slip on steel toes the entire time during his eight hour workday. He testified that he occasionally has to take over-the-counter medications, elevate his leg, and use ice at the end of a work shift. At the present time he doesn't require any narcotic pain medication. Petitioner further described some limitation in the ability to fully move his leg/knee when dressing or trying to squat or kneel. Petitioner also testified that he hears some "knocking, clunking, or clicking" when he walks and it is probably audible to others if it's real quiet.

Petitioner testified that his right knee "works fine."

On cross-examination Petitioner testified that he has not been working any overtime although he could volunteer for it if he wished. He also acknowledged that he received 20% loss of use of the left leg for his earlier left knee injury (RX 2) and that he has received an advance of permanency in the amount of $21,627.90 for this injury. On further cross-examination Petitioner acknowledged that his swelling and stiffness occurs "pretty much" on a daily basis as does his need to elevate his leg when he gets home.

The Arbitrator concludes:

L: What is the Nature and Extent of the Injury?

N: Is Respondent due any credit?

The parties stipulated that Petitioner's current condition of ill-being in his left knee was causally related to his undisputed work accident of July 14, 2010. Petitioner's testimony at arbitration was credible, supported by the medical records, and unrebutted. As a result of his work accident in 2010 Petitioner underwent two arthroscopic procedures culminating in a total knee replacement. Dr. Lux released Petitioner to full duty work on July 1, 2013, and he has continued to work full duty since that point. Based upon the medical records and Petitioner's credible testimony regarding his ongoing complaints and symptoms the Arbitrator concludes that Petitioner is now permanently and partially disabled to the extent of 50% loss of use of the left leg as provided in Section 8(e) of the Act.

The parties agreed that Petitioner received a prior award in case number 06 WC 1664 regarding his left knee/leg. The award was for 20% loss of use of the left leg and at the time the award was entered the maximum number of weeks allowed for loss of use of the leg was set at 200 weeks, therefore 20% loss of use of the left leg equated to 40 weeks. After the 2005 Amendments to the Workers Compensation Act, the maximum number of weeks is now set at 215 weeks, therefore 20% loss of use of the leg today equates to 43 weeks. With that in mind, and based upon the holding in *McBride v. State of Illinois*, 09 IWCC 0914, any credit provided to Respondent should be based upon the number of weeks actually paid to Petitioner and not based upon the percentage for loss of use.

Applying the credit from the previous award, Respondent would be ordered to pay Petitioner permanent partial disability benefits of $514.95/week for 67.5 weeks (107.5 weeks less 40 weeks as credit for weeks actually paid). However, the parties have further agreed that Respondent is to receive credit for its advance in permanent partial disability benefits paid on this claim (the sum of $21,627.90 or 42 weeks of PPD at Petitioner's rate of $514.95) The result of applying that further credit is that Respondent shall pay Petitioner an additional $514.95/week for 25.5 weeks on account of the current claim (67.5 weeks less 42 weeks advanced).

****

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

Countiss Perkins,

Petitioner,

vs.

NO: 10 WC 27258

14IWCC0918

Cook County Juvenile
Detention Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the 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 August 16, 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.

14IWCC0918

The party commencing the 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 27 2014
TJT:yl
o 10/21/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

PERKINS, COUNTISS
Employee/Petitioner

Case# **10WC027258**

COOK COUNTY JUVENILE DETENTION CENTER
Employer/Respondent

14IWCC0918

On 8/16/2013, 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 0.07% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

0132 COOK COUNTY STATE'S ATTORNEY
KEVIN G WALLACH ASA
500 RICHARD J DALEY CENTER
CHICAGO, IL 60602

14IWCC0918

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

Countiss Perkins
Employee/Petitioner

v.

Cook County Juvenile Detention Center
Employer/Respondent

Case # **10** WC **27258**

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 **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **7/22/2013**. 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 **June 13, 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 **$48,643.92**; the average weekly wage was **$935.46**.

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

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

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

Respondent shall be given a credit for all temporary total disability paid.

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

ORDER

With respect to the back injury, Respondent shall pay Petitioner permanent partial disability benefits of **$561.28** per week for **20** weeks because the injury sustained caused the 4% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

With respect to the right shoulder injury, Respondent shall pay Petitioner additional permanent partial disability benefits of **$561.28** per week for **42.5** weeks, because the injury sustained caused the 8.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act. Will County Forest Preserve District v. IWCC, 2012 Ill.App.LEXIS 109 (3rd Dist. 2012).

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

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

Molly C Mason
Signature of Arbitrator

8/16/13
Date

AUG 16 2013

14IWCC0918

Procedural History

The Arbitrator conducted a Section 19(b) hearing in this case on November 30, 2011. On December 15, 2011, the Arbitrator issued a decision finding that Petitioner sustained an accident on June 13, 2010 arising out of and in the course of her employment and established a causal connection between that accident and her then-current lumbar spine and right shoulder conditions of ill-being. The Arbitrator awarded temporary total disability benefits from June 15, 2010 through November 30, 2011, with Respondent receiving credit for the benefits it paid, medical bills relating to treatment rendered by Dr. Holstein, the Northwestern Orthopedic Institute and Select Physical Therapy, prospective care in the form of an epidural steroid injection, as prescribed by Dr. Nolden, and work conditioning, as prescribed by Dr. Saltzman, and Section 19(l) penalties in the amount of $1,230.00. Arb Exh 2.

Respondent filed a review. On July 25, 2012, the Commission (Tyrrell, Lamborn and Donohoo) issued a Decision and Opinion on Review affirming and adopting the Arbitrator's decision. Arb Exh 2.

Respondent filed, but did not ultimately pursue, a Circuit Court review. The parties agree that Respondent paid the 19(b) award. Arb Exh 1.

Arbitrator's Findings of Fact Relative to Permanency Hearing

The Arbitrator held a second hearing on July 22, 2013, with the parties stipulating to all issues other than causal connection and nature and extent. Arb Exh 1.

Petitioner testified that, after the Commission issued its Decision and Opinion on Review, Respondent authorized her to undergo additional treatment. On September 19, 2012, she returned to Dr. Nolden and complained of persistent lower back pain radiating into her legs. Petitioner testified her low back pain persisted between the 19(b) hearing and September 19, 2012.

Dr. Nolden's note of September 19, 2012 reflects that Petitioner complained of right-sided lower back pain radiating to her right buttock as well as numbness radiating from her back into her right leg and foot. Petitioner described her symptoms as having worsened since her last visit on July 25, 2011. Dr. Nolden noted he had recommended an epidural steroid injection to the right side at L4-L5 at that visit. He also noted that the injection had recently been approved and that Petitioner remained off work.

On September 19, 2012, Dr. Nolden noted an antalgic gait favoring the right leg, 5/5 motor strength throughout both legs and positive straight leg raising on the right. He noted

that Petitioner "appears quite uncomfortable." He recommended a repeat lumbar spine MRI since he had not seen Petitioner in over a year. PX 1.

The repeat MRI, performed without contrast on September 20, 2012, showed mild disc bulging at L1-L2, degenerative disc disease at L4-L5, with a "small disc protrusion centrally and towards the right," and a partial transitional segment on the right at L5-S1, with no herniation or stenosis noted. PX 2.

Petitioner returned to Dr. Nolden on October 17, 2012. The doctor interpreted the repeat MRI as showing "no appreciable change" since the original MRI. He again noted a "posterior annular tear and early disc desiccation at the L4-L5 level." He did not see any frank disc herniations or significant stenosis at any level. He again recommended a right-sided transforaminal epidural steroid injection at L4-L5. He also recommended that physical therapy be re-instituted. He released Petitioner to light duty. PX 1.

Petitioner underwent the epidural steroid injection thereafter. She testified that the injection provided about forty days of pain relief Petitioner also underwent physical therapy between October 3 and November 19, 2012. She returned to Dr. Nolden on November 29, 2012. The doctor noted that Petitioner reported improvement and complained of only mild lower back pain, rated 1-2/10. He recommended observation only and released Petitioner to full duty.

Petitioner testified she also returned to Dr. Saltzman, the orthopedic surgeon who treated her shoulder. She underwent physical therapy for both her shoulder and her back between October 3, 2012 and November 19, 2012. In a discharge summary dated November 19, 2012, the therapist, Shannon McCann, P.T., noted that, while Petitioner exhibited some inconsistencies, she could not rule out the influence of chronic pain and potential for central sensitization phenomenon. She referred Petitioner back to Dr. Saltzman. PX 3. On November 20, 2012, Dr. Saltzman noted that Petitioner was better after six sessions of therapy but was still taking Advil or Aleve. He also noted that Petitioner had fallen on her right shoulder two days earlier but was rapidly improving from that incident. He described the fall as causing only a mild contusion. He described Petitioner as "status post rotator cuff decompression and labral debridement." He found Petitioner to be at maximum medical improvement and instructed Petitioner to continue taking Advil or Aleve as necessary and return to him as needed. PX 2.

Petitioner testified she continues to experience pain in her lower back and sometimes in her buttocks. She experiences burning and tingling with extended sitting. Her right shoulder and arm are weaker than before the accident. She has difficulty extending her right arm overhead in order to reach a high shelf.

Petitioner testified she never returned to work for Respondent. She occasionally performs clerical work on a temporary basis through employment agencies.

Under cross-examination, Petitioner acknowledged she has not sought work of a permanent nature.

Respondent did not call any witnesses. Respondent offered into evidence a Section 12 examination report authored by Dr. Julie Wehner, an orthopedic surgeon. The report is dated November 21, 2012. Dr. Wehner noted that Petitioner complained of radiating right-sided low back pain, rated 4/10, and some neck pain. On examination, Dr. Wehner noted some self-limiting and positive Waddell's signs. On right shoulder examination, the doctor noted active abduction to 80 degrees (compared with 180 degrees on the left), forward flexion of 80 degrees (compared with 180 degrees on the left), the inability to perform adduction on the right and internal rotation on the right to only 10 degrees (normal on the left).

Dr. Wehner interpreted the repeat lumbar spine MRI as showing some degeneration at L4-L5 and L5-S1 secondary to disc dehydration and a small central protrusion at L4-L5 on the right. She described these findings as minor and "consistent with the normal aging process."

Dr. Wehner diagnosed neck pain and lower back pain. She found no correlation between the work injury and the neck pain, noting "there was no neck pain initially documented in any of [Petitioner's] injury patterns." She found Petitioner's back pain consistent with a lumbar strain. She did not recommend any additional care, noting that Petitioner exhibited self-limiting. She found Petitioner capable of full duty and saw "no evidence of any impairment rating based on a diagnosis of a soft tissue sprain to the lumbar spine area with no objective findings." RX 1.

Arbitrator's Credibility Assessment

The Arbitrator found Petitioner's testimony concerning her ongoing complaints to be credible. While Petitioner's physical therapist noted some inconsistencies, she could not rule out "the influence of chronic pain" on Petitioner's overall presentation.

Did Petitioner establish causal connection?

The Arbitrator finds that Petitioner established causal connection as to her current lumbar spine and right shoulder conditions of ill-being. In so finding, the Arbitrator relies in part on the final decision of the Commission, upholding the Arbitrator's finding of causation as to the lower back and right shoulder, and the "law of the case" doctrine. Irizarry v. Industrial Commission, 337 Ill.App.3d 598, 607 (3rd Dist. 2003). The Arbitrator also relies on Petitioner's credible testimony that her back and right shoulder symptoms persisted during the interval between the 19(b) hearing and the issuance of the Commission decision. The Arbitrator also relies on the repeat lumbar spine MRI, which showed no appreciable change, and the treatment records. There is no evidence suggesting that Petitioner reinjured her back after the 19(b) hearing. There is evidence suggesting Petitioner fell in November of 2012, landing on her right shoulder, but Dr. Saltzman indicated this fall caused only a mild contusion. The Arbitrator assigns little weight to the causation opinions expressed by Dr. Wehner, who was Respondent's

third Section 12 examiner. The Arbitrator notes that Dr. Wehner examined Petitioner's right shoulder but did not address causation vis-à-vis that body part.

What is the nature and extent of Petitioner's injuries?

With respect to the lumbar spine condition, the Arbitrator awards permanency equivalent to 4% loss of use of the person as a whole, or 20 weeks of benefits, under Section 8(d)2 of the Act. In making this award, the Arbitrator relies on the lumbar spine MRI findings, Dr. Nolden's records and Petitioner's credible testimony concerning her ongoing back/buttock complaints.

With respect to the right shoulder condition, the Arbitrator awards additional permanency equivalent to 8.5% loss of use of the person as a whole, or 42.5 weeks of benefits, under Section 8(d)2 of the Act. The Arbitrator awards permanency under Section 8(d)2 in accordance with Will County Forest Preserve District v. IWCC, 2012 Ill.App.LEXIS 109 (3rd Dist. 2012). In making this award, the Arbitrator relies on Dr. Saltzman's operative findings of January 12, 2011, i.e., extensive fraying of the posterior superior labrum and some mild fraying at the junction of the supraspinatus and infraspinatus (Arb Exh 2), Dr. Wehner's right shoulder examination findings of November 21, 2012 and Petitioner's credible testimony concerning her limited right arm range of motion.

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

Myron Spring,

Petitioner,

14IWCC0919

vs.

NO: 13WC 3120

Gilster Mary Lee,

Respondent,

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, 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 January 17, 2014, is hereby affirmed and adopted.

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

14IWCC0919

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

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

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

DATED: OCT 2 7 2014
MJB/bm
o-10/21/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

14IWCC0919

SPRING, MYRON
Employee/Petitioner

Case# **13WC003120**

GILSTER MARY LEE CORPORATION
Employer/Respondent

On 1/17/2014, 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:

3067 KIRKPARTICK LAW OFFICES PC
ERIC KIRKPATRICK
#3 EXECUTIVE WOODS CT STE 100
BELLEVILLE, IL 62226

0693 FEIRICH MAGER GREEN & RYAN
D BRIAN SMITH
2001 MAIN ST SUITE 101
CARBONDALE, IL 62903

14IWCC0919

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)

Myron Spring
Employee/Petitioner

v.

Gilster-Mary Lee Corporation
Employer/Respondent

Case # 13 WC 003120

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 Molly Dearing, Arbitrator of the Commission, in the city of Herrin, on November 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, **January 5, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$1,115.38**; the average weekly wage was **$371.69**.

On the date of accident, Petitioner was **42** 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 **$3,504.73** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$3,504.73**.

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

ORDER

The parties stipulated that Petitioner's condition of ill-being in his cervical spine is causally related to his work accident of January 5, 2013. Petitioner's current condition if ill-being in his lumbar spine is not causally related to his work accident of January 5, 2013. All medical bills, as set forth in Petitioner's Exhibit 3, are denied. Temporary total disability benefits for the period of May 17, 2013 through August 23, 2013 are denied. The prospective medical treatment recommended by Dr. Kovalsky for Petitioner's lumbar spine is denied.

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

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

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

Signature of Arbitrator

January 12, 2014
Date

JAN 17 2014

STATE OF ILLINOIS)
) ss.
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Myron Spring,
Employee/Petitioner,

v. Case No. 13 WC 3120

Gilster-Mary Lee Corporation,
Employer/Respondent.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On January 5, 2013, Petitioner was employed by Respondent at the Respondent's Centralia facility as a laborer in the packing and cleaning departments. He was forty two years of age at the time of his accident. Petitioner testified that as he was taking a twelve-foot fiberglass ladder upstairs to clean it, the ladder fell on his head, neck and back, causing him to fall to the ground. As Petitioner lay on the ground, a coworker asked him if he was alright, but he testified that he could not move after being hit. Petitioner developed a headache and felt a sharp pain down his back.

Petitioner presented to the Emergency Department at St. Mary's Good Samaritan Hospital, Centralia, Illinois. The Emergency Nursing Record for "Head/Face Trauma" indicates that Petitioner's chief complaint was neck and lower back pain after Petitioner was reportedly hit in the head with a ladder. The Emergency Physician Record for "Head Injury" indicates simply neck pain after a ladder fell on Petitioner's head. Radiographs of the cervical spine were negative, as was a CT of the cervical spine. The emergency physician's clinical impression was a contusion of the neck, and Petitioner was allowed to return to work full duty. He was given a cervical collar, and discharged with an Ibuprofen prescription. No diagnosis for Petitioner's low back was given, nor were any diagnostic studies performed for same. PX 4.

On January 8, 2013, personnel from St. Mary's Hospital conducted a post-discharge phone call to Petitioner, and the Emergency Room Post Discharge Follow Up Phone Call record indicates that Petitioner was still suffering from neck pain on that date, but reported to the caller that his neck was not as bad. PX 4.

Petitioner testified that he sought treatment at Salem Medical Center and Salem Medical Clinic, but no records from either facility were introduced into evidence.

On January 30, 2013, Petitioner presented to Dr. Don Kovalsky at the Orthopedic Center of Southern Illinois with a chief complaint of neck pain with radiation into his left parascapular regional and upper arm numbness and tingling down the left arm. The history of accident indicates that a ladder fell and struck Petitioner's head and neck, causing a forward-flexion of same, and Petitioner reported being off work since the date of accident on January 5, 2013. Petitioner denied prior injuries to his neck, with no symptoms of a headache, shoulder, or arm pain prior to this episode. Dr. Kovalsky noted that Petitioner was a normal-appearing male in minor stress, and took a lengthy physical examination. After reviewing Petitioner's diagnostic studies, Dr. Kovalsky formulated a clinical diagnosis of acute cervical flexion injury with cervical strain and left cervical radiculopathy. He noted that Petitioner was also having some lower back pain which was "aggravated by resisted extension from a forward flexed position, probably just muscular. There was no local trauma to his lumbar spine." Dr. Kovalsky excused Petitioner from work, ordered a high dose prednisone taper and Flexeril, and referred Petitioner for a cervical MRI. PX 2.

The MRI of Petitioner's cervical spine of February 5, 2013 revealed mild multilevel degenerative disc disease with mild loss of T2 signal present within the intervertebral discs and mild endplate and fact hypertrophy. PX 2.

A New Complaint History Form contained in the records of Dr. Kovalsky indicates "I was working on 1-5-13 cleaning an [sic] I was going to clean the ladder and it got away from me and fell and hit me in my head Neck Back being in pain ever since". The second page of the Form appears to have been signed by Petitioner. A nurse's note also included in the records of Dr. Kovalsky states that a ladder fell and struck Petitioner in the head, neck and back, but at the bottom of the page, contains a notation that he was struck in the back of the head. PX 2.

Petitioner returned to Dr. Kovalsky on February 8, 2013, stating that Petitioner had initially presented with a chief complaint of neck and severe radicular left arm pain, his neck and arm were mildly improved, but Petitioner had now had a severe increase in his low back pain, which was now radiating into both of his buttocks and legs. Petitioner reported a feeling that his right leg was going to give out while he was walking. An examination of Petitioner's cervical spine revealed improved range of motion, decreased cervical muscle spasm, pain in the left trapezius muscle with cervical extension and left lateral bending, and no significant pain with right lateral bending. Upon examination of Petitioner's lumbar spine, he was diffusely tender around the L4 to S1 regions to the midline, and had positive straight leg raising signs bilaterally. Dr. Kovalsky's impression was that based upon Petitioner's MRI and improvement, he did not feel that surgery was indicated for Petitioner's cervical spine. With regard to his lumbar spine, Dr. Kovalsky felt that Petitioner suffered from an exacerbation of lower back pain with bilateral lumbar radiculopathy. Dr. Kovalsky continued Petitioner's off work status and current medications, and referred him for an MRI of his lumbar spine. PX 2.

The MRI of Petitioner's lumbar spine, obtained on February 18, revealed no evidence of an acute/subacute fracture, and multilevel degenerative disc disease with loss of T2 signal present within the intervertebral discs worse at L4-5, loss of disc heights, endplate and facet hypertrophy and multilevel endplate degenerative signal changes. There was noted a broad central disc herniation at L4-5 mildly indenting the anterior aspect of the thecal sac and touching

the S1 nerve root. At L5-S1, there was noted a tiny right paracentral disc herniation, mostly contained within the epidural fat, touching the right S1 nerve. PX 2.

Petitioner returned to Dr. Kovalsky on February 28, 2013 and reported an escalation in his neck pain and persistent back pain going down both legs into his thighs. After reviewing Petitioner's lumbar spine MRI, Dr. Kovalsky's formulated a diagnosis of back pain secondary to annular tear, small disc herniation, and no severe neural compressive lesions. Dr. Kovalsky stated it was unlikely he would recommend lumbar surgery, and that neither lower back injections nor surgery were indicated at that time. Dr. Kovalsky ordered physical therapy for his low back condition, and referred Petitioner to pain management for a series of epidural steroid injections in his cervical spine. He also continued Petitioner's off work status. PX 2.

On April 4, 2013, Petitioner returned to Dr. Kovalsky. Petitioner reported that his neck and low back pain were getting worse. He rated his neck pain as a ten, and his low back pain as an eight, both on a ten point scale. Petitioner also reported that his left side had gotten worse, and he was losing balance. Dr. Kovalsky reported that Petitioner presented on this date "all hunched over ambulating with a quad cane which clearly shows me there's some element of symptom magnification. None of his injuries are that severe". *Id.* Dr. Kovalsky noted that Petitioner "acts like he's having difficulty getting in and out of a chair, and is very slow. He says he's having predominantly back pain. He walks with a forward-flexed posture of about 10 [degrees]. He doesn't appear to have any neuromuscular weakness from walking. When I examined his spine extension past 0 to 5 [degrees] causes him severe back pain which again is unusual." Dr. Kovalsky further stated that "[g]iven the small findings on his lumbar MRI and again how he's behaving, I think there's a significant element of symptom magnification or embellishment. I discussed this with the patient frankly today. I told him he doesn't have anything seriously wrong and that we need to try and push him along in therapy." Dr. Kovalsky continued his off work status, referred Petitioner for epidural injections at L4-5 and L5-S1, and ordered more aggressive therapy. Because of Petitioner's current physical and mental status, he indicated that surgery would not be a good option. PX 2.

On May 9, 2013, Petitioner again returned to Dr. Kovalsky. Since last seeing Dr. Kovalsky, Petitioner's injections had been denied, and he had underwent an examination with Dr. Russell Cantrell, who had returned him back to work light duty in a sedentary job with no bending, lifting, twisting, or carrying. Petitioner reported he was unable to continue in the light duty capacity due to severe pain. Dr. Kovalsky again ordered an epidural injection for his low back along with physical therapy. He allowed Petitioner to return to work with a maximum ten pound lifting restriction with no repetitive bending, lifting, and twisting, with a changing of positions every thirty minutes as necessary. PX 2.

Dr. Kovalsky issued additional work restrictions on May 22, 2013 of no standing longer than two hours at a time and no more than six hours in an eight hour shift. PX 2.

Petitioner returned to Dr. Kovalsky on June 13, 2013, at which time Dr. Kovalsky allowed Petitioner to continue working within his restrictions, referred him back to Dr. Smith for epidural injections, and requested he return within three months. Dr. Kovalsky noted that

Petitioner reported that he had separated from his employment with Respondent, and Dr. Kovalsky encouraged Petitioner to obtain new employment within his restrictions. PX 2.

Dr. Kovalsky's bill indicates that he saw Petitioner again on September 19, 2013, however, the Arbitrator finds no corresponding treatment record. PX 2.

On July 1, 2013, Petitioner presented to Dr. Smith. Petitioner reported pain in his low back as an eight out of ten, with his pain ranging from a seven to a ten. Petitioner was reported to be ambulating with a normal gait, and was able to perform intact toe/heel walks. Dr. Smith recommended Petitioner continue on his pain medications and home exercise program, and recommended only two nerve injections at L4-5, L5-S1. PX 2.

Petitioner was examined by Dr. Russell Cantrell on April 10, 2013 at the Orthopedic Sports Medicine & Spine Care Institute at the request of Respondent pursuant to Section 12. Petitioner reported standing next to an eight foot stepladder, getting ready to clean it, when it fell, striking him on the back of his head, neck and low back. He denied any prior history of spinal injury. Dr. Cantrell noted that Petitioner gave a history of using a quad cane for the previous month. Petitioner acknowledged that the cane was not prescribed by any particular physician, but was chosen by him to use because of weakness in his lower left extremity. After performing a physical examination, reviewing Petitioner's treatment records and diagnostic studies, Dr. Cantrell opined that Petitioner's low back condition is not causally connected to his work accident of January 5, 2013. Dr. Cantrell stated that given the absence of any acute onset lumbar back pain complaints when initially presenting to the emergency department and the absence of any clear lumbar symptomatology or examination findings in the subsequent visit on January 8, the discogenic pathology within the lumbar spine was preexisting to his work injury, representative of a degenerative condition, and not causally related to his work injury. Dr. Cantrell stated that, regarding Petitioner's cervical condition, the MRI does not offer an explanation for his radiating pain and numbness in to his left upper extremity, and noted that there was an apparent discrepancy between psychiatric records noting a prior history of neck problems that contrasted with his history given to his medical providers denying any prior problems. Dr. Cantrell recommended work restrictions of no lifting greater than twenty pounds, avoiding ladder climbing and overhead activity. Dr. Cantrell further recommended Petitioner undergo an MRI of his thoracic spine to rule out any cord compression as a basis for Petitioner's symptomatology. RX 1.

Following the thoracic radiograph, which was normal, Dr. Cantrell found nothing to identify any objective radiographic pathology correlating with Petitioner's upper motor neuron findings on examination, and he was specifically unable to identify any pathology that could explain Petitioner's reported injury of January 5, 2013. Therefore, he saw no reason to continue Petitioner's work restrictions, and felt that he was at maximum medical improvement. RX 2.

Dr. Kovalsky testified by way of evidence deposition on October 22, 2013. Dr. Kovalsky testified that his office has a policy that requires patients to prioritize their complaints because "[w]hen people come in with two problems, it just takes too long unless they have a serious injury. It's too involved, you know, to sit there and spend too much time looking at both. So they're asked to prioritize. We usually will then, once the other problem stables, start treating

the other problem." PX 1, Pg. 21. Petitioner was told of the policy when he initially made an appointment with Dr. Kovalsky. Dr. Kovalsky testified that he did not tell Petitioner of the policy. In Petitioner's case, Dr. Kovalsky noted, his neck pain went away without any aggressive treatment at all, and the back pain persisted, and accordingly, a majority of Petitioner's care since April 4, 2013 was more for his lower back than for his neck. PX 1.

With regard to Petitioner's cervical spine, Dr. Kovalsky testified that he had a contusion/strain. He did not think that Petitioner's cervical MRI findings were relevant because he was not having any significant arm pain, and Dr. Kovalsky did not expect Petitioner to have any ongoing disability or problems with regard to his cervical spine. Dr. Kovalsky placed Petitioner's cervical condition at maximum medical improvement as of April 4, 2013. PX 1.

Dr. Kovalsky testified that when Petitioner first presented to him on January 30, 2013, he a very cursory examination of Petitioner's lumbar spine to ensure that he did not have any neurological deficits or any severe injury. Dr. Kovalsky's final diagnosis with respect to Petitioner's lumbar spine was a disc herniation at L4-5. When asked whether the work accident might or could have caused Petitioner's lumbar condition, he stated that "when you get hit on the back, you tend to flex forward...and that violent motion, bending forward, could result in a disc herniation such as the one that he had." PX 1, P. 14-15. Dr. Kovalsky indicated that the pathology in Petitioner's lumbar spine at L5-S1 was irrelevant because he was not having any symptoms in his right leg consistent with a diagnosis at that level. When Dr. Kovalsky last saw Petitioner on September 13, 2013, Dr. Kovalsky was of the opinion that Petitioner could work with the same restrictions he had previously instituted of no lifting greater than ten pounds, no repetitive bending, lifting or twisting, change positions ever thirty minutes, and no standing longer than two hours at a time, in total six hours in an eight hour shift. If Petitioner does not continue to improve, Dr. Kovalsky indicated that he would recommend a functional capacity examination to assess permanent restrictions. PX 1.

Dr. Kovalsky testified that Petitioner was engaged in symptom magnification during his treatment. He stated that Petitioner has a history of bipolar disease and depression, and explained that numerous studies show that people with those mental conditions do not deal well with pain, and typically rate their pain over forty percent higher than someone who does not suffer from those same conditions. Dr. Kovalsky further explained that malingering occurs when someone purposefully acts more injured than what he really is, whereas symptom magnification occurs when the patient actually believes their pain is real, even though it is clearly exaggerated. He noted that when a patient rates his pain as a nine or ten, then that is a "red flag to me that there's a problem; and we try not to operate on people like that. They basically have an unrealistic expectation of what their pain is." PX 1, P. 28.

Dr. Cantrell testified by way of evidence deposition on July 16, 2013. Dr. Cantrell opined that Petitioner sustained a cervical sprain or strain as a result of his work accident of January 5, 2013. Regarding Petitioner's lumbar spine, Dr. Cantrell noted that the MRI showed that Petitioner has a broad-based disc protrusion at the L4-5 level and a right paracentral disc protrusion at L5-S1. Dr. Cantrell diagnosed Petitioner with subjective low back pain in light of the lack of objective evidence of findings upon examination, and a lack of objective explanation findings on his MRI scans to explain his symptoms. However, he did not feel that Petitioner's

current lumbar condition was causally related to the work accident in light of the lack of any clear lumbar symptoms immediately after the accident, the findings of the MRI appeared to be degenerative rather than traumatically induced, and the symptoms Petitioner's described in his low back seemed to vary in their location in terms of the presence or absence of any radiating symptoms in his leg. Dr. Cantrell opined that the discogenic abnormality and facet hypertrophy noted in Petitioner's lumbar spine were not aggravated by the work accident of January 5 so as to cause Petitioner to become symptomatic because Petitioner's initial presentation on January 5, 2013 did not reflect any lumbar symptoms, and the note from January 8, 2013 does not reflect any physical findings in the lumbar spine on examination. Dr. Cantrell recommended work restrictions on Petitioner on April 10, 2013 of lifting less than twenty pounds, avoid ladder climbing, and avoid overhead activity until he was able to rule out any thoracic pathology, which Dr. Cantrell explained had nothing to do with Petitioner's lumbar condition. RX 3.

At Arbitration, Petitioner testified that when he first presented to Dr. Kovalsky, his neck was hurting him the most, but that he had neck and back pain during the duration of his treatment. He stated that he was unable to move or walk. Although Dr. Kovalsky eventually treated both his neck and back, Petitioner testified that Dr. Kovalsky personally told him that he can only treat one condition at a time. Dr. Kovalsky informed Petitioner that he was not a surgical candidate, and instead, sent him to physical therapy. Three weeks of physical therapy did not relieve his pain, and the injection he received alleviated his pain for a few hours.

Petitioner returned to work for Respondent with restrictions on April 20, 2013, and Petitioner testified that Respondent accommodated his restrictions. From April 20, 2013 through May 15, 2013, Petitioner opened brownie and cocoa packages while seated, and dumped them into a bucket. On May 16, 2013, Petitioner testified that his supervisor told him to sweep the floor and pack bags. Petitioner testified he told his supervisor that he could not lift, squat, or bend, but his supervisor asked him to attempt the assigned work. Petitioner testified on direct examination that after his supervisor told him to sweep the floors and pack bags, he tried doing so for a few minutes before going to his supervisor's office and informing him he could not perform the work he was given. On cross examination, Petitioner testified he started his shift sweeping, and then performed case packing duties for approximately an hour. His testimony on cross examination insinuated that the reason he was unable to complete his assignment on May 16, 2013 was because of the lifting and twisting he indicated was required to prevent the case boxes from becoming jammed. Yet, when he recalled himself as a rebuttal witness, Petitioner testified he did not attempt to do the case packing job because the machine was not running, and stated that he was unable to perform the sweeping duties he was assigned.

After speaking with his supervisor, Petitioner testified that he was told he had to sign the statement admitted as Respondent's Exhibit 4, and Petitioner informed them that he would contact his attorney in the morning. Petitioner testified that he left voluntarily and went home after being at work for an hour.

Petitioner did not attend work the next day, and when he called in to report his absence, he reached an automated message. Thereafter, Petitioner was hospitalized for dehydration, which Petitioner acknowledged was unrelated to his January 5, 2013 work accident. Petitioner testified that he called into work to inform them of his absence, but when he did, he was told to

speak to Dan Lackey, Respondent's Plant Manager, before coming back to work. Petitioner stated that he called Mr. Lackey several times to speak with him, but was repeatedly told that Mr. Lackey was unavailable. The last time he called Mr. Lackey, he was told that he was being discharged for absenteeism. Although Petitioner acknowledged receiving an off work slip while he was hospitalized for dehydration, he testified that Respondent prevented him from turning it in. Petitioner was terminated from his employment on May 28, 2013. Following his discharge, he continued to have symptoms in his neck and low back. He ultimately found employment at Hardees on August 24, 2013 within the restrictions imposed by Dr. Kovalsky.

Petitioner testified that on some days he cannot get out of bed, and sometimes he cannot bend over. He has to take a shower instead of a bath, or if he takes a bath, his wife has to help him in and out of the bathtub. He is unable to clean, and he stated that he cannot really do anything as of the present. Petitioner testified that he can only walk a half of a block before he has to stop, and that his gait has been affected, because he is unable to walk normally. Petitioner testified that he suffers from constant pain in his low back, and his still has some pain in his neck, but his lower back is more problematic. He has symptoms down his left leg, and his feet and posterior thigh ache. Petitioner cannot twist his neck, and if he twists it too quickly, he suffers from pain for two to three days. He stated that if you walk up behind him and catch him off guard, it causes pain in his neck and back.

Tim Buretta testified on behalf of Respondent. Mr. Buretta is an assistant foreman for Respondent. He testified that he is familiar with Petitioner, as he is Petitioner's supervis. Mr. Buretta was aware of the work restrictions Petitioner had while he was employed by Respondent. He testified that prior to Petitioner reporting to work on May 16, 2013, he had time to consider what job assignments he was going to assign Petitioner to within his restrictions, and he held Petitioner and the line leader over after the pre-shift meeting to discuss Petitioner's work restrictions. Mr. Buretta assigned Petitioner to run the case packer machine for thirty minutes, which consisted of pushing six sixteen-ounce boxes of cake mix at a time from a conveyor belt directly in front of Petitioner into a box. Mr. Buretta testified that six boxes of cake mix cumulatively weigh less than ten pounds, and in any event Petitioner was never required to lift any boxes of cake mix. Mr. Buretta testified that Petitioner was not required to repetitively bend, lift or twist in this position, and that the farthest Petitioner would have to reach while performing this job was approximately eighteen inches, or about the length of his arm.

After thirty minutes running the case packer machine, Mr. Buretta testified that Petitioner was to rotate to a packet placer position, where Petitioner could sit on a stool and individually place packets of caramel weighing approximately one ounce each onto a conveyor line. This job also did not require any repetitive bending, lifting or twisting.

Mr. Buretta testified that on May 16, 2013, Petitioner was informed of his job duties, and began working on the case packer line, but after approximately twenty minutes, he came into Mr. Buretta's office and refused to work any longer. Mr. Buretta explained that the machines started up at five minutes before midnight, and Petitioner came into his office at 12:25 a.m. Mr. Buretta testified that he then reviewed Dr. Kovalsky's work restrictions with Petitioner, and informed him that the job duties were in line with those restrictions, however, Petitioner refused to return to the line.

Petitioner signed a statement acknowledging he was not being sent home by any representative of the Respondent, and that the Respondent had given Petitioner the opportunity to work light duty in accordance with his work restrictions. The statement further acknowledged that Petitioner was not entitled to miss any future scheduled shifts without permission pursuant to the Respondent's handbook. PX 4.

Linda Phee testified on behalf of Respondent. She is employed by Respondent as the Personnel Manager. Ms. Phee is familiar with Petitioner, as she performed his orientation, or if needed anything from her department, she was available to help him. Ms. Phee testified that Petitioner was terminated because he had missed several days of work, and did not provide any off work slips for the days he was absent. Petitioner was absent on May 17, 2013, and May 20, 2013 through 23, 2013. On those dates, Ms. Phee acknowledged that Petitioner called in everyday, but he failed to submit work excusal slips. She was unaware as to whether Petitioner attempted to contact her between May 17, 2013 and May 23, 2013 as she was off of work on vacation. Although she would not have been there had he tried to submit off work slips during that time, Ms. Phee testified that the slips would have been turned into the office, but none were ever received.

Ms. Phee testified that Petitioner was aware of Respondent's company policy concerning the submission of work slips, as it is included in Respondent's Handbook, which each employee must acknowledge with their signature. Ms. Phee explained that the handbook states employees must submit work slips within five calendar days within their last day worked. An employee may submit off work slips by way of facsimile or by leaving the slip at the plant. Thereafter, Ms. Phee spoke to Petitioner, and explained to him that due to the company attendance policy and because she had only received on slip with work restrictions, he was dismissed from his employment. Petitioner stated that he would call his attorney.

A portion of Respondent's handbook was admitted as Respondent's Exhibit 7. The section entitled "Documentation to Authorize Time Off from Work" indicates that if an employee is off work longer than two working days, he must submit written documentation to be off work within five calendar days after their last day worked. RX 7. Petitioner signed an acknowledgement of receipt of the Respondent's handbook on March 8, 2013. RX 8. Petitioner testified that he does not remember receiving the handbook, but acknowledged signing same.

Petitioner was convicted of Criminal Damage to Property, a Class 4 felony. RX 10.

Petitioner reviewed Respondent's Exhibit 13, and identified it as a true and accurate copy of his Facebook page as it existed on November 11, 2013, two days prior to Arbitration. He testified that he is the only authorized user on his Facebook account. Petitioner's Facebook account contains a post dated May 7, 2011, which states, "[W]hat up to all my friends god blessed me with a new life an *have back surgery monday May9*". RX 13. Petitioner denied writing the post of May 7, 2011 and denied being scheduled for back surgery on May 9, 2011. Although Petitioner testified he was incarcerated at the time the post was made, he acknowledged that his felony conviction records indicate he was not incarcerated until July 2011. RX 10.

CONCLUSIONS OF LAW

With regard to disputed issue (F), the parties stipulated that Petitioner's cervical condition was causally related to Petitioner's work accident of January 5, 2013. Respondent disputed causation as to Petitioner's low back condition and any treatment after April 19, 2013.

When ascertaining causation, where medical evidence is conflicting, it is for the Commission to determine which testimony is to be accepted, as the Commission is to determine the facts and whether there was a causal relationship between the employment and the injury. *County of Cook v Industrial Comm'n*, 69 Ill. 2d 10, 18 (1977). Likewise, "[i]t is the function of the Commission to judge the credibility of witnesses, determine the weight to be given to their testimony, and to draw reasonable inferences from that testimony." *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 478 (4th Dist. 1987).

The Arbitrator finds Petitioner to be an incredible witness, as he did not appear to be candid or forthcoming at Arbitration. Petitioner was, at times, overly defensive, and at other times, his testimony seemed intentionally ambiguous. Petitioner's memory became muddled and his demeanor bewildered when responding to questions damaging to his claim, yet he was able to recall distinct details of innocuous events.

The Arbitrator finds that the evidence introduced at Arbitration further undermines Petitioner's credibility, the most probative being the finding of Petitioner's own treating physician, Dr. Kovalsky, that he was significantly exaggerating his symptoms. In his note of April 4, 2013, Dr. Kovalsky noted that Petitioner "comes in today all hunched over ambulating with a quad cane which clearly shows me there's some element of symptom magnification. None of his injuries are that severe…Given the small findings on his lumbar MRI and again how he's behaving, I think there's a significant element of symptom magnification or embellishment. I discussed this with the patient frankly today. I told him he doesn't have anything seriously wrong…." PX 2. Although Dr. Kovalsky distinguished symptom magnification from malingering, Dr. Kovalsky's testimony nonetheless evidences Petitioner's lack of credibility. Given that his own treating physician finds Petitioner to not be forthright regarding his reported physical condition, the severity of his symptoms, and his limitations, this Arbitrator is disinclined to give Petitioner's testimony any weight.

Petitioner's credibility is further cast into doubt by the spontaneous development of his radicular symptomatology, and the change in location of same, as set forth in his treating records. Although Petitioner reported to Kovalsky "severe neck pain and low back pain radiating into his left buttock and thigh since the injury" (PX 2), the Emergency Department records and the records of Dr. Kovalsky indicate that to be untrue. The Emergency Department records of January 5, 2013 lack any complaints of weakness or radicular symptoms in Petitioner's lower extremities. PX 4. Dr. Kovalsky's lumbar examination of January 30, 2013 revealed no lower extremity weakness, no neurological deficits, and no significant injury. It was not until February 8, 2013, over a month following Petitioner's accident, that Petitioner complained of radicular pain and right leg weakness. By April 4, 2013, the feeling that Petitioner's leg was going to give out had changed from affecting only his right leg to now affecting only his left. PX 2. The

spontaneous development of radicular symptoms and the change in location of those symptoms corrupts any authenticity of Petitioner's testimony concerning his alleged lumbar condition.

The discrepancies regarding Petitioner's history of accident further evidences Petitioner's unreliability. Petitioner testified at Arbitration that he was struck in his head, neck and back by the ladder, though the Emergency Department records indicate that Petitioner was struck on his head only. It was not until treatment with Dr. Kovalsky that any mention of trauma, forward flexion upon impact, or falling forward was noted. A New Complaint History Form contained in the records of Dr. Kovalsky indicates "I was working on 1-5-13 cleaning an [sic] I was going to clean the ladder and it got away from me and fell and hit me in my head Neck Back being in pain ever since". Although the lack of punctuation renders the history ambiguous, a reasonable reading of the Form indicates that Petitioner was struck in the head, and his neck and back had been in pain ever since. A nurse's note also included in the records of Dr. Kovalsky states that a ladder fell and struck Petitioner in the head, neck and back, but at the bottom of the page, contains a notation that Petitioner was simply struck in the back of the head. PX 2. Interestingly, the 8-foot stepladder that Petitioner described to Dr. Cantrell as striking him (RX 3) turned into a 12-foot fiberglass ladder when he testified at Arbitration. Although Respondent did not dispute the issue of accident, the discrepancies concerning Petitioner's mechanism of accident are significant not only with respect to Petitioner's credibility, but also to the issue of causation, because the accident history, as Petitioner reported it to Dr. Kovalsky, forms the basis of Dr. Kovalsky's causation opinion, which is discussed further below.

Lastly with regard to the issue of credibility, Petitioner denied a history of neck and low back problems prior to January 5, 2013 to both Dr. Kovalsky and Dr. Cantrell, however, evidence introduced at Arbitration indicates otherwise. Dr. Cantrell's review of Petitioner's medical records revealed prior complaints of neck problems, and Petitioner's social media posting of May 7, 2011 on Facebook that he was having back surgery two days later indicates that Petitioner appears to have had a history of lumbar complaints. The Arbitrator acknowledges that an accident need only aggravate or accelerate a pre-existing condition such that a claimant's current condition of ill-being can be said to be causally connected to the work injury. *See Sisbro v. Industrial Comm'n,* 207 Ill.2d 193, 204-205 (2003). The Arbitrator makes note of the aforementioned evidence not to insinuate that any of Petitioner's pre-existing conditions would necessarily preclude a finding of compensability, but rather, the Arbitrator finds Petitioner's denial of pre-existing neck and back conditions to Dr. Kovalsky and Dr. Cantrell in light of Dr. Cantrell's review of the psychiatric records and Petitioner's Facebook post to be relevant to the issue of Petitioner's credibility.

Based upon the foregoing and the Arbitrator's observations at trial, the Arbitrator finds that Petitioner is not credible, and accordingly affords his testimony no weight.

In support of his position on causation, Petitioner proffered the opinions of Dr. Kovalsky. A review of Dr. Kovalsky's deposition reveals that Dr. Kovalsky based his opinion regarding the relatedness of Petitioner's lumbar condition to the work accident of January 5, 2013 upon the history Petitioner provided to him of a ladder falling on his head, neck, and back. Dr. Kovalsky testified that "[m]y feeling as - - is that it [the ladder] struck him and then kind of rolled down, but he fell forward. So I think it probably struck his head and neck first and then kind of hit him

in the back. It was my impression he fell forward after that happened." PX 1, P. 15. In explaining how the impact of the ladder striking Petitioner's head, neck and back caused Petitioner's L4-L5 herniation, Dr. Kovalsky testified that "when you get hit on the back, you tend to flex forward, you know, and that violent motion, bending forward, could result in a disc herniation such as the one that he [Petitioner] had." PX 1, P. 14-15.

The crux of Dr. Kovalsky's causation opinion rests upon two aspects of Petitioner's mechanism of accident, namely the ladder striking Petitioner's back and Petitioner violently flexing forward upon impact. As noted above, the history of the ladder striking Petitioner's back is ambiguous at best, and did not arise until, at the very earliest point, Dr. Kovalsky's initial treatment visit three and a half weeks after the accident. PX 2. Further, the origin of Petitioner violently flexing forward upon being struck by the ladder is unclear. Dr. Kovalsky's deposition testimony insinuates that the forward flexion motion was merely his assumption. See PX 1, P. 14-15. When asked the history obtained directly from Petitioner on January 30, 2013, Dr. Kovalsky did not state that Petitioner reported violently flexing forward (PX 1, P. 7-8) and no such mention of same is enumerated in the New Complaint History Form. Therefore, the alleged history of a violent forward flexion motion which Dr. Kovalsky opined caused Petitioner's herniation at L4-5 was mere conjecture on Dr. Kovalsky's behalf. PX 2. Even if Dr. Kovalsky obtained that specific history from Petitioner, then the same is of little probative value, given the Arbitrator's conclusions with regard to Petitioner's credibility. Regardless, the Arbitrator is not persuaded by the causation opinion of Dr. Kovalsky, when his opinion is based on a history of accident unsupported by the record or reported to him by an individual found to be incredible.

The Arbitrator gives the opinions of Dr. Cantrell more weight, as she finds the opinions of Dr. Cantrell to be supported by the record and to be in accord with the Arbitrator's findings above. Dr. Cantrell found Petitioner's lumbar condition unrelated in light of the lack of any clear lumbar symptoms immediately after the accident, the findings of the MRI which appeared to be degenerative rather than traumatically induced, and because the symptoms Petitioner's described in his low back seemed to vary in their location in terms of the presence or absence of any radiating symptoms in his lower extremities.

Like Dr. Cantrell, the Arbitrator finds the token mention of low back complaints immediately following the accident significant. Although Petitioner repeatedly pointed to the complaint of low back pain in the nurse's Emergency Department record of January 5, 2013 to evidence causation, the Arbitrator declines to find this singular mention of low back complaints as supportive of the finding of a lumbar condition, especially when it was uncorroborated by the Emergency Department physician, any lumbar diagnosis or treatment on that date, and any mention of low back pain in St. Mary Hospital's telephone follow-up to Petitioner three days later. Further, as discussed more thoroughly above, the Arbitrator, as did Dr. Cantrell, finds the variance in Petitioner's radicular symptomatology to be indicative of a lack of relatedness of Petitioner's lumbar condition to the work accident.

The Arbitrator concludes that Petitioner failed to prove by a preponderance of evidence that his current condition of ill-being in his lumbar spine is causally related to his work accident of January 5, 2013, as the basis of Dr. Kovalsky's causation opinion is not supported by the record and is fatally undermined by Petitioner's lack of credibility.

In regard to disputed issue (J), Petitioner claimed $1,922.30 in outstanding medical bills as enumerated in Petitioner's Exhibit 3, consisting of a charge in the amount of $310.00 from Dr. Kovalsky for the dates of service of June 13, 2013, July 1, 2013, and September 19, 2013, and a charge in the amount of $1,612.30 from the Injured Workers Pharmacy. PX 3. In light of the Arbitrator's findings with regard to disputed issue (L), and because Petitioner was at maximum medical improvement for his cervical condition on April 4, 2013, Petitioner has failed to prove that the aforementioned bills are reasonable and necessary in Petitioner's care and treatment. Therefore, the outstanding medical bills set forth in Petitioner's Exhibit 3 are denied.

In regard to disputed issue (K), given the Arbitrator's findings with regard to disputed issue (L), prospective medical treatment recommended by Dr. Kovalsky for Petitioner's lumbar spine is denied. As Petitioner was placed at maximum medical improvement for his cervical condition as of April 4, 2013, no further treatment has been recommended for same and is not presently at issue.

In regard to disputed issue (L), the parties stipulated that Respondent paid temporary total disability benefits from January 8, 2013 through April 19, 2013. Petitioner sought additional benefits from May 17, 2013 through August 23, 2013, which Respondent disputed. Given the Arbitrator's findings herein, Petitioner is not entitled to temporary total disability benefits for the claimed time period. Dr. Kovalsky testified that the work restrictions imposed after April 4, 2013 were related solely to Petitioner's low back condition. Because the Arbitrator finds Petitioner's lumbar condition is not causally related to Petitioner's work accident, temporary total disability benefits for May 17, 2013 through August 23, 2013 are denied.

Furthermore, the Arbitrator notes that because of Petitioner's lack of credibility, the Arbitrator is unpersuaded by Petitioner's testimony that he left work on May 16, 2013 because Respondent assigned him work duties that exceeded his restrictions. Instead, the Arbitrator places greater weight on the testimony of Mr. Buretta and Ms. Phee, both of whom testified that Petitioner left work on May 16, 2013 on his own volition after only approximately twenty minutes after having begun work on the case packer line. The Arbitrator finds that Petitioner abandoned his job prior to being terminated, as he left work voluntarily on May 16, 2013 and failed to return thereafter despite Respondent providing him work accommodations. Therefore, Petitioner is not entitled to temporary total disability benefits for the claimed period.

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

Sharon Ross-Tieken,
Petitioner,
vs.
North Star Memorial Group,
Respondent,

14IWCC0920
NO: 13 WC 5996

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, 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 11, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,424.00. 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 27 2014
MJB/bm
o-10/21/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROSS-TIEKEN, SHARON
Employee/Petitioner

Case# **13WC005996**

13WC030703

NORTH STAR MEMORIAL GROUP
Employer/Respondent

14IWCC0920

On 3/11/2014, 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:

0333 SHAY & ASSOC LAW FIRM LLC
TIMOTHY M SHAY
260 E WOOD ST
DECATUR, IL 62523

2250 LAW OFFICES OF STEPHEN H LARSON
BRUCE J MAGNUSON
940 W PORT PLZ SUITE 208
ST LOUIS, MO 63146

14IWCC0920

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

Sharon Ross-Tieken
Employee/Petitioner

v.

North Star Memorial Group
Employer/Respondent

Case # 13 WC 05996

Consolidated cases: 13 WC 30703

An *Application for Adjustment 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 Springfield, on February 13, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On December 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $33,814.56; the average weekly wage was $650.28.

On the date of accident, Petitioner was 51 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of $1,064.18 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services for services provided through May 18, 2011, as identified in Petitioner's Exhibit 13, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit for $1,064.18 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 $390.17 per week for 21.5 weeks because the injury sustained caused the 10% loss of use 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.

William R. Gallagher, Arbitrator

February 5, 2014
Date

MAR 11 2014

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim both of which alleged that she sustained accidental injuries arising out of and in the course of her employment for Respondent. In case 13 WC 05996, Petitioner alleged that on December 27, 2010, she fell in a gully and injured her right knee. In 13 WC 30703, Petitioner alleged that on August 16, 2013, she slipped on a wet surface and injured her right knee. Respondent stipulated that Petitioner sustained work-related accidents on both occasions; however, in 13 WC 05996, Respondent disputed liability on the basis of causal relationship. In 13 WC 30703, the primary disputed issue was the nature and extent of permanent partial disability.

Respondent owns a number of retirement homes and funeral homes and Petitioner worked for Respondent as an advance planning counselor. Petitioner's primary job was selling pre-paid funerals. Petitioner testified that on December 27, 2010, she was at a cemetery and stepped into a snow-covered gully. Because of the amount of snow that was present, Petitioner thought that she was stepping onto a flat surface. When Petitioner stepped into the gully, she felt a sharp jolt to her right knee. The accident was reported to Respondent in a timely manner.

Subsequent to the accident Petitioner had pain and swelling in the right knee; however, Petitioner deferred seeking any medical treatment in anticipation that the symptoms would resolve on their own. Petitioner initially sought medical treatment on January 23, 2011, when she was seen at Decatur Memorial Hospital Express Care by Dr. Mary Kay Randolph. The record of that visit indicated that Petitioner denied any recent injury but that Petitioner fell striking the knee one to two years ago. The record also noted that Petitioner had an injury to the right knee in 2004. Dr. Randolph examined Petitioner and opined that she had possible iliotibial band syndrome (Petitioner's Exhibit 1). At trial, Petitioner denied having any right knee problems prior to the accident of December 27, 2010, and that the history contained in that medical record was erroneous.

On February 25, 2011, Petitioner was seen by Dr. Ahmed Elrakhawy, her primary care physician. Dr. Elrakhawy's record of that date noted that Petitioner had right knee pain for two months after slipping and falling on ice. Dr. Elrakhawy examined Petitioner, prescribed medication and an Ace knee brace and also ordered an MRI (Petitioner's Exhibit 2). An MRI was performed on February 28, 2011, which, according to the radiologist, revealed joint effusion with a small Baker cyst and prepatellar soft tissue swelling (Petitioner's Exhibit 3).

Dr. Elrakhawy saw Petitioner on March 10, 2011, and Petitioner's right knee pain had improved although there was still some swelling. Dr. Elrakhawy recommended Petitioner continue wearing the knee brace. On April 5, and May 6, 2011, Petitioner contacted Dr. Elrakhawy's office and advised that she was still having right knee symptoms. Dr. Elrakhawy referred Petitioner to Dr. Edmund Raycraft, an orthopedic surgeon (Petitioner's Exhibit 2).

Dr. Raycraft saw Petitioner on May 18, 2011, and his record noted that Petitioner injured her right knee at a cemetery when she stepped into a gully, but indicated the onset date was January 15, 2011. Petitioner has significant right knee complaints; however, Dr. Raycraft noted that the MRI was unremarkable and his findings on clinical examination were benign. He opined that

Petitioner probably had iliotibial band syndrome and he recommended physical therapy. If physical therapy was not successful, Dr. Raycraft opined that Petitioner should have a steroid injection or bone scan (Petitioner's Exhibit 4). Petitioner testified that she did not obtain physical therapy because Respondent refused to pay for it and that she was unable to pay for the treatment on her own.

Petitioner did not seek any further medical treatment for right knee symptoms until July 26 and August 17, 2012, when she went to Decatur Memorial Hospital Express Care because of her right knee complaints. On both occasions, Petitioner complained of a worsening of her right knee pain. On the August 17, 2012, visit, Petitioner was referred to Dr. John Kefalas, an orthopedic surgeon (Petitioner's Exhibit 1).

Dr. Kefalas saw Petitioner on August 24, 2012, and his records contained a history of the work-related accident but indicated that it occurred in January, 2011. Dr. Kefalas noted that it had been over 20 months since the injury and that Petitioner's right knee symptoms persisted. He recommended Petitioner have a right knee arthroscopy to evaluate the lateral meniscus and chondral surfaces.

At the direction of Respondent, Petitioner was examined by Dr. Lawrence Li, an orthopedic surgeon, on October 21, 2012. In connection with his examination of Petitioner, Dr. Li reviewed medical treatment records as well as the MRI. Dr. Li's findings on clinical examination were benign and he noted that the MRI showed no evidence of ligamentous or meniscal injuries. He opined that Petitioner had iliotibial band syndrome based on her subjective complaints and he opined that he was in agreement with the diagnoses of Dr. Elrakhawy and Dr. Raycraft. In regard to causality, Dr. Li opined that Petitioner had an exacerbation of the iliotibial syndrome as a result of the accident of December 27, 2010. He further noted that this was a condition wherein symptoms would come and go. He also opined that the surgery recommended by Dr. Kefalas was not medically necessary for the iliotibial band syndrome (Respondent's Exhibit 1; Deposition Exhibit 2).

On November 29, 2012, Dr. Kefalas performed a right knee arthroscopy with a partial medial meniscectomy, chondroplasty of the patellofemoral joint and lateral retinacular release. At that time, Dr. Kefalas authorized Petitioner to be off work and released her to return to work on December 16, 2012, with the restriction of seated work only (Petitioner's Exhibit 5).

Subsequent to the surgery, Petitioner continued to be treated by Dr. Kefalas who saw her periodically through July 19, 2013. During this period of time, Petitioner continued to have right knee symptoms and Dr. Kefalas ordered physical therapy and performed steroid injections. Dr. Kefalas released Petitioner from his care on two occasions, April 12, and July 19, 2013 (Petitioner's Exhibit 5).

Approximately one month after Petitioner's being discharged by Dr. Kefalas, on August 16, 2013, Petitioner slipped and fell on a wet floor at one of Respondent's funeral homes. Petitioner testified that she struck the floor with her right leg/knee as well as her back. She stated that she struck the floor with a significant amount of force.

Following the accident Petitioner was seen at the ER of St. Mary's Hospital. Petitioner was diagnosed as having sustained a knee injury, given some medication, instructed to immobilize the knee and to apply ice and use crutches on an as needed basis (Petitioner's Exhibit 14).

On August 19, 2013, Petitioner was seen by Dr. Kefalas. On clinical examination, Dr. Kefalas noted tenderness in the medial joint line and a reduced range of motion. He ordered an MRI scan. An MRI was performed on August 23, 2013, which, according the radiologist, revealed a complete disruption of the lateral patellar retinaculum, moderate joint effusion and the cyst that was present in the prior MRI (Petitioner's Exhibits 5 and 8).

Dr. Kefalas saw Petitioner on August 23, 2013, and he reviewed the MRI scan at that time. He opined that the scan revealed an MCL sprain. Dr. Kefalas instructed Petitioner to continue to use her knee brace and he restricted her work to sit down work only (Petitioner's Exhibit 5).

Petitioner continued to be treated by Dr. Kefalas who ordered physical therapy which Petitioner received from September 24, through October 17, 2013. Dr. Kefalas continued to have Petitioner use a knee brace and, on October 21, 2013, he gave her a steroid injection. When Dr. Kefalas saw Petitioner on December 9, 2013, his office record indicated that Petitioner felt "100% improved" and his findings on examination revealed some minimal tenderness. Petitioner was not wearing her knee brace at that time. Dr. Kefalas saw Petitioner on January 20, 2014, and his record noted that Petitioner was doing well and had returned to work on full duty. Dr. Kefalas' examination was benign and he opined that Petitioner was at MMI (Petitioner's Exhibit 5).

Dr. Kefalas was deposed on October 2, 2013, and his deposition testimony was received into evidence at trial. Dr. Kefalas' deposition testimony was consistent with his medical records. In regard to the accident of December 27, 2010, Dr. Kefalas reaffirmed his opinion as to the diagnosis of a torn medial meniscus, chondral lesions, and cartilage damage on the under surface of the patella. He did not make the diagnosis of iliotibial band syndrome and opined that his findings on clinical examination did not indicate such a diagnosis and that it was not one that could be made arthroscopically. In regard to the issue of causality, Dr. Kefalas did not relate the torn meniscus to the accident of December 27, 2010, but did opine the chondral lesions that he observed were related to the accident (Petitioner's Exhibit 9; pp 12-14).

In regard to the accident of August 16, 2013, Dr. Kefalas' deposition testimony was consistent with his medical records. In regard to causality, Dr. Kefalas noted that the MCL was intact when he performed arthroscopic surgery and that the injury was causally related to the accident (Petitioner's Exhibit 9; pp 22-23).

Dr. Li was deposed on October 21, 2013, and his deposition testimony was consistent with his medical report. Dr. Li reaffirmed his opinion that the accident of December 27, 2010, caused or exacerbated the iliotibial band syndrome, that it resolved sometime in 2011, and then reoccurred in 2012 causing Petitioner to seek medical treatment again. He opined that the condition for which Dr. Kefalas recommended and performed surgery was not related to the accident of December 27, 2010, because Petitioner went over one year without having obtained treatment (Respondent's Exhibit 1; pp 10-12).

At trial, Petitioner testified that her right knee hurts all of the time, in particular, when she has to stand for any length of time. Petitioner also complained of persistent swelling of the right knee. At trial, the Arbitrator observed Petitioner's right knee and noted that the inside of the right knee and an area immediately below it appeared to be larger than the corresponding area of Petitioner's left knee.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being is, in part, causally related to the accident of December 27, 2010.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds that the accident of December 27, 2010, either caused or exacerbated the condition of iliotibial band syndrome but that the torn medial meniscus was not causally related to the accident of December 27, 2010.

When Petitioner initially sought medical treatment on January 23, 2011, iliotibial band syndrome was indicated as a possible diagnosis by Dr. Randolph. This diagnosis was indicated as a probable diagnosis by Dr. Raycraft, an orthopedic surgeon, who saw Petitioner on referral from Dr. Elrakhawy, her family physician.

The MRI performed on February 28, 2011, did not reveal any meniscal tears.

The physician who performed the arthroscopic knee surgery, Dr. Kefalas, did not relate the torn medial meniscus to the accident of December 27, 2010.

Dr. Li's opinion was that Petitioner had iliotibial band syndrome related to the accident and that this is a condition that comes and goes is consistent with Petitioner's not having medical treatment for any right knee issues for over one year.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner through May 18, 2011 (the date of the last office visit with Dr. Raycraft), was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services for services provided through May 18, 2011, as identified in Petitioner's Exhibit 13, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $1,064.18 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 not entitled to payment of any temporary total disability benefits because of the Arbitrator's conclusion of law in disputed issue (F).

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 10% loss of use of the right leg.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator concluded that Petitioner sustained iliotibial band syndrome as a result of the accident of December 27, 2010.

Petitioner continues to have right knee symptoms related to this condition.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Butts,
Petitioner,

vs. No: 09 WC 07085

The American Coal Company,
Respondent.

14IWCC0921

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 statute of limitations, notice, occupational disability, and permanent disability, and being advised of the facts and law, reverses the July 18, 2013 Decision of the Arbitrator, which is attached hereto and made a part hereof.

Arbitrator Gerald Granada found that Petitioner failed to prove by a preponderance of the evidence that Petitioner suffered from an occupational disease arising out of and in the course of his employment for Respondent. The Arbitrator noted that given Petitioner's testimony regarding his shortness of breath at work due to a cardiac condition, the Respondent's expert's opinions were more persuasive. The Arbitrator further found that Petitioner failed to prove that his current condition of ill-being was casually connected to his coal mine employment and failed to prove timely disablement as required by Sections 1(e) and 1(f) of the Occupational Disease Act. The Arbitrator found the event which caused Petitioner to cease earning wages in coal mine employment was his cardiac condition, not coal workers' pneumoconiosis. As such, the Arbitrator denied Petitioner's claim for benefits.

After considering the entire record, and for the reasons set forth below, the Commission reverses the July 18, 2013 decision of the Arbitrator.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner filed an Application for Adjustment of Claim on February 19, 2009 claiming injury on October 17, 2004 due to inhalation of coal mine dust, fumes and vapors for a period in excess of 41 years causing injury to his lungs and/or heart in the scope and course of his employment with Respondent. (AX2). There is no dispute Petitioner was regularly exposed to coal dust, silica, roof bolting glue fumes and diesel fumes while working for Respondent. (T11).

Petitioner's Testimony

Petitioner testified he worked for Respondent for 41 years as a coal miner with 39 of those years spent underground. During his coal mining career he worked as a laborer, maintenance trainee, mechanic and maintenance supervisor. (T10-11).

Petitioner had no tobacco use history other than smoking 1/3 pack of cigarettes a day for about a 4 year period in his early 20s. Petitioner suffers from high blood pressure and diabetes, but these conditions are controlled with medication and diet respectively. (T28)

Petitioner testified he regularly had to shovel coal around the belt which removed crushed coal from the feeder. The area was very dusty. He testified strenuous work in dusty condition would cause him to cough by the end of his shift. (T24-26). He first began developing chest discomfort in September 2004, but he had experienced shortness of breath at work approximately 10-12 years prior to that time. (T25).

Petitioner testified he regularly worked 10-12 hour days, 6 days a week. (T24). Petitioner's last mining exposure occurred on October 17, 2004, while working at Respondent's Galatia Mine. At that time, Petitioner was 60 years of age. (T11-13). During Petitioner's shift on October 17, 2004, he started to experience chest pains. He completed his shift but went to the hospital the next morning.(T11-13).

Petitioner testified that he was diagnosed with a blood clot and underwent a triple heart bypass on October 20, 2004. An aneurysm on his heart was also diagnosed. (T11-13). Petitioner was off work to recuperate from the heart surgery until March 17, 2005 when he was released by his cardiologist, Dr. Mufti, to return to work. Petitioner testified that he was advised by his doctors to avoid stress and lifting due to fear that the aneurysm would grow. Petitioner testified he resigned his position on April 1, 2005 fearing the aneurysm would increase due to stress and his underground workload at the mine (T35-37, RX7).

Petitioner testified he has not looked for work since resigning in 2005. He testified his breathing problems have worsened since retiring but he does not have shortness of breath if he does not exert himself. Petitioner testified if he walks or exerts himself much he coughs. His breathing problems limit what he is able to do with his grandchildren. Petitioner testified he currently spends his time hunting, working on small engines, fishing, traveling with family and spending time with grandchildren. He walks for his heart health. (T21-22).

Medical Records

Petitioner was seen by cardiologist Dr. Amjad Mufti as a new patient on March 10, 2004. A chest x-ray was ordered since he was a coal miner. The chest x-ray showed the lungs to be clear of active disease. (RX3).

Petitioner was seen by at the Harrisburg emergency room on September 26, 2004 due to chest pain and pressure and he followed up with Dr. Mufti. After chest symptoms at work on October 17, 2004, Petitioner underwent a stress test on October 19, 2004 with positive results; typical of ischemia. (RX3).

Petitioner was seen by Dr. Bernard Fogelson for a consultation on October 20, 2004. At that time, Petitioner's lungs were noted to be clear, and he had good respiratory effort. That day, Dr. Fogelson performed a left heart catheterization and coronary angiography followed by coronary artery bypass grafting times three. An aneurysm on Petitioner's heart was also discovered. Petitioner was scheduled to regularly obtain CT scans and x-rays of the chest in order to monitor the aortic aneurism and also his lungs due to his coal mining work. (RX3).

Dr. Mufti released Petitioner to return to mining on March 17, 2005. It was charted that Petitioner had been called by several supervisors at the mine a few days earlier and that Petitioner was under a lot of stress to return to work and his blood pressure was elevated. (RX3).

Petitioner underwent a CT scan of the chest on May 17, 2005. The radiologist's interpretation included old healed granulatomous disease, as well as several small nodules without definite calcification in the right lower lobe. The radiologist noted the nodules might be non-calcified granulomas, but other etiologies could not be totally excluded. Scarring or subsegmental atelectasis was also noted anteriorly in the right upper lobe. A four centimeter ascending aortic aneurysm was noted, as well. (RX5).

Petitioner was seen by Dr. Mufti on August 25, 2005 in follow up after the abnormal CT scan. Although some sub-centimeter nodules were previously noted in the right lower lobe, they were not identified in a new study on August 24, 2005. The ascending aortic aneurysm was unchanged (RX3, RX5).

Petitioner was seen by Dr. Fogelson on February 20, 2006 for follow-up regarding the aortic aneurysm. A CT scan of that date showed no growth of the aneurysm, but did show some mild scarring in the lungs. It was charted that Petitioner had no dyspnea, cough or wheezing. (RX3).

On June 8, 2007, Petitioner was seen by Dr. William Clap at Methodist Family Practice to re-establish care. At that time, Petitioner complained of a chronic cough that had been ongoing for months. On exam, the lungs revealed no wheezing or rhonchi. A chest x-ray was ordered and interpreted by the radiologist as revealing no acute heart or lung disease. (RX4).

NIOSH records showing negative interpretations by B or A readers of films from 1974, 1983 and 2000 were entered into evidence. (RX6).

Deposition Testimony

Dr. Sanjabi.

Dr. Parviz Sanjabi testified by way of deposition on March 1, 2012. At his attorney's request, Petitioner was examined by Dr. Sanjabi on September 28, 2009. Dr. Sanjabi testified he currently works part-time for the Southern Illinois Respiratory Disease Clinic but previously was the Director of the School of Respiratory Therapy at SIU School of Technical Careers, Medical Director at the Cardiopulmonary Lab at Herrin Hospital and Pulmonary Rehabilitation Program of Southern IL Hospital Services Corporation, an internist with subspecialty in pulmonary disease at the Carbondale Clinic, and Medical Director of the Black Lung Clinic in Herrin, IL for about 30 years. While Dr. Sanjabi is not a certified B-Reader, he testified that he took the B-reader course in the 1970s but elected not to pursue certification because he did not want to devote his practice entirely to reading x-rays as he would have been the only B-reader in his geographic area. (PX1).

Dr. Sanjabi noted Petitioner's long career in the coal mines with significant work underground and further noted that Petitioner's chest exam was normal, except for some surgical scarring. Pulmonary function testing was normal, but a chest x-ray showed coal workers' pneumoconiosis category 1/0. (PX1). Dr. Sanjabi testified that CWP is caused by coal dust retained in the lungs, which causes cells to react defensively, causing damage. The result is the formation of granulomas that prevent the affected tissue from performing normally. Dr. Sanjabi further opined that while there will be an impairment of function at the damage site, it may not be measurable by pulmonary function testing. One can have radiographic CWP and still have normal pulmonary function testing. Dr. Sanjabi stated that the medical treatment records would not change what he observed on x-ray. (PX1)

Dr. Sanjabi testified that with added exposure CWP can progress and, as such, he advises miners with CWP to terminate their exposure to coal dust. Dr. Sanjabi testified that the CWP he found on Petitioner's x-ray would have been present when Petitioner left work with Respondent and he would have recommended that Petitioner cease mining at that time. Based on Petitioner's spirometry and pulmonary function testing, he is still capable of heavy manual labor however. (PX1)

Dr. Wiot.

Dr. Jerome Wiot testified by way of deposition on September 8, 2010. Dr. Wiot has been a board certified radiologist since 1959 and is a certified B-Reader. Dr. Wiot also teaches a B-reader program and helped develop the program. Dr. Wiot testified that he reads some 50-60 chest films a day. He provided a review on behalf of Respondent with a report dated December 4, 2009. Dr. Wiot reviewed the chest x-rays of June 8, 2007, October 3, 2008, and December 12, 2008 and found no evidence of CWP on the films. He also reviewed CT scans dated May 17, 2005, August 24, 2005 and February 20, 2006 and found no evidence of CWP. He did note some granulotamous and bilateral parenchymal liner bands in the bases but stated that they were most likely manifestations of past inflammation rather than evidence of CWP. Dr. Wiot did not note the aortic aneurysm on the CT scans but he testified that the ascending aorta just gets a little dilated as one gets older, but that doesn't mean an aneurysm exists.(RX1).

Dr. Wiot testified that CWP invariably begins in the upper lung fields and progresses to the mid and lower zones. Dr. Wiot noted that Dr. Smith found the upper lung zones clear in Petitioner's films. Dr. Wiot stated that by definition, a person with CWP would have an impairment in the function of his lungs at the site of the scar tissue even if that impairment might not be able to be measured by pulmonary function testing. Dr. Wiot testified that CWP tends not to progress after exposure ceases. (RX1)

Dr. Selby.

Dr. Jeffrey Selby performed a record review at the request of Respondent's counsel on March 26, 2010. He testified by way of deposition on April 24, 2012. He is board certified in internal medicine and pulmonology, is a certified B-reader, and works in a general pulmonary practice with a small percentage of his practice devoted to occupational lung disease. He reviewed the reports of Dr. Sanjabi, Dr. Smith and Dr. Wiot as well as the medical records of Petitioner's treating physicians including chest x-rays taken October 3, 2008 and December 12, 2008. Dr. Selby opined all the x-rays were negative for pneumoconiosis. He also reviewed CT scans of the chest from 2005 and 2006 and found no evidence of CWP. Dr. Selby did testify that he observed some right upper lobe anterior streaky scarring, which he opined was probably a prior pneumonia or some other kind of infection. Dr. Selby's interpretations did not mention the aortic aneurism. Dr. Selby testified that for a proper reading of a chest x-ray for black lung, one must put the date on the film being read and it is of value to review serial x-rays for consistency. (RX2)

Dr. Selby concluded that Petitioner does not suffer from any subjective or objective findings consistent with CWP and opined Petitioner has the respiratory capacity to perform all of his prior coal mining duties. (RX2). Dr. Selby testified in line with Dr. Sanjabi that for a person to have CWP, he must have coal mine dust in the lungs and a tissue reaction that causes scarring or fibrosis. By definition, if someone has CWP, he would have impairment in the function of his lung at the site of the scarring, whether measured by spirometry or not. Dr. Selby confirmed that one can have pulmonary function tests within the range of normal and normal findings on exam but still have radiographically significant CWP. Dr. Selby opined that he would expect someone with category one CWP to have a normal physical exam and possibly no complaints. Dr. Selby testified that if a miner leaves the mine with category one pneumoconiosis and does not have further exposure, in the vast majority of miners, the disease does not progress. Dr. Selby agreed with Dr. Sanjabi that Petitioner was capable of heavy labor. (RX2).

Section 12 Reports

Dr. Henry K. Smith, a board certified radiologist and NIOSH B-Reader, authored reports dated January 6, 2009, February 17, 2010 and May 17, 2010 at Petitioner's request after review of chest x-rays dated December 12, 2008, October 3, 2008 and June 8, 2007, respectively. Dr. Smith read the x-rays as positive for pneumoconiosis, category 1/0 with opacities in the mid and lower lung zones bilaterally. He also authored a report dated February 6, 2013 after review of CT scans taken May 17, 2005, August 24, 2005 and February 20, 2006. Dr. Smith read the CT scans as positive for pneumoconiosis, category 1/0 with opacities in all lung zones (PX2).

Dr. Robert Cohen is a B-Reader board certified in internal medicine, pulmonary disease and critical care. As a B-Reader and at Petitioner's request, on April 28, 2013 he interpreted the chest x-ray of September 28, 2011 as positive for pneumoconiosis, category 1/0 with opacities in all lung zones except the mid left zone. Dr. Cohen also issued a report dated April 7, 2013 stating he interpreted CT scans dated May 17, 2005, August 24, 2005 and February 20, 2006 as showing scattered round opacities between 1.5 and 3 mm in diameter throughout the lung fields. He noted that given appropriate exposures, the opacities were consistent with pneumoconiosis. (PX7).

Dr. Sanjabi, Dr. Wiot and Dr. Selby provided narrative reports consistent with their deposition testimony.

Discussion

Notice / Statute of Limitations

The Arbitrator found that timely notice of the accident was not given to Respondent. No further discussion was made in the decision about the issue of notice.

Unlike the Workers' Compensation Act, the Occupational Disease Act does not provide a definite time for giving notice. It requires that notice be provided to Respondent "as soon as practicable after the date of disablement." 820 ILCS 310/6(c). Section 6(c) also provides that CWP claims must be filed within five years of the date of last exposure or last payment of compensation. Petitioner's last exposure was his last date of work, October 17, 2004. Dr. Smith provided the first positive interpretation for CWP on January 6, 2009 with his review of the December 12, 2008 chest x-ray. Petitioner filed his Claim for Compensation on February 19, 2009. By giving Respondent notice within two months of his diagnosis of CWP, the Commission finds Petitioner filed a timely claim and also provided timely notice to Respondent of his alleged occupational disease and disablement.

Occupational Disease

The Arbitrator made a finding that Petitioner failed to prove by a preponderance of the evidence that he developed an occupational disease arising out of and in the course of his employment. The Arbitrator explained "given Petitioner's testimony regarding his shortness of breath at work due to a cardiac condition, the Arbitrator finds the testimony of the Respondent's experts more persuasive."

The Arbitrator went on to conclude that Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being was causally connected to his coal mine employment. The Arbitrator explained "again, the Arbitrator notes that the Petitioner's testimony and the medical records show he suffered from a cardiac condition, of which no expert has casually connected to his employment."

While medical records and a petitioner's testimony ordinarily warrant significant consideration when determining causation of a work injury or occupational disease, in this case, the fact that Petitioner suffered from a cardiac condition or experienced shortness of breath has no bearing on the determination of whether Petitioner developed radiographic coal workers' pneumoconiosis that arose out of and in the course of his employment with Respondent. Section

1(d) of the Occupational Disease Act provides that if a miner suffering from pneumoconiosis was employed for 10 years or more in coal mines, there shall be a rebuttable presumption that his or her pneumoconiosis arose out of such employment.

Dr. Sanjabi, Dr. Selby and Dr. Wiot all testified that by definition a person with CWP would have impairment in the function of his lungs at the site of the scar tissue even if that impairment might not be able to be measured by pulmonary function testing. Dr. Selby testified that he would expect someone with simple CWP, category one, to have a normal physical exam and possibly no complaints. They each opined the diagnosis of CWP has no bearing on the documentation of lung function as the diagnosis is dependent on radiographic evidence alone. There is no dispute that Petitioner was regularly exposed to coal dust over his 41 year career in the Respondent's coal mine and that the only cause of CWP is exposure to coal dust. Therefore, the question before the Commission is whether Petitioner had coal workers' pneumoconiosis evidenced on diagnostic films.

Dr. Smith, a board certified radiologist and B-Reader, interpreted Petitioner's chest x-rays of December 12, 2008, June 8, 2007, and October 3, 2008 as all being positive for CWP category 1/0 with opacities in the mid and lower lung zones bilaterally. He further interpreted CT scans of the chest from May 17, 2005, August 24, 2005 and February 20, 2006 as positive for CWP category 1/0 with opacities in all lung zones. Dr. Smith has been a B-Reader since 1987. (PX2).

Dr. Cohen is a board certified pulmonologist, the head of the National Coalition of Black Lung Clinics, and has been a B-Reader for many years. He is a board certified pulmonologist and B-Reader interpreted Petitioner's chest x-ray of September 28, 2011 as positive for CWP in all but the left middle lung zone. He also interpreted CT scans in May 2005, August 2005 and February of 2006 as showing scattered round opacities throughout the lung fields consistent with CWP. (PX7).

Dr. Sanjabi has been practicing internal medicine and pulmonary disease in Southern Illinois since 1975 and is currently working part time at the Southern Illinois Respiratory Disease Clinic. Previously he was the medical director of the Black Lung Clinic in Herrin, Illinois for approximately 30 years. Dr. Sanjabi is not board certified in any specialty and is not a B-Reader. Dr. Sanjabi explained he did not pursue B-Reader certification because he did not want to be the only B-Reader in his geographic area and have that be the focus of his practice. Dr. Sanjabi found Petitioner's chest x-ray to show CWP category 1/0. Dr. Sanjabi failed to note the date of the x-ray he reviewed. (PX1).

Dr. Wiot, a board certified radiologist and B-reader, read Petitioner's chest x-rays of June 2007, October 2008 and December 2008 as negative for CWP. He also interpreted CT scans of May 2005, August 2005 and February 2006 as negative for CWP. Dr. Wiot began teaching the B- Reader program at its inception in 1970 and has been a B-Reader since that time. Dr. Wiot did not recognize the four centimeter ascending aortic aneurism on any imaging reviewed. (RX1).

Dr. Selby, a B-Reader board certified in pulmonology and internal medicine, provided a record review on behalf of Respondent. He has been a B-Reader since 1985. Dr. Selby reviewed chest x-rays from June 2007, October 2008 and December 2008 and opined all were negative for CWP. Dr. Selby also reviewed CT scans of the chest from May 2005, August 2005, and February 2006 and opined all were negative for CWP. Dr Selby's interpretations also fail to mention an aortic aneurism. Dr. Selby did testify that he did note some right upper lobe anterior streaky scarring, but he attributed its presence to a prior pneumonia or infection. (RX2).

Dr. Smith, Dr. Cohen and Dr. Sanjabi all diagnosed coal workers' pneumoconiosis category 1/0. Dr. Selby and Dr. Wiot opined there was no evidence of CWP on x-ray or CT scans. Dr. Selby noted scarring in the right upper lobe on CT scan reports in May 2005, August 2005, and February 2006 but attributed it to a possible prior infection. Dr. Wiot did not see the scarring on any scans. Dr. Selby and Dr. Wiot both opined the upper right lobe is usually where CWP begins. Dr. Wiot and Dr. Selby failed to identify the four centimeter ascending aortic aneurism on any imaging reviewed. Dr. Wiot opined, when questioned about the aneurism, that as a person ages sometimes the aorta gets ectatic but that does not mean there is an aneurysm. This is inconsistent with the abundance of treatment records in evidence regarding Petitioner's aortic aneurysm which affected his ability to continue working for Respondent. (PX1, RX1, RX2).

The Commission finds the opinions of Dr. Smith, Dr. Cohen and Dr. Sanjabi more credible than those of Dr. Selby and Dr. Wiot regarding the presence of radiographic coal workers' pneumoconiosis. As a result, the Commission finds Petitioner has proven by a preponderance of the evidence that he developed an occupational disease arising out of and in the course of his employment.

Disablement

The Arbitrator made a finding that Petitioner failed to prove timely disablement as required by Sections 1(e) and 1(f) of the Occupational Disease Act. He explained, "the event which caused Petitioner to cease earning full wages in coal mine employment was his cardiac condition, not the presence of coal workers' pneumoconiosis."

Section 1(e) of the Act defines disablement as "an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment."

Petitioner's last mining exposure was October 17, 2004. Dr. Smith and Dr. Cohen both interpreted 2005 CT scans as being positive for CWP. Dr. Sanjabi opined the CWP he identified on x-ray would have been present when Petitioner left the mines. All experts deposed agreed that CWP causes a reduction in functional lung tissue that may not be measurable on pulmonary function testing but radiology will show the areas damaged. The disease is progressive and the only treatment for CWP is removal from the coal dust exposure by ceasing work in coal mines. Further exposure can advance the disease, endangering Petitioner's health and causing added functional loss.

The Illinois Supreme Court has stated that for purposes of Section 1(e) of the Act, an employee is considered disabled from earning full wages at the work in which he was engaged when last exposed to the hazards of the occupational disease or equal wages in other suitable employment where he can no longer work without endangering his life or health. Freeman United Coal Mining Co. V. Ill. Workers' Comp. Comm'n, 999 N.E.2d 382 (5th Dist. 2013), citing Owens-Corning Fiberglas Corp. v. Industrial Comm'n, 362 N.E.2d 335 (1977). The Appellate Court has indicated in concurring opinion that evidence of CWP is sufficient proof of disablement in a coal miner. Freeman United Coal Mining Co. V. Ill. Workers' Comp. Comm'n, 999 N.E.2d 382 (5th Dist. 2013).

While Petitioner did not return to his mining job after October 17, 2004 out of fear of how exertional activity and stress might affect his aortic aneurysm, the evidence is clear that Petitioner, as a result of the occupational disease coal workers' pneumoconiosis, was unable to engage in the work he had performed for 41 years without further endangering his health and was disabled within the statutory time frame with loss of functional lung tissue as seen on chest x-ray and CT scans. Accordingly, we find that Petitioner met his burden of proving his CWP is causally connected to his employment as a coal miner, and he suffered timely disablement under the Act.

Petitioner's complaints are relevant to the determination of the extent of permanent partial disability suffered on account of the occupational disease. Petitioner testified at hearing the strenuous work he performed for Respondent in dusty conditions underground would cause him to cough by the end of his shift. He first began developing chest discomfort in September 2004, but he had experienced shortness of breath at work approximately 10-12 years prior to that time. Petitioner testified that if he walks or exerts himself much he coughs, and his breathing problems limit what he is able to do with his grandchildren. Petitioner has not looked for other employment since resigning from Respondent in 2005, but Dr. Sanjabi and Dr. Selby opined Petitioner was capable of heavy manual labor from a pulmonary standpoint.

The Commission finds Petitioner to be a credible witness. His long career in Respondent's coal mine caused him to suffer from coal workers' pneumoconiosis category 1/0 with recognizable loss of functional lung tissue on chest x-rays and CT scans. While Petitioner's complaints at trial were limited to occasional shortness of breath with exertion, he is no longer able to work in a mining environment without further risk to his health.

Petitioner claims no medical expenses or temporary total disability benefits. The parties stipulated at hearing that Petitioner's earnings during the year preceding the injury were $72,000.24 and his average weekly wage was $1,384.62. For the foregoing reasons, the Commission finds Petitioner suffered from an occupational disease arising from the hazards of coal mining, that he was disabled within the statutory time frame, and that he was permanently partially disabled to the extent of 7.5% of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the July 18, 2013 Decision of the Arbitrator is reversed.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $830.77 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent disability to the extent of 7.5% of the person as a whole.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 7 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-08/27/2014
drd/adc
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUTTS, KENNETH
Employee/Petitioner

Case# **09WC007085**

THE AMERICAN COAL COMPANY
Employer/Respondent

14IWCC0921

On 7/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KENNETH BUTTS
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # **09** WC **7085**

Consolidated cases:

14IWCC0921

An *Application for Adjustment 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 **May 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **Sections 1(d)-(f) and 6 of the Occupational Diseases Act**

FINDINGS

14IWCC0921

On **October 17, 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 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 **$72,000.24**; the average weekly wage was **$1,384.62**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

Petitioner claims no medical.

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

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

ORDER

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

7/14/13
Date

JUL 18 2013

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FINDINGS OF FACT

Petitioner was 68 years old at the time of arbitration. He lives in Harrisburg. Petitioner went through 10th grade and then took work to support his family. He worked for 41 years as a coal miner with 39 years being underground. During his coal mine career he was a laborer, maintenance trainee, mechanic and maintenance supervisor. In addition to coal dust, he was regularly exposed to silica, roof bolting glue fumes and diesel fumes.

Petitioner testified that he began developing chest discomfort in September 2004. On October 17, 2004, he was doing some manual labor and started having bad chest pains. He finished out his shift and then went to the hospital. He had a stress test followed by cardiac catheterization. He testified that he was found to have a blood clot and underwent triple bypass surgery. During that surgery they also found that he had a four centimeter aneurysm on his aorta at the top of his heart. Petitioner testified that he last worked a shift in coal mine employment for Respondent on October 17, 2004. He was 60 years old on that date and working as a maintenance supervisor. When he went to work that morning, he expected to work his full shift and expected to return the next day as well.

With regard to the aneurysm, Petitioner testified that he was given caution in terms of engaging in physical activities that could cause him to be short of breath. He was advised to avoid stress and lifting. Petitioner testified that coughing put stress on his aneurysm. Petitioner testified that he did not go back to coal mining after his heart surgery because of the aneurysm. He was concerned that the stress, the running and the breathing would cause the aneurysm to become larger. Petitioner performed physical labor alongside his crew to complete whatever needed to be done.

Petitioner testified that he first noticed shortness of breath at work 10 or 12 years before he quit mining. If he was doing a lot of strenuous activity in dusty areas, he would start coughing. By the end of the shift he would be coughing and hacking from the dust. Petitioner testified that from the time he first noticed his breathing problems at work until the time he left coal mining, they got worse. He testified that since leaving the mine his breathing problems have worsened.

Petitioner testified that if a physician had asked him about shortness of breath or cough while he was working, he would have told him that it just goes along with the job. Since realizing that he has the aneurysm, Petitioner has not engaged in activities that would cause him to be short of breath or cough. If he gets to coughing, he stops the activity immediately. Petitioner testified that if he was offered a job at the coal mine today, he would not take it because he figured he would end up dying.

Petitioner smoked cigarettes for about four years starting when he was 20 years old. A pack of cigarettes would last about two days. In addition to his heart problems and aneurysm, Petitioner has high blood pressure and is diabetic.

Petitioner has not worked since October 17, 2004, and has not looked for work since that date. Petitioner testified that Dr. Shahid Mufti was the cardiologist who treated him following his triple bypass surgery. Petitioner reported to Dr. Mufti on March 17, 2005, that he had been called by seven supervisors a few days before and that it was stressful for him and his blood pressure was elevated. On March 17, 2005, Dr. Mufti indicated that Petitioner was released to go back to coal mining. Petitioner signed a resignation from employment with Respondent on March 18, 2005.

Petitioner testified that when his doctors asked him whether he was short of breath or whether he had cough, he was honest with what he told them. He testified that he was honest with Dr. Sanjabi when he asked him those questions. Petitioner testified that when he told Dr. Sanjabi he did not have shortness of breath or cough it was because when he was not doing anything he did not have those symptoms. Petitioner testified that he walks about two blocks occasionally as exercise for his heart. He also push mows his yard. He generally would have to stop a couple of times while mowing the yard. He also tinkers around with small engines. He does some traveling with his children and grandchildren. He also fishes and hunts.

Petitioner was seen by Dr. Parviz B. Sanjabi on September 28, 2009, at the request of his counsel. (Petitioner's Exhibit No. 1, p. 9). Dr. Sanjabi has been practicing internal medicine and pulmonary disease in Southern Illinois since 1975. (Petitioner's Exhibit No. 1, p. 5). Dr. Sanjabi has been the Medical Director of the Cardiopulmonary Laboratory at Herrin Hospital and Pulmonary Rehabilitation Program for Southern Illinois Hospital Service Corporation. (Petitioner's Exhibit No. 1, Deposition Exhibit No. 1). Dr. Sanjabi is presently working part-time as a pulmonologist with Shawnee Health Development Respiratory Program. Dr. Sanjabi over the years has performed pulmonary function tests and interpreted same. He has also interpreted chest x-rays. (Petitioner's Exhibit No. 1, pp. 8-9).

Petitioner gave Dr. Sanjabi a history of 41 years of exposure in the coal mine. He did not have a smoking history. The pulmonary function test was basically normal and no obstructive pattern was present. (Petitioner's Exhibit No. 1, p. 11). The chest x-ray showed coal workers' pneumoconiosis which Dr. Sanjabi thought was 1/0 profusion. (Petitioner's Exhibit No. 1, pp. 11-12). He could not say what lung zones were involved (Petitioner's Exhibit No. 1, p. 34). Other than some scarring from his prior coronary artery bypass graft surgery, Petitioner's chest examination was normal. (Petitioner's Exhibit No. 1, pp. 10-11). Dr. Sanjabi is not a B-reader. He took the course for learning to interpret x-rays according to the ILO classification, but he did not take the exam and is thus an A-reader. (Petitioner's Exhibit No. 1, pp. 24-25; 35-36).

Dr. Sanjabi testified that to have coal workers' pneumoconiosis there must be a tissue reaction to the trapped coal dust. This tissue reaction is called scarring. (Petitioner's Exhibit No. 1, p. 13). Dr. Sanjabi testified that at the very site of the reaction there will be an impairment in the function of the lung even if it is not always capable of being measured by pulmonary function studies. (Petitioner's Exhibit No. 1, p. 14). Dr. Sanjabi testified that one can have coal workers' pneumoconiosis that shows up on chest x-ray but still have normal pulmonary function testing, normal blood gases, normal physical examination of the chest and no complaints or symptoms. This is what he would expect with category 1 coal workers' pneumoconiosis. (Petitioner's Exhibit No. 1, pp. 17-18). Dr. Sanjabi testified that in light of his diagnosis of coal workers' pneumoconiosis, he would recommend that Petitioner not be exposed to coal mine dust. (Petitioner's Exhibit No. 1, pp. 19-20). Dr. Sanjabi testified that the coal workers' pneumoconiosis that he found on chest x-ray would have been present when Petitioner left the coal mine. (Petitioner's Exhibit No. 1, p. 20).

Dr. Sanjabi's only professional contact with Petitioner was that one visit. Dr. Sanjabi has seen patients referred by Petitioner's counsel for two or three decades. (Petitioner's Exhibit No. 1, pp. 30-31). Petitioner told Dr. Sanjabi that he discontinued his work at the mine in October 2004, when he suffered a coronary artery problem. He did not tell Dr. Sanjabi that he left the coal mining on the advice of a physician because of his lungs. Petitioner did not relate to Dr. Sanjabi that he had ever taken any medications for a breathing problem. In review of systems, Petitioner denied cough or sputum. He related no significant shortness of breath to Dr. Sanjabi. (Petitioner's Exhibit No. 1, p. 33). Dr. Sanjabi testified that more likely than not, coal workers' pneumoconiosis will not progress once the exposure ceases. (Petitioner's Exhibit No. 1, p. 38).

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If Petitioner had exercise testing performed in October 2004, which showed seven METS, that would be the required maximum amount predicted for work in the coal mines. (Petitioner's Exhibit No. 1, p. 28). Dr. Sanjabi testified that if Petitioner had ischemia at the time the exercise testing was performed it would decrease his METS performance. (Petitioner's Exhibit No. 1, pp. 40-41). Dr. Sanjabi testified that there is no objective evidence of a pulmonary abnormality in Petitioner other than the chest x-ray. (Petitioner's Exhibit No. 1, p. 41). The spirometry did not reveal either the presence of an obstruction or a restriction. Based upon Dr. Sanjabi's spirometry and from a pulmonary standpoint, Petitioner would be capable of heavy manual labor. Dr. Sanjabi's opinion that Petitioner has coal workers' pneumoconiosis is based on his history of exposure to coal dust and the x-ray abnormality. If either of those two were missing, Dr. Sanjabi would not have diagnosed Petitioner with black lung. (Petitioner's Exhibit No. 1, p. 42).

Dr. Henry K. Smith, board certified radiologist and NIOSH B-reader, interpreted chest x-rays dated December 12, 2008, June 8, 2007, October 3, 2008, October 21, 2004, and October 23, 2004. He interpreted all of these chest x-rays as positive for pneumoconiosis, category 1/0 with opacities in the mid and lower lung zones bilaterally. Dr. Smith interpreted CT scans taken May 17, 2005, August 24, 2005, and February 20, 2006, as positive for pneumoconiosis, category 1/0 with opacities in all lung zones. (Petitioner's Exhibit No. 2). Dr. Cohen, who is board certified in internal medicine, pulmonary disease and critical care and is also a B-reader, interpreted the chest x-ray of September 28, 2011, as positive for pneumoconiosis, category 1/0 with opacities in all lung zones except the mid left zone. Dr. Cohen interpreted CT scans dated May 17, 2005, August 24, 2005, and February 20, 2006, as showing scattered round opacities between 1.5 and 3 millimeters in diameter throughout the lung fields. He noted that given appropriate exposures, the opacities were consistent with pneumoconiosis. He also noted cardiomegaly and an ascending aortic aneurysm. (Petitioner's Exhibit No. 7).

At the request of counsel for Respondent, Dr. Jerome F. Wiot reviewed chest x-rays regarding Petitioner. Dr. Wiot reviewed x-rays dated June 8, 2007, October 3, 2008, and December 12, 2008. He found no evidence of coal workers' pneumoconiosis on the films. (Respondent's Exhibit No. 1, p. 48). He also reviewed CT scans dated May 17, 2005, August 24, 2005, and February 20, 2006. He found no evidence of coal workers' pneumoconiosis on these films. (Respondent's Exhibit No. 1, p. 48). With regard to the CT scans, Dr. Wiot made reference to some granulotamous and bilateral parenchymal linear bands in the bases and stated that they were most likely a manifestation of a past inflammatory process. That finding is not an occupational disease or a manifestation of dust exposure. (Respondent's Exhibit No. 1, pp. 48-49). Dr. Wiot did not see an ascending aortic aneurysm on the CT scans. He testified that the ascending aorta is a little dilated as one gets older. As the aorta gets ectatic, the ascending aorta as well as the descending aorta dilate a little bit, but that is not an aneurysm. (Respondent's Exhibit No. 1, pp. 49-50).

Dr. Wiot was the Past President of the American Board of Radiology and served as an examiner for the Board. (Respondent's Exhibit No. 1, pp. 11-13). Dr. Wiot was also the Past President of the American College of Radiology and as a member of the Task Force on Pneumoconiosis, he helped to develop a weekend symposium which eventually became the modern day B-reader program. (Respondent's Exhibit No. 1, pp. 13-19). Dr. Wiot has been teaching the B-reading program since the first weekend course was held in 1970. (Respondent's Exhibit No. 1, p. 37). Dr. Wiot was a C-reader when that classification existed, and as such, when there were discrepancies in readings between A and B-readers, he was called upon to resolve said conflicts. (Respondent's Exhibit No. 1, pp. 24-26). Dr. Wiot has been a B-reader since the program started (Respondent's Exhibit No. 1, p. 26).

Dr. Wiot testified that in reviewing a film for the presence of pneumoconiosis, the reader looks at the profusion or degree of involvement as well as the opacity type. (Respondent's Exhibit No. 2, pp. 31-32). Dr.

Wiot testified that with coal workers' pneumoconiosis the vast majority of the opacities will be round with irregular opacities as a secondary type. (Respondent's Exhibit No. 2, p. 31). Dr. Wiot testified that the reader also indicates what lung zones are involved. Coal workers' pneumoconiosis invariably begins in the upper lung fields. When it progresses, it will move to the mid and lower lung zones. He testified that it is almost invariably worse in the top lung zones than in the bottom. (Respondent's Exhibit No. 1, p. 33). Dr. Wiot testified that the scarring of coal workers' pneumoconiosis is permanent. By definition if a person has coal workers' pneumoconiosis, theoretically he would have an impairment in the function of his lungs at the site of the scar tissue even though that impairment may not be able to be measured by pulmonary function testing. (Respondent's Exhibit No. 1, p. 67).

Dr. Wiot testified that it is very important in reading chest x-rays to be able to understand what is normal and what is abnormal. He testified that one has to understand what is acceptable for normal before he can decide if the minor changes are significant. This understanding only comes with experience. (Respondent's Exhibit No. 1, p. 38).

Dr. Jeff Selby performed a records review regarding Petitioner at the request of Respondent's counsel. Dr. Selby is board certified in internal medicine and pulmonology. He has been a B-reader since 1985. (Respondent's Exhibit No. 2, p. 3). Dr. Selby has a general pulmonology practice that entails both inpatient and outpatient and does all manner of consultation work as far as chest, lungs or breathing disorders. His practice also includes occupational lung disease. (Respondent's Exhibit No. 2, p. 4).

Dr. Selby reviewed the diagnostic testing performed by Dr. Sanjabi. Dr. Selby noted that the spirometry performed on Petitioner was normal. (Respondent's Exhibit No. 2, p. 21). Dr. Selby testified that the American Thoracic Society recommends for validity in spirometry that the best effort and the second best effort be within 5%. Dr. Selby testified that Petitioner's second best effort was not within that guideline. Dr. Selby testified that based upon the American Thoracic Society standards Petitioner's testing with Dr. Sanjabi was not valid. Dr. Selby testified that the best effort was clearly normal indicating that Petitioner could do at least that much and possibly more. (Respondent's Exhibit No. 2, pp. 22-23).

Dr. Selby reviewed chest x-rays dated June 8, 2007, October 3, 2008, and December 12, 2008. He found those films to be of diagnostic quality and all negative for pneumoconiosis. (Respondent's Exhibit No. 2, p. 24). Dr. Selby also reviewed CT scans of Petitioner's chest dated May 17, 2005, August 24, 2005, and February 20, 2006. Dr. Selby testified that there was no evidence of coal workers' pneumoconiosis on the CT scans. On the first scan there was a prior median sternotomy and some right upper lobe anterior streaky scar. The second CT scan was essentially the same. On the third CT scan the same scar was still seen in the right upper lobe anterior. (Respondent's Exhibit No. 2, pp. 24-25). Dr. Selby described the right upper lobe anterior streaky scar as probably a prior pneumonia or some kind of infection. Same would not be due to coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 25).

Dr. Selby testified that it is of value to have serial chest x-rays to review for an individual when he is trying to make a diagnosis of occupational lung disease because he can see through time the changes that could be consistent or inconsistent with pneumoconiosis. For a proper reading of a chest x-ray for black lung, it is mandatory to indicate in what lung zones opacities are present. (Respondent's Exhibit No. 2, pp. 25-26). Dr. Selby testified that the CT scan can provide greater accuracy as part of a thorough assessment of the pulmonary parenchyma, which is what one is looking at when trying to make a diagnosis of coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, pp. 26-27).

Based on his review of the records and films, Dr. Selby concluded that Petitioner had the respiratory capacity to perform any and all duties of his coal mine occupation, whether above or below ground, and whatever intensity or work level was necessary. Petitioner did not complain of shortness of breath, cough or non-cardiac chest pain to any treating physician. Petitioner had coronary artery disease to a severe degree, but it was not related to his coal mining experience. (Respondent's Exhibit No. 2, p. 28).

Dr. Selby testified that for a person to have coal workers' pneumoconiosis, he must have coal mine dust in his lungs, and a tissue reaction is required. This tissue reaction is called scarring or fibrosis. The scarring of coal workers' pneumoconiosis cannot perform the function of normal, healthy lung tissue. By definition, if a person has pneumoconiosis, he would have impairment in the function of the lung at the very site of the scarring, whether that impairment could be measured by spirometry or not. (Respondent's Exhibit No. 2, pp. 29-30). He testified that it is possible for a person to have radiographically-significant coal workers' pneumoconiosis and have normal findings on physical examination of the chest, normal pulmonary function tests and normal arterial blood gas tests. (Respondent's Exhibit No. 2, p. 36). He testified that radiographically-significant coal workers' pneumoconiosis first shows up typically in the right upper lobe of the lung. (Respondent's Exhibit No. 2, p. 50). Dr. Selby noted that Petitioner underwent exercise testing on October 19, 2004. The test was positive and typical of ischemia which would reduce Petitioner's MET level. It was subsequent to that testing that he underwent a triple heart bypass. (Respondent's Exhibit No. 2, p. 55).

Medical records of Welborn Clinic were admitted into evidence. Petitioner was seen by Dr. Amjad Mufti on March 10, 2004, as a new patient for complete examination. He denied history of chest pain or shortness of breath. A chest x-ray was ordered because he was a coal miner. (Respondent's Exhibit No. 3, p. 67). The chest x-ray showed the lungs to be clear of active disease. (Respondent's Exhibit No. 3, p. 66). Petitioner was seen by Dr. Mufti on October 18, 2004, reporting that he had been in a fair state of health until September 26, 2004, when he noticed chest pain and pressure and was seen at the Harrisburg Emergency Room. He reported to the doctor that for the prior few weeks he had noticed chest pain with exertion. (Respondent's Exhibit No. 3, p. 52). On that date his lungs were clear to auscultation and percussion. (Respondent's Exhibit No. 3, p. 53). On October 19, 2004, Petitioner underwent an exercise stress test which was positive, typical of ischemia. (Respondent's Exhibit No. 3, p. 51). On October 20, 2004, Petitioner had a consultation with Dr. Bernard Fogelson, who charted that Petitioner had no cough or shortness of breath. His lungs were clear, and he had good respiratory effort. (Respondent's Exhibit No. 3). On that date Petitioner underwent left heart catheterization and coronary angiography followed by coronary artery bypass grafting times three. (Respondent's Exhibit No. 3, pp. 40-45).

Petitioner was seen on March 17, 2005, by Dr. Mufti for a cardiovascular follow up. It was charted that he had been called by seven supervisors at the mine a few days earlier and that was stressful. His blood pressure was elevated. He was anxious to return to work and planning to retire soon. He was released to return to work the upcoming Monday. (Respondent's Exhibit No. 3, pp. 20, 22). Petitioner was seen on August 25, 2005, in follow up for an abnormal CT scan. Previously some sub-centimeter nodules were noted in the right lower lobe. These were not identified on the current study. A four centimeter ascending aortic aneurysm was unchanged. (Respondent's Exhibit No. 3, p. 19). Petitioner returned for follow up on September 15, 2005. The doctor noted that he had done remarkably well since his emergent bypass surgery a year prior. His lung fields were clear. (Respondent's Exhibit No. 3, p. 18).

Petitioner was seen on February 20, 2006, by Dr. Fogelson for follow up regarding his ascending aortic aneurysm. CT scan of that date showed that the aneurysm had not grown. Petitioner felt well and had no other complaints other than some pain in his right chest when moving his arms in certain ways and a mild amount of

tenderness over the left breast. He had no dyspnea, cough or wheezing. The CT of the chest conducted on that date showed that the lungs were stable and some mild scarring. (Respondent's Exhibit No. 3, pp. 13-14). He was seen by Dr. Deborah Cortlandt on February 27, 2006, for follow up cardiac exam. Petitioner denied any chest pain or shortness of breath. He had no dyspnea, cough or wheezing. His chest was clear to auscultation. (Respondent's Exhibit No. 3, pp. 9-11). Petitioner was seen by Dr. Cortlandt again on April 24, 2006, for follow up on his lipids. On that date he had cough, but no dyspnea or wheezing. His chest was clear to auscultation. (Respondent's Exhibit No. 3, pp. 2-4).

Medical records of Methodist Family Practice were admitted into evidence. On June 8, 2007, Petitioner was seen by Dr. William Clapp to reestablish care. At that time he complained of chronic cough which had been going on for months. He had a lot of allergic symptoms. On examination his lungs revealed no wheezes or rhonchi. Chest x-ray was ordered and interpreted by Dr. James King as having no acute heart or lung disease present. He was prescribed Claritin as needed for allergies. (Respondent's Exhibit No. 4, p. 34). Petitioner returned for recheck on July 13, 2007, and reported that his cough was pretty well gone. Review of the lungs revealed no wheezes or rhonchi. (Respondent's Exhibit No. 4, p. 44). Petitioner was seen on October 3, 2008, for recheck on elevated blood pressure. His lungs were clear. A chest x-ray was ordered. Dr. William Gyette found the lungs to be clear bilaterally. The impression was no acute pulmonary disease. Dr. Clapp charted that the chest x-ray showed no acute changes. (Respondent's Exhibit No. 4, pp. 20, 35). Petitioner was seen on June 12, 2009, for recheck. Petitioner had no cough on examination and his lungs were clear. (Petitioner's Exhibit No. 5, p. 20). Petitioner was seen again on February 4, 2010. He had no shortness of breath. His lungs revealed no wheezes or rhonchi. (Petitioner's Exhibit No. 5, p. 18). Petitioner was seen again on August 18, 2011. He reported no cough. Lungs were clear on examination. (Petitioner's Exhibit No. 5, p. 9). Petitioner was seen on January 17, 2012, complaining that his back hurt. He had no chest pain or shortness of breath. His lungs were clear on examination. (Petitioner's Exhibit No. 5, p. 6). Petitioner was seen on February 7, 2013. He was complaining of a large umbilical hernia that bothered him when he lifted or pushed. He requested a referral for hernia repair. He had no chronic cough. Physical examination of the chest revealed no wheezes or rhonchi. (Petitioner's Exhibit No. 4, p. 5). A CT scan of the chest dated February 18, 2013, showed that the aneurysm of the ascending aorta was stable. The radiologist saw no pulmonary nodules, infiltrates or significant interstitial lung disease. (Petitioner's Exhibit No. 4, p. 6).

Medical records of Ohio Valley Heart Care were admitted into evidence. A report dated April 1, 2005, noted that Petitioner had been released from the Cardiac Rehab Exercise Program and returned to full-time employment at the coal mine. (Respondent's Exhibit No. 5, p. 30). Petitioner underwent a CT of the chest on May 17, 2005. The radiologist's interpretation included old healed granulatomous disease as well as several small nodules without definite calcification in the right lower lobe. He noted that they might be non-calcified granulomas, but other etiologies could not totally be excluded. He noted scarring or subsegmental atelectasis anteriorly in the right upper lobe. (Respondent's Exhibit No. 5, p. 28). Petitioner was seen for a follow up CT scan on August 24, 2005. The nodules were not present. His aneurysm was stable, and Petitioner was completely asymptomatic. (Respondent's Exhibit No. 5, p. 23).

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CONCLUSIONS OF LAW

1. Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment. The Arbitrator notes that both sides have provided experts in support of their position on the issue, but given the Petitioner's testimony regarding his shortness of breath at work due to a cardiac condition, the Arbitrator finds the testimony of the Respondent's experts more persuasive.

2. Petitioner has failed to prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his coal mine employment. Again, the Arbitrator notes that the Petitioner's testimony and the medical records show he suffered from a cardiac condition, of which no expert has causally connected to his employment.

3. Petitioner has failed to prove timely disablement as required by Sections 1(e) and 1(f) of the Occupational Diseases Act. The event which caused Petitioner to cease earning full wages in coal mine employment was his cardiac condition, not the presence of coal workers' pneumoconiosis. See Forsythe v. Industrial Comm'n, 263 Ill. App. 3d 463 (5th Dist. 1994).

4. Petitioner's claim for benefits pursuant to Section 8 is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frank Schneider,
Petitioner,

vs.

No: 13 WC 05403

14IWCC0922

J F Brennan Co. Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and temporary disability and being advised of the facts and law, reverses the November 13, 2013 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).

Arbitrator Gerald Granada found that Petitioner did sustain an accident that arose out of and the course of employment on January 23, 2013 when Petitioner fell at work. The Arbitrator found that Petitioner did provide timely notice of the accident to Respondent but his current condition of ill-being was not causally related to the accident. The Arbitrator ordered Respondent to pay Petitioner temporary total disability benefits of $1,149.75 per week for 10 6/7 weeks for the period February 13, 2013 through April 29, 2013. Petitioner's undisputed average weekly wage was $1,724.62. Petitioner was also awarded medical expenses pursuant to the Act through

the date of Dr. Lange's examination, April 29, 2013, at which time Dr. Lange found Petitioner to be at maximum medical improvement. The Arbitrator denied Petitioner's request for prospective medical treatment.

After considering the entire record, and for the reasons set forth below, the Commission affirms the finding of accident and notice and reverses the remainder of the November 13, 2013 decision of the Arbitrator.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner filed an Application for Adjustment of Claim on February 20, 2013 claiming injury on January 23, 2013 to the low back and body as a whole when he fell on a metal plate while unloading rebar in the scope and course of his employment for Respondent. (AX2)

2. Petitioner testified he worked for Respondent for 13 years as a union ironworker. His duties included erecting steel buildings, welding, reinforcing rebar in concrete, etc. Petitioner described the strenuous nature of his work, including wearing a 30-35 pound harness and tool belt, climbing up to 80 feet in the air, and using heavy tools to weld, drive in bolts and wire rebar. (T11-12).

3. Prior to the January 23, 2013 accident, Petitioner treated at St. Elizabeth's emergency room on December 20, 2010, after a fall on ice at home, with injury to his neck and back. He was given a prescription for Vicodin 5/500 #20, Flexeril 10 mg #20, and Motrin. (RX3)

4. Petitioner began seeing Dr. Garner, a general practitioner, as a new patient on January 13, 2011. His main complaints at that time were trouble sleeping and a possible ear infection. Petitioner also mentioned he worked as an ironworker and experienced some back pain. Petitioner noted to Dr. Garner that he had recently had a fall, went to the ER, and was given a short supply of Vicodin and Flexeril that seemed to work well for his pain. Dr. Garner provided a short refill of the Vicodin and Flexeril and recommended a formal back workup. (RX2)

5. Dr. Garner assessed Petitioner on February 4, 2011 and opined he suffered from persistent low back pain with a question of radiculopathy and required prescription medication for pain control as well as an MRI of the lumbar spine. Petitioner never had the MRI performed. In April 2011, Petitioner presented to Dr. Garner for checkup and was noted to be working in a current job where he didn't have to carry a tool belt as much and hoped that would decrease his pain somewhat. At that time, Petitioner was taking four Vicodin daily and Flexeril before bed. Vicodin 5/500 #120 with 3 refills and Flexeril 10 mg was prescribed. (RX2)

6. Throughout 2011, Dr. Garner continued to prescribe refills of Vicodin and Flexeril for what was described in the records as "iron working pain." In a note dated September

6, 2012, Petitioner asked Dr. Garner to write a note for a job he was performing in Canada that required a doctor to certify that Petitioner was able to work full duty without restriction while on Vicodin for chronic back pain; Dr. Garner obliged. (RX2)

7. Petitioner followed with Dr. Garner for a check up on September 17, 2012. At that time, he was noted to have continued chronic low back pain and a new complaint of numbness and tingling in his hands, greater on the right. It was further noted that Petitioner has been working a lot of 12 hour shifts lately. Dr. Garner increased the number of Vicodin Petitioner received per month from #120 to 150 as it was noted the Vicodin did help his pain. (RX2) Petitioner testified that he told Dr. Garner that he felt #120 was sufficient Vicodin a month but Dr. Garner wrote for #150 just in case as Petitioner was working so many hours. (T32)

8. Petitioner presented to Dr. Garner on November 15, 2012 with complaints of significant left knee pain for a little over a week without injury but it was noted that Petitioner is required to crawl a lot for his job and carry weights. Dr. Garner gave a preliminary diagnosis of bursitis and a prescription for prednisone. It was also noted that Petitioner was refilling Vicodin at #150 per month and Flexeril at #90 per month with a couple of refills. The November 15, 2012 note makes no mention of any back complaints. (RX2)

9. The last visit with Dr. Garner prior to the January 23, 2013 accident was on January 18, 2013. It was noted that Petitioner's blood pressure was rechecked and he was doing well. It was also noted that his carpal tunnel complaints were better with bracing and his left knee pain was intermittent. Vicodin and Flexeril were refilled at that time. No specific mention of back pain was made in the record. (RX2)

10. Petitioner testified the low back pain he experienced prior to January 23, 2013 did not radiate regularly and he only occasionally experienced pain that went into his hip or buttock; never lower than his knees (T15).

11. Despite his regular pain complaints, Petitioner testified he never missed work due to low back pain and he regularly worked 12 hour days, up to 7 days a week for 4-5 years prior to the accident. (T13). Petitioner testified that he worked steadily for 7 years prior to the January 2013 accident and worked about 3000 hours total out of the union hall the prior year. (T26)

12. On January 23, 2013, Petitioner testified that around 9:00 am he was at work, unloading steel from a barge, guiding a load of rebar, when he stepped back onto a steel plate that was two inches thick, set atop 6 inches of cribbing, for a total height of 8 inches. Petitioner slipped off the edge of the plate, causing him to hit his low back on the edge of the steel plate. Petitioner testified that the pain in his low back progressively worsened and he left work around lunchtime to go home and lie down. (T15-17).

13. Petitioner presented to Dr. Garner on January 24, 2013 and gave a history of fall the prior day at work with current complaints of pain in the low back and numbness in his hands and feet. Petitioner noted that his hardhat came off and he hit the back of his head in the fall. Dr. Garner noted Petitioner's history of back pain and use of Vicodin and Flexeril prior to the accident.

14. Petitioner testified that his pain continued and progressively worsened with pain beginning to shoot down his leg, numbness in his buttock with prolonged standing, and tingling if he lay too long in one position. (T16-19). Petitioner followed up with Dr. Garner on January 28, 2013 with worsening complaints including pain that radiated to his feet bilaterally. Dr. Garner diagnosed lumbago after a fall at work with radicular symptoms and ordered a short course of prednisone, imaging of the lumbar spine and light duty work restrictions.

15. On February 13, 2013, Petitioner followed with Dr. Garner and it was noted that Petitioner had not had an MRI yet due to insurance scheduling and Petitioner continued to have a lot of pain with radiculopathy into the left leg with numbness, burning and tingling. It was at this time that Dr. Garner increased the dosage of Vicodin from 5/500, as Petitioner had been taking since 2010, to 7.5/500. (PX1)

16. On February 18, 2013, a lumbar MRI revealed an L4-5 paracentral disc herniation causing stenosis on the left neural foramen. Facet arthropathy with associated effusions at L3 through S1 were also noted by the radiologist. Dr. Garner continued Petitioner's off work status and referred him for injections and physical therapy. (PX1)

17. Petitioner's initial treatment with Dr. Gornet was on March 14, 2013. Petitioner complained of bilateral low back pain radiating into both buttock and down both legs to the knees. Petitioner advised that the current magnitude and severity of his complaints began after a work injury on January 23, 2013. Petitioner gave a history of some low back pain in the past, but no significant treatment and no previous MRIs. Petitioner advised that his current symptoms were constant and worse with prolonged bending, sitting, or standing and he currently took 7.5s Vicodin, 5 times a day. Dr. Gornet recommended Petitioner wean off narcotic medication and undergo a series of epidural steroid injections. He further opined that Petitioner suffered a disc injury at L4-5 in the January 2013 accident. Petitioner underwent ESIs on March 25, 2013 and April 29, 2013 at the L4-5 and 5-S1 levels.

18. Petitioner presented to Dr. Lange for a Section 12 examination ordered by Respondent on April 29, 2013. Petitioner gave a history of the January 2013 fall. Dr. Lange noted that Petitioner was currently taking 3 Vicodin daily at the time of the exam and Petitioner denied any prior low back difficulties or treatment in the past. Dr. Lange noted signs of symptom magnification on exam. Petitioner had neither referred nor radiating symptoms in the lower extremities. He opined Petitioner's complaints were not suggestive of a work injury, noting Petitioner had a history of narcotics use for 2 years and if only one lumbar level was affected, that must be a chronic condition related to that level. Dr. Lange opined Petitioner was not at

maximum medical improvement but could work at the light/medium demand level with a maximum lift of 30 pounds. Dr. Lange amended his report on June 3, 2013 to note that while Petitioner did suffer an accident on January 23, 2013, the bulk of his current symptoms were chronic in nature and the treatment recommended could not be associated with that accident. Dr. Lange opined Petitioner suffered a temporary aggravation of his preexisting lumbar condition but recommended further treatment, including surgery, for his preexisting condition. (RX1)

19. Dr. Gornet diagnosed an annular tear at L4-5 on May 2, 2013 and opined that the tear accounted for the majority of Petitioner's left-sided pain complaints. Dr. Gornet further opined that given the fact Petitioner is a heavy laborer, he would be best served with an anterior spinal fusion at that level. Dr. Gornet noted Petitioner would need to wean off narcotic pain relievers before surgery. (PX4)

20. Petitioner testified at trial that he had stopped taking Vicodin and Flexeril so he could proceed with the surgery recommended by Dr. Gornet. He further testified that medication and injections did not alleviate his pain after the January 2013 accident. (T24-25)

21. Petitioner testified that currently he is unable to help take care of his young children, play with them or pick them up. He spends most of his time on the couch. He cannot stand for more than 30 minutes without his buttock falling asleep. He is unable to pick up a gallon of milk because it causes shooting pain down the left leg into the calf and sometimes to the heel. He is unable to sleep for longer than 3 hours at a time and therefore has to nap throughout the day. Petitioner testified that prior to the January 23, 2013 accident, he did not experience these complaints. (T21-23).

22. On cross-examination, Petitioner confirmed he sustained a fall in his driveway in the winter of 2010 for which he was seen in the emergency room with complaints of back pain radiating to the left side. (T28). However, the radiation was in a different location than after the work accident as the emergency room record of December 28, 2010 showed pain just above the buttock on the left side with no radiation, numbness or tingling. (RX3)

23. Petitioner was taken off work by Dr. Garner on February 13, 2013 due to Petitioner's complaints following the January 23, 2013 accident and he has not been released to return to work. Dr. Gornet has also opined Petitioner is temporarily totally disabled pending lumbar fusion surgery for the injury sustained in the work accident of January 23, 2013. (PX4)

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

The Arbitrator found Petitioner's current condition of ill-being was not related to the January 23, 2013 accident. The Arbitrator stated his findings were "based on the questions of credibility raised by the medical evidence and Petitioner's testimony." The Arbitrator further found that the medical evidence documented a two year history of pre-existing chronic low back pain for which Petitioner was prescribed Vicodin and Flexeril in increasing dosages and he sustained a fall with injury to his back in December 2010. The Arbitrator further opined that

Petitioner was not credible that he would be able to perform his duties as an ironworker prior to the accident without the use of narcotics to control his chronic low back pain. The Arbitrator found the opinions of Dr. Lange more credible than those of Dr. Gornet regarding causation.

The Commission, after reviewing the entire record, reverses the Arbitrator's denial of causal connection of Petitioner's current condition of ill-being for the reasons stated below.

The Commission's review of the Petitioner's testimony does not lead to a determination that Petitioner lacked credibility. The Commission found his answers to be truthful, non-evasive and logical given his work history. Petitioner worked for Respondent as a union ironworker erecting steel structures, a position that required him to work with heavy steel and tools, climb and kneel in tight spaces, hang from harnesses and perform welding duties from heights. Petitioner testified he regularly took Vicodin and Flexeril for up to two years prior to the January 23, 2013 accident. Petitioner readily testified that he began taking the medication in 2010 after being prescribed the narcotics after a fall on his driveway. He continued to take the medication, with a prescription from his primary care doctor, for pain in his knees, back and wrists due to the "everyday wear and tear of iron work." Petitioner testified that for 4-5 years prior to the January 2013 fall he steadily worked out of the union hall, working on average 12 hour days, up to 7 days a week and he never missed work due to low back pain. Petitioner testified the year prior to the accident, he worked about 3000 hours. Petitioner testified that he did receive an increase in the number of pills he received per month in the fall of 2012 because he was working so many hours in a heavy demand position. Petitioner testified that prior to the January 2013 fall, Vicodin and Flexeril mitigated his pain, but the medication was ineffective after the accident.

The Commission finds the medical records prior to January 23, 2013 substantiate Petitioner's testimony regarding his pain complaints. Petitioner treated at St. Elizabeth's emergency room on December 20, 2010, after a fall on ice at home with injury to his neck and back. He was given a prescription for Vicodin, Flexeril and Motrin. Petitioner began seeing Dr. Garner as a new patient on January 13, 2011. His main complaints at that time were trouble sleeping and a possible ear infection. Petitioner also mentioned he was an ironworker and experienced some back pain. Petitioner told Dr. Garner that he had recently had a fall and went to the ER and was given a short supply of Vicodin and Flexeril that seemed to work well for his pain. Dr. Garner provided a short refill of the Vicodin and Flexeril. Throughout 2011 and 2012, Dr. Garner continued to prescribe refills of Vicodin and Flexeril for what was described in the records as "iron working pain." Petitioner followed with Dr. Garner for a check-up on September 17, 2012. At that time, he was noted to have continued chronic low back pain and new numbness and tingling in his hands, greater on the right. It was further noted that Petitioner has been working a lot of 12 hour shifts. Dr. Garner increased the number of Vicodin Petitioner received per month from #120 to 150 as it reduced his pain. In November 2012, he presented with complaints of significant knee pain due to crawling required by his job and carrying of weights. Vicodin and Flexeril were refilled at the new dosage. On January 18, 2013, a few days before the accident, Dr. Garner noted that Petitioner's carpal tunnel complaints were doing better with braces but his left knee pain was still intermittent. There was no notation of specific back pain.

When Petitioner presented to Dr. Garner the day after the work accident, January 24, 2013, he had specific complaints of back and neck pain. The pain was noted to have worsened by January 28, 2013 with radiation down to the feet bilaterally.

The medical records also substantiate Petitioner's testimony that he was able to work full and heavy duty prior to the January 23, 2013 accident. In September 2012, Petitioner's pain medication was increased as he had been working a lot of 12 hour shifts and was experiencing knee pain from a lot of crawling and carrying weights at work. There is no evidence Petitioner was taken off work or put on light duty prior to January 28, 2013.

The Commission finds it irrelevant to the question of causation whether Petitioner was able to work full duty without Vicodin or Flexeril prior to the January 23, 2013. What is relevant to the question of causation is that Petitioner was able to work full heavy duty prior to the accident, the prescription for Vicodin and Flexeril were given not only for chronic low back pain but also for pain in his extremities, that it was the increasing pain in the extremities that lead to the increase in medication prior to the accident, and that Petitioner had new or increased complaints of lumbar radiculopathy after the accident. Petitioner repeatedly stated in the medical records and his testimony at hearing that he did suffer from chronic back pain prior to he January 23, 2013 accident, but that the pain he experienced prior was "nothing like" the pain he experienced post-accident. Prior to the January 23, 2013 accident Petitioner worked on average 60-70 hours a week heavy labor. After the accident he is no longer able to work due to pain that is not satiated by narcotic medication.

When reviewing the record as a whole, including the Petitioner's unrebutted testimony and the treating medical records, the Commission finds the opinions of Dr. Gornet more credible than those of Dr. Lange regarding causation. While Petitioner did not specifically mention the 2010 fall on ice to Dr. Gornet, the doctor was aware and noted a history of low back pain and ongoing narcotic prescriptions. Dr. Gornet noted in his initial exam record that Petitioner's current problem began in its magnitude and severity after a work injury on January 23, 2013 and it was after that accident he was placed on light duty and then off work. Petitioner testified that Dr. Lange asked him whether he had back pain like he was experiencing currently before the accident. Petitioner truthfully answered that he had not had prior treatment, only medication. Petitioner only had one diagnostic image of his spine prior to the work injury, a normal x-ray of the lumbar spine after the 2010 fall. The MRI obtained on February 18, 2013 showed a left paracentral disc bulge at L4-5 causing moderate stenosis of the left neural foramen. Dr. Gornet opined Petitioner suffered an annular tear at L4-5 and that Petitioner's current symptoms were causally related to the January 23, 2013 accident. Dr. Gornet opined that given Petitioner's occupation, he would be best served with a spinal fusion after being weaned off narcotics. Dr. Lange opined that Petitioner was not yet at MMI with regard to the low back and required light duty restrictions, but not because of the work accident. However, Dr. Lange readily admitted that Petitioner was able to work full heavy duty with extensive overtime as an ironworker prior to the January 23, 2013 accident without any recommendation for treatment other than maintenance medication. Dr. Lange makes special note of the "increasing dosage of narcotics just prior to

January 23, 2013" in forming his opinion regarding causation. The Commission reiterates the medical records show the increase in narcotics was to combat knee and wrist pain due to his job demands and schedule. Further, the Commission notes the increase in quantity prescribed occurred in September 2012, not November as Dr. Lange states. The dosage of Vicodin did not increase from 5 to 7.5 until February 13, 2013; after the work accident and due to radicular pain into the legs.

The Commission finds Petitioner proved by a preponderance of the evidence that his current condition of ill-being is casually related to the January 23, 2013 fall that arose out of and in the course of employment for Respondent. The fall was not disputed and caused direct injury to the back. Prior to the fall, Petitioner was able to work on average 60-70 hours a week heavy duty for Respondent and after, was unable to work. He developed significant radicular pain and was diagnosed with an annular tear at L4-5 with a recommendation made by Dr. Gornet for fusion surgery. Prior to the accident, he had never had any recommendation for treatment to his spine, less maintenance medication. While Petitioner did have a long history of using heavy narcotic pain relievers for what has been described as "iron working pain," it is significant that Petitioner was able to work full duty at a heavy demand level on average 60 hours a week for years prior to the accident.

Were the medical services proved to Petitioner reasonable and necessary? Is Petitioner entitled to any prospective medical care?

Based on his finding regarding causation, the Arbitrator found Respondent was liable for the medical expenses incurred from the date of accident through April 29, 2013 subject to the fee schedule and in accordance with the Act. All medical opinions found the treatment Petitioner received was reasonable and necessary to relieve his complaints.

The Commission has found Petitioner proved the January 23, 2013 accident was a cause of his current condition of ill-being with regard to the low back and body as a whole. As such, the Commission modifies the Arbitrator's finding of medical expenses. Respondent shall pay all related, reasonable and necessary medical services contained in Petitioner's Exhibit 5 incurred from the date of accident, January 23, 2013, through the date of hearing, September 25, 2013, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner also seeks prospective medical treatment for the work related lumbar condition as recommended by Dr. Gornet, including fusion surgery at L4-5. Petitioner testified that he has been able to wean himself off narcotic pain relievers in anticipation of surgery as recommended by Dr. Gornet. Dr. Lange and Dr. Gornet have both opined that the surgery recommended is reasonable and necessary to relieve Petitioner's complaints. As the Commission has found Petitioner's spinal condition is casually related to the work injury, the Commission orders Respondent to approve prospective medical treatment for the lumbar spine as recommended by Dr. Gornet, including fusion at L4-5.

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What temporary benefits are in dispute?

Based on his finding regarding causation, the Arbitrator found Petitioner reached maximum medical improvement as of April 29, 2013, the date of Dr. Lange's Section 12 evaluation of Petitioner. The Arbitrator awarded temporary total disability for the period February 13, 2013 through April 29, 2013.

Petitioner was taken off work by Dr. Garner on February 6, 2013. Dr. Garner continued Petitioner off work through the date of hearing and Petitioner testified he never returned to work after February 13, 2013. Dr. Gornet also found Petitioner to be temporarily totally disabled due to the work accident in his note of March 14, 2013. Dr. Lange found Petitioner only able to work in a light duty capacity in his report of April 29, 2013.

The Commission finds Petitioner was temporarily totally disabled by the work accident of January 23, 2013 for the period February 13, 2013 through hearing, September 25, 2013. Respondent shall pay Petitioner TTD benefits of $1149.75 per week for 32 1/7 weeks as provided in Section 8(b) of the Act.

After considering the entire record and for the foregoing reasons, the Commission finds that on the date of accident, January 23, 2013, Respondent was operating under and subject to the provisions of the Act and an employee-employer relationship did exist between Petitioner and Respondent. Petitioner did sustain an accident on that date that rose out of and in the course of employment and timely notice of the accident was given to Respondent. In the year preceding the injury, Petitioner earned an average weekly wage of $1,724.62 and on the date of accident he was 35 years of age, married with two dependent children. The Commission further finds Petitioner's current condition of ill-being is causally related to the accident and Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services. Consistent with these findings, the Commission affirms the Arbitrator's finding of accident and notice but reverses the remainder of the Arbitrator's findings including causation, medical expenses and temporary disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the November 13, 2013 Decision of the Arbitrator is reversed. The Commission finds Petitioner sustained an accident on January 23, 2013 that arose out of and in the course of employment, timely notice was given and Petitioner proved by a preponderance of the evidence that his current condition of ill-being is causally related to the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,724.62 per week for a period of 32 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses contained in Petitioner's Exhibit 5 pursuant to §8(a) and 8.2 of the Act.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorizes and pays for prospective medical treatment for the lumbar spine, including spinal fusion, as recommended by Dr. Gornet.

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 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 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 $67,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 7 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-08/26/2014
drd/adc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SCHNIEDER, FRANK
Employee/Petitioner

Case# **13WC005403**

J F BRENNAN CO INC
Employer/Respondent

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On 11/13/2013, 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 0.09% 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:

3067 KIRKPARTICK LAW OFFICES
ERIC KIRKPATRICK
3 EXECUTIVE WOODS CT
BELLEVILLE, IL 62226

2250 LAW OFFICES OF STEPHEN H LARSON
STACEY GLOGOVAC
940 W PORT PLZ SUITE 208
ST LOUIS, MO 63146

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)

Frank Schneider
Employee/Petitioner

v.

J.F. Brennan Co., Inc.
Employer/Respondent

Case # 13 WC 005403

Consolidated cases: ___

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An *Application for Adjustment 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 **9/25/13**. 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 ___

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FINDINGS

On the date of accident, **1/23/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**(worked approximately three weeks for Respondent)**; the average weekly wage was $**1,724.62**.

On the date of accident, Petitioner was **35** 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 shall pay Petitioner temporary total disability benefits of $1149.75/week for 10-6/7 weeks, commencing 2/13/13 through 4/29/13, as provided in Section 8(b) of the Act.

Respondent shall receive a credit for any and all TTD it has paid to date.

Respondent shall pay all related, reasonable and necessary medical services incurred through 4/29/13, subject to the Fee Schedule, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner's request for prospective medical treatment is denied based on the findings regarding causation and TTD.

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.

Gerald A. Grasovich

Signature of Arbitrator

11/7/13

Date

ICArbDec19(b)

NOV 13 2013

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FINDINGS OF FACT

This case involves a 35 year old iron worker who alleges he sustained injuries to his low back stemming from an undisputed accident on January 23, 2013. Respondent is disputing the issue of causation, medical expenses, TTD and prospective medical treatment. This case proceeded to hearing pursuant to Sections 19(b) and 8)(a) of the Act.

Petitioner testified at the time of hearing that he is currently 35 years of age and has been an iron worker for thirteen years. He works out of the union hall. His job duties consist of erecting steel buildings, welding, tying and reinforcing rebar and wearing a harness weighing 30-35 lbs. He testified that the very nature of his job duties as an iron work are strenuous, require heavy lifting and working from heights. In January 2013, he began working on a job for Respondent, J.F. Brennan Co, Inc. On January 23, 2013, while working for Respondent, he was unloading steel from a barge up to a lock and dam. At approximately, 9:00 am petitioner slipped after releasing a load falling backwards and landing on his back and buttocks on a steel plate. Petitioner testified that he immediately felt a throbbing pain. Two of his co-workers came to his aid. The next day he went to his primary care physician with complaints of tingling, numbness and back pain. He further testified five days after the accident he started experiencing shooting pain down his left leg. He experiences left leg and buttock pain. His buttock falls asleep. Pain medication prescribed by Dr. Garner temporarily relived the pain but did not totally relieve it. He has not experienced any relief from injections. He has been off work since February 6, 2013. His back pain is excruciating and causes him to wake up at night and therefore he must nap during the day. Dr. Gornet wants to perform a back fusion.

Prior to January 23, 2013, petitioner testified that he had chronic low back pain and slight pain going to his left hip and buttocks. He took pain medication for his chronic low back pain. His primary care doctor's records contain complaints of low back radicular pain in February 2011 and April 2011. In November 2012, Dr. Garner increased his pain medication because he was working 12 hours a day and 7 days a week as an iron worker. He testified that he never missed work prior to the accident for lower back pain. Prior to seeing Dr. Gornet, he was still taking pain medication prescribed by Dr. Garner. He testified that has now quit taking Vicodin and Flexeril.

On Cross-Examination, petitioner admitted that he had previously fallen in December 2010 in his driveway at home landing flat on his back. He admitted that he was seen at the Emergency Room at St. Elizabeth's Hospital with complaints of low back pain with radiation to the left side. He was given a prescription for Hydrocodone and Flexeril at that time. After this fall, he began seeing his primary care doctor, Dr. Garner, for low back pain. He admitted that Dr. Garner recommended an MRI of the lumbar spine in February 2011 and again in April 2011 because of his radiating back complaints. Petitioner admitted he never had had the MRI because he couldn't afford it. He testified that he didn't think he needed the MRI. Petitioner admitted that Dr. Garner thought be needed the MRI.

On Cross-Examination, petitioner admitted that between January 2011 and January 23, 2013, Dr. Garner prescribed him Hydrocodone/Vicodin on at least 12 separate occasions for chronic low back pain. In September 2012, he was given a prescription for 150 Vicodin pills to take 4-5 pills per day. He further admitted that on November 15, 2012, he requested another 150 Vicodin pills and 90 Flexeril pills with a couple refills for his low back pain. On January 18, 2013, five days before the accident, he received another 150 Vicodin pills and 90 Flexeril pills. He admitted taking at least 5 Vicodin pills per day for the two months prior to the accident to control his low back pain. In addition, he admitted to taking Vicodin on the job while working for

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Respondent to control his low back pain. He admitted he took Vicodin on the day of the accident. He continued to take 150 Vicodin per month after the accident.

Further on Cross-Examination, petitioner admitted that when he was hired by Respondent, he was given a copy of their drug and alcohol policy and asked to read it. The policy required him to report if he was taking prescription drugs and to have a doctor's note that the prescription drugs would not affect his work performance. He admitted that he signed paperwork that he accepted and agreed to the policy. He admitted that he didn't tell Respondent that he was taking prescription drugs or Vicodin. He testified that he thought the policy was referring to illegal drugs. He admitted that he had provided a previous employer a letter from Dr. Garner that he took hydrocodone for chronic low back pain.

He admitted that he didn't tell Dr. Gornet about the fall he had at home in December 2010 prior to the accident. In addition, he didn't tell Dr. Gornet about his pre-existing radicular pain. He admitted that he didn't tell Dr. Lange about his prior back problems.

The medical records of Dr. Garner (Respondent's Exhibit 2) indicate petitioner presented on February 4, 2011 with persistent low back pain with some radiation into the legs bilaterally for which he has been taking Vicodin, Flexeril and Ibuprofen. An MRI was recommended. Petitioner returned on April 27, 2011 and his lower exam was unchanged. He was diagnosed with lumbago with radiculopathy. It was noted that he needed an MRI when he is able to get testing done. The records thereafter document multiple refills of Vicodin/Hydrocodone for low back pain. In September 2012, petitioner was given an increase in his prescription after he relayed to Dr. Garner that he has being doing a lot of 12 hour shifts as an iron worker. He admitted to over doing it lately.

Petitioner presented to Dr. Garner's office on January 24, 2013, with low back pain and gave a history of falling while unloading iron at work. The records note, on January 28, 2013, he returned to Dr. Garner and complained of back pain with radicular symptoms. An MRI of the lumbar spine was performed on February 18, 2013 which showed a disc herniation with left paracentral extension at L4-L5.

Petitioner came under the care of Dr. Gornet on March 14, 2013. Per Dr. Gornet's report, petitioner presented with chief complaints of low back pain to both sides, both buttocks, down both legs to his knees. Petitioner gave a history of the January 23, 2013 work related incident. He admitted to having a history of some low back pain in the past, but didn't recall any significant treatment and no previous MRIs. Dr. Gornet reviewed the MRI films and noted a large left-sided annular tear at the L4-5 level. It was Dr. Gornet's opinion that petitioner's current symptoms are causally connected to the January 23, 2013 work related event. Dr. Gornet referred petitioner to Dr. Boutwell for trigger point and steroid injections. On March 25, 2013, an L4/5 epidrual steroid injection and left L5/S1 transforaminal epidural space injection was performed. On April 8, 2013, a L4/5 epidural steroid injection and right L5/S1 transforaminal epidural space injection was performed.

The petitioner saw Dr. Gornet in follow up on May 2, 2013 and A CT discogram at L4-5 and L5-S1 was recommended as well as an anterior lumbar fusion at L4-5. The note documented that Dr. Gornet had a long discussion with petitioner regarding his narcotics use and he indicated he would delay surgery if he saw further narcotic prescriptions. On July 8, 2013, Dr. Gornet reviewed Dr. Lange's report and indicated that he disagreed with him regarding causation. He further noted that the continued use of Hydrocodone 150 tablets per month was unacceptable. He requested that petitioner demonstrate through drug testing that he is off all narcotics prior to moving forward with surgery. On August 19, 2013, a CT of the lumbar spine was performed which showed no evidence of disc herniation, canal compromise, or changes. Petitioner last saw Dr. Gornet in follow up on

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August 19, 2013. Petitioner reported that he was off all Hydrocodone and he was moving forward taking control of his life. Dr. Gornet is currently awaiting approval for a lumbar fusion at L4-5. Dr. Gornet has indicated that the petitioner has been temporarily and totally disabled since the time of his initial evaluation on March 14, 2013.

At the request of Respondent, petitioner underwent a Section 12 examination performed by orthopedic spine surgeon, Dr. Lange on April 29, 2013. Per Dr. Lange's report and deposition testimony, Petitioner reported that he was injured at work on January 23, 2013 when he fell backward landing on steel plates. He initially had discomfort in the low back and then developed some discomfort passing into the bilateral hips. At the time of the exam, petitioner had neither referred nor radiating symptoms into the lower extremities. Petitioner reported using Flexeril and Hydrocodone three times a day. Petitioner was asked by Dr. Lange in a very straightforward fashion whether he had low back difficulties or treatment of low back problems in the past and the answer was no. Waddell testing was significantly positive. He was seen walking out of the office in a normal fashion, in the office, however, he had an intermittent limp to the left. Straight leg exam was normal. Dr. Lange summarized Petitioner's pre-existing records from Dr. Garner regarding chronic low back pain and the use of Hydrocodone. Dr. Lange's diagnoses were subjective complaints of axial low back pain, no symptoms consistent with radiculopathy, signs of symptoms magnification, chemical dependency. Dr. Lange indicated that one could not say within any degree of medical certainty that petitioner's current complaints were related to the work related event of January 23, 2013. He was of the opinion that petitioner's medical history suggests a lumbar condition sufficiently severe to warrant the use of chronic narcotics. A few weeks prior to the work incident there was an escalation of usage with the prescribing of 25% more narcotics than previously received. Dr. Lange indicated that the MRI reveals pathology only at L4-5 and if petitioner had a chronic lumbar condition requiring narcotics for at least the past two years, the pre-existing lumbar condition and need for narcotics must be related to the same L4-5 level. Dr. Lange noted that petitioner's medical treatment had been reasonable and necessary up to this point in time for the chronic low back condition and no further treatment was necessary for the work-realted incident.

Dr. Lange provided two subsequent reports dated May 14, 2013 and June 3, 2013. In the reports and per Dr. Lange's deposition, Dr. Lange could not say with certainty that the work related incident of January 23, 2013 even aggravated or changed petitioner's pre-existing back condition. Dr. Lange agreed at most petitioner had a temporary aggravation following the work related incident which has since resolved. Any further treatment including surgery would be to address petitioner's pre-existing chronic lumbar condition and is not related to the work-related incident. Dr. Lange did acknowledge that the petitioner was not at maximum medical improvement with respect to his chronic lumbar condition. However, it was his opinion that he has reached maximum medical improvement with respect to the work related incident. It was his opinion that he should currently be able to work at the light-medium physical demand level. He acknowledged that a work release however, would need to come from a treating physician.

CONCLUSIONS OF LAW

1. With respect to issue of causation, the Arbitrator finds that petitioner has failed to sustain his burn of proof that his present condition of ill-being is causally related to the work related incident. The Arbitrator's findings are based on the questions of credibility raised by the medical evidence and Petitioner's testimony. The medical evidence documents a two year history of pre-existing chronic low back pain for which petitioner was prescribed Hydrocodone and Flexeril at increasing dosages. Petitioner admitted to a pre-existing fall in December 2010 wherein he landed flat on his back and complained of radiating left low back pain. When his radiating complaints persisted, Dr. Garner recommended an MRI of the lumbar spine. Petitioner admitted that

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he did not have the MRI. Petitioner's testimony that he didn't believe he needed the MRI is contradicted by the medical records documenting pre-existing chronic low back pain with radicular complaints for which he received narcotics to treat. Further as acknowledged by Petitioner, two months prior to the work injury, he was taking 150 pills of Vicodin and 90 pills Flexeril per month to control his chronic low back pain. Five days before the work related incident, he requested an additional 150 pills of Vicodin and 90 pills of Flexeril. He acknowledged that he took the narcotics for pre-existing chronic low back pain. His testimony that he would have been able to perform his job duties as an iron worker without use of narcotics is not credible since he continued to seek narcotics at increasing dosages from Dr. Garner due to chronic low back pain from his job duties as an iron worker. Moreover, the medical evidence documents that petitioner was not able to perform his duties as an iron worker without complaint. It is difficult to believe that petitioner would have been physically able to perform his duties as an iron worker without the use of narcotic medication to control his chronic low back pain. Dr. Lange's opinion and testimony regarding causation is more credible than the opinion of Dr. Gornet. Dr. Gornet's records do not contain a detailed history of petitioner's pre-existing chronic low back complaints. Petitioner himself admits that he did not tell Dr. Gornet about his fall in 2010 or about his pre-existing radiating low back complaints. Dr. Lange had the benefit of reviewing petitioner's pre-existing records. Dr. Lange and Dr. Gornet both agree on the level of pathology at L4-5 on Petitioner's MRI. Dr. Lange's opinion that petitioner's pre-existing low back symptoms came from his level and therefore the need for additional treatment including surgery pre-existed the work incident is more credible than Dr. Gornet's opinion regarding causation. The work-related incident at most caused a temporary aggravation which has since resolved. Therefore, the Arbitrator finds the petitioner is at maximum medical improvement following the work-related incident and finds that the petitioner has not demonstrated a causal relationship between the work-related incident and his current condition of ill-being.

2. Regarding the issue of TTD, the Arbitrator finds that the Petitioner was found to have reached maximum medical improvement according to the April 29, 3013 evalutation by Dr. Lange. Accordingly, the Petitioner is awarded TTD from February 13, 2013 through April 29, 2013. This finding is supported by the Arbitrator's findings on the issue of causation above. Respondent shall receive a credit for any TTD it has paid to date.

3. Based on the Arbitrator's findings above, the Petitioner is awarded medical expenses through the date he was found to have reached maximum medical improvement – April 29, 2013, the date of Dr. Lange's IME. Respondent shall pay any and all reasonable, related and necessary medical expenses incurred from the date of accident through April 29, 2013, subject to the fee schedule and in accordance with Sections 8(a) and 8.1 of the Act.

4. Petitioner's request for prospective medical treatment is denied based on the findings above.

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

Deborah D. Kirkland,
Petitioner,

vs. NO: 07 WC 29731

State of Illinois, Menard Correctional Center,
Respondent.

14IWCC0923

DECISION AND OPINION PURSUANT TO §8(a)

This matter comes before the Commission on Petitioner's §8(a) Petition, filed on August 4, 2009. A hearing was held before Commissioner Donohoo in Springfield on August 27, 2014. Both parties were represented by counsel. The underlying claim arises out of a cervical spine injury that occurred on May 17, 2007. That case was tried before Arbitrator Dibble with a Decision issued on May 9, 2008. Prior to the arbitration in 2008, the parties stipulated to accident and causal connection and that Petitioner was entitled to $178,210.62 in medical expenses, as well as permanent total disability. Petitioner filed this §8(a) Petition seeking medical expenses for ongoing treatment, which she alleges is related to her 2007 work injury.

Petitioner, a correctional officer at Menard Correctional Center, suffered a prior work injury to her cervical spine in 2005, when she fell down a flight of stairs at work, causing injury to her cervical spine and shoulder. She underwent a two-level fusion at C5-6 and C6-7 and was able to return to her work at the prison. On June 2, 2006, Arbitrator Dibble awarded Petitioner medical expenses of $109,146.11 and §19(k) penalties of $40,777.25. Respondent appealed that decision to the Commission, which affirmed the award of medical expenses and reversed the award of penalties. On May 31, 2007, Arbitrator Dibble entered a permanency award of 25% of the person as a whole for Petitioner's 2005 cervical spine injury and 25% of the right arm for her shoulder injury. No appeal was taken from that award, and the Arbitrator's Decision became final.

Petitioner re-injured her cervical spine on May 17, 2007, while carrying a bag of weapons into a guard tower. Petitioner testified that she suffered neck pain, arm pain and headaches as a result of her May 17, 2007 injuries, and she was required to undergo additional surgeries and treatments. Dr. Gornet performed a posterior fusion with Medtronic instrumentation from C5 to C7 to rectify failed fusion at C5-6 and C6-7. Following an FCE, Petitioner received the following permanent restrictions: no lifting over 30 pounds, no significant pushing, pulling, or overhead work, and no inmate contact. These restrictions disabled her from performing her job as correctional officer. The parties stipulated to all issues prior to hearing on April 11, 2008, and Arbitrator Dibble awarded Petitioner $178,210.62 for medical expenses and found Petitioner permanently and totally disabled on May 9, 2008.

Petitioner filed this §8(a) claim, alleging that her post-2008 hearing medical treatment is causally connected to her 2007 work injury and resulting surgeries.

After the 2008 arbitration hearing, Petitioner continued to suffer from headaches, bilateral neck pain and spasms, and on January 22, 2009, she reported increased symptoms for two months to Dr. Gornet. He opined that her pain emanated from the level adjacent to her cervical fusion, but also noted that she had screw penetration at C7-T1. A new MRI showed no significant adjacent level failure or disc herniation, but showed a possible small left herniation at C2-3. Dr. Gornet referred Petitioner for steroid injections. On February 18, 2010, Petitioner reported severe cluster headaches, and Dr. Gornet recommended chiropractic care. Petitioner attempted to control her pain through injections, therapy, and narcotics, but required emergency treatment for severe pain, nausea and vomiting.

On January 27, 2011, Petitioner sought treatment with Dr. Sonjay Fonn, a neurosurgeon specializing in spinal surgery and located in Cape Girardeau, Missouri, who ordered an updated MRI and CT myelogram. These tests showed screw fragments at C5 and C7 with severe straightening of the spinal canal. Dr. Fonn causally related Petitioner's condition to her prior surgeries, which were in turn related to her work accidents in 2005 and 2007. Dr. Fonn prescribed diagnostic epidural steroid injections at C5-6 and C6-7 to identify the pain generators and recommended a two part revision of Petitioner's fusion. Dr. Fonn would first remove the existing hardware and allow Petitioner to recover from that surgery before performing a lateral posterior fusion and stabilization using lateral mass screws. Petitioner underwent the two part procedure and was fitted with a bone growth stimulator and cervical collar.

Petitioner's headaches improved with therapy, but she developed decreased sensation and weakness in her upper extremities. Dr. Fonn referred her to Dr. Gardner, an orthopedic surgeon in Springfield, Illinois, who attributed her complaints to a C5-6 level lesion. Petitioner was referred to neurologists Dr. Alam and Dr. Quinn for NCVs, but these tests did not explain her radiculopathy, and Dr. Fonn referred her to Dr. Baxter for acupuncture.

Eventually, St. Louis neurologist, Dr. Phillips, performed EMGs and determined that Petitioner suffered from both cervical sensory radiculopathy at C6 and median neuropathies across the carpal tunnels, or carpal tunnel syndrome. Dr. Phillips could not determine whether Petitioner's symptoms were related to her radiculopathy or carpal tunnel syndrome. On September 21, 2012, Petitioner underwent left carpal tunnel release, but her numbness and arm pain persisted.

On December 20, 2012, Petitioner was evaluated by Dr. Riew, a cervical spine specialist to whom she was referred by her primary care doctor. Dr. Riew noted that Petitioner's arm pain began after her last cervical surgery; he diagnosed her with pseudoarthritis or failed fusion at C4-5 and C7-T1 with radiculopathy. He recommended repeat MRI and CT scans and posterior cervical fusion at C4-5 and C7-T1.

On February 25, 2013, Dr. Riew surgically removed and replaced Petitioner's posterior segmental instrumentation, bilateral C4 screw, bilateral T1 pedicle screws, and lateral mass screws on the left at C5, C6, and C7. He revised Petitioner's posterior cervical left hemilaminectomy at C5-7 and removed scarring, redid the posterior cervical fusion at C4-5, fused additional levels at C5-6, C6-7 and C7-T1, and implanted new allograft. Petitioner reported that her neck felt more stable and her neurological deficits improved over the following months, though she continued to have bilateral hand numbness and problems with dexterity. Dr. Riew causally related the need for the treatment he provided to Petitioner's 2007 work accident through her prior failed surgeries. He anticipated that Petitioner would have problems at C3-4 as "adjacent level failure" and would eventually need another operation to extend her fusion to that level.

Dr. Joseph Williams, a board certified orthopedic surgeon, performed a Section 12 exam for Respondent on April 29, 2013 and noted that Petitioner's films showed only multi-level cervical degenerative disc disease. He opined that Petitioner's cervical condition was unrelated to her 2005 fall, but was causally related to her use of tobacco, history of hysterectomy, and overall chronic changes. He was unaware of Petitioner's 2007 lifting injury. He attributed Petitioner's complaints primarily to her smoking and probable osteoporosis. Dr. Williams opined that all of Petitioner's treatment from 2008-2013 was causally related to her degenerative disc disease, and all of her symptoms were attributable to that condition.

Petitioner testified at the review hearing that her neck condition has improved, but the feeling in her hands has not returned. She takes Gabapentin, Flexeril and Excedrin and sees her primary care doctor every three months for refills.

Petitioner filed this §8(a) Petition to obtain medical expense benefits of $847,994.60 for her ongoing medical treatment which she alleges is related to her 2007 work injury. See Petitioner's Exhibit 3. Dr. Riew and Dr. Fonn provided causation opinions causally relating all of Petitioner's treatment to her 2005 and 2007 work injuries and resulting surgeries. Respondent relies upon Dr. Williams' opinion that Petitioner's condition is related to her degenerative disc disease, smoking, and presumed osteoporosis.

The Commission finds Dr. Williams' opinion is based upon speculation and is therefore not persuasive. He was unaware that Petitioner had suffered another injury to her cervical spine in 2007; he concluded that Petitioner's cervical condition was not related to her 2005 injury; he was unsure of whether she had undergone a complete hysterectomy, so as to be unable to produce the hormones necessary for bone maintenance, and speculated further that she had developed osteoporosis as a result; he found the treating doctors' opinions ridiculous, as it was clear to him that Petitioner's condition would continue to deteriorate independent of any alleged work injuries due to her presumed osteoporosis and smoking. Dr. Williams' opinion is contrary

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to not only Petitioner's treating physicians' opinions but also to Arbitrator Dibble's Decision and Respondent's own stipulation at hearing in 2008. Respondent stipulated to all issues in the Request for Hearing form prior to arbitration, including causal connection, medical expenses, and permanent total disability.

The Commission finds the causation opinions of Dr. Fonn and Dr. Riew more persuasive than Dr. Williams' and further finds that Petitioner's medical expenses, as listed in Petitioner's Exhibit 3, represent treatment that was reasonable and necessary to cure and relieve her from the effects of her work-related cervical injuries and the prior related surgeries. Respondent stipulated in the 2008 hearing to causal connection between Petitioner's 2007 work injury and her cervical condition. Its attempt to repudiate that causal connection in this Section 8(a) review hearing, supported only by Dr. Williams' opinion, is not persuasive. The Commission finds that Petitioner's post-hearing treatment is causally connected to her 2007 work injury and hereby grants her Section 8(a) petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) petition is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $847,994.00 for medical expenses contained in Petitioner's Exhibit 3, pursuant to §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.

Pursuant to §19(f)(1) of the Act, this case is not subject to judicial review.

DATED: OCT 2 7 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

drd/dak
o-08/27/14
68

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

Diana Maberry,

Petitioner,

vs.

NO: 12 WC 43449

14IWCC0924

Pace,

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, 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 January 21, 2014 is hereby affirmed and adopted.

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

DATED: OCT 28 2014

MB/mam
O:9/4/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MABERRY, DIANA
Employee/Petitioner

Case# **12WC043449**

14IWCC0924

PACE
Employer/Respondent

On 1/21/2014, 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:

0062 TEPLITZ & BELL
JOEL BELL
221 N LASALLE ST SUITE 1900
CHICAGO, IL 60601

1505 SLAVIN & SLAVIN
NICOLE NELSON
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

14IWCC0924

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

Diana Maberry
Employee/Petitioner

v.

Pace
Employer/Respondent

Case # **12** WC **43449**

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 **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **December 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 _____

14IWCC0924

FINDINGS

On **11/3/2012**, 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 accidental injury that arose out of and in the course of employment.

Timely notice of the alleged accident ***was*** given to Respondent.

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

ORDER

Claim for compensation is denied. Petitioner failed to prove she sustained an accidental injury that arose out of and in the course of employment. By the same token, Petitioner failed to prove her low back condition is causally connected to the incident on November 3, 2012.

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

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

Signature of Arbitrator

1/17/2014
Date

JAN 21 2014

14IWCC0924

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 18, 2012, Petitioner filed an application for adjustment of claim, alleging that on November 3, 2012, she sustained accidental injuries to her back during the course of her employment.

Petitioner, a bus driver, testified that at approximately noon on November 3, 2012, a Saturday, she stopped the bus at a relief point at 163rd St. and Dixie Hwy, where another driver would take over the route. According to Petitioner, the other driver, Carol Shelton, got on the bus and said offensive things to her as she was gathering her belongings. Then, as Petitioner was exiting the bus, Ms. Shelton closed the bus doors. Petitioner testified the doors struck her back, and she felt pain in her low back and legs. When Petitioner arrived at Respondent's garage, she reported the incident and completed an accident report.

Petitioner further testified that she took "sick time" to rest at home, but did not seek medical attention. She returned to work the following Tuesday and worked through pain. On Wednesday, November 7, 2012, Petitioner sought treatment with her primary care physician, Dr. Patel. The medical records from Dr. Patel note the following history: "C/o work injury, bus door was shut on patient's back, radiates into legs." X-rays showed moderate facet arthropathy and grade I spondylolisthesis at L5-S1. Dr. Patel prescribed medication. Petitioner regularly followed up with Dr. Patel, and he restricted her from work from November 13, 2012, through December 16, 2012. Petitioner testified that she returned to work for Respondent full duty on December 17, 2012. She underwent physical therapy in December of 2012 and January of 2013. On cross-examination, Petitioner admitted a prior back injury approximately 15 years ago.

Carol Shelton testified that she did not remember anything unusual happening on November 3, 2012, and denied ever closing the bus doors on anyone. Ms. Shelton further testified that during Respondent's investigation of the alleged accident, she related her side of the events and completed paperwork. Respondent did not reprimand her in connection with the accident.

Joel Carranza, Respondent's superintendent of maintenance, testified that the doors on Respondent's buses take approximately four seconds to close. The doors have safety mechanisms, including an "air bladder" function that would open a closing door if a sensor picks up a person or an object. The air bladder is installed along the edges of the doors and is sensitive on both sides.

Respondent introduced into evidence on-board bus surveillance video from November 3, 2012. The parties stipulated the relevant time interval is from 11:59:32 a.m. through 12:00:12 p.m. The Arbitrator has viewed Respondent's Exhibit 1, containing video files from several on-board cameras. Two on-board cameras recorded the incident from two different angles. The Arbitrator has closely watched the video from both cameras. The video is stop-motion, without sound. The view of the door from one camera is partly obstructed by a mirror. The video shows Petitioner and another driver exchanging words, in what appears to be an unfriendly manner. The other driver started closing the doors while Petitioner was stepping off the bus. The doors, when open, are inside the bus, perpendicular to the step. They close by slowly turning until the

edges meet. It is unclear whether the doors made a contact with Petitioner's back or buttocks as they were closing behind her. The video shows Petitioner glaring at the other driver after the doors closed. The doors did not reopen. Petitioner did not touch or rub her back, and walked away from the bus in a brisk manner.

In support of the Arbitrator's decision regarding (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:

The Arbitrator finds it is possible the doors grazed Petitioner's back or buttocks as she was stepping off the bus. If this is the case, the impact was not strong enough to cause Petitioner to stumble. Petitioner did not touch or rub her back, and walked away from the bus in a brisk manner. The Arbitrator finds the only injury was to Petitioner's pride. As such, Petitioner's claim is not compensable.

All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Barbara Whittaker,
Petitioner,

vs.

NO: 11 WC 5611

14IWCC0925

Dana Corporation,
Respondent,

DECISION AND OPINION ON REVIEW

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

The Commission finds that Petitioner sustained an accidental injury arising out of her employment on October 8, 2009. The Petitioner alleged that she injured her low back and right knee as a result of the October 8, 2009 accident. Having reviewed the record, the Commission finds that while Petitioner's low back condition is causally related to the October 8, 2009 work accident, the evidence supports a finding that Petitioner only sustained a temporary aggravation of her right knee condition and as such her current right knee condition is not causally related to the October 8, 2009 work accident. The Commission bases its decision on the following evidence.

Leading up to the October 8, 2009 work accident, Petitioner had a work accident exactly two year prior to that on October 8, 2007 which resulted in an injury to her right knee. As a result of the October 8, 2007 work accident, Petitioner underwent right knee surgery. On June 3, 2008 during a post surgical follow visit, Dr. Kinman noted that Petitioner had bone on bone on the medial side of her right knee. He treated her with a cortisone injection and indicated that she should get approval for an Euflexxa injection, which would likely prevent a further total knee replacement surgery. Three months later, during a September 23, 2008 follow up visit, Dr.

Kinman indicated Petitioner was doing fairly well with her right knee and she was responding okay to having injections every 2 to 3 months. He noted that at this stage of the game she does not need a total knee replacement but she will in the future. On November 12, 2008, Petitioner was seen by Dr. Goris who noted that Petitioner has lost some weight and feels that her right knee condition is tolerable. Therefore, no further treatment is being recommended. He further noted that no restrictions were being imposed on Petitioner's work. Petitioner may use her right knee for activities of daily living as comfort allows. Lastly, he opined that it is unlikely that performing activities of daily living will cause any structural damage or accelerate her degenerative process. Petitioner testified that post surgery she continued to receive injections into her right knee through 2008 and leading up to October 8, 2009. She agreed that she had three injections into her right knee in August of 2009.

Petitioner testified that on October 8, 2009 she stepped backwards while at work and her right leg became entangled on a table leg causing her to pull her right knee and twist her back. On October 13, 2009, five days later, Dr. Kinman again treated the Petitioner. He noted that Petitioner had a "flare up" again in her right knee. He injected her knee and indicated she would follow up on a later date. On October 30, 2009 Dr. Kinman's records indicate "DNS", which the Commission infers means did not show. Petitioner testified that after the accident she treated with Dr. Feldman for her low back. Petitioner testified that after the October 8, 2009 accident, she primarily received treatment for her low back and that the focus was not on her right knee until 2010. Petitioner testified that the doctor who treated her back primarily does one thing at a time and he treated her back first. The medical records show that after October 13, 2009 Petitioner did not receive treatment for her right knee again until February 11, 2010, some four months later.

On February 11, 2010 Petitioner completed a Patient Information sheet for Dr. Kinman. She indicated that the main reason for visit was right knee pain. She was asked how long has this problem been present and she indicated two days. She was asked if she had an injury and she said yes and indicated her date of injury was February 9, 2010. The same day Petitioner again saw Dr. Kinman who noted that Petitioner reported she had done excessive cleaning and mopping at work and as a result she had experienced an increased pain in her right knee. He further noted that her standing x-rays show she had totally absent medial joint space. Once again he injected her right knee and said she should be scheduled for a total knee replacement in the future. He then returned her to work without any restrictions. On April 12, 2010, Dr. Kinman did indicate that Petitioner was in need of a total knee replacement. Petitioner testified that she was told in the spring of 2010 that the workers' compensation insurance company was denying her surgery so she postponed it until November of 2010 so she would have time to take off of work.

On September 29, 2010, Petitioner again saw Dr. Kinman and reported that she was experiencing increased pain on the medial side of her right knee. Dr. Kinman noted that Petitioner had been scheduled for a total knee replacement in April of 2010. He once again treated her with injections to the right knee.

On November 8, 2010, Petitioner again followed up with Dr. Kinman. He noted that Petitioner has had injections. However, they are not working much anymore and she is admitted

at this time for right total knee replacement. Petitioner underwent total knee replacement surgery that day.

On July 9, 2012, Dr. Coe was deposed. He indicated that at this time Petitioner reports she is no longer regularly following up with specialists for her right knee. Dr. Coe concluded Petitioner suffered an injury to her right knee when she tripped on a table at work on October 8, 2009. He opined that the October 8, 2009 work accident aggravated Petitioner's degenerative right knee arthritis causing a bout of acute and chronic right knee pain that did not improve with conservative care. As a result, she ultimately underwent right total knee replacement surgery on November 9, 2010.

On September 12, 2012, Dr. Stiehl was deposed. He testified that he evaluated Petitioner's medical records. After reviewing her records, he opined that the October 8, 2009 accident was not the cause of the subsequent total knee replacement surgery that took place on November 11, 2010. He testified that he based his opinion of Petitioner's condition on the fact that her need for surgery pre-existed the October 8, 2009 accident and she received very little treatment after the October 8, 2009 work accident. She was given one cortisone injection in her right knee and did not see the doctor again during the following 2-3 months for her knee problem. He stated that it would be impossible post October 8, 2009 to conclude that the knee arthritis has progressed beyond the point that it required a knee replacement.

While the Commission does not want to belabor this issue, the Commission notes that on Review Respondent incorrectly indicated that leading up to the October 8, 2009 work accident Petitioner had an appointment with Dr. Kinman on September 23, 2009 when the appointment actually took place on September 23, 2008. Petitioner's attorney further exacerbates this problem by repeating the same information and then stated Petitioner sustained an undisputed work injury two weeks later that necessitated returning to Dr. Kinman three months early. What the medical records actually shows is that subsequent to the September 23, 2008 date Petitioner was seen by Dr. Goris on November 12, 2008 at which time Petitioner indicated her symptoms were tolerable, and he indicated that no further treatment was being recommended and no work restrictions were being put in place. Lastly, Dr. Goris opined that Petitioner may use her extremity for activities of daily living as comfort allows and it is unlikely that doing so will cause any structural damage or acceleration of any degenerative process. From this point, Petitioner went onto a period of no treatment for six months and then starting in May of 2009 she again started receiving conservative treatment in the form of injections for the next three months followed again by a period of no treatment for any additional six weeks leading up to the October 8, 2009 accident. This error in the facts could lead one to believe that Petitioner was imminently on the brink of a total knee replacement surgery when in actuality said opinion was given a year removed from October 8, 2009 accident date. The Commission notes that the medical records indicate Petitioner was going to need a total knee replacement at some point in time in the future. However, prior to October 8, 2009 accident it appears that Petitioner's condition appears to wax and wane during the period leading up to October 8, 2009 and Petitioner was provided only conservative treatment without any mention being made of a total knee replacement until four months after the October 8, 2009 work accident when Petitioner again reports an increased pain in her knee while at work.

With the correct set of facts presented, the question then becomes one of whether or not Petitioner's pre-existing condition was aggravated by the October 8, 2009 work accident such that Petitioner's condition required medical treatment consisted up to and including needing surgery. The evidence shows that Dr. Kinman indicates on October 8, 2009 that Petitioner experienced a "flare up" of her right knee condition which he treats with another injection. Petitioner appears to be a "no show" at a follow up visit with Dr. Kinaman on October 30, 2009. Petitioner receives physical therapy for her related back condition from December 15, 2009 through January 28, 2010 at which time Petitioner only provides a history of a right knee condition and Petitioner did not express any complains or receive any treatment for her right knee. Petitioner receives no treatment by Dr. Kinman from October 9, 2009 through February 11, 2010 for a period of approximately four months. On a February 11, 2010 patient information sheet Petitioner indicates that she injured herself two days ago/February 9, 2010 while at work. On April 12, 2010 Dr. Kinman indicated Petitioner was in need of a total knee replacement. The Commission finds that it is at this point that Dr. Kinman found that the tipping point between providing conservative care and requiring surgery had been reached. However, surgery was rejected by Respondent's carrier and it did not take place until November of 2010 when Petitioner placed it under her general insurance and she had accumulated enough time to be off of work.

Given the records as a whole, the Commission finds that on October 8, 2009 Petitioner at most sustained a temporary aggravation of her pre-existing degenerative right knee condition for which she again received conservative treatment in the form of an injection. Petitioner then continues to work and receives treatment for her back while not complaining of or receiving treatment for her right knee. It was not until some four months later when Petitioner reported sustaining an accident at work on February 9, 2010 and sought treatment on February 11, 2010 that Petitioner's condition transitioned from receiving invasive treatment as opposed to conservative treatment. Given this evidence, the Commission finds that the October 8, 2009 work accident lead to at most a temporary aggravation of Petitioner's pre-existing right knee condition and further finds that Petitioner failed to prove that the medical expenses and lost time Petitioner incurred after October 8, 2009 are causally related to the October 8, 2009 work accident. Furthermore since the Commission finds that Petitioner at most sustained a temporary aggravation of her pre-existing right knee condition, it also finds Petitioner failed to prove she sustained any permanent disability in regard to right knee as a result of the October 8, 2009 work accident. Thus, any and all awards relate strictly to Petitioner's right knee condition are vacated while any and all awards related to Petitioner's low back injury that she sustained on October 8, 2009 are affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that any and all awards pertaining to Petitioner's October 8, 2009 right knee injury are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner any and all causally related and reasonable and necessary medical expenses incurred as a result of Petitioner's low back injury as set forth in Petitioner's PX1 subject to §8(a) and §8.2 of the Act.

IT IS FUTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $257.81 per week for a period of 40 weeks, as provided in §8(d)2 of the Act, for the

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reason that the injuries sustained caused the 8% loss of a person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 28 2014

O: 8/28/14

MB/jm

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WHITAKER, BARBARA
Employee/Petitioner

Case# **11WC005611**

14IWCC0925

DANA CORP/DANA SEALING
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:

0230 FITZ & TALLON LTD
PATRICK A TALLON
5338 MAIN ST
DOWNERS GROVE, IL 60515

0180 EVANS & DIXON LLC
JAMES M GALLEN
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

14IWCC0925

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

BARBARA WHITTAKER
Employee/Petitioner

v.

DANA CORP./DANA SEALING
Employer/Respondent

Case # 11 WC 5611

An *Application for Adjustment 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 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 8, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$13,997.80** (only 32+ weeks worked in prior 52 weeks); the average weekly wage was **$429.68**.

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

Respondent shall pay Petitioner temporary total disability benefits of $286.45/week for 7 weeks, commencing November 8, 2010 through December 26, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $257.81/week for 40 weeks, because the injuries sustained to her low back caused the 8% loss of the person as a whole, as provided in Section 8(d)2 of the Act. Respondent shall also pay Petitioner permanent partial disability benefits of $257.81/week for 43 weeks, because the injuries sustained to her right knee caused the 40% loss of the right leg, as provided in Section 8(e) of the Act, with Respondent to receive credit for the settlement in Case Number 09 WC 13491 (settlement representing 20% loss the right leg).

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

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

Signature of Arbitrator

09/04/2013
Date

SEP 11 2013

14IWCC0925

STATE OF ILLINOIS)
)SS
COUNTY OF CHAMPAIGN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BARBARA WHITTAKER
Employee/Petitioner

v. Case# 11 WC 5611

DANA CORP./DANA SEALING
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Barbara Whittaker, then 58 years of age, was employed by Respondent, Dana Corp./Dana Sealing, as a screen print operator at the time of her undisputed work injury on October 8, 2009. (Arbitrator's Exhibit (AX) 1). This injury occurred when Petitioner's right foot got entangled on a lift table while working in a cramped area, causing her to twist her right leg and her low back. She noticed immediate pain in her right knee and low back, leading her to give timely notice of her injury and begin a course of medical care.

Petitioner was thereafter seen on October 13, 2009 by Dr. Phillip Kinman. Dr. Kinman had previously treated Petitioner for right knee complaints, including surgery to the right knee in April 2008, following a prior work injury. Petitioner's October 2009 injury was recorded by Dr. Kinman on October 13, 2009, along with the notation that this injury "flared" Petitioner's right knee. A right knee steroid injection was performed on October 13, 2009. (Petitioner's Exhibit (PX) 6).

Petitioner was then sent to Respondent's occupational physician, Dr. Howard Feldman at Wabash Valley Occupational Health, on December 3, 2009. Dr. Feldman documented Petitioner's October 2009 work injury, which was said to involve both the right knee and the low back, with back complaints including lower back pain radiating into the left leg. Dr. Feldman documented Petitioner's prior medical history as including no history of low back or left leg symptoms, but a positive history of right knee surgery and cervical problems. Dr. Feldman diagnosed a lumbar strain and lumbar degenerative disc disease and prescribed physical therapy, which Petitioner underwent at Crawford Memorial Hospital beginning December 15, 2009. (PX 7; PX 2).

Petitioner testified that Dr. Feldman treated only one condition at a time, and that condition in Petitioner's initial case following the incident regarded the low back. Petitioner explained that even if she came in complaining about her right knee, his focus remained on the low back. Dr. Feldman's continuing treatment of Petitioner therefore focused on her low back complaints, which by December 28, 2009, included low back pain radiating into both buttocks and thighs with positive left-sided straight leg raise. Dr. Feldman diagnosed lumbar strain/lumbar radiculopathy and prescribed a lumbar MRI. (PX 7; PX 12).

Petitioner underwent the lumbar MRI on January 22, 2010 at Good Samaritan Hospital. The scan showed central protrusion of the L5-S1 intervertebral disc indenting the thecal sac along with moderate facet arthrosis at this level. There was also broad-based disc bulging and facet hypertrophy at L4-5. (PX 4, p. 55; PX 7, p. 12; PX 12). Upon his review of the scan, Dr. Feldman diagnosed a herniated disc at L5-S1 and prescribed lumbar epidural steroid injections. Worker's compensation approval was requested for referral to Dr. Bailey, a pain management specialist, for the injections. (PX 7; PX 12).

Petitioner's right knee complaints not only continued during this time but they had increased according to Dr. Kinman's February 11, 2010 office note. Dr. Kinman again injected Petitioner's right knee at this time and discussed the possibility of a right total knee replacement. (PX 6; PX 12).

Petitioner then came under the care of the pain management specialist, Dr. Roger Bailey, per Dr. Feldman's referral, on March 4, 2010. After his examination of Petitioner, which revealed decreased sensation in the left leg, Dr. Bailey diagnosed low back pain, lumbar radiculopathy and a lumbar disc herniation. Dr. Bailey then performed lumbar epidural steroid injections on March 19, 2010 and April 16, 2010 at St. Vincent Surgical Center. (PX 8; PX 9).

In the meantime, Petitioner returned to see Dr. Kinman on April 12, 2010. A right total knee replacement was prescribed, however, this care was denied under Respondent's workers' compensation carrier. (PX 6). Petitioner testified she therefore postponed the treatment to November 2010, as she knew she would have to save money and time to take off work for the surgery.

Petitioner thereafter returned to see Dr. Feldman on May 14, 2010. After documenting his impression (herniated intervertebral disc with radiculopathy, multiple bulging discs, and multiple facet degenerative arthritis), Dr. Feldman then referred Petitioner to Dr. Wilson, a neurosurgeon, for treatment of her low back. (PX 7).

Petitioner saw Dr. Andrew Wilson pursuant to this referral on July 1, 2010. After diagnosing displacement of a lumbar intervertebral disc as well as possible left hip or sacroiliac joint abnormality, Dr. Wilson discussed treatment options, including a repeat lumbar epidural steroid injection. Petitioner thereafter underwent a third lumbar epidural steroid injection on July 6, 2010. (PX 5). Petitioner testified these injections provided a short period of relief.

Petitioner returned to see Dr. Wilson on August 6, 2010. After noting that Petitioner continued with low back pain following an acute onset during work, the doctor diagnosed displacement lumbar intervertebral disc with myelopathy. (PX 5). An EMG of the lower extremities was ordered, which was interpreted as normal. (PX 11). Dr. Wilson thereafter discharged Petitioner at maximum medical improvement (MMI) on September 9, 2010, once again noting that Petitioner's back/hip/leg pain followed an acute onset at work. (PX 5).

By September 29, 2010, Petitioner was complaining of difficulty standing and walking due to her right knee pain. Dr. Kinman therefore performed another steroid injection into the right knee on that date, and then a right total knee replacement on November 8, 2010. (PX 4; PX 6).

Petitioner began losing time from work on the date of surgery, and remained off work through December 26, 2010. No temporary total disability (TTD) benefits were paid. Respondent did not dispute the TTD period claimed, only liability for TTD benefits. When Petitioner returned to work for Respondent, it was initially in a light duty capacity for about one month. She then returned to her regular job, which she continued to perform as of the date of trial.

Petitioner's treatment for her right knee continued until the end of 2010; treatment for both conditions of ill-being, therefore, had ended by that time.

Both parties submitted reports of medical experts based upon record reviews: Petitioner's review was conducted by Dr. Jeffrey Coe and is dated July 9, 2012 (PX 12); and Respondent's review was conducted by Dr. James Stiehl and is dated September 21, 2012. (RX 1).

Dr. Coe opined that Petitioner's October 8, 2009 injury "aggravated degenerative arthritis in her right knee causing both acute and chronic right knee pain that did not improve with conservative therapy," and ultimately led to the right total knee arthroplasty performed by Dr. Kinman on November 8, 2010. Dr. Coe further opined that the October 8, 2009 injury "aggravated degenerative disc disease and degenerative arthritis in the lumbar spine causing both acute and chronic lumbar discogenic, facetogenic and myofascial pain." Dr. Coe concluded that in his opinion there is a causal relationship between Petitioner's work injury on October 8, 2009, and her current and ongoing right knee and lower back symptoms and state of impairment. Dr. Coe further opined that the October 8, 2009 injury caused permanent partial disability to both the right leg and the person as a whole. (PX 12).

Dr. Stiehl opined that "the accident or injury claimed on 10/08/2009 was not an approximate cause in ANY fashion for the subsequent total knee arthroplasty that was performed on 11/11/2010 (sic)." It was Dr. Stiehl's opinion that surgery would have been necessary based on the findings of the prior arthroscopic procedure performed in April 2008. He opined that Petitioner's condition pre-existed the October 2009 injury. Dr. Stiehl did not address causation of Petitioner's lumbar condition of ill-being. (RX 1).

Petitioner's bills for care following the work injury were submitted to her health insurance due to disputes regarding coverage under Respondent's workers' compensation carrier. These bills are in evidence as Petitioner's Exhibit 1.

Petitioner previously sustained a work injury to her right knee on October 8, 2007. She underwent surgery performed by Dr. Kinman on April 29, 2008, consisting of a partial medial meniscectomy and chondroplasty of the medial tibial plateau, medial femoral condyle and patellofemoral joint. She then underwent physical therapy for awhile, as well as injections which continued into August 2009, and which, according to Dr. Coe, "led to significant symptom improvement allowing her (Petitioner) to continue at full duty for the Dana Corporation until her right knee and lower back accident of October 8, 2009...." (PX 12). The claim for the 2007 injury was settled for 20% loss of use of the right leg in 2009. (RX 3, 09 WC 13491).

Respondent also offered into evidence records of prior settlements for an injury to Petitioner's left hand (RX 4, 08 WC 93) and Petitioner's neck (RX 5, 07 WC 21854), as well as the record of a 1993 work injury to the "back and leg(s)" settled in 1994 for 1.5% loss of use of the person as a whole (RX 6, 93 WC 16217). The parties also agreed that there was a recent settlement representing 10% loss of the person as a whole in Case Number 12 WC 24255 for a shoulder injury sustained in October 2011.

At present, Petitioner notices her low back bothers her constantly, with ongoing nagging pain. Vacuuming and bending bothers her low back. She takes over-the-counter pain medication for her low back daily. She cannot lift like she used to; she has to be mindful of what she lifts, so she does not lift as much. While she continued to perform her regular job for Respondent as of the date of trial, she explained that her job allows flexibility in lifting; it is up to her as to what she lifts. She never had these problems before the work injury of October 8, 2009.

Petitioner also notes that while the surgery took away a lot of the pain in her right knee, she still cannot put full pressure on it, and she walks with a slight limp. She currently cannot walk the distances she could before the accident, and her knee now tires out after walking two-to-three blocks.

CONCLUSIONS OF LAW

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

Petitioner sustained an undisputed work injury on October 8, 2009, causing immediate pain to both her right knee and her low back. She was seen by Dr. Kinman on October 13, 2009. Dr. Kinman, who previously treated Petitioner for right knee complaints (including surgery to the right knee in April 2008 following a prior work injury, as well as injections to the right knee continuing to August 2009), stated that the new work injury on October 8, 2009 "flared" Petitioner's right knee. A right knee steroid injection was performed on October 13, 2009. Petitioner then saw company physician Dr. Feldman on December 3, 2009. After recording a history of Petitioner's October 2009 work injury involving both the low back and right knee, Dr. Feldman then limited his diagnosis to lumbar strain and lumbar degenerative disc disease and began a course of treatment limited to Petitioner's low back. Petitioner credibly testified that Dr. Feldman treated only one condition at a time, which in Petitioner's case was the low back. Dr. Feldman's continuing treatment of Petitioner therefore focused on her low back complaints, which by December 28, 2009, included low back pain radiating into both buttocks and thighs with positive left-sided straight leg raise. After a lumbar MRI performed on January 22, 2010 revealed what Dr. Feldman opined to be a herniated disc at L5-S1, lumbar epidural steroid injections were prescribed. Petitioner was ultimately referred to Dr. Bailey, a pain management specialist, for the injections.

According to the records of Dr. Kinman, Petitioner's right knee complaints were not only continuing post-injury, but as of February 11, 2010, they had increased. Dr. Kinman therefore again injected Petitioner's right knee and also discussed the possibility of a right total knee replacement.

Petitioner was then seen by Dr. Bailey for epidural steroid injections on March 19, 2010 and April 16, 2010. Dr. Bailey's diagnosis of Petitioner's low back condition – which was why Petitioner was referred to him - was low back pain, lumbar radiculopathy and a lumbar disc herniation.

In the meantime, Petitioner returned again to see Dr. Kinman on April 12, 2010. A right total knee replacement was prescribed, but this care was denied under Respondent's workers' compensation carrier. Petitioner credibly testified she therefore had to postpone the treatment to save up money, as she knew she would be off work for the surgery.

By May 14, 2010, after diagnosing Petitioner with herniated intervertebral disc with radiculopathy, multiple bulging discs, and multiple facet degenerative arthritis, Dr. Feldman referred Petitioner to Dr. Wilson, a neurosurgeon. Dr. Wilson diagnosed displacement of a lumbar intervertebral disc as well as possible left hip or sacroiliac joint abnormality, and recommended a repeat lumbar epidural steroid injection, which was then performed on July 6, 2010. Petitioner returned to see Dr. Wilson on August 6, 2010, at which time the doctor, after noting Petitioner continued with low back pain following an acute onset during work, ordered an EMG of the lower extremities. When this test, performed August 31, 2010, was interpreted as normal. Dr. Wilson thereafter discharged Petitioner at MMI on September 9, 2010, once again noting that Petitioner's back/hip/leg pain followed an acute onset at work.

By September 29, 2010, Petitioner's right knee pain had become so bad she complained of difficulty standing and walking. Dr. Kinman performed another steroid injection into the right knee on September 29, 2010, and then, ultimately, a right total knee replacement on November 8, 2010.

Both parties submitted reports of record reviews by medical experts. Dr. Coe, Petitioner's expert, opined that the October 8, 2009 injury aggravated degenerative arthritis in her right knee, causing both acute and chronic right knee pain that did not improve with conservative therapy, and ultimately led to the right total knee arthroplasty performed by Dr. Kinman on November 8, 2010. Dr. Coe further opined that the October 8, 2009 injury aggravated degenerative disc disease and degenerative arthritis in the lumbar spine causing both acute and chronic lumbar discogenic, facetogenic and myofascial pain. Dr. Coe concluded that there is a causal relationship between Petitioner's work injury of October 8, 2009, and her current and ongoing right knee and lower back symptoms and state of impairment. Dr. Coe also opined that the October 8, 2009 injury caused permanent partial disability to both the right leg and the person as a whole.

Dr. Stiehl, Respondent's expert, opined that the work injury was not a proximate cause in any fashion for the subsequent total knee arthroplasty that was performed. It was Dr. Stiehl's opinion that surgery would have been necessary based on the findings of the prior arthroscopic procedure performed April 29, 2008, and that Petitioner's condition pre-existed the October 8, 2009 injury. Dr. Stiehl did not address causation of Petitioner's lumbar condition of ill-being.

Based upon the foregoing, the Arbitrator finds there is a causal connection between the condition of ill-being in Petitioner's lumbar spine and the work injury of October 8, 2009. There was a consistent history of acute onset injury at work, followed by a consistent course of symptoms and treatment. Moreover, the opinions of not only Petitioner's expert, Dr. Coe, but also Petitioner's treating physicians, including Respondent's occupational physician, Dr. Feldman, and his chain of referrals, support a finding of causal connection between the present condition of ill-being of Petitioner's lumbar spine and her work injury of October 8, 2009. No evidence to the contrary was offered by Respondent. Respondent's medical expert, Dr. Stiehl, did not address the condition of ill-being in Petitioner's lumbar spine.

The Arbitrator further finds a causal connection between the present condition of ill-being of Petitioner's right knee and the work injury of October 8, 2009. There was clearly a pre-existing condition of the right knee. However, as noted by Dr. Coe, Petitioner's symptoms had improved as a result of the injections performed in 2009, and she was performing her job duties without incident prior to the undisputed work injury of October 8, 2009. Immediately after that work injury, however, she saw her physician with her right knee having "flared" as a result of the October 8, 2009 work injury. Injections did not work this time; a right total knee replacement was the only recourse for the aggravation of Petitioner's condition of ill-being, as found by Dr. Coe. The Arbitrator finds Dr. Coe's opinion to be more persuasive and reliable than that of Dr. Stiehl, and in reliance upon that opinion finds a causal connection between Petitioner's current condition of ill-being in her right knee and the work injury of October 8, 2009.

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

Respondent paid some, but not all, of Petitioner's medical bills as outlined in Petitioner's Exhibit 1. Based upon the Arbitrator's causation finding, discussed above, the Arbitrator finds Respondent liable for all of Petitioner's medical bills as found in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act. Pursuant to the parties' agreement, the Arbitrator gives Respondent credit for all medical benefits that have been paid, but orders Respondent to hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Petitioner's lost time from work extended from November 8, 2010, when she underwent a right total knee replacement, through December 26, 2010. Respondent agreed to the period of disability, but disputed its liability for payment of benefits under the Act for this period of disability pursuant to its denial of causal connection. Based upon the Arbitrator's causation findings, as discussed *supra*, the Arbitrator further finds Respondent liable for payment of TTD benefits to Petitioner for the period from November 8, 2010 through December 26, 2010.

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

With regard to the condition of ill-being of Petitioner's lumbar spine, Petitioner underwent a lumbar MRI on January 22, 2010 which showed central protrusion of the L5-S1 intervertebral disc indenting the thecal sac along with moderate facet arthrosis at this level; and also broad based disc bulging and facet hypertrophy at L4-5. Petitioner thereafter underwent a course of lumbar epidural steroid injections performed by a pain management specialist, Dr. Bailey. As of May 14, 2010, when Petitioner was seen by company physician, Dr. Feldman, the doctor's impression was herniated intervertebral disc with radiculopathy, multiple bulging discs, and multiple facet degenerative arthritis. Dr. Feldman then referred Petitioner to Dr. Wilson, a neurosurgeon, for treatment of her low back. Dr. Wilson diagnosed a displacement of a lumbar intervertebral disc as well as possible left hip or sacroiliac joint abnormality, and recommended a repeat lumbar epidural steroid injection, which Petitioner underwent on July 6, 2010. When a subsequent EMG of the lower extremities performed on August 31, 2010, was interpreted as normal, Dr. Wilson thereafter discharged Petitioner at MMI regarding her back condition on September 9, 2010.

At present, Petitioner notices her low back bothers her constantly, with ongoing nagging pain. Vacuuming at home and bending causes back pain. Petitioner takes over-the-counter medication for her back pain. She cannot lift like she did before the accident. She never had these problems before the work injury of October 8, 2009.

Based upon the foregoing medical findings and credible subjective complaints, the Arbitrator finds Petitioner has sustained the 8% loss of the person as a whole pursuant to Section 8(d)2 of the Act as a result of the injury to Petitioner's lumbar spine.

With regard to the condition of ill-being of Petitioner's right knee, the Arbitrator notes that by September 29, 2010, Petitioner was complaining of difficulty standing and walking due to her right knee pain. Dr. Kinman thereafter performed a right total knee replacement on November 8, 2010. Petitioner began losing time from work on the date of surgery, and remained off work through December 26, 2010. Petitioner initially returned to work for Respondent to light duty for about one month. She then returned to her regular job, which she continued to perform as of the date of trial.

Petitioner previously sustained a work injury to her right knee on October 8, 2007, following which she underwent a partial medial meniscectomy and chondroplasty of the medial tibial plateau, medial femoral condyle and patellofemoral joint. The claim for this 2007 injury was settled for 20% loss of use of the right leg in 2009. (RX 3, 09 WC 13491). She then underwent physical therapy and injections, which continued into August 2009. These led to significant improvement until the work accident.

Petitioner testified that the November 2010 surgery alleviated a lot of the pain in her right knee. She still, however, cannot put full pressure on her right knee, and she walks with a slight limp. She also cannot walk as far as did prior to the accident, and that walking two-to-three blocks will cause her knee to tire out.

Based on the foregoing, the Arbitrator finds that Petitioner sustained the 40% loss of use of the right leg as a result of her knee injury and resulting treatment, including the total knee replacement. Respondent shall be given a credit as a result of the settlement in Case Number 09 WC 13491 for 20% loss of use of the right leg, leaving a net award in this instance of 20% loss of use of the right leg under Section 8(e) of the Act.

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

Jeric Burns,

Petitioner,

vs.

NO: 11 WC 11367
11 WC 11368

State of Illinois/Menard Correctional Center,

14IWCC0926

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, 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 September 9, 2013 is hereby affirmed and adopted.

No bond or summons for State of Illinois cases.

DATED: OCT 28 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:8/28/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURNS, JERIC
Employee/Petitioner

Case# **11WC011367**
11WC011368

SOI/MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0926

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:

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

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

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

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH 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

SEP 9 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0926

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

Jeric Burns
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # **11** WC **11367**

Consolidated cases: **11 WC 11368**

An *Application for Adjustment 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 D. Luskin**, Arbitrator of the Commission, in the city of **Herrin**, on **7/10/13**. 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. ☐ 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 _____

14IWCC0926

FINDINGS

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

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

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

Timely notice of the allegations of accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$57,385.50**; the average weekly wage was **$1,103.57**.

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

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 **$if any** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$any payments made**.

Respondent would be entitled to a credit of **any medical benefits paid through its group carrier** 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

August 25, 2013
Date

SEP 9 - 2013

14IWCC0926

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JERIC BURNS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 11367
	)	11 WC 11368
STATE OF ILLINOIS/MENARD C.C.,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

These claims each involve an allegation of a MRSA infection. The cases were consolidated and tried jointly. The parties requested a joint decision encompassing both claims; given the overlapping issues, the Arbitrator concurs with this approach.

STATEMENT OF FACTS

The petitioner works as a correctional officer at the Menard Correctional Center. He currently works the 11 p.m. to 7 a.m. shift, but at the time of the asserted incidents he worked the 7 a.m. to 3 p.m. shift at the North One cell house.

The claimant testified that during his shift on December 16 2010, he began to feel his face itching and swelling. He presented to his primary care provider, Dr. Coulter, on December 17. PX3. Dr. Coulter noted sores on the right side of his chin and assessed him with follicular lesions, likely staph in origin. He provided medication and sent the cultures for analysis. The culture was positive for MRSA [Methicillin resistant staphylococcus aureus]. PX4.

The claimant presented to Sparta Community Hospital on December 19, 2010, with complaints of chills, vomiting and lower back pain. PX4. He related the treatment over the prior two days for the facial abscess. They also noted a prior history of a previous facial abscess, as well as an abscess in the right leg that had been incised and drained earlier in the year, which had been assessed as a staph infection. Following examination, Dr. Coulter did not believe the infection had become blood-borne, but believed the back pain and nausea were related to the antibiotics. He admitted the petitioner to the hospital for observation, however. The petitioner was discharged on December 21 with improved symptoms. Dr. Coulter instructed him to be off work until December 23 and to follow up in ten days.

The petitioner saw Dr. Coulter on January 3, 2011 in follow-up. PX3. His medications were refilled and he was maintained on regular work duties.

Thereafter, in January of 2011, the petitioner again had an itchy bump arise on his face. On January 19, 2011, he again saw Dr. Coulter. He was prescribed another course of antibiotics and was restricted from work through January 25, 2011. PX3.

The petitioner testified that at roll call memos were read regarding MRSA infections among inmates with warnings to wash hands. However, he could not recall when the memos were posted and discussed. He also testified he was not aware of any particular inmate that had a MRSA diagnosis. He did not identify any particular incident, such as a cut or puncture wound, which could have prompted the infection. He further testified he had no knowledge of any inmate in his cell house having MRSA during the time period in question, and did not identify any coworker who could have infected him.

The claimant's physician, Dr. Coulter, testified in deposition MRSA infections are more likely when people are in close quarters, but further testified that:

Q: ... If Mr. Burns was not exposed – if the evidence would show that he was not exposed to anybody specifically carrying MRSA, what would your – is there – my understanding is there's lots of MRSA going around in the general population. Would that be a correct statement?

A: That's a correct statement, that it's –

Q: You can catch it from anything or anyone that's been exposed to it; is that true?

A: Yes – could catch it from anybody who's a carrier, and it's a fairly common state in the community.

See PX5, p.12. Dr. Coulter further acknowledged that the prior infection from April 2010 had not been cultured. PX5 p.13-14.

The respondent called Charlotte Miget, the Nursing Supervisor at Menard Correctional Center. She testified she had been a registered nurse for forty years and had worked at Menard for the last nineteen years. Her duties there included being in charge of infection control issues at that facility. She testified the facility maintains a tracking system for identifying, isolating and tracking potentially communicably infectious inmates. A log of all such diagnosed patients is maintained, which includes, but is not limited to, MRSA infections. She testified the log demonstrated several MRSA-infected inmates in December 2010 and January 2011, but none of them were in the North Wing where the claimant was assigned. Copies of the log were introduced as RX5-6.

OPINION AND ORDER

A claimant has the burden of proving by the preponderance of credible evidence all elements of the claim, including that the alleged injury arose out of and in the course

of employment and that his employment in turn caused the condition of ill-being that the petitioner seeks recompense for 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 (1st Dist. 1993).

The claimant's accident and causal connection arguments are belied by the credible information of the prison's infectious disease log, which shows that the only MRSA-infected inmates were not in physical proximity to the claimant. There has been no actual evidence presented that Mr. Burns had contact with anyone infected with MRSA at his work at any time proximate to the accident dates alleged. The claimant notes the crowded prison and it is theoretically possible he was infected there; however, it is, as his treating physician testified, equally plausible that he was infected by a passer-by outside his employment. The petitioner has presented a theory of accident and causal connection which lacks empirical basis and does not rise to the level of proof. The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill.2d 24 (1977). The Arbitrator finds that the petitioner has failed to meet his burden.

Issues of notice (regarding 11 WC 11368), medical costs, TTD benefits, and permanent partial disability are rendered moot by the above findings.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DONOHUE,

Petitioner,

14IWCC0927

vs.

NO: 09 WC 48055

SYSCO FOOD SERVICES OF CHICAGO,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on Remand from the Circuit Court of Cook County, Illinois, in Michael Donohue v. Illinois Workers' Compensation Commission, and Sysco Food Service of Chicago, 12 L 51452.

By way of history, Petitioner appealed the Commission's Decision and Opinion on Review dated October 24, 2012. By that Decision, the Commission affirmed and adopted the Decision of the Arbitrator filed February 14, 2012. There, the Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment on November 6, 2009, that Petitioner's left knee torn meniscus injury is causally related to his work injury, that Petitioner failed to prove his degenerative left knee condition is causally related to his work injury, that Petitioner's average weekly wage in the year preceding the injury was $1,591.03 and that the Petitioner's current average weekly wage in his new position is $1,000.00.

Additionally, the Arbitrator found that Petitioner was temporarily totally disabled for a period of 41-3/7 weeks, that being from November 12, 2009 through November 22, 2009, January 04, 2010 through February 22, 2010, May 13, 2010 through August 16, 2010, and from August 18, 2010 through January 04, 2011. The Arbitrator also found that Petitioner sustained a

permanent injury resulting in 30% loss of use of the use of his left leg under Section 8(e) of the Act and that Petitioner is entitled to $9,543.00 for necessary medical expenses under Section 8(a) and pursuant to Section 8.2 of the Act, and that Respondent is entitled to a credit of $34,927.33 for TTD benefits paid.

In its Remand Order of December 23, 2013, the Circuit Court determined that the Commission's finding that the Petitioner failed to prove entitlement to an award of a wage differential under Section 8(d)1, and failed to prove that his degenerative condition of his left knee was casually related to his work injury, was against the manifest weight of the evidence. The Circuit Court Ordered the Commission to reverse the prior decision of the Commission and find Petitioner established that the degenerative condition of his left knee is casually related to his work injury, and that Petitioner is entitled to a wage differential under Section 8(d)1.

The Commission takes specific note of the Circuit Court's conclusion relative to the issue of causal connection, reading in pertinent part:

> "Contrary to the Commission's finding, Dr. Regan was not silent on the issue of whether the degenerative condition of Plaintiff's left knee was causally related to the work accident, Dr. Regan specifically mentioned Petitioner's degenerative condition in a letter dated June 7, 2011, which is in the record on page 352. The letter contains evidence that Plaintiff could have used to further his case. Any reasonable trier of fact would have noted this evidence in the record and weighted it accordingly. The fact that the Commission ignored it suggests that they were determined to reach a particular outcome."

With regard to the June 7, 2011 report of Petitioner's treating physician, Dr. Regan, found at page 352 of the record, and which was discussed by the Circuit Court, the Commission noted, reviewed, considered, analyzed, and weighed this report in reaching its decision. Dr. Regan specifically opined:

"In terms of commenting on whether or not degeneration is related to the aging process or on the job, I have a more difficult time saying one versus the other. It is easy for me to say the meniscal tear and the bone bruise have relationship to the on the job accident." (emphasis added). (Attachment A).

This comment does not establish the doctor's belief that a causal nexus existed between the alleged work accident and the Petitioner's degenerative process. The Commission found "no evidence in the record to support any finding that Petitioner's degenerative condition of his left knee is causally related to the work accident. His treating doctor is silent on the issue. (PX2)."

The Commission takes umbrage with the Circuit Court's insinuation that the findings of the Commission were pre-ordained. The Commission does not have an agenda and to suggest

otherwise is an affront to the integrity of the members of the Commission that have been appointed by the Governor and confirmed by the Senate of the State of Illinois.

It is the Commission's reasoned Opinion and belief that Petitioner's degenerative left knee condition was not caused, aggravated or accelerated by the work injury. This conclusion is based upon a review of the record as it was enunciated by the decision of Arbitrator Lee. He concisely stated the reasons why the Petitioner failed to establish the necessary nexus that would require the Commission to find a causal connection between Petitioner's work related injury and his degenerative left knee condition. Dr. Walsh, Respondent's Section 12 examiner, opined Petitioner's degenerative left knee condition was not caused, aggravated or accelerated by the work injury, that Petitioner required no work restrictions as a result of his work injury and that it would be reasonable to restrict Petitioner from returning to work as a truck driver for the unrelated degenerative left knee condition.

As a result of its belief that Petitioner failed to prove a causal nexus between his degenerative knee condition and his current condition of ill-being, the Commission likewise previously found that Petitioner is not entitled to a Section 8(d)1 wage differential and that Petitioner is not partially incapacitated from returning to work in his former position as a truck driver as a result of his work related injury.

However, based upon the Circuit Court's remand order, as aforesaid, the Commission is now required to find that Petitioner established his current degenerative left knee condition is causally related to his November 6, 2009 work related injury, that Petitioner is entitled to a wage differential of $394.68 per week pursuant to Section 8(d)1 of the Act as of January 16, 2011, the date Petitioner returned to work in his alternative position for Respondent, and otherwise affirms and adopts the Arbitrator's Decision. The wage differential award is based upon Petitioner's average weekly wage prior to his work related injury, $1,592.03, and his current earnings in his alternative position, $1,000.00, both wages having been established by the evidence submitted at the time of the arbitration hearing in this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2012, as modified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $9,543.00 for medical expenses under §8(a), and pursuant to §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,061.35 per week for a period of 41-3/7 weeks, from November 12, 2009 through November 22, 2009, January 04, 2010 through February 22, 2010, May 13, 2010 through August 16, 2010, and August 18, 2010 through January 04, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner wage differential benefits in the sum of $394.68 per week, commencing on January 16, 2011, and continuing for the duration of his disability as provided in §8(d)1 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of 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 28 2014
KWL/kmt
R-10/21/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

BRYAN STEIDINGER,

Petitioner,

14IWCC0928

vs.

NO: 12 WC 16806

FORREST REDI-MIX,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the December 10, 2013 Decision of Arbitrator Zanotti finding that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on April 21, 2011, 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 2 as provided in Section 8(a) and subject to the medical fee schedule in Section 8.2 of the Act, and finding that Petitioner permanently lost 20% of the use of his right leg under Section 8(e) of the Act. The issues presented on review are accident, causal connection, medical expenses, and permanent partial disability benefits. 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. As a result the Commission's findings herein, the Arbitrator's awards of medical expenses and permanent partial disability benefits are hereby vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) Petitioner testified he began working for Respondent as a truck driver and mechanic in 1995. Petitioner testified that on April 21, 2011 he was injured while removing

and replacing a dolly on a trailer for a semi truck. Petitioner testified that the dolly replacement process requires him be on his knees and to crawl underneath the front end of the trailer. Petitioner testified that on April 21, 2011 he spent two and a half hours working on replacing a dolly, kneeling on concrete, while his co-worker, Scott Olive assisted him. Petitioner testified that during the course of the day he takes a 15 minute break to stretch his legs every hour. (T10-18).

2) Petitioner testified that on April 21, 2011, a Friday, around 2:10pm, at break time, he was getting back out from underneath the trailer, and as he stood back up from a kneeling to standing position, he heard and felt his right knee "pop." Petitioner testified that he then stood there for a while, was unable to walk at first, then walked to the break table and sat down. Petitioner testified he advised his boss something happened to his knee, and he finished working the rest of his shift, which ended at 3:30 p.m. (T19-21).

3) Petitioner testified he sought medical care the following morning, a Saturday, at Gibson Hospital, at which time he underwent x-rays of his right knee. (T21).

4) Petitioner's Exhibit 1 contains a one page Emergency Room Report from Gibson Area Hospital, dated April 23, 2011, two days after Petitioner's alleged April 21, 2011 work injury. (PX1). The report reflects that Petitioner felt "a pop in his right knee yesterday after squatting. He was ambulatory afterwards." Petitioner's right knee examination revealed midline patellar tenderness to palpation of the right knee, limited range of motion secondary to pain, flexion over 90 degrees, and no deformities. Petitioner was diagnosed with right knee pain, was discharged home and advised to take ibuprofen, elevate his right leg and return to the emergency room if his condition worsened. The Emergency Room Report contains no history of a work-related injury or of an injury on April 21, 2011, the date of the alleged injury.

5) Petitioner's Exhibit 1 also contains an April 23, 2011 Right knee X-ray report. The history of injury provided is "Injury when squatting. Pain anteriorly below patella." The radiologist's impression was no acute bony injury, but suprapatellar effusion and possibly an injury to the quadriceps muscle. The April 23, 2011 X-ray Report contains no history of a work-related injury or of an injury on April 21, 2011.

6) Petitioner testified he sought subsequent treatment with Dr. Price, and was sent for an MRI scan of his right knee, after which time right knee surgery was recommended. Petitioner testified he postponed his surgery until his seasonal layoff in the fall. (T22-23).

7) Although Petitioner testified Dr. Price referred him for an MRI scan of his right knee, the MRI scan of his right knee was performed on May 03, 2011, under orders of family physician, Dr. Wenger, prior to Petitioner seeking any medical care with

Dr. Price. The Indication for the May 03, 2011 MRI scan was "Generalized knee pain. No specific injury. Patient heard something pop 1 week ago." The document fails to contain any reference to a work related injury or work related condition. Petitioner's MRI study was significant for chondromalacia of the patella, slight lateral subluxation of the patella and irregularity of articular surface of patella, and moderate sized joint effusion. (PX1).

8) On May 11, 2011, Petitioner completed a patient history form for his upcoming May 19, 2011 office visit with Dr. Price. Petitioner reported that his problem began when he knelt down and stood back up. Petitioner failed to provide a history of work-related condition, failed to check off that his problem was due to work-related condition on patient intake form, failed to provide a date of accident, failed to provide a location of accident, and failed to provide any requested details of the injury on the patient intake form.

9) On May 19, 2011 Petitioner sought treatment with Dr. Price's office, at which time he was seen by Nurse Practitioner Lori Fitton. Petitioner reported he was referred by Dr. Wenger, his primary care physician. Petitioner provided a history that he "knelt down and stood back up," that his first episode of his knee locking was on April 21, 2011, when "he was working as a mechanic, knelt and as he stood up he had pain on the lateral aspect of his knee. He was able to continue working and actually has worked since then, but he has learned how to hold his knee to avoid this repetition of painful incident. Last Tuesday he was working and the same thing happened. The knee locked." Nurse Fitton opined that although Petitioner's MRI did not reference a lateral meniscus tear, his clinical symptoms and signs on examination were compatible with a lateral meniscus tear. She recommended Petitioner follow up with Dr. Price for an evaluation with arthroscopic debridement/repair. Petitioner expressed concern about lost time from work and mentioned his typical lay off period in the fall. (PX1).

10) On May 20, 2011 Dr. Price evaluated Petitioner. Petitioner reported he drives a big cement mixer, and that it was difficult to kneel on his knee. Petitioner's knee examination revealed full extension to 130 degrees of flexion, no gross ligamentous laxity, and a possible slight boggy synovitis. Dr. Price diagnosed persistent right knee pain, a possible clinically significant tear of the posterior horn of the lateral meniscus, which was asymptomatic as of that office visit. Dr. Price also diagnosed retropatellar knee pain syndrome. He recommended Petitioner avoid keeling on his right knee, or use a padded knee sleeve, and opined it was okay for Petitioner to postpone surgery until fall, unless his symptoms increased. Dr. Price recommended that if Petitioner's knee was still bothering him in the fall, then diagnostic arthroscopy was reasonable, and that consideration of a local cortisone injection for mild swelling or discomfort was reasonable. (PX1).

11) Petitioner testified he underwent right knee surgery in December of 2011, spent eight weeks recuperating, and returned to work for Respondent in April 2012, after his seasonal layoff ended. (T24).

12) Petitioner testified he continues to work for Respondent as a truck driver and mechanic, that he still has pain in his knee maybe once a month, for which he uses ice but nothing else. (T25-26).

13) On Cross examination, Petitioner admitted he provided a recorded statement over the phone to Respondent's workers' compensation adjuster on June 14, 2011, and that RX1 was an accurate transcription of what he said on that day. (T26-28).

14) Petitioner also admitted that from May 20, 2011 through December 06, 2011 he worked his regular job duties for Respondent. (T29).

15) Petitioner's co-worker, Scott Olivero, testified on behalf of Petitioner. Olivero testified he had worked for Respondent as a driver for 16 years. Olivero testified that on April 21, 2011 he was working in the shop with Petitioner, assisting him with replacing some jacks underneath one of the trailers, running and getting tools that Petitioner needed, and helping Petitioner position equipment underneath. Olivero testified that he and Petitioner both had to kneel down as they were bolting the dolly, and that when Petitioner went to get up from under the trailer he injured his knee. Olivero testified that he was getting out from the right-hand side of the trailer, that Petitioner was getting out from the left-hand side, and that as Petitioner got up Petitioner grabbed his knee as if it locked up on him. Olivero testified that Petitioner did not say anything to him at that time, but he saw Petitioner grimace and assumed Petitioner hurt something. Olivero testified he had no conversations with Petitioner about this injury during the rest of the shift. (T30-34).

16) RX1 is a June 14, 2011 Recorded and Transcribed Statement of Petitioner taken by Carl Combs with BerkleyNet Underwriters. The transcription reflects that Petitioner advised that his uncle owns Respondent's business, that his direct supervisor is his brother, Ron Steidinger. Petitioner further reported that on April 22, 2011 at around 2:00 p.m. he was putting dollies on a semi, and "All I did was kneeled [sic] down and stood back up, and something happened." Petitioner further testified that he had only knelt down for "probably not even 20 seconds", and as he stood back up, he "heard something pop, just a little bit." Petitioner specifically denied that he was holding anything when he was getting up, and that instead he was just getting up to stretch. Petitioner also specifically stated he was working by himself at the time of his injury. Petitioner further indicated he was not sure when he first mentioned his injury to a co-worker or to a supervisor. Petitioner further reported that he sought initial treatment on Saturday, had x-rays, and told his supervisor, Ron Steidinger, before he went for treatment that day. Petitioner reported he sought first treatment at Gibson Hospital,

on own, that he was advised to have an MRI, which he did. Petitioner also reported that he sought treatment with Dr. Price as that was who the hospital had referred him to. Petitioner reported that his primary care physician was Dr. Wenger. Petitioner further reported that he had some hospital bills for his treatment, that "I forget [sic] when I get in there. I never give [sic] it a thought, I should [sic] told them it was through workers' comp. But I didn't."

The Commission reverses the Arbitrator's Decision and finds Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent, and specifically finding the testimony of Petitioner and his co-worker, Scott Olivero, to be less than credible, non-persuasive, and contradicted by the overwhelming weight of the evidence.

Although Petitioner testified, and the Arbitrator found, that he sustained a right knee injury arising out of and in the course of his employment on April 21, 2011, the April 23, 2011 Emergency Records Gibson Area Hospital contradict this, and instead indicate Petitioner was hurt the day prior to April 23, 2011, which would have been April 22, 2011.

The Commission finds suspect that Petitioner only tendered one page from Petitioner's Gibson Area Hospital Emergency Room admission on April 24, 2011, which was a discharge note, and an x-ray report from that day, with no intake information or other documentation from that visit. The Commission also finds suspect that the Gibson Area Hospital Records are not certified or issued pursuant to subpoena. The Commission also finds significant that the Emergency Room Report and the x-ray report from that Emergency Room visit fail to reflect any history of a work injury. The Emergency Room Report only reflects that Petitioner felt a pop in his right knee yesterday after squatting, and that he was ambulatory afterwards. The x-ray report from that date also indicates an injury when squatting, without mention of work related condition.

Further suspect is Petitioner's testimony that Gibson Area Hospital referred him for an MRI, and referred him to Dr. Price. The May 03, 2011 MRI report reflects that Petitioner was referred by his primary care physician, Dr. Wenger. The initial office visit note of Dr. Price from May 19, 2011 further reflects that Petitioner was referred to his office by Dr. Wenger. Despite a clear indication that Petitioner was seen by his family physician, Dr. Wenger, following his alleged right knee injury, prior to his MRI and prior to his office visit with Dr. Price, that Dr. Wenger referred Petitioner for an MRI study of his right knee, and that Dr. Wenger referred Petitioner to Dr. Price, Petitioner failed to tender any records from Dr. Wenger.

The May 03, 2011 office note from Petitioner's MRI of his right knee fails to indicate a work related injury, and instead indicates Petitioner had no specific injury, but "heard something pop 1 week ago."

The patient history form completed and signed by Petitioner on May 11, 2011, prior to and in relation to his initial office visit with Dr. Price, contains no mention of work related condition, and instead indicates that his problem began when he knelt down and stood back up. The patient history form is also unchecked as whether his problem was due to a "work accident, car accident, other accident, or not accident related," and contains no requested details on the injury itself.

The Commission also finds suspect the absence of any history of a work related right knee injury until after Petitioner comes under the care of Dr. Price, following his positive MRI study. The first history of a work related injury was recorded by Dr. Price's nurse practitioner on May 19, 2011, when Petitioner reported that while working as a mechanic he knelt, and as he stood up he had pain on the lateral aspect of his knee.

Although Petitioner testified a co-worker, Scott Olivero, was present at the time of his injury, and Olivero testified to same, Petitioner's June 14, 2011 recorded statement taken by Carl Combs with BerkleyNet Underwriters, RX1, less than two months after his alleged date of injury, clearly reflects that Petitioner was working by himself when his injury allegedly happened. The transcription also reflects that Petitioner's uncle owns Respondent's business, and that his direct supervisor at the time of his injury was his brother, Ron Steidinger.

Based on the evidence contained in the record, the Commission finds that the Petitioner failed to establish that he sustained accidental injuries arising out of and in the course of his employment. Given the Commission's findings above, relative to accident, the Arbitrator's award of medical expenses identified in Petitioner's Exhibit 2, and the award of permanent partial disability benefits are herby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's December 10, 2013 decision is reversed for the reasons stated herein, and Petitioner's claim for compensation is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses identified in Petitioner's Exhibit 2, totaling $27,360.99, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 20% loss of use of the right leg under Section 8(e) 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.

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). The 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 2 8 2014
KWL/kmt
07/28/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSHUA GOCHANOUR,

Petitioner,

vs.

NO: 11 WC 49129

14IWCC0929

EICHENAUER SERVICES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The injury in this case occurred on September 27, 2011. As such, Section 8.1(b) of the Act is applicable to a determination of permanency, i.e. the nature and extent of the injury. This involves an analysis using the five statutory factors contained in this section of the Act. The Arbitrator awarded the Petitioner 17.5% of the left thumb. The Commission modifies this award and finds that Petitioner sustained the loss of use of 25% of the left thumb, for the reasons noted below.

First, the Respondent submitted an AMA impairment rating of 10% of the thumb, which was determined by Dr. Brower (Respondent's Exhibit 2). The Petitioner did not submit an AMA impairment rating into evidence. In making his determination, Dr. Brower noted complaints of decreased sensation along the left radial thumb, no atrophy, normal range of motion other than inability to extend the IP joint past zero degrees, and normal strength. Sensory testing verified partial loss of sensation at the radial aspect of the thumb.

Petitioner's occupation was a server/waiter. While he complained subjectively of problems doing his job subsequent to the accident, his medical records, other than Dr. Nord's, appear to indicate he was having no significant problems doing his job. Dr. Nord noted (see Petitioner's Exhibit 1) that Petitioner continued to have left thumb pain after returning to work, and after a few months left to take a different job. We note that the ER report from Advocate Bromenn and the report of Dr. Brower indicated the Petitioner is right handed, so this injury was to his non-dominant hand. At the same time, being that the injury was to the thumb, any impairment was to a digit that is important to gripping.

The Petitioner returned to employment at approximately 33 years of age. Dr. Tattini noted in his last report of September 15, 2012 that he hopes Petitioner's ongoing sensation problems will continue to improve over time. Petitioner testified that it hadn't improved at the time of the hearing date. Dr. Nord reported (see Petitioner's Exhibit 13) that he believed Petitioner may sustain increasing discomfort in the area of the laceration as he gets older.

No evidence was presented by either party that indicates real or possible impact from the injury on the Petitioner's future earning capacity.

With regard to the factor involving evidence of disability corroborated by the medical records, the Petitioner's continued complaints of a lack of sensation in the radial nerve of the thumb are supported by his treating records, as well as the report of Dr. Brower. While he testified to a lack of strength, this does not seem to be corroborated by the medical, as the physical therapy records and last notes of Dr. Tattini indicate essentially normal strength. Dr. Brower, Respondent's examining physician, did note a small loss of range of motion with regard to IP joint extension. Dr. Nord's June 25, 2013 report supports some ongoing weakness of the left thumb.

The Commission believes that, based on a review of the surgical report, this case involves a relatively significant thumb injury with nerve repair. There was no evidence of significant tendon or bone injury. There was evidence of ongoing problems with radial sensation. The Commission takes into account the AMA rating and the lack of evidence presented with regard to earning capacity. However, in this particular case, we give more weight to the fact that Petitioner has corroborated complaints regarding an ongoing lack of sensation and some lack of strength, that he will have to live with this injury and its sequelae for a significantly longer time than an older worker, and that he testified to difficulty in returning to his normal job due to the injury. Based on this and a review of prior precedent regarding similar injuries, the Commission declines the Petitioner's request to increase the award to 35% of the left thumb, but does increase it from the Arbitrator's award of 17.5% of the left thumb to 25% of the left thumb.

Neither party has submitted the applicable fee schedule amounts with regard to the awarded medical bills, which are not at issue on review. Given this, the Commission notes that the bond indicated below is based on the total of the billed amounts of the awarded bills and the permanency award. The bills that have been awarded by the Arbitrator, and affirmed on review, are still to be paid by Respondent pursuant to the fee schedule, with credit to Respondent for any that have been previously paid.

14IWCC0929

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $139.12 per week for a period of 19 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 25% of the left thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses submitted into evidence from Ireland Grove Center for Surgery and Ambulatory Anesthesiology, limited to the amounts indicated via the medical fee schedule, pursuant 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 9 2014
TJT: pvc
o 09/09/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GOCHANOUR, JOSHUA
Employee/Petitioner

Case# **11WC049129**

SWINGERS INC
Employer/Respondent

14IWCC0929

On 4/9/2014, 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:

0564 WILLIAMS & SWEE LTD
STEVE R WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2871 LAW OFFICES OF PATRICIA M CARAGHER
MARY FLANAGAN-DAVIS
1010 MARKET ST SUITE 1510
ST LOUIS, MO 63101

14IWCC0929

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

Joshua Gochanour
Employee/Petitioner

v.

Swingers, Inc.
Employer/Respondent

Case # **11** WC **49129**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **11/12/13**. 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 **9/27/11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$7,234.24**; the average weekly wage was **$139.12**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$1,172.81** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$1,172.81**.

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

ORDER

Medical benefits

Respondent shall pay the medical bills submitted into evidence of Ireland Grove Center for Surgery and Ambulatory Anesthesiology pursuant to the medical fee schedule. Respondent shall receive credit for any amounts it may have paid.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of **$139.12**/week for **13.3** weeks, because the injuries sustained caused the **17.5**% loss of the **left thumb**, 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

April 9, 2014
Date

ICArbDec p. 2

APR 9 - 2014

Joshua Gochanour v. Swingers, Inc.
Case No.: 11 WC 49129

This case was heard by Arbitrator Mathis, but no Decision was issued before Arbitrator's Mathis' appointment to the Commission. The case was then reassigned to Arbitrator David A. Kane to review the transcript and evidence and issue a Decision.

Petitioner cut the base of his left thumb while polishing a wine glass at work on September 27, 2011. Petitioner went to the emergency room on the date of accident. At the ER, petitioner had five sutures to close the 1.6 cm wound. On October 14, 2011, claimant had wound exploration of his left thumb with "microscopic repair of left thumb digital nerve (radial)" followed by occupational therapy. At the final visit on September 5, 2012, the treating surgeon, Dr. Tattini, noted decreased sensation on the radial aspect of his thumb and baseline sensation on the dominant side of the thumb. Petitioner had baseline active and passive range of motion of all his joints, according to Dr. Tattini.

Petitioner returned to work in his prior profession as a bartender. According to the occupational therapy note dated January 23, 2012 (Petitioner's Exh. 11), petitioner stated he worked more "this past weekend" than in previous weeks without any complications to his hand.

Petitioner was evaluated by Dr. Paul Nord at the request of petitioner's attorney. Dr. Nord noted decreased sensation in the left lateral thumb area with slight hypersensitivity over the lateral thumb laceration area, and slight weakness of the left thumb.

Petitioner was also evaluated by Dr. Brower of Midwest Occupational Health Associates in Springfield, Illinois, on May 9, 2013, at the request of Respondent. Dr. Brower calculated 10% of the thumb per The Guides to the Evaluation of Permanent Impairment, Sixth Edition, Second Printing. This took into account loss of radial digital nerve and associated sensory loss.

(820 ILCS 305/8.1b)

Sec. 8.1b. Determination of permanent partial disability.

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) .....

(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.

Addressing each of the factors of section 8.1(b) separately, consideration is provided for (i) 10% of the thumb AMA impairment rating. (ii) Petitioner is able to return to work as a bartender without complications according to statements by Petitioner noted in the physical therapy records. This carries more weight than the evaluation by Dr. Nord because Dr. Nord's opinion was generated in anticipation of litigation. (iii) Claimant's age does not hinder his ability to heal from this injury. He is young enough and healthy enough to recover well from this laceration. (iv) There is no evidence in the record that petitioner has had a loss of earning capacity as a result of this

laceration. (v) According to Section 8.1(b)(v), evidence of disability referenced in the treatment records is considered in the evaluation of permanent partial disability. The final visit of Dr. Tattini notes petitioner is "fine operating on his daily tasks as it stands now." This is the only reference in the treatment records to disability.

Based on the above, and after considering the entire record, the Arbitrator finds that Petitioner permanently lost 17.5% of the use of his left thumb under section 8(e) of the Act.

With regard to the issue of reasonable and necessary medical expenses, Respondent did not dispute the bills from Ireland Grove Center for Surgery or Ambulatory Anesthesiology. Respondent did dispute the bills of OSF Medical Group and Bloomington Radiology. The Arbitrator finds with respect to the disputed bills that Petitioner failed to prove that he is entitled to those medical expenses , due to a lack of evidence.

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

Kevin Van Duyn,

Petitioner,

vs.

NO: 02 WC 00828

Joseph Weil & Sons,

14IWCC0930

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 medical expenses, temporary total disability benefits, and permanent disability benefits, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent, and in doing so, we find that Petitioner suffered an intervening accident on or about August 19, 2002, breaking the causal chain between Petitioner's November 29, 2001 work accident and his current condition of ill-being.

At hearing, Petitioner testified that immediately following the accident he had pain in his right ankle and foot. (T.14-15) Petitioner further testified that he started having neck and low back pain the following day. (T.18-19) Regarding the effect of the August 19, 2002 car accident, Petitioner testified that it "affected the right side of my neck, caused me some headaches. And my upper back, I think I got a little herniated disc in there." (T.76-77,79) Petitioner denied that the accident affected his low back condition. (T.80) According to Petitioner, the car accident caused him right sided neck pain with headaches and the work accident caused him left sided neck pain with headaches. (T.115-116)

During his evidence deposition for his lawsuit against Labor Temps and the forklift driver, taken on November 30, 2004, Petitioner again testified that he felt right foot and ankle pain immediately following the work accident, and then started having neck and low back pain the following day. (RX6-pgs.66,83,86) Petitioner also testified that the 2002 car accident "aggravated my neck and my upper back" and denied that it aggravated his low back condition. (RX6-pgs.143, 145-146)

The Commission notes that during the evidence deposition, Petitioner was more detailed regarding his conditions before and after the car accident. Petitioner testified that his upper back condition had been improving when the car accident occurred and that his upper back condition was about 50% improved before the car accident. (RX6-pgs.146-147) Petitioner further testified that after the car accident, his upper back condition worsened and the pain was worse than it had been following the November 29, 2001 work accident. (RX6-pgs.147-148)

Regarding his neck pain, the Commission notes that Petitioner testified that it had improved prior to the car accident. (RX6-pg.152) Petitioner further explained that his neck pain worsened after the car accident, but that it was back to the point it was shortly after the car accident. (RX6-pg.152) Petitioner testified that he occasionally got headaches, which he attributed to the car accident. (RX6-pg.153) Finally, Petitioner testified that he continued to have pain down the center of his back and that that pain was present before the car accident. (RX6-pg.154)

In the interrogatories from the civil case stemming from the August 19, 2002 automobile accident, sent out on February 25, 2005, Petitioner declared that "[a]s a result of the auto accident, I injured my neck, upper and lower back, and suffered from severe headaches....As a result of suffering personal injuries from the accident, I saw the following medical service providers/healthcare treaters: Dr. Jose Medina...Dates of Treatment: 10/14/2002 to 12/18/03....Schening Chiropractic Clinic...Dates of Treatment: 8/20/02 to 11/13/02....as a result of the accident I took seven days off from work...Dates: 8/20/02 to 8/27/02....On November 28, 2001, I injured my right foot, upper and lower back as a result of a forklift being driven over my right foot." (RX4) Petitioner signed the interrogatories, certifying that "the statements set forth in this instrument are true and correct."

Petitioner's testimony at hearing contradicts his testimony during the evidence deposition and the statements he made in the interrogatories. Despite his statement at hearing that the 2002 automobile accident did not affect his low back condition, the interrogatories he signed, certifying that his statements were true and correct, state that the automobile accident not only aggravated his neck and upper back condition, but also affected his lower back. (RX4) The Commission further notes that at hearing Petitioner described the automobile accident as a "minor accident" (T.76-77), yet at the evidence deposition Petitioner claimed that after the automobile accident his pain not only worsened, but was worse than the pain he had following the November 29, 2001 work accident. (T.RX6-pgs.147-148) Petitioner's inconsistent statements regarding which accident caused his current conditions of ill-being evidence a lack of credibility on Petitioner's part.

Therefore, based on the evidence presented and the contradictory nature of Petitioner's testimony, the Commission finds that Petitioner suffered an intervening accident on August 19, 2002, which broke the causal connection between Petitioner's November 29, 2001 accident and his current conditions of ill-being.

Based on the above, the Commission finds that Petitioner is entitled to temporary total disability benefits from November 29, 2001 through January 30, 2002, since Petitioner returned to work, light duty, on January 31, 2002.

The Commission notes that Petitioner was again taken off work on November 12, 2002 and has not been released to return to work; however, this period of disablement occurred after the automobile accident. Therefore, the Commission finds that Petitioner is not entitled to temporary total disability benefits from November 12, 2002 to present.

Regarding medical expenses, Petitioner is entitled to medical expenses up to August 19, 2002, the date of the automobile accident.

As to Petitioner's claim for permanent disability, the Commission notes that when the automobile accident occurred, Petitioner had returned to work, albeit light duty. Furthermore, as noted above, Petitioner's conditions had been improving prior to the automobile accident. The Commission also notes that Petitioner's claims as to what caused and/or aggravated his conditions have varied throughout. Therefore, based on a complete review of the record and for the reasons set forth above, the Commission finds that the Arbitrator's award of 60% loss of use of the person as a whole is not supported by the record and vacates the award.

The only condition not affected by the automobile accident was Petitioner's right ankle condition. Petitioner testified that his right foot "continuously swells up." (T.46) Due to the ongoing swelling, Petitioner wears shoes that are normally 1-2 sizes higher than what he used to wear prior to the work accident. (T.46-47) Petitioner also complained of continued throbbing in the ankle and his big toe. (T.46-47) The Commission finds that based on Petitioner's ongoing right foot and ankle complaints, Petitioner has suffered a 10% loss of use of the right foot as a result of the work accident.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 1, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $280.45 per week for a period of 9 weeks, from November 29, 2001 through January 30, 2002, that being the period of temporary total incapacity for work under §8(b) of the Act.

14IWCC0930

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $252.41 per week for a period of 15.5 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused the 10% loss of use of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable, necessary and related medical expenses until August 19, 2002, pursuant to §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 $11,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 9 2014
MJB/ell
o-09/08/14
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VAN DUYN, KEVIN
Employee/Petitioner

Case# **02WC000828**

JOSEPH WEIL & SONS
Employer/Respondent

14IWCC0930

On 10/1/2013, 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 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5006 THE ROMAKER LAW FIRM
CHARLES ROMAKER
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

2337 INMAN & FITZGIBBONS LTD
TERREBCE DONOHUE
33 N DEARBORN SUITE 1825
CHICAGO, IL 60602

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin Van Duyn
Employee/Petitioner

v.

Joseph Weil & Sons
Employer/Respondent

Case # 02 WC 00828

14IWCC0930

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **October 17, 2012** and **July 15, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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: **Payment of all conditional payments to Medicare that are related to Petitioner's condition that resulted from the accident injuries of November 29, 2001**

FINDINGS

On **November 29, 2001**, 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 **$21,875.36**; the average weekly wage was **$420.68**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent child.

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 **$0.00**.

Respondent claims that the workers' compensation carrier paid **$15,663.14** in medical bills. (AX1)

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

ORDER

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of **$280.45**/week for **528-2/7** weeks, from **11-30-2001** through **1-30-2002**, **6-25-2002** through **7-2-2002** and **11-12-2002** through **10-17-2012**.

Permanent Partial Disability Benefits

Respondent shall pay Petitioner permanent partial disability benefits of **$252.41**/week for **300** weeks since Petitioner, as a result of the **11-29-2001** accident, sustained a loss of use, man as a whole, to the extent of **60%** thereof.

Medical Bills

Provided the medical bill or bills has/have not been written off, Respondent shall pay Petitioner an amount equal to the sum of the following outstanding medical bills for the reasonable, necessary and related medical care rendered to Petitioner, pursuant to Section 8(a) of the Act: Physicians Plus, Ltd.'s bill of **$12,092.00** (less any charge for a 12-17-2001 sonograph), Dr. Timothy Schening's bill of **$5,247.00**, Dr. Jose L. Medina of The Neuro Center's bill of **$27,836.00**, Dr. Sarmed G. Elias, of Bone and Joint Center's bill of **$30,055.40,** for a total of medical bills awarded of **$75,230.40.**

All bills incurred for related treatment rendered on or after **February 1, 2006** shall be subject to Section 8.2 of the Act.

In addition, Respondent shall pay Medicare's Conditional Payments in the amount of **$6,037.16**. Respondent is entitled to a **credit** in the amount of **$636.00** for payment made to Physicians Plus, Ltd., on May 6, 2009. Respondent claims that the workers' compensation carrier paid **$15,663.14** in medical bills. (AX1) Respondent is entitled to a credit for medical bills previously paid.

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

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

Brian T Cronin

Signature of Arbitrator

September 30.2013

Date

ICArbDec p. 2

OCT 1 - 2013

MEMORANDUM OF
DECISION OF ARBITRATOR

Kevin Van Duyn
Employee/Petitioner
v.

Joseph Weil & Sons
Employer/Respondent

Case # **02** WC **00828**

14IWCC0930

FINDINGS OF FACT

The Accident:

Petitioner testified that prior to November 29, 2001, he never injured or had medical treatment to his neck, low back or right foot. On November 29, 2001, Petitioner was an employee of Respondent. His job duties included picking orders, stacking orders on pallets and driving a forklift. Petitioner worked for Respondent for approximately one year before he was injured.

On November 29, 2001, between 6:30 p.m. to 7:00 p.m., Petitioner sustained an injury at work when a forklift struck him from behind. At that time, Petitioner testified, he was filling out a document that described the inventory stacked on a skid in front of him. While Petitioner was writing, Respondent's employee, Edgar Favela, backed up a forklift and struck Petitioner. Petitioner testified that the forklift struck the right middle area of his low back/buttocks and his right foot. The next thing he recalled was that his right foot and ankle were pinned under the forklift. He was laying face down. It was a metal part of the forklift, and not the tire, that initially pinned his right foot to the ground. Edgar Favela looked at him. Since Petitioner's right foot was pinned to the ground, Petitioner twisted his body, including his back, and pulled as hard as he could in an effort to extricate his right foot. It felt as though his right lower leg and right foot were on fire. He experienced great pain in his right foot and he just wanted the forklift off his foot. Edgar Favela proceeded to drive over his foot. After Petitioner

finally freed his right foot from the forklift, his co-workers assisted him. They covered him with a blanket and called an ambulance, which took him to MacNeal Hospital.

MacNeal Hospital:

Petitioner testified on direct examination that upon arriving at MacNeal Hospital emergency room, his right foot was pulsating and bleeding and that he was given a shot of Demerol for pain. Petitioner further testified that they stitched up his foot, gave him pain medication and put him on modified duty for three days.

The handwritten, November 29, 2001 triage notes in the Emergency Service Record list the chief complaint as follows:

"ankle pain s = Pt. states accidentally had R foot run over by forklift. o=Pt A-Ox3; skin w/d; [?] [?] labored; + tenderness + swelling noted to R ankle + heel; ~ 1' lac. noted to ankle Ø active bleeding; + CMS." (PX1)

The triage nurse indicated that Petitioner's PMH was significant for asthma and his present medication was Albuterol. (PX1)

The typewritten, November 29, 2001 notes in the Emergency Department History, Physical and Treatment record state, *inter alia*, the following:

"**HISTORY**

CHIEF complaint: ankle injury

HPI: Patient complains of having an injury to the right ankle. Injury occurred about 1 hours (sic) prior to arrival. Patient is unable to bear weight. he (sic) was run over by a fork lift, c/o pain of the ankle and the heel, the foot was caught in between the forklift and the floor, no c/o numbness, no tingling, no weakness, no prior injury, pt has moderate pain, and a laceration on the right foot/ankle area. tetanus is utd . . .

REVIEW OF SYSTEMS (by Physician)

See HPI for pertinent positives and negatives. All other pertinent systems are negative or other systems are non-contributory to the presenting complaint . . . (PX1)

John B. Alexis, M.D., examined Petitioner and ordered x-rays of his foot and ankle.

The radiologist, Reeni Karavattuveetil, M.D., gave the following impression of the x-ray images "UNREMARKABLE PLAIN RADIOGRAPHS OF THE RIGHT ANKLE AND CALCANEUS."

Dr. Alexis injected Petitioner with Demerol, applied a splint to his right ankle, recommended he use crutches as needed, prescribed Vicodin and Motrin, instructed him to elevate and apply cold compresses to the affected area and discharged Petitioner home. Dr. Alexis' diagnosis was 2 cm. laceration of the right ankle, contusion of the ankle and sprain of the ankle. Petitioner was instructed to follow up with an occupational health doctor; sutures to be removed in 14 days. Dr. Alexis placed Petitioner on light-duty for three days with work limited to sitting only. (PX1)

On cross-examination, Petitioner testified that he told the staff at MacNeal that his right foot was run over and pinned to the ground, that he was struck from behind and that he fell to the floor. The Petitioner did not know if they examined his bruised back. Petitioner further testified that at that time, his main focus was on his foot. Petitioner testified that although the record states that there was no active bleeding, he testified that his foot was bleeding, although it might have stopped. Petitioner testified that he did not think that he complained of neck pain at that time, but that he did tell them his back/spine was numb. Petitioner testified that he told the doctor who stitched him up that the forklift struck his back. Petitioner testified that he did not complain of numbness or tingling in the leg or foot at that time, but of throbbing and pain in the ankle and foot. Petitioner admitted that the staff at MacNeal did not take x-rays of the low back or neck at that time, and that the diagnosis they gave was contusion and sprain of the ankle.

Petitioner testified that the next morning, Friday, November 30, 2001, he woke up to pain in his neck, lower back and down his right leg to his right foot. Petitioner testified that over the weekend, he noticed bruises forming on his lower back where he was hit by the forklift. Petitioner further testified that one of his co-workers suggested he visit Physicians Plus for a follow-up. Petitioner testified that on Saturday, December 1, 2001, and Sunday, December 2, 2001, the pain in his neck, low back and right foot became worse.

Physician Plus, Ltd.:

On Monday December 3, 2001, Petitioner first visited Frederic B. Bauer, M.D., at Physicians Plus, Ltd. Petitioner wrote on the Work Comp Questionnaire form: "HIT ^ BY FORK LIFT, RAN IN BACK OVER FOOT LEG" on November 29, 2001 while employed by Joseph Weil & Sons in LaGrange Park, IL. (PX2) Petitioner further noted on his intake form that he was feeling pain in his "foot, back, leg, neck, side hurt when breathing." (PX2 at Work Comp Questionnaire) Petitioner described his pain as "constant, tingling, burning, throbbing, deep stabbing, deep achy, and sharp recurring pain." (PX2) At that time, Petitioner indicated that he required a walker and/or wheelchair. In Dr. Bauer's initial note, he wrote that Petitioner's presenting complaints were "pains in neck, upper back, mid and lower back, right lower leg and foot." (PX2) Dr. Bauer's examination on December 3, 2001 showed a limited range of motion of the cervical and lumbar spine, but negative results for the bilateral, straight-leg raising test. (PX2)

In his December 3, 2001 Initial Evaluation form, Dr. Bauer also wrote the following:

"Pt. complains of severe tenderness when touched lightly over entire spine from C3 to L5 and para-vertebral MM along the entire length of the spine. Also tender over L + R SI joints. Both gluteals. Tenderness over the entire length of the R Tibia, medial malleolus + lateral. Sutures in place in 2"

laceration of ankle (lateral) c same [?]. Pt's response to palpation is so strong that it is hard to get an idea of where there is tissue injury –" (PX2)

Dr. Bauer prescribed an MRI and an EMG of the lower extremity, a right ankle brace, and physical therapy three times per week for neck, lower back pain; and right ankle pain and he placed him off work. (PX2)

Dr. Rosita Dee – Nerve Conduction-Somatosensory Study of Lower Extremities:

On December 17, 2001, Petitioner underwent a Nerve Conduction-Somatosensory Study of the lower extremities by Rosita Dee, M.D. Dr. Bauer referred Petitioner to Dr. Dee. In the history of present illness in the EMG report, Dr. Dee wrote: "The patient is a 35 year old male who is experiencing back pain, neck pain, leg pain, and foot pain as a result of a work related injury." (PX 4) Following the study, Dr. Dee offered the following comments: "The MNCV of the peroneal and tibial nerves are normal. The sural sensory is normal. The F wave latencies are normal. The H reflex is normal. The SEP latencies are prolonged. The DEP latencies are prolonged at left L4/L5 and right S1." Dr. Dee's interpretation of the study: "L4/L5/S1 radiculopathy." She recommended an MRI of the L spine. and if such MRI is negative, than an EMG of the leg. (PX4)

The Arbitrator notes that supporting charts and graphs of the Nerve Conduction-Somatosensory Study, if such exist, were not included in PX4.

Thereafter, Dr. Bauer saw Petitioner again on December 21, 2001. He wrote that Petitioner's right ankle had shown some improvement but his low back seemed to be resistant to therapy. He further wrote that Petitioner's right S1 nerve root was implicated by Dr. Dee's study. Dr. Bauer referred

Petitioner for an MRI of the lumbar spine and recommended that he continue to participate in physical therapy. (PX2)

MRI Lincoln Imaging Center:

At Dr. Bauer's recommendation, Petitioner submitted to an MRI scan of his lumbar spine on January 10, 2002. An impression of the images, as offered by J. Karen Clark, M.D., is as follows: "Disc bulge centrally at L5-S1 where there are also moderate degenerative changes." (PX5)

Physicians Plus, Ltd. (Cont'd):

Dr. Bauer and Dr. David Krueger at Physicians Plus treated Petitioner numerous times after the positive EMG of December 17, 2001 up to and including April 29, 2002. (PX2) Throughout that time period, Petitioner complained of pain in his low back, neck, and right foot. Dr. Bauer's diagnosis was lumbar impingement, cervical sprain and right ankle injury. (PX2 at January 2, 2002)

From December 3, 2001 until January 30, 2002, Dr. Bauer placed Petitioner completely off work with disability slips. (PX2).

In January 2002, Dr. Krueger of Physicians Plus, Ltd., referred Petitioner to Dr. Robert Samuel Goldberg. (PX2)

Later on February 28, 2002, Dr. Bauer wrote that Petitioner was unable to work on February 25, 2002, February 26, 2002 and February 27, 2002 due to an aggravation of his symptoms. (PX2 at off-work note of February 28, 2002) From December 3, 2001 to April 29, 2002, Petitioner underwent 52 physical therapy sessions for his neck, lower back, and right ankle with Dr. Bauer. (PX2)

Petitioner returned to Dr. Bauer on March 21, 2002, and Dr. Bauer wrote: "The patient is back again today. I had released him twice from physical therapy because it had been ineffective over three

months. The MRIs do not provide enough abnormalities to explain his symptoms." He further wrote: "Patient must try to get orthopedic treatment, perhaps steroid therapy." In this note, Dr. Bauer indicated that Mr. Van Duyn was discharged from care. (PX2)

In his April 29, 2002, Comments, Dr. Bauer wrote:

> "I don't know why the pt. is back today. He does not get better (sic) at any time since 12/01. He has been told twice that PT has not helped him and he show (sic) D/C. He is making aware (sic) that he has been told he is going to see a company Dr. regarding the disposition of his case. He is also being told by Dr. Ray he needs some kind of a motion study." (PX2)

Dr. Robert Samuel Goldberg:

On January 21, 2002, Petitioner saw Dr. Robert Samuel Goldberg. Dr. Goldberg took a history of the accident. Dr. Goldberg wrote that a forklift ran into Petitioner's right flank area and ran over his right foot, which caused him to fall. (PX6) Dr. Goldberg wrote that Petitioner complained of low back pain with on and off radiation to right lower extremity as well as paresthesias of the right foot and pain in the right foot and ankle. (PX6) Dr. Goldberg conducted a physical examination. Dr. Goldberg wrote:

"In summary, Mr. Van Duyn has low back pain related to an L5-S1 lumbar central disc bulge. Currently, there is no evidence of neurologic deficit. Also, there is no current evidence of radiculopathy. In my experience, this is common with central disc bulges, as they often cause lower back pain without sciatic-type physical examination signs. His right foot and ankle examination is near normal today. I would like to review his past medical records to review the course of his recovery. I provided a prescription for Vioxx 25 mg. qd and a physical therapy script. Mr. Van Duyn is capable of light-duty, 20 pounds maximal lift, push, or pull, and avoid bending. He will return to my office in one month." (PX6)

On January 28, 2002, Petitioner again saw Dr. Goldberg for low back pain and was given the same work restrictions and was prescribed Vioxx. (PX6)

Petitioner testified that at the end of January 2002, he returned to work and worked light duty until he underwent his right ankle surgery on June 25, 2002. He further testified that, thereafter, he was off work a couple of weeks in order to recuperate from such surgery. Petitioner provided unrebutted testimony that on November 11, 2002, after Dr. Schening had released him to return to seated work only, he had a telephone conversation with Santiago, his supervisor at Respondent, wherein Santiago told him that he could not honor Petitioner's work restrictions, that Petitioner must be 100% and that Santiago would make sure Petitioner received his workers' compensation payments.

MRI Lincoln Imaging Center:

At Dr. Bauer's recommendation, on February 27, 2002, Petitioner submitted to an MRI scan of his right ankle and an MRI scan of his cervical spine.

An impression of the right ankle images, as offered by J. Karen Clark, M.D., is as follows: "Mild posterior tibial tendinitis and moderate flexor hallucis longus tendinitis." (PX7)

An impression of the cervical spine images, as offered by J. Karen Clark, M.D., is as follows: "Mild degenerative change of the cervical spine with a small posterior bulge secondary to osteophytes at C3-C4." (PX7)

Dr. Asok K. Ray:

On April 9, 2002, Petitioner saw Asok K. Ray, M.D., upon a referral by Dr. David Krueger of Physicians Plus, Ltd. (PX8) Petitioner gave Dr. Ray the history of the accident that he was hit on the

right side of his body by a forklift, was knocked down and fell to the ground. (PX8) He went to MacNeal, had eight stitches, which were later removed, underwent conservative treatment, was off work for two months and is back to light-duty work and has had no difficulties with the light duties. On April 9, 2002, Petitioner complained of severe pain and stiffness of the low back, pain and stiffness of the cervical spine and pain, swelling and tenderness of the right ankle. (PX8). Upon physical examination, Dr. Ray noted moderate to excellent range of motion without pain of the cervical spine, and a fair range of motion of the lumbar spine. He also noted muscle spasm and tenderness over the lumbar spinal muscle mass and marked tenderness over the right sacroiliac joint. Dr. Ray found straight leg raising to be 90 degrees bilaterally and all reflexes to be present and equal. Motor sensory was unremarkable. Dr. Ray observed diffuse swelling of the right ankle and tenderness along the posterior tibial and extensor hallucis longus tendon. Otherwise, Dr. Ray wrote, the right ankle and foot is normal. (PX8)

Dr. Ray administered a cortisone shot into the right sacroiliac joint, and recommended Petitioner continue conservative treatment. He advised Petitioner to lose some weight and get into physical fitness. He further advised Petitioner to try to return to full work, at least on a trial basis. (PX8)

Dr. John F. Kane:

On May 9, 2002, Petitioner sought treatment with his second choice of doctors, John F. Kane, D.P.M., for his work-related injury. (PX9) On that date, Petitioner indicated to Dr. Kane that he had severe right ankle pain and lower back pain subsequent to a recent work accident. (PX9) Dr. Kane noted that Petitioner presented with antalgic gait favoring his right limb with crepitus and radiating pain. (PX9)

On May 16, 2002, Dr. John Kane referred Petitioner to Dr. Timothy Schening for physical therapy and on May 23, 2002, Dr. John Kane referred Petitioner to a neurologist, Dr. Jose Medina, for a neurological consultation. (PX9 at notes of May 16, 2002 and May 23, 2002)

On June 25, 2002, Dr. John Kane performed an arthroscopic repair of the synovium of the right ankle, an arthrocentesis of the right ankle and an excision of synovitis and fractured cartilage of the right ankle. (PX9 at Operative Report)

Petitioner testified that he was off work for a couple of weeks after from such surgery.

In a letter to Petitioner's Work Supervisor dated July 2, 2002, Dr. John Kane wrote: "Please pardon Kevin from his normal work activities on June 20th due to complications from ankle pain and swelling. Please pardon Kevin from his normal work activities from June 25th through July 2, 2002 due to a scheduled surgery for his painful ankle." (PX9)

In another letter to Petitioner's Work Supervisor dated July 2, 2002, Dr. John Kane wrote: "Please allow Kevin continued light duty activities at work until August 10th. Kevin is currently receiving physical therapy to help reduce symptoms from a recent work injury. Light duty restrictions should include: (1) No lifting, pulling or pushing in excess of 25 pounds. (2) Please allow occasional rest periods to elevate his foot. (3) No ladder work." (PX9)

Dr. Kane later saw Petitioner several times in 2003 and 2004. Dr. John Kane prescribed an evaluation and treatment of Petitioner for pain control.

On October 1, 2003, Dr. Kane performed an unrelated surgery to Petitioner's feet for ingrown toenails of the great toe, bilateral, and hypertrophic bone along the medial aspect of the distal phalanx of the great toe, bilateral. (PX9)

Dr. Timothy N. Schening: (May 22, 2002 to May 14, 2003)

On May 22, 2002, Petitioner saw Timothy N. Schening, D.C., of Northwest Community and Wellness Center, at the referral of Dr. John Kane. (PX 9 at note of May 16, 2002, PX10 at Rx slip of

May 16, 2002). Petitioner also testified that he saw Dr. Schening at the referral of Dr. John Kane. On May 22, 2002, Dr. Schening took a history from Petitioner in which he was hit by a forklift and injured his right foot, ankle, pelvis, and lower back. (PX10 at note of May 22, 2002) On that date, Petitioner indicated that he had constant lumbar pain and constant numbness and tingling down both legs. (Id.) He further indicated he had no injuries prior to his work accident. (Id.) Dr. Schening's chiropractic evaluation revealed positive bilateral Ely's, Bechterew's, Kemp's, Nachla's and Anterior Foot Drawer tests. (Id.) During Dr. Schening's lumbosacral R.O.M testing, Petitioner demonstrated limited range of motion and during his ankle R.O.M. testing, he demonstrated limited range of motion of his right ankle. (PX10 at note of May 22, 2002 at p. 2)

From May 23, 2002 to November 11, 2002, Dr. Schening rendered physical therapy and examined Petitioner's lumbar spine and right foot. (PX10)

PX10 includes various off-work and light-duty work slips. Dr. Schening completed slips in which he kept Petitioner off work from August 20, 2002 through September 2, 2002. He then placed Petitioner on light duty from September 3, 2002 through September 28, 2002. Dr. Schening then took Petitioner off work from September 29, 2002 until November 11, 2002, at which time he would re-evaluate Petitioner. (PX10 at notes and various off-work slips)

On November 11, 2002, Dr. Schening found, *inter alia*, the following:

> **Subjective**: On today's visit, the patient stated he has had a decrease in the frequency of his lumbar pain bilaterally from constant (76 to 100% of awake time) to frequent (51 to 75% of awake time) since his previous visit. He also stated that the severity has modestly improved to 4/10. In addition, he also indicated the severity of his pain, numbness and tingling down both legs improved noticeably since his previous visit to 5/10. Additionally, Mr. Van Duyn stated the severity of his swollen, painful right ankle and

foot improved modestly since his previous visit to 5/10.

Objective: Palpation of the spinal tissues at the sacral region induces moderate bilaterally (sic) discomfort. The lumbar was revealed to have a moderate level of pain and discomfort when evaluated by palpation. The lower thoracic region was found to have a moderate level of pain and discomfort when evaluated by palpation. Examination of muscle tenderness and spasm revealed the following: Quadratus lumborum revealed moderate tenderness and spasm. Psoas revealed moderate tenderness and spasm. Gluteus maximus revealed moderate tenderness and spasm. Palpation of the quadratus lumborum muscle area revealed an active myofascial trigger point. There is an active myofascial trigger point in the psoas muscle area. A subluxation was revealed at L4, L5, S1. A misalignment was revealed, right and left sacroiliac. Decreased R.O.M. was revealed today in the patient's lumbar region.

Assessment: The patient has improved since the last visit . . . " (PX10)

On November 11, 2002, Dr. Schening issued a combined Return to Work Order/Employee's Work Limitation Slip. In the Return to Work Order, Dr. Schening certified that Petitioner will be able to return to work on November 12, 2002. In the Employee's Work Limitation Slip, Dr. Schening recommended that Petitioner's work be limited as follows: "Full duty in seated position only." (PX10)

Dr. Schening continued to treat Petitioner through May 14, 2003. However, PX10 does not contain any subsequently issued work status slips.

The Arbitrator points out that at the top right corner of the Return to Work Order/Employee's Work Limitation Slip, there is a handwritten note in apparently different handwriting that indicates that Santiago, the second shift supervisor, called at 6:20 PM on 11-12-02 and told him not to come back and that he can not use him until he is100% healthy. (PX10)

Dr. Jose Medina: (June 20, 2002 to present)

On June 20, 2002, Petitioner saw neurologist Dr. Jose L Medina, at the referral of Dr. John Kane. (PX12) Petitioner gave Dr. Medina the history of the accident that he was hit from behind with a forklift, was knocked to the ground and had his right foot run over. (PX12 at note of August 5, 2002) Dr. Medina opined that as a result of that accident, Petitioner suffered neck, back and right ankle pain and injuries. (Id.) On June 20, 2002, Petitioner presented with stiff and tender right ankle, neck and low back and was limping with the right leg. (PX12) Dr. Medina performed an EMG of the lumbar spine on June 20, 2002 that revealed active severe L5 and S1 radiculopathy. (PX12) Dr. Medina opined that the diagnosis of lumbar and cervical radiculopathy and right ankle sprain were the result of the of the work accident of November 29, 2001. (Id.)

On October 14, 2002, Dr. Medina authored a report in which he interprets MR images of the cervical spine. He noted that the disc spaces, the spinal cord and the spinal canal all appear normal. Dr. Medina's impression: "Straightening of normal lordosis with indirect evidence of muscle spasm and bulging C3-C4, C4-C5 and C5-C6 discs. Posterior osteophyte at C3/C4 level." (PX 12)

From June 20, 2002 to the present, Dr. Medina performed the following EMGs tests that were interpreted as follows:

EMG-6-20-02	**Lumbar** - Severe, active, ongoing left sacral 1 radiculopathy and lumbar 5 radiculopathy
EMG-7-11-02	**Cervical** - Moderate, active, ongoing bilateral C6 radiculopathy
EMG-2-13-03	**Lumbar** - Severe, active ongoing left sacral 1 radiculopathy and bilateral lumbar 5 radic.
EMG-7-7-03	**Lumbar** - Severe, active ongoing left sacral 1 radiculopathy and bilateral lumbar 5 radic.
EMG-6-24-04	**Lumbar** - Moderate, bilateral sacral 1 radiculopathy
EMG-8-24-04	**Cervical** - Moderate, active ongoing left cervical 5, 6 and 7 radiculopathy
EMG-4-5-05	**Lumbar** - Moderate, active ongoing right lumbar 5 and sacral 1 radiculopathy
EMG-8-4-05	**Cervical** - Moderate, active right cervical 6 and left cervical 7 radiculopathy
EMG-1-31-06	**Lumbar** - Moderate, active ongoing right lumbar 5 and sacral 1 radiculopathy
EMG-11-15-07	**Lumbar** - Severe, active ongoing right lumbar 5 and sacral 1 radiculopathy
EMG-2-18-08	**Cervical** - Moderate, active left cervical 6 and 7 radiculopathy
EMG-11-20-08	**Lumbar** - Moderate, active ongoing bilateral lumbar 5 and sacral 1 radiculopathy

EMG-3-23-09 **Cervical** - Moderate, active ongoing left cervical 6 radiculopathy
EMG-10-15-09 **Lumbar** - Moderate, active ongoing bilateral lumbar 5 and sacral 1 radiculopathy
EMG-3-18-10 **Cervical** - Inactive changes of the left cervical six-seven
EMG-11-10-10 **Lumbar** - Moderate, active ongoing bilateral sacral 1 radiculopathy
EMG-6-15-11 **Cervical** - Moderate, active ongoing left cervical 5 and 6 radiculopathy
EMG-11-30-11 **Lumbar** - Moderate, active ongoing right sacral 1 radiculopathy

(See part 3 of PX 12, EMG reports of Dr. Jose Medina)

On February 23, 2003 and April 16, 2003, Dr. Medina performed lumbar epidural injections at Methodist Hospital. (See part 2 of PX12 injection reports) Dr. Medina's notes of March 11, 2003 and April 23, 2003 state that there was some temporary improvement in the lumbar spine post lumbar injections, but by May 5, 2003, the effect of the lumbar epidurals had diminished. (PX12 at notes of March 11, 2003, April 23, 2003 and May 5, 2003) On May 5, 2003, Dr. Medina had previously prescribed Relafen, Darvocet, and Xanax and currently had Petitioner on Kerlone. On May 5, 2003, Dr. Medina referred Petitioner for an orthopedic consultation with Dr. Sarmed Elias. (PX12 at May 5, 2003 note at p. 2) Petitioner also testified at trial that Dr. Medina referred him to Dr. Elias for a low back and neck consult.

MRI Lincoln Imaging Center:

At Dr. Medina's recommendation, on July 22, 2003, Petitioner submitted to an MRI scan of the lumbar spine, with and without infusion of contrast media.

An impression of the images, as offered by Mohammad Rezai, M.D., is as follows: "There is a small central and right-sided disc protrusion demonstrated at the level of L5-S1. There is early degeneration/desiccation of the disc." (PX21)

Dr. Sarmed Elias: (May 20, 2003 to April 28, 2004)

Petitioner testified and the records demonstrate that Petitioner saw Dr. Sarmed Elias at the referral of Dr. Medina on May 20, 2003. (PX18) Petitioner gave Dr. Elias the history of accident that the forklift struck him, he was knocked to the floor and his right foot was pinned under the forklift. (PX 18, note of May 20, 2003 at p. 1). Dr. Elias' diagnosis on May 20, 2003 was disc bulge of the cervical spine at 3-4-5 and annular tears of the lumbar spine at 4-5 and L5-S1. (PX 18, note of May 20, 2003 at p. 2)

On May 28, 2003, Dr Elias performed a lumbar discogram, which demonstrated pain response at right L5-S1 level. (PX18, discogram report of May 28, 2003 and PX 20)

On June 11, 2003, Dr. Elias performed an L5-S1 discectomy and he removed large disc fragments. He also preformed an annuloplasty. (PX18, discectomy operative report of June 11, 2003 and PX 20)

On July 30, 2003, Dr. Elias wrote that he performed cervical 3-4-5-6 injections for relief of pain caused by the work-related accident of November 29, 2001. (PX 18 and PX 20) On April 28, 2004, Petitioner had a re-evaluation with Dr. Elias noting that Petitioner continued to have pain in his neck radiating into his left arm and pain in his low back with bilateral radiculopathy. (PX18 at note of April 28, 2004)

Dr. Gerald S. Kane: (April 10, 2003 to February 14, 2007)

Petitioner saw Dr. Gerald Kane on April 10, 2003. (PX 17) On that date, Dr. Gerald Kane reviewed the medical records from McNeal Hospital, the medical records/operative report from Dr. John Kane of June 25, 2002, Dr Medina's records, Dr. Samuel Goldberg's records and the nerve conduction study. (PX17 at note of April 10, 2003) On April 10, 2003, Dr. Gerald Kane opined that Petitioner is

completely disabled from work because of a work-related injury of November 28, 2001 to his cervical and lumbar spine. (PX17 at note of April 10, 2003)

On June 9, 2003, Petitioner saw Dr. Gerald Kane. Dr. Gerald Kane examined Petitioner. In his report, Dr. Gerald Kane discussed the MRI and EMG. Dr. Gerald Kane concluded: "The above findings and decision by Dr. Elias [to perform endoscopic surgery on Petitioner] corroborate the fact that the patient has significant permanent injury [sic] to the cervical and lumbar spine as a result of the November 28, 2001, injury." (Bracketed words added.) (PX17)

On November 11, 2003, Dr. Gerald Kane testified via deposition.

Petitioner continued to see Dr. Gerald Kane from August 16, 2006 to February 14, 2007. Dr. Kane examined Petitioner, ordered an MRI of the thoracic spine, prescribed Lyrica, a back brace, lumbar exercises, Feldenkrais and flexion exercises for the neck. (PX17) On February 14, 2007, Dr. Gerald Kane noted that Petitioner was doing better with the present medications and that the exercises have helped him. (PX17)

Dr. Jose Medina: (June 20, 2002 to present) (Cont'd)

Dr. Medina continued to treat Petitioner after his lumbar surgery with Dr. Elias on June 11, 2003. Dr. Medina ordered Petitioner completely off work as of February 13, 2003. (PX12)

Petitioner testified he has seen Dr. Medina nearly every one to two months from 2002 to 2012.

On October 28, 2004, Dr. Medina wrote in his office notes that Petitioner is permanently and totally disabled. (PX12 at note of October 28, 2004 attached as Exhibit 3)

On July 18, 2006, Dr. Medina's wrote in his office note that Petitioner said: "I lie down a lot and I lost 50% of use of my foot." (PX12 at note of July 18, 2006) Dr Medina noted Petitioner was limping

on the right side. He prescribed Norco 325mg for pain and Xanax. (PX12 at note of July 18, 2006) Each one of Dr. Medina's medical notes, from June 20, 2002 to August 16, 2012, state: "Cause: work accident." (PX12)

Dr. Medina wrote in all his 2008 notes: "Limping right leg." As of July 24, 2008, Dr. Medina noted "Very marked stiffness of neck and lumbar spine." (PX12 at note of July 24, 2008) On January 22, 2009, Dr. Medina noted: "Ankle is still in severe pain" and "his lumbar spine was stiff." (PX12 at note of January 22, 2009) On September 14, 2009, Dr. Medina noted: "Pain is about the same. Ankle swells up" and "stiffness of his spine is prominent." (PX12 at note of September 14, 2009) On October 15, 2009, Petitioner informed Dr. Medina: "his pain is always raging at the same intensity except when he takes his pills." (PX12 at note of October 15, 2009) On June 10, 2010, Dr. Medina noted that Petitioner's "Pain is still severe … medications are helping." (PX12 at note of June 10, 2010) On August 5, 2010, Dr. Medina opined: "His condition is still quite disabling" in reference to his low back and neck condition and on August 30, 2010, Petitioner told Dr. Medina "without his medications, pain would be 9 or 10." (PX12 at notes of August 5, 2010 and August 30, 2010) On December 8, 2010, Petitioner informed Dr. Medina: "He stays at home. Anything he does causes him pain." (PX12 at note of December 8, 2010)

On March 9, 2011, Petitioner informed Dr. Medina at his office visit that "Without the pain medication, the pain is off the chart" (PX12 at note of March 9, 2011) On April 6, 2011, Dr. Medina noted that the Petitioner's "range of motion was markedly diminished" and his lumbar ranges of motion were flexion 30% of 90% and extension was 0 of 30%. (PX12 at note of April 6, 2011)

On May 18, 2011, Dr. Medina noted that Petitioner's neck was better but his low back was worse and he had the same extremely limited range of motion of the lumbar spine. (PX12 at note of May 18, 2011) On June 15, 2011, Petitioner informed Dr. Medina that when his pain medications wear off, his

pain becomes unbearable. Dr. Medina noted on exam that Petitioner's stiffness was more prominent. (PX12 at note of June 15, 2011) On September 28, 2011, Petitioner informed Dr. Medina that his pain was getting worse and he is feeling stiffer with cold weather. (PX12 at note of September 28, 2011)

On October 26, 2011, Petitioner informed Dr. Medina his back pain flared up and Dr. Medina's exam revealed: "his back is very stiff and his motility is worse." (PX12 at note of October 26, 2011) On November 30, 2011, Petitioner told Dr. Medina his whole spine was in pain and his right ankle pain bothers him when he walks. (PX12 at note of November 30, 2011) On December 28, 2011, Petitioner had lower back pain and right leg pain that was sharp and burning and exacerbated by standing, sitting, bending, lifting or lying down. (PX12 at note of December 28, 2011) On that date, Dr. Medina had Petitioner on eight different medications. (Id.) On January 25, 2012, Petitioner's low back had a sharp, burning pain with almost any type of movement. (PX12 at note of January 25, 2012) On February 22, 2012, Petitioner was suffering from low back pain radiating down his right leg and into his right foot. (PX12 at note of February 22, 2012) On March 26, 2012, Dr. Medina noted Petitioner had sharp, stabbing low back pain that was only improved by lying down. (PX 12 at note of March 26, 2012)

Dr. Medina again prescribed multiple medications, including Percocet, 325 mg., and Lyrica, 75 mg., three times a day. (PX 12 at note of March 26, 2012)

On May 4, 2012, Petitioner had sharp, stabbing, throbbing low back pain radiating into his right leg. (PX12 at note of May 4, 2012) Petitioner's low back pain was constant and aggravated by almost any movement. (Id.) On June 8, 2012, Petitioner had neck pain and low back pain radiating into his right buttock, right upper leg and right leg below the knee. (PX12 at note of June 8, 2012) Petitioner also had severe right ankle pain on that date. (Id.) On July 6, 2012, Petitioner saw Dr. Medina and had low back pain radiating into his right leg and had severely limited range of motion of the lumbar spine of flexion

30% of 90% and extension of 0 of 30%, identical to Dr. Medina's lumbar range of motion findings of April 6, 2011. (PX12 at note of July 6, 2012)

On August 16, 2012, Petitioner had right leg pain, numbness of the right leg, neck and back pain. (PX12 at note of August 16, 2012) Petitioner still had severely limited range of motion of the lumbar spine of flexion of 30/90 and extension of 0/30. (PX12 at note of August 16, 2012) Petitioner has also had limited range of motion of the cervical spine and all of which is aggravated by almost any movement. (Id.)

Dr. Medina examined and placed work restrictions on Petitioner from June 20, 2002 through August 16, 2012. Petitioner testified he was to have seen Dr. Medina on the date of the trial. (PX12) Dr. Medina has documented Petitioner's consistent low back pain and radiculopathy with continuing neck and right ankle pain. (PX12) Dr. Medina's records also reveal consistent limping with the right leg, severely limited lumbar range of motion and prescriptions of pain medications for over a ten-year period of Petitioner's treatment. (PX1)

Dr. Renlin Xia: (11/4/03 to 6/1/2004)

On November 4, 2003, Petitioner saw Dr. Renlin Xia, at the referral of Dr. John Kane, for pain control. (PX 22) Petitioner gave the history of accident to Dr. Xia that he was hit in the back by a forklift and since then he has had low back pain with pain radiating down his right leg. (PX 22) On that date, Dr. Xia noted that Petitioner walked with an antalgic gate and posture. (PX 22) Dr. Xia's diagnosis was chronic low back pain with radiculopathy, back spasm, and cervical strain. (PX 22 at note of November 4, 2003) Dr. Xia continued Petitioner on Celebrex, Vicodin and Xanax. (Id.) Dr. Xia also opined that Petitioner had a herniated L5-S1 disc that required lumbar injections. (PX 22 at notes of November 11, 2003 and December 9, 2003). Dr. Xia gave petitioner lumbar injections on the following dates:

LUMBAR INJECTIONS – DR. XIA:

- 11/15/03 – bilateral L3/4 L4/5
- 12/6/03 – right L3/4, L4/5, L5/S1
- 12/13/03 – bilateral L4/5, L5/S1
- 12/20/03 – bilateral L3/4, L4/5
- 3/20/04 – bilateral L3/4, L4/5
- 4/10/04 – bilateral L3/4, L4/5
- 4/24/04 – bilateral L3/4, L4/5
- 5/1/04 – bilateral L3/4, L4/5

(PX 22 AND 24)

For the period from November 4, 2003 to February 6, 2004, Dr. Xia had Petitioner off work. On June 1, 2004, Dr. Xia examined Petitioner and found lumbar tenderness and prescribed Norco 325mg. (PX22 at note of June 1, 2004)

Evidence Deposition of Dr. Gerald Kane

On November 12, 2003, Dr. Gerald Kane testified at his evidence deposition. (PX23) After reviewing his reports and medical records following his examinations of Petitioner, Dr. Kane opined that Petitioner suffered neck and low back injuries as a result of the forklift accident of November 2001. (PX 23 at p. 14, L 20-24) Dr. Gerald Kane also opined that the medical treatment of Dr. Medina and the lumbar disc surgery performed by Dr. Elias were reasonable and necessary. (PX 23 at p. 17, L 7-10 and p. 18-19 at L 24 and L 1-3) Dr. Gerald Kane also opined that the disc fragments found by Dr. Elias in the lumbar surgery were causing Petitioner's lumbar symptoms. (PX23 at p.19, L 19-23)

Dr. Gerald Kane also testified that Petitioner could not return to work as a warehouse worker. (PX23 at p. 22, L7-13) Dr. Gerald Kane opined that Petitioner could only do sedentary-type work in which he does not have to lift over 15 lbs. or be on his feet all day. (PX23 at p.22, L 14-24 and p. 23 at L 1-9) Dr. Kane stated that these were permanent restrictions. (PX23 at p. 24, L 8-12)

On cross-examination, Dr. Gerald Kane admitted that (as of the date of the deposition) he did not examine Petitioner after the lumbar disc surgery and that he did not know how such surgery turned out. (PX23, pp. 23-24) Later, during cross-examination, the following exchange took place:

Q: - - do you have an opinion as to how much chiropractic care you typically feel is reasonable for somebody who has a back injury before it's time to go to a neumog (phonetic)?

A: You specified chiropractic but what they described is typical physical therapy treatments, which does not mention anything about manipulation or adjustments. It mentions mostly modalities, which there's no set number of treatments that are right or wrong prior to insurance making it difficult and not paying for patients. We used to have people in the hospital receiving two therapy treatments a day anywhere from two to three weeks at a time.

Q: Okay. So you have no limit as to the amount of that type of care an individual with a back injury might be appropriate for?

A: That's correct. (PX23, pp. 28)

Dr. Gerald Kane testified that it's not unusual for a patient's response to palpation to be so strong that it is difficult for the doctor to get an idea of exactly where the patient is injured. (PX23, pp. 32-34)

Dr. Gerald Kane testified that that a sonograph is not a standard medical test that one can rely on to diagnose and treat a patient with a low back condition. (PX23, p. 35)

Dr. Gerald Kane agreed with Respondent's Counsel that the radiologist's lumbar MRI report of January 10, 2002, does not make mention of any nerve impingement or effacement or any type of other nerve involvement, no mention of a herniated disc and that it does not demonstrate anything that acute. (PX23, p. 38) Dr. Kane agreed that the October 14, 2002, lumbar MRI findings differed from the earlier

MRI findings. (PX23, p. 43) Dr. Kane did not review the actual films of either the January or October 2002 lumbar MRI.

Dr. Gerald Kane testified that he has never performed endoscopic surgery. (RX1, p. 55)

At the November 12, 2003 deposition, Dr. Gerald Kane testified that in none of the cervical records he reviewed is there evidence of a herniated nucleus pulposus at the levels of C3-4, C4-5 and C5-6, but that they showed evidence only of nerve root involvement. (PX23, p. 56)

Evidence Deposition of Section 12 Physician Dr. Julie Wehner

At the request of Respondent and pursuant to Section 12 of the Act, Julie Wehner, M.D., examined Petitioner on two occasions: July 1, 2003 and May 11, 2007. Dr. Wehner testified, via evidence deposition, on June 22, 2007.

Dr. Wehner testified that she is a board-certified orthopedic surgeon and that she performs seven to ten lumbar spine surgeries per month. (RX1, pp. 6-8, 59)

Dr. Wehner found that when she examined Petitioner on May 11, 2007, given his MRI results, he demonstrated self-limiting behavior when she instructed him to bend forward and touch his knees. (RX1, p. 28) With regard to upper extremity strength testing, Dr. Wehner found that with the exception of his right thumb in abduction, Petitioner demonstrated normal strength. With regard to motor strength testing in the lower extremities, Dr. Wehner found that manual motor strength was 5 over 5, which is normal. (RX1, p. 30) She also found that Petitioner's knee and ankle reflexes were 2 plus and symmetric, which is normal. She found that he had 1 plus pitting edema of his ankles (bilaterally), which usually goes along with someone who is hypertensive. She found that any touching of his foot caused him pain. She found that because she was unable to carry out the straight-leg raising test, she

asked him to straighten out his leg. He did so and complained that it caused pain in his knee. (RX1, pp. 30-31) Dr. Wehner testified that after conducting the examination, she formed the following opinion that impacted her eventual diagnosis:

"He had diffuse complaints of pain which were not in a specific anatomic distribution, meaning I couldn't produce a particular pain pattern on his exam that would fit with a specific medical disease such as a radiculopathy or carpal tunnel syndrome or any specific type of medical disease that might be a reason why he had these pain complaints." (RX1, p. 34)

Dr. Wehner diagnosed Petitioner with an ankle contusion-sprain-laceration. (RX1, p. 52)

Dr. Wehner opined, to a reasonable degree of medical and surgical certainty, that the back, neck and spinal treatment that Petitioner has undergone is not causally related to the work injury of November 29, 2001. The basis of her opinion is as follows:

"That the initial injury was an ankle injury and there was no documentation of any spine injury on the initial emergency room report and the extent of his pain complaints that developed were so out of proportion to the MRI findings and the initial doctors - - doctor - - Physicians Plus and Dr. Ray, and all felt that he had pain complaints that did not match his clinical findings and lasted - - and were out of proportion so that he eventually went on to continue to complain and as so happens, you can usually convince somebody to do things as long as you keep on complaining." (RX1, p. 53)

On cross-examination, Dr. Wehner testified that she created a Section 12 report but subsequently lost her entire file and all the medical records she was given. (RX1 at pp. 60-61) She examined Petitioner a second time and created a new report dated May 11, 2007, which was more than 3-1/2 years after initially seeing Petitioner. (RX1, pp. 11-12) Dr. Wehner did not remember if she ever saw the lumbar MRI films and agreed she would not usually make a surgical recommendation without seeing the

MRI films. (RX1 at p. 62, L 17-19) Dr. Wehner's understanding of the mechanism of injury is that Petitioner was hit from behind by the forklift and pinned to the floor. (RX1 at p. 64, L5-16) Dr Wehner agreed that it is not unusual for a person to develop pains in other areas of their body after having an initial insult such as this in which someone could get their foot run over and then develop pain in other areas later. (RX1, p. 65) Dr. Wehner also agreed that four days after the accident, 12-3-2001, Petitioner was complaining - - and from the records it appears that he was consistently complaining - - in those areas thereafter, and also agreed that the EMG of 12-17-2001 was interpreted as showing L4-5 and S1 radiculopathy. (RX1, pp. 66-67)

Section 12 Physician Dr. Carl Graf

Carl N. Graf, M.D., an orthopedic surgeon, conducted a Section 12 examination of Petitioner on October 31, 2011, at the request of Respondent. Dr. Graf opined that Petitioner, based on his review of the records, suffered an ankle laceration on the date of accident. (RX2, Dep. Ex. 2) Dr. Graf noted that it is well documented that there were no other complaints while Petitioner was in the emergency department of MacNeal Hospital, although subsequently, Mr. Van Duyn reported a myriad of complaints throughout the upper and lower extremities, essentially from the neck down to the feet, and has undergone extensive care and treatment since that point. Petitioner has been listed as completely disabled secondary to this injury in question and rates his pain nearly everywhere as a 10/10 without medication. During Dr. Graf's examination, he noted that Petitioner had multiple subjective complaints of pain. (RX2, Dep. Ex. 2) He opined that Petitioner further demonstrated multiple, non-organic pain signs with notable symptom magnification and clear non-anatomic distribution of pain, sensation, and motor strength. Dr. Graf opined that, other than the ankle injury, he could not causally relate Petitioner's ongoing, various, and diffuse complaints of pain and disability secondary to the isolated injury from 2001. Dr. Graf opined that the Petitioner is malingering, and supported this conclusion with

the multiple non-organic pain signs he exhibited during the examination. Dr. Graf further testified that multiple treating physicians throughout the medical record documented such behavior. (RX2, Dep. Ex. 2)

Dr. Graf gave his evidence deposition on May 18, 2002. (RX2) Dr. Graf never saw any of the MRI films. (RX2 at p. 36, L 3-8) Dr. Graf opined as he did because he claimed that, in spite of Petitioner's years of medical records that included low back and neck complaints, he could not substantiate those complaints so he could not relate them to the accident. (RX2 at p. 34, L 16-24 and p. 35, L 1-9) Dr. Graf agreed that Petitioner consistently complained of pain in his neck and low back from December 3, 2001 to October 2011 when he examined Petitioner. (RX2 at p. 45, L 1-14)

Petitioner's Motor Vehicle Accident

On cross-examination, Respondent asked Petitioner questions regarding an August 19, 2002, motor vehicle accident. Petitioner testified that he was a passenger in the vehicle and that a result of the motor vehicle accident, he hurt his neck and upper back, but not his lower back.

Petitioner filed a lawsuit (04 M1 303133) as a result of the motor vehicle accident. Respondent offered into evidence an undated document entitled "Plaintiff's Answers to Interrogatories." (RX4) Petitioner testified in the case at bar that he signed RX4 and that he never mentioned anything in the interrogatories with regard to his low back.

In response to question 5, Petitioner answered: "As a result of the auto accident, I injured my neck, upper and lower back, and suffered from severe headaches." (RX4) In response to question 6, Petitioner answered that as a result of suffering personal injuries from the accident, he saw the following medical service providers/healthcare treaters: (1) Dr. Jose Medina, Neurocenter, 5015 N. Paulina, Suite 325, Chicago, IL 60640, Dates of Treatment: 10/14/02 to 12/18/03, Charges: $11,195.00, Report: Yes,

and (2) Schening Chiropractic Clinic, 1810 E. Northwest Highway, Arlington Heights, IL 60004, Dates of treatment: 8/20/02 to 11/13/02, Charges: $754.00, Report: Yes." (RX4)

Petitioner testified in the case at bar that the $11,000 + for treatment with Dr. Medina and $754.00 for treatment with Dr. Schening are bills for treatment attributable to the motor vehicle accident.

Petitioner agreed with Respondent that the motor vehicle lawsuit proceeded to a hearing and that Petitioner participated in such hearing.

Petitioner agreed with Respondent that the amount listed in RX5 were damages claimed in the motor vehicle lawsuit, which represents a total of the bills of Doctors Medina and Schening, as well as his lost wages.

Petitioner further testified that he is claiming that today's headaches are not related to the motor vehicle accident, but to the workers' compensation accident. Petitioner testified that after the motor vehicle accident, he had difficulty raising his right arm. Before the motor vehicle accident, he did not recall having difficulty raising right arm.

On redirect examination, Petitioner testified that the motor vehicle accident did nothing to aggravate his low back condition, and had nothing to do with his right foot injury. He further testified that all of the treatment for the low back was related to the workers' compensation accident. Lastly, Petitioner testified that the following body parts were injured as a result of the November 29, 2001 work accident: low back, right side of neck, right foot, right ankle and right big toe.

Deposition Testimony in Civil Case

Petitioner gave a sworn deposition in his civil suit (case number 03 L 011952) against Edgar Favela and Labor Temps, Inc., on November 30, 2004. Petitioner was represented when he gave that testimony. (RX6) In his sworn testimony, Petitioner stated that he was reading his paycheck immediately before being struck by the forklift. (RX6, pp. 52, 54) He testified very specifically in the deposition that he asked and obtained permission to cash his check at 7 o'clock from his supervisor immediately before the incident. (RX6, p. 58) He specifically testified, *"I was opening my paycheck reading it at that time that's when I you know, waking up, I just remember waking up on the floor"*. (RX 6, p. 58) *" I was walking back to my forklift and I was looking at my paycheck. "* (RX6, p. 65) The Petitioner was specifically asked at the deposition, "*Q: Do you know what part of the forklift came in contact with what part of your body? A: No"* (RX 6, p. 61) The Petitioner was specifically asked what part of the forklift struck him and he testified that he did not know. (RX6, p. 79) He was asked whether he felt any portion of it strike him and he replied he could not recall. (RX6, pp. 79, 80)

Petitioner testified at his deposition that the ambulance paramedic personnel did not ask him what was hurting or bothering him, but that they asked him what happened and he told them that the guy struck him from behind and ran over his foot. (RX6, p. 78)

Petitioner testified at the deposition, "*Q: So you had no complaints of pain in your back or your neck when you were at MacNeal Hospital? A: Not at that time, sir.*" (RX6, p. 83)

Petitioner testified at the deposition that Dr. Goldberg told him that if he thought he was going to go to court and this and that with arthritis and some kind of disc, he goes, you know, *"I'm not buying it."* (RX6, pp. 95-96)

Petitioner testified at his deposition that this auto accident aggravated his neck and his upper back. (RX6, pp. 143, 145) Petitioner testified that his upper back was feeling okay prior to the auto

accident. (RX6, p. 146) Petitioner agreed that his neck and upper back had been improving since the work accident of November 29, 2001. (RX6, p. 147) With regard to his neck and upper back, Petitioner testified that after the auto accident, he felt "like a hundred percent pain." (RX6, pp. 147-148) He testified that it felt worse than it did immediately after the November 29, 2001 accident. (RX6, p. 148) With regard to his upper back and neck, Petitioner was asked whether the pain he was experiencing at the time of this deposition was from the auto accident or from the alleged work accident or from both. (RX6, p. 148) Petitioner stated he did not have an opinion. (RX6, p. 148) Petitioner testified that the pain from the auto accident is different from the pain before the auto accident with respect to his neck, and that this new pain from the auto accident still was there at the time of the deposition. (RX6, p. 151) It is constant. (RX 6, p. 151)

Petitioner stated that he has headaches that are from the auto accident. (RX 6, p. 153) He specifically stated that his headaches have nothing to do with the November 29, 2001 work accident because *"I can't recall having no headaches."* (RX6, p. 153) *"Q: All right. Your headaches have nothing to do with the incident at the warehouse?" A: "I don't believe so, sir."* (RX6, p. 153)

Petitioner's Testimony Regarding His Current Condition:

Petitioner testified at trial that he has constant pain in his neck, with pain level of 4 out of 10, and he has constant pain in his low back, which is 10 of 10 unless he takes his pain medication and then the pain is 4 to 6 of 10 on the pain scale. Petitioner also testified that he has pain level of 4 to 6 of 10 for his right ankle with medications. He testified that the pain that he has today in his neck, low back and right ankle are the same as those he had immediately after and since the work accident of November 29, 2001. Petitioner testified that today he takes Oxycodone, Morphine and Xanax three times a day.

Petitioner testified that his right foot swells, he has trouble walking, his neck, on the right side, throbs and his low back is constantly painful. He testified that he has low back pain, which radiates down his right leg and right foot. Petitioner testified that he stays in the house most of the time and has trouble sleeping as a result of the work accident of November 29, 2001.

CONCLUSIONS OF LAW

ISSUE F : CAUSAL CONNECTION

Petitioner testified and all the medical records indicate that never injured his neck, low back or right foot prior to the work accident of November 29, 2001. Petitioner testified that on the date of such accident, he was hit in the right flank portion of the low back, was knocked to the ground and had his right foot run over by the forklift. Respondent did not present a witness to contradict this testimony.

Petitioner provided unrebutted testimony that since his right foot was pinned to the ground, he twisted his body, including his back, and pulled as hard as he could in an effort to extricate his right foot. At that time, Petitioner continued, it felt as though his right lower leg and right foot were on fire.

Petitioner was taken by ambulance to the MacNeal Hospital Emergency room where he complained of the severe pain in his right foot, which was run over by the forklift. (PX1) Petitioner testified that he woke up the next day, November 30, 2001, and his neck, low back and his right foot all were very painful. He also testified that he had bruises on the right side of his lower back and swelling of his right foot.

On Monday, December 3, 2001, Petitioner visited Physicians Plus, Ltd., where he wrote in the Work Comp Questionnaire: "Hit in back by forklift, ran over foot and leg." On December 3, 2001, it is also documented in multiple places of Dr. Bauer's notes that Petitioner had low back, neck and right foot pain. (PX 2) Petitioner had an EMG of his lower extremities on December 17, 2001 that

documented that he had lumbar radiculopathy. (PX 4) Petitioner testified that from that date until the time of trial, he has had pain in his low back and right foot. Petitioner has undergone numerous lumbar and cervical injections by Dr. Medina, Dr. Elias and Dr. Xia, none of which permanently relieved his low back or neck pain. Dr. John Kane performed a right foot surgery in June 2002 and Dr. Elias performed a lumbar surgery in June 2003, but Petitioner continued to have documented neck, low back and right foot pain with limitations in the range of motion of the cervical and lumbar spine from December 3, 2001 until August 2012.

Dr. Medina's note of August 5, 2002 states that Petitioner's cervical, lumbar and ankle injuries were caused by the work accident of November 29, 2001. (PX12 at note of August 5, 2002) Each of Dr. Medina's notes from June 20, 2002 to August 16, 2012, states that the cause of his injuries was the work accident. (PX12) Dr. Schening opined in his May 22, 2002 note that Petitioner sustained these injuries at work. (PX10 at note of May 22, 2002) Dr. Gerald Kane opined that Petitioner suffered from injuries to his cervical and lumbar spine caused by the work accident. (PX17 at note of April 10, 2003 and PX23 at p. 14)

Even Dr Wehner agreed that it is not unusual for a person to develop pains in other areas of their body after having an initial insult such as this in which someone could get their foot run over and then develop pain in other areas later. (RX1, p. 65)

With regard to Petitioner's August 19, 2002 motor vehicle accident, the Arbitrator finds that this was not an intervening accidental injury to Petitioner's cervical spine. Dr. Medina's records contain no history of such motor vehicle accident, and the cervical spine symptoms that he records on July 25, 2002 and October 17, 2002 are identical: neckache with moderate to severe radiation to the arms with 5/10 pain that is sharp and daily.

A comparison of the interpretations of cervical MRIs taken before and after the motor vehicle accident follows:

February 27, 2002: An impression of the cervical spine images, as offered by J. Karen Clark, M.D.: "Mild degenerative change of the cervical spine with a small posterior bulge secondary to osteophytes at C3-C4." (PX7)

October 14, 2002: Dr. Medina authored a report in which he interprets MR images of the cervical spine. He noted that the disc spaces, the spinal cord and the spinal canal all appear normal. Dr. Medina's impression: "Straightening of normal lordosis with indirect evidence of muscle spasm and bulging C3-C4, C4-C5 and C5-C6 discs. Posterior osteophyte at C3/C4 level." (PX12)

Respondent's Section 12 physician, Dr. Carl Graf, opined that Petitioner's neck and low back injuries were not caused by the work accident ten years later after the accident because he claimed that, in spite of ten years of medical records which document Petitioner's complaints of low back and neck pain, Dr. Graf could not substantiate Petitioner's complaints so he could not relate them to the accident. (RX2 at p. 34, L 16-24 and p. 35, L 1-9)

The Arbitrator finds that, based upon the medical evidence and testimony at trial, Petitioner's current conditions of ill-being of his right foot, his low back and his neck are causally related to the work accident of November 29, 2001.

ISSUE K : TEMPORARY TOTAL DISABILITY

Petitioner's TTD rate for this accident was is $280.45.

The Arbitrator finds that Dr. Alexis at MacNeal Hospital on November 29, 2001 took Petitioner off work for three days, that Dr. Bauer of Physicians Plus ordered Petitioner off work from December 3, 2001 through January 30, 2002 (PX2), that Petitioner worked light duty from January 31, 2002 through June 24, 2002 (the day before Petitioner underwent right ankle surgery) and that Petitioner was off work

from June 25, 2002 through July 2, 2012. Dr. John Kane wrote a retroactive off-work slip in which he asked that Petitioner be pardoned from his normal work activities from June 20, 2012 through July 2, 2012. Thereafter, Petitioner worked light duty from July 3, 2002 through November 11, 2002, when Dr. Schening gave him the permanent restriction of seated work only. (PX10) Petitioner testified that on November 11, 2002, his supervisor Santiago advised him that Petitioner must be 100% in order for Respondent to accept him back to work.

After November 11, 2002, Respondent never offered Petitioner light-duty work. As of February 13, 2003, Dr. Medina ordered Petitioner completely off work. He continued to issue this order until October 28, 2004. (PX12)

On October 28, 2004, Dr. Medina declared Petitioner to be permanently and totally disabled from work. (PX 12 at note of 10/28/04; also attached as Exhibit 3)

At trial, Respondent offered no evidence that after November 11, 2002, they ever offered Petitioner light-duty work. Respondent did not have a Section 12 opinion until Dr. Wehner wrote her report on July 1, 2003. (RX1) Dr. Wehner subsequently lost her file, examined Petitioner on May 11, 2007, and wrote a second report wherein she addressed Petitioner's lumbar and cervical spine injuries, as well as his right ankle injury.

On direct examination, Dr. Wehner testified to the following:

Q: Did you have an opinion at the time of this examination based on a reasonable degree of medical and surgical certainty regarding Kevin Van Duyn's work abilities?

A: Based on the injury that he sustained to his ankle, I had no reason why he could not work at full duty.

Q: Okay. Did you feel that he would need any sort of trial period of light duty for that ankle injury?

A: That would be appropriate for him to possibly do sedentary activity for the first two to four weeks and then light duty, and by three weeks - - or by three months, I would have expected, based on this type of injury, that he would have been able to return to his full-duty job.

Then, Dr. Carl Graf, Respondent's second Section 12 examining physician, testified to the following during the direct examination portion of the May 18, 2012 deposition:

Q: Fair enough. Dr. Graf, did you have an opinion at the time of your examination regarding Mr. Van Duyn's work capabilities based upon a reasonable degree of medical certainty?

A: It was my opinion there was no objective reason why he couldn't return to his full duty to work. (sic)

Then, on the cross-examination of Dr. Graf, the following exchange took place:

Q: When I was asking you - - he asked you and we had a little discussion about whether you had given an opinion whether he could have returned to work, I believe, that was only relative to the neck and back and not relative to the right foot, correct?

A: Correct.

Q: Okay. Since that's outside your area, he may or may not have a work capacity relative to the right foot, but you didn't opine about it?

A: Correct.

So, Dr. Graf does not offer a return-to-work opinion with regard to Petitioner's right foot/ankle.

More significantly, Dr. Wehner's release to return to full-duty work is premised on her opinion that only Petitioner's right foot/ankle (and not his neck and back) condition of ill-being is causally related to the accident of November 29, 2001.

Yet, the Arbitrator has found Petitioner's neck, back and right foot/ankle conditions to be causally related to the accident of November 29, 2001.

Based upon the foregoing evidence presented at trial, the Arbitrator awards TTD from November 30, 2001 through January 30, 2002, June 25, 2002 (the date of the right ankle surgery) through July 2, 2002 and November 12, 2002 through October 17, 2012, for total TTD benefits owed of 528-2/7 weeks.

ISSUE L : PERMANENCY

Petitioner testified that on the day after the accident, November 30, 2001, he experienced pain in his neck, low back and down his right leg to his right foot. On January 21, 2002, treating physician Robert Samuel Goldberg, M.D., wrote: "Mr. Van Duyn is capable of light-duty, 20 pounds maximal lift, push, or pull, and avoid bending." Petitioner underwent conservative treatment, which included injections. He underwent right foot surgery in June 2002 and lumbar endoscopic surgery in June of 2003. Petitioner worked light duty from July 3, 2002 until November 11, 2002, when Dr. Schening put him on permanent seated duty. Respondent refused to provide light-duty to him with those restrictions from that time forward.

On November 12, 2003, Dr. Gerald Kane, Petitioner's evaluating physician, testified that Petitioner could not return to work as a warehouse worker. Dr. Gerald Kane also testified that Petitioner could only do sedentary-type work in which he does not have to lift over 15 lbs. or be on his feet all day, and that these were permanent restrictions.

On October 28, 2004, Dr. Medina wrote in his follow-up note that the duragesic patches have helped Mr. Van Duyn a lot and that he has no pain when he uses them. Petitioner rated his neck pain at 8-9/10 with radiation to the left arm. Petitioner rated his back pain at 4-6/10 with radiation to the left lateral thigh. Petitioner rated his ankle pain at 4-6/10. Dr. Medina documented the physical

examination. His assessments remained unchanged. Dr. Medina concluded: "He is permanently totally disabled."

On May 11, 2007, Dr. Julie Wehner examined Petitioner. At her June 22, 2007 deposition, Dr. Wehner testified that only Petitioner's right ankle injury was causally related to the accident of November 29, 2001. She testified that as of May 11, 2007, Petitioner was capable of returning to full-duty work. She further testified that Petitioner had diffuse complaints of pain which were not in a specific anatomic distribution.

Dr. Carl Graf examined Petitioner on October 31, 2011. He opined that Petitioner's neck and back conditions were not causally related to the November 29, 2001 accident. Dr. Graf claimed that he could not substantiate Petitioner's pain complaints. He felt that Petitioner was malingering.

Petitioner testified at trial that he has constant pain in his neck, with pain level of 4 out of 10, and he has constant pain in his low back, which is 10 of 10 unless he takes his pain medication and then the pain is 4 to 6 of 10 on the pain scale. Petitioner also testified that he has a pain level of 4 to 6 out of 10 for his right ankle with medications. He testified that the pain he has today in his neck, low back and right ankle are the same as those he had immediately after and since the work accident of November 29, 2001. Petitioner testified that today he takes Oxycodone, Morphine and Xanax three times a day.

Petitioner testified that his right foot swells, he has trouble walking, his neck, on the right side, throbs and his low back is constantly painful. He has low back pain, which radiates down his right leg and right foot. Petitioner testified that he stays in the house most of the time and has trouble sleeping as a result of the work accident of November 29, 2001.

There is no evidence that after November 11, 2002, Respondent offered Petitioner any light-duty work.

On cross-examination, Petitioner reiterated that he cannot work. He further testified that he has had job offers he did not accept due to his inability to perform such work as a result of the injuries he sustained on November 29, 2001. Petitioner testified that just after he left Respondent, he was offered a maintenance position at the British Home.

The Arbitrator notes that other than the British Home, Petitioner did not identify any other prospective employers. Moreover, Petitioner failed to provide any documentation of a job search.

In Courier v. Indus. Comm'n, 282 Ill.App.3d 1, 668 N.E.2d 28, 217 Ill. Dec. 843 (5th Dist. 1996), the Appellate Court discussed the evolution of the burden of proof as follows:

A number of cases which discuss the odd-lot category of PTD use the term "*prima facie.*" These cases state that once a claimant makes a *prima facie* showing that he fits into odd lot, the burden shifts to the employer to produce evidence that some type of regular and continuous employment is available to the claimant. By using the term *prima facie*, this rule appears at first glance to require that the claimant must merely make a *prima facie* case, i.e., produce sufficient evidence so that a finding in the party's favor could be supported if contrary evidence were ignored. However, after careful review of the language of *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 546 – 47, 50 Ill. Dec. 710, 714, 419 N.E.2d 1159, 1163, (1981), quoted in the *Ceco Corp.* decision, we find that the claimant must do more than make a *prima facie* case. In light of *Valley Mould*, the claimant has the burden to initially "establish" that she falls into the odd-lot category, before the burden of proof shifts to the employer to show availability of work. By using the word "establish", *Valley Mould* requires that the claimant make more than a *prima facie* case. The claimant must prove by a preponderance of the evidence that she falls into the odd-lot category. See *Meadows v. Industrial Comm'n*, 262 Ill.App.3d 650, 653-654, 199 Ill. Dec. 937, 939-

940, 634 N.E.2d 1291, 1293-1294 (1994) (holding that "claimant has the burden of proving that he fits into the 'odd lot' category of section 8(f) of the Act" (emphasis added)) . . . . We believe that the cases which use the term *prima facie* when discussing odd lot, use that term to mean "initially." See *Meadows*, 262 Ill.App.3d at 653-654, 199 Ill. Dec. at 939-940, 634 N.E.2d at 1293-1294. In other words, those cases hold that the claimant must "initially" establish, by a preponderance of the evidence, that she falls into the odd-lot category, before the burden shifts to the employer to show availability of work. See *Old Ben Coal Co. v. Industrial Comm'n*, 261 Ill.App.3d 812, 814, 199 Ill. Dec. 446, 448, 634 N.E.2d 285, 287 (1994). 668 N.E.2d at 31.

Based on Mr. Van Duyn's presentation at trial and the evidence in the record, the Arbitrator questions whether or not Petitioner is entirely credible.

At no point after November 11, 2002 did Petitioner conduct a diligent job search.

Therefore, based upon the facts and the law, the Arbitrator finds that Petitioner, by a preponderance of the evidence, has not met his burden of proving that he is an odd-lot permanent total. Consequently, the Arbitrator finds that Petitioner is entitled to permanent partial disability of 60% loss of use, man as a whole, pursuant to Section 8(d)2 of the Act.

ISSUE J : MEDICAL BILLS

In this case, Petitioner offered into evidence medical bills from Dr. Krueger and Dr. Bauer of Physicians Plus, Ltd.'s bill of $12,092.00, Dr. Timothy Schening's bill of $5,247.00, Dr. Jose L. Medina of The Neuro Center's bill of $27,836.00 and Dr. Sarmed G. Elias Bone and Joint Center's bill of $30,055.40. Dr. Gerald Kane testified that these bills were reasonable and necessary and related to the work injury of November 29, 2001.

Dr. Wehner opined, to a reasonable degree of medical and surgical certainty, that the back, neck and spinal treatment that Petitioner has undergone is not causally related to the work injury of November 29, 2001.

Dr. Graf disputed whether the bills were related to the work injury since he testified he could not substantiate Petitioner's pain.

Respondent did not present any evidence or utilization reviews in order to show that Petitioner's medical charges were not fair or reasonable. In addition, since all the bills, except Dr. Medina's bills, were for medical services provided prior to February 1, 2006, no fee schedule reduction is required.

Based upon the foregoing, and provided that such medical bill or bills have not been written off, the Arbitrator finds that the bills of Dr. Krueger and Dr. Bauer of Physicians Plus in the amount of $12,092.00 (yet, the Arbitrator denies the bill for the sonograph, based on the testimony of Dr. Gerald Kane), the bills of Dr. Timothy Schening's bill in the amount of$5,247.00, the bills of Dr. Jose L. Medina of The Neuro Center's bill in the amount of $27,836.00 (yet, for dates of service on or after February 1, 2006, such bills are subject to Section 8.2 of the Act) and the bills of Dr. Sarmed G. Elias of Bone and Joint Center in the amount of $30,055.40, are all reasonable, necessary and related, and awards said bills.

Respondent is entitled to a credit for all medical bills previously paid.

ISSUE O - <u>CONDITIONAL MEDICARE PAYMENTS OF $6,037.16</u>

On June 5, 2008, CMS sent Petitioner a Conditional Payments letter. The letter states that Petitioner owed Medicare $6,037.16 for conditional payments it made on behalf of Mr. Van Duyn. (PX

26) Based upon his findings on the issues of causation and medical bills above, the Arbitrator awards the $6,037.16 in conditional payments.

DATED AND ENTERED _____, 2013

_____

Arbitrator Brian Cronin

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

Evangelina Gutierrez,

Petitioner,

14IWCC0931

vs.

NO: 09 WC 34561

Doralco, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review was filed by the Romaker Law Firm (hereinafter "Romaker") and notice was given to all parties. Romaker is appealing the decision of the Arbitrator granting the Petition for Attorney's Fees and Costs filed by Steven B. Salk & Associates (hereinafter "Salk") on September 14, 2011 and awarding Salk $8,424.82 in attorney's fees and $1,668.87 to Romaker in attorney's fees. For the reasons set forth below, the Commission modifies the Arbitrator's Decision and awards $4,420.00 to Salk in attorney's fees and costs and $5,673.69 to Romaker in attorney's fees.

Procedural History

On August 13, 2009, Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent. On August 18, 2009, Petitioner retained Salk to represent her regarding her workers' compensation claim against Respondent. That same day, Salk filed an Application for Adjustment of Claim on behalf of Petitioner.

On or about August 13, 2011, Petitioner retained Romaker to represent her in her workers' compensation claim. On August 24, 2011, Petitioner filed a Motion to Dismiss Salk as her legal representative. On September 16, 2011, a Stipulation to Substitute Attorney was filed, replacing Salk with Romaker as Petitioner's counsel.

On September 14, 2011, Salk filed a Petition for Attorney's Fees and Costs. Salk alleged

14IWCC0931

that while it represented Petitioner, it "interviewed...Petitioner, prepared and filed an Application for Adjustment of Claim on her behalf, ordered and subpoenaed medical records, marshaled the file and performed various services on behalf of and at the request of the Petitioner." Salk claimed that it had spent $220.00 in costs representing Petitioner and had received a written offer of $42,124.10 from Respondent's counsel to settle Petitioner's claim. Salk requested that the Arbitrator enter an order "continuing the Petition for Attorney's Fees and Cost...to the time of disposition of this case....That [Salk] be listed on the settlement draft unless otherwise ordered....That [Salk] be reimbursed their outstanding costs in the amount of $220.00....For such other and further relief as this Arbitrator and Commission deem just and applicable."

On October 11, 2011, Arbitrator Dollison granted Salk's request that the Petition for Attorney's Fees and Costs be continued until the disposition of the case.

On or about December 21, 2012, Romaker and Respondent's counsel reached an agreement to settle Petitioner's claim. On January 3, 2013, Patrick Serowka of Romaker contacted Damien Flores of Salk by telephone and facsimile and offered a 1/3 fee split with reimbursement of costs. Salk rejected the offer.

On January 8, 2013 and February 14, 2013, Patrick Serowka of Romaker spoke to Frank Gaughan of Salk in an attempt to resolve the fee dispute, but a resolution was not reached.

On February 14, 2013, Romaker filed a Motion for Attorney's Fees under Section 16(a) of the Workers' Compensation Act (hereinafter "Act") requesting that a hearing be held on Salk's fee petition.

On March 7, 2013, Arbitrator Cronin approved Settlement Contracts in which Respondent agreed to a total settlement amount of $50,468.46. Attorney's fees, totaling $10,093.69, were placed in trust "pending decision from Arb on division."

Also on March 7, 2013, hearing on Salk's Petition for Attorney's Fees and Costs was held before Arbitrator Cronin. Patrick Serowka appeared for Romaker and Damien Flores and Steven Salk appeared for Salk.

On October 28, 2013, Arbitrator Cronin issued a decision granting Salk's Petition for Attorney's Fees and Costs and dividing the attorney's fees as follows: $8,424.82 for Salk and $1,668.87 for Romaker.

On November 4, 2013, Romaker filed a Petition for Review alleging that the Arbitrator's Division of the attorney's fees among Petitioner's current and prior attorneys was incorrect as a matter of law.

Analysis

Romaker argues that the Arbitrator erred in awarding the majority of the attorney's fee to Salk since the benefit of the representation agreement is earned by the Settling Attorney,

Romaker, and the prior attorney, Salk, must make a quantum meruit argument supporting payment for the reasonable value of its services. Romaker argues that the Arbitrator erroneously relied on Section 16a(H) of the Act, which states:

> With regard to any claim where the amount to be paid for compensation does not exceed the written offer made to the claimant or the claimants **by the employer or his agent prior to representation by an attorney**, no fees shall be paid to any such attorney." (emphasis added) 820 ILCS 205/16a(H) (2013).

As noted by Romaker in its Statement of Exceptions, the language of Section 16a(H) clearly indicates that this section only applies when an offer is made to a claimant prior to any representation by an attorney. The Commission finds that since Petitioner was represented by Salk when the original offer was made, Section 16a(H) is not applicable in this matter. As such, the Arbitrator's reliance on this section in determining how much of the attorney's fee Salk was entitled to was incorrect.

Next, Romaker argues that the Arbitrator erred in awarding the original contingent fee to Salk since Petitioner had terminated Salk, rendering the representation contract void. Romaker, citing *Susan E. Loggans & Associates v. Estate of Marvin Magid*, 226 Ill.App.3d 147 (1992), argues that under the circumstances, Salk is entitled to recovery on a quantum meruit theory for the reasonable value of the services it performed prior to discharge. The Commission notes that the court in *Loggans* explained that:

> "Several factors must be considered to determine what fee is properly due to an attorney fired by a client. A contract between the parties provides guidelines, but in all cases, contingent or hourly fee cases, only those fees which are reasonable charges for reasonable services will be allowed. *Kaiser v. MEPC American Properties Inc.* (1987), 164 Ill. App. 3d 978, 983, 518 N.E. 2d 424. The determination of the reasonableness of the fees is left to the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *Kaiser*, 164 Ill. App. 3d at 983-84....
> When a contingency fee contract is signed and the lawyer involved is fired, such as occurred here, the attorney is entitled to recovery on a *quantum meruit* theory for the reasonable value of his services performed up to the time of his discharge. *Loggans*, 226 Ill.App.3d at 153.

The Commission also looks to *Delapaz v. Selectbuild Construction, Inc.*, 394 Ill.App.3d 969, 973-974 (2009), which was cited and relied on by Salk, and where the court explained that:

> "A client may discharge his attorney with or without cause

at any time, even in a contingency fee based agreement. *Thompson v. Hiter*, 356 Ill. App. 3d 574, 580-81, 826 N.E.2d 503, 509, 292 Ill. Dec. 362 (2005). When the attorney is discharged, the contingent fee contract no longer exists and the contingency term is no longer operative. *Thompson*, 356 Ill. App. 3d at 581, 826 N.E.2d at 509. A discharged attorney, however, is entitled to payment for the services rendered prior to discharge on a *quantum meruit* basis. *Thompson*, 356 Ill. App. 3d at 580, 826 N.E.2d at 509. The term '*quantum meruit*' literally means 'as much as he deserves.' *Much Shelist Freed Denenberg & Ament, P. C. v. Lison*, 297 Ill. App. 3d 375, 379, 696 N.E.2d 1196, 1199, 231 Ill. Dec. 625 (1998), quoting *First National Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 365, 688 N.E.2d 1179, 228 Ill. Dec. 202 (1997). Several factors are considered in determining the *quantum meruit* amount for services rendered, which include 'the time and labor required, the attorney's skill and standing, the nature of the cause, the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client.' *Will v. Northwestern University*, 378 Ill. App. 3d 280, 304, 881 N.E.2d 481, 504-05, 317 Ill. Dec. 313 (2007). If an attorney performed much of the work on a case before discharge and a settlement immediately follows the discharge, the factors used to determine a reasonable fee 'would justify a finding that the entire contract fee is the reasonable value of services rendered.' *Will*, 378 Ill. App. 3d at 304, 881 N.E.2d at 505, quoting *Wegner v. Arnold*, 305 Ill. App. 3d 689, 693, 713 N.E.2d 247, 238 Ill. Dec. 1001 (1999)."

The record indicates that Salk worked 21 hours on Petitioner's case during the two years it represented her. (FA2) The record also shows that Salk requested, subpoenaed and received Petitioner's medical records and updated records, prepared memos, filed Petitions for Penalties, wrote to opposing counsel, repeatedly, requesting benefits and payment of medical expenses, and made settlement demands, ultimately receiving an offer of settlement for $42,124.10, which Petitioner refused. (FA3) The Commission notes that while the breakdown of the offer was not entered into the specific breakdown at the bottom of the Terms of Settlement section of the settlement contract offer, it was detailed in the Terms of Settlement section above and, according to description of the settlement in that section, the $42,124.10 offer broke down to the following: 8% loss MAW ($20,640.00), $16,815.64 in disputed medical, and 8-1/7 weeks in disputed accrued outstanding TTD ($4,668.46).

Mr. Flores alleged that he told Petitioner that she would receive $15,922.32; however,

Petitioner claimed that Mr. Flores told her she would receive less than $10,000.00 total. (T. 42-43)

The Commission finds that Salk has established that it worked 21 hours on Petitioner's file and was able to secure a settlement offer for Petitioner prior to her returning for additional treatment and retaining Romaker. The Certification of Activity demonstrates that Salk performed what is considered customary work on a case of this nature. There is nothing to indicate that Petitioner's case was novel or involved a difficult subject matter.

In *Stephens v. Industrial Comm'n (Cook County)*, 284 Ill. App. 3d 269, 275-276 (1996), the court explained that:

> "The determination of the reasonableness of the amount of attorney fees is a question of fact for the Commission which will not be overturned unless it is contrary to the manifest weight of the evidence. *Augustine v. Industrial Comm'n*, 239 Ill. App. 3d 561, 573, 607 N.E.2d 229, 237, 180 Ill. Dec. 335 (1992)....Courts will not substitute their judgments for that of the Commission [276] simply because different inferences could have been drawn. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 549, 578 N.E.2d 921, 924, 161 Ill. Dec. 275 (1991)."

Therefore, based on *Delapaz* and *Stephens*, the Commission finds that Salk has established entitlement to $4,200.00 in attorney's fees (21 hours x $200 an hour), which the Commission finds to be a reasonable amount paid at a reasonable and customary rate. Salk is also entitled to costs incurred, which are $220.00. Therefore, Salk the Commission hereby awards Salk a total of $4,420.00 in attorney's fees and costs. The Commission further awards Romaker the remainder, $5,673.69, in attorney's fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Salk shall receive $4,200.00 in attorney's fees and $220.00 in costs, and Romaker shall receive $5,673.69 in attorney's fees.

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

DATED: OCT 2 9 2014
MJB/ell
o-09/09/14
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
)
COUNTY OF Cook)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ORDER

Evangelina Gutierrez
Employee/Petitioner

v.

Doralco, Inc.
Employer/Respondent

Case # **09** WC **34561**

14IWCC0931

The *petitioner* filed a petition or motion for **attorneys' fees and costs**

on **September 14, 2011** , and properly served all parties. The matter came before me on

March 7, 2013 in the city of **Chicago** . After hearing

the parties' arguments and due deliberations, I hereby *grant* the petition.

A record of the hearing *was* made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

On March 7, 2013, the Arbitrator approved a lump sum settlement contract for the above-captioned case. The total amount of settlement was $50,468.46. At that time, attorneys' fees in the amount of $10,093.69 were place in a trust. Evangelina Gutierrez's first attorney, Damian Flores of Steven B. Salk & Associates, Inc., filed the petition. Ms. Gutierrez's second attorney, Charles P. Romaker, settled the case.

Steven B. Salk argued that before Evangelina Gutierrez sought repesentation with Charles P. Romaker, his firm secured, from Respondent, a written offer in the amount of $42,124.10. A copy of the reverse side of a proposed settlement contract with such amount is included in the Amended Petition for Attorneys' Fees. Mr. Salk further argued that pursuant to Section 16a(H) of the Act, The Romaker Law Firm is not entitled to take a fee on a settlement offer secured in writing prior to the creation of the attorney-client relationship between the Petitioner and The Romaker Firm. Mr. Salk pointed out that the current settlement is a total increase of $8,344.36, which includes additional permanency of 2% under 8(d)2 ($5,160.00) and additional medical ($3,184.36), but no increase in TTD benefits.

Mr. Salk also offered evidence of the services that his firm performed and the number of hours that his firm spent on this case.

On behalf of The Romaker Law Firm, Patrick Serowka argued that said firm is entitled to the reasonable value of their services. Mr. Serowka stated that when the Petitioner was represented by Mr. Flores, she received a $42,000.00 offer, but was told that she would only net approximately $10,000.00. Evangelina Gutierrez testified and confirmed such statement.

The Arbitrator notes that as part of the initial, proposed settlement, Mr. Salk's firm negotiated $16,850.00 in disputed medical expenses, which they apparently deducted from the total amount of settlement. There is no evidence that such amount for medical expenses was a lien.

Section 10(a) of Public Act 93-0051 states:

"Every health care professional and health care provider that renders any service in the treatment, care or maintenance of an injured person, except services rendered under the provisions of the Workers' Compensation Act or the Workers' Occupational Diseases Act, shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person."

As part the settlement, The Romaker Law Firm secured $20,000.00 "to resolve the outstanding medical bills from the providers listed on the front of this contract", and did not deduct $20,000.00 from the total amount of settlement. However, there is no evidence that The Romaker Law Firm secured, on behalf of Evangelina Gutierrez, a hold harmless agreement from the Respondent wherein the Respondent would relieve the Petitioner of her liability for the outstanding medical bills from the providers listed on the front of the settlement contract.

The Attorney Representation Agreement between Evangelina Gutierrez and Charles P. Romaker of The Romaker Law Firm states, in relevant part, the following:

"In return for representation before the Commission, the client agrees to pay the attorney a sum of money equal to:

A. 20% of any amount received in excess of the written offer, if any, or 20% (not to exceed 20%) of the total amount received for compensation for permanent disability caused by the accident, whichever is less; provided, however, if the compensation received for permanent disability does not exceed the written offer, the attorney shall receive no fee for permanent disability; . . .

B. 20% (not to exceed 20%) of any compensation for temporary total disability that the employer refused to pay in a timely manner or in the proper amount; and

C. 20% (not to exceed 20%) of all disputed medical bills; . . . "

Therefore, based on the facts and the law, the Arbitrator concludes that Steven B. Salk and Associates, Inc., is entitled to attorneys' fees in the amount of $8,424.82 and The Romaker Law Firm is entitled to attorneys' fees in the amount of $1,668.87.

This order is interlocutory and therefore not appealable.

Signature of arbitrator

October 28, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Victoria Morales,

Petitioner,

vs.

NO. 10 WC 029857

Chiquita Brands International,

Respondent.

14IWCC0932

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 denial of the petition to reinstate the claim and being advised of the facts and law, affirms and adopts the Order of the Arbitrator, which is attached hereto and made a part hereof. In affirming and adopting the Order of the Arbitrator, the Commission notes:

That Petitioner filed an Application for Benefits on July 17, 2009 represented by the law firm of Rubin & Machado. On May 9, 2011 the law firm of James Ellis Gumbiner & Associates filed a motion to dismiss Rubin & Machado as attorneys of record, which was granted.

The petition to reinstate asserts that the appearance of Gumbiner & Associates was filed on May 9, 2011 but was not properly entered into the IWCC mainframe database. On December 13, 2012 Respondent filed a motion to dismiss which was served at Petitioner Victoria Morales at her last known address.

The petition to reinstate asserts that because of this "data entry error" the Gumbiner office did not receive notice of the pending motion and that an order of dismissal was entered on January 23, 2013 by the Honorable Lynette Thompson-Smith. The entry of the order was first discovered by the Gumbiner firm on December 18, 2013 when reviewing the IWCC mainframe database.

In their petition to reinstate the Gumbiner firm states that around the time of January 23, 2013 dismissal order they established contact with their client Victoria Morales. The petition is silent as to the nature of the communication nor does it state whether at that time the Gumbiner office learned of the dismissal. In fact the petition to reinstate is silent as to any action undertaken by the Gumbiner office in the prosecution of Petitioner's case between January 2013 and December 2013. On December 30, 2013 Petitioner filed a motion to reinstate the case. On January 21,2014 Arbitrator Lynette Thompson-Smith entered an order denying the petition to reinstate the case.

The Petitioner has not been diligent in the prosecution of her case. The action lanquished from May 9, 2011 when the Gumbiner firm filed their appearance, until December 23, 2013 when counsel took the initiative to contact the IWCC and e-mail copies of their Appearance to the data entry department.

There has been a total lack of due diligence in the prosecution of this action for over the course of 31 months. The Petitioner provides no reasonable explanation for the delay. See *Contreras v. Industrial Commission, No. 1-98-1357WC, 1st District, July 27, 1999*. The Arbitrator was correct in denying the petition to reinstate the case on January 31, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 21, 2014 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 on Petitioner's appeal. The 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
SJM/msb
Orals: 9-4-14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

14IWCC0932

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF MOTION AND ORDER

ATTENTION. You must attach the motion to this notice. If the motion is not attached, this form may not be processed.
Upon filing of a motion before a Commissioner on review, the moving party is responsible for payment for preparation of the transcript.

ictoria Morales
mployee/Petitioner

Case # 09 WC 29857

hiquita Brands International
mployer/Respondent

o: Nyhan Bambrick Kinzie & Lowry 20 N Clark Street Suite 1000 Chicago, IL 60602

n 1/6/14 at 2:00 PM, or as soon thereafter as possible, I shall appear before
e Honorable Thompson-Smith, Lyne, or any arbitrator or commissioner appearing in
s or her place at Illinois Workers' Compensation Commision 100 W. Randolph St. Ste 8-200 Chicago,
inois, and present the attached motion for:

] Change of venue (#3072)
] Consolidation of cases (#3071)
(list case#)
] Dismissal of attorney (#3052)
] Dismissal of review (#3085)
☐ Fees under Section 16 (#1600)
☐ Fees under Section 16a (#1645)
☐ Hearing under Sect.19(b) (#1902)
☐ Penalties under Sect. 19(k) (#1911)
☐ Penalties under Sect. 19(l) (#1912)
☒ Reinstatement of case (#3074)
☐ Request for hearing (#R33)
☐ Withdrawal of attorney (#3073)
☐ Other (explain) ____

ature Petitioner ☒ Respondent ☐

mes Ellis Gumbiner #243
rney's name and IC code # (please print)

mes Ellis Gumbiner & Associates
e of law firm, if applicable

180 N. Michigan Ave. Ste 2100
Street address

Chicago, IL 60601
City, State, Zip code

312-236-9751
Telephone number

E-mail address

ORDER

motion is set for hearing on _____

ature of arbitrator or commissioner

Date

ORDER

motion is ✓ Granted ___ Withdrawn ___ Continued to _____
___ Denied ___ Dismissed ___ Set for trial (date certain) on _____

ure of arbitrator or commissioner

1-21-14
Date

14IWCC0932

ILLINOIS WORKERS' COMPENSATION COMMISSION
PETITION TO REINSTATE CASE

DEC 30 P 1:01

ATTENTION: This petition must be filed within 60 days of receipt of the dismissal order.

Victoria Morales
Employee/Petitioner

v.

Chiquita Brands International
Employer/Respondent

Case # **09** WC **029857**

Chicago

On **1-23-13**, this case was dismissed for want of prosecution. I received the dismissal order on **2-18-13**. On 1/6/14, I will present this petition to reinstate the case before Arbitrator **Thompson-Smith, Lyne** for the following reason:

That on 1-23-13 when this case was last before the Arbitrator, Petitioner's attorneys did not receive notice of the hearing date on this matter. That Petitioner's attorneys filed their appearance as representatives on May 9, 2011. That Petitioner's attorneys were not listed as attorneys of records on the IWCC website. That Petitioner's attorneys did not receive notice of the dismissal until 12-18-13. That the Petitioner has a meritorious case. That the Petitioner is available for a hearing on this matter. That Petitioner's counsel has contacted the IWCC Data Entry Department to correct this issue. This Petition has been filed within 60 days of notice of the dismissal

Signature

James Ellis Gumbiner & Associates
Name (please print; attorneys, please include IC code #)

312-236-9751
Telephone number

12/27/13
Date

14IWCC0092

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF MOTION AND ORDER

ATTENTION You must attach the motion to this notice If the motion is not attached, this form may not be processed
Upon filing of a motion before a Commissioner on review, the moving party is responsible for payment for preparation of the transcript

VICTORIA MORALES
Employee/Petitioner
v
FRESH EXPRESS
Employer/Respondent

Case # **09 WC 29857**

DEC 13 PM 1:01

TO: **VIA CERTIFIED MAIL WITH RETURN RECEIPT**
Ms. Victoria Morales
2224 North Knox Avenue
Chicago, IL 60639

The Honorable Lynette Thompson-Smith
Illinois Workers' Compensation Commission
100 W. Randolph Street, 8th Floor
Chicago, IL 60601

On **January 16, 2013**, at **2:00** PM, or as soon thereafter as possible, I shall appear before the Honorable **Arbitrator Lynette Thompson-Smith**, or any arbitrator or commissioner appearing in his or her place at **100 W Randolph St Ste 8-200, Chicago**, Illinois, and present the attached motion for:

- ☐ Change of venue (#3072)
- ☐ Consolidation of cases (#3071) (list case#)
- ☐ Dismissal of attorney (#3052)
- ☐ Dismissal of review (#3065)
- ☐ Fees under Sect. 16 (#1600)
- ☐ Fees under Sect. 16a (#1645)
- ☐ Hearing under Sect.19(b)(#1902)
- ☐ Penalties under Sect. 19(k) (#1911)
- ☐ Penalties under Sect. 19(l) (#1912)
- ☐ Reinstatement of case (#3074)
- ☐ Request for hearing (#R33)
- ☐ Withdrawal of attorney (#3073)
- ☒ Other (explain) **Respondent's Motion to Dismiss**

Signature Petitioner ☐ Respondent ☒

Barnali Roy-Mohanty, #2461
Attorney's name and IC code # (please print) [1]
Nyhan, Bambrick, Kinzie, & Lowry, P.C.
Name of law firm, if applicable

20 North Clark Street, Suite 1000
Street address
Chicago, Illinois 60602-4195
City, State, Zip code
(312) 629-9800 Telephone number
broy-mohanty@nbkllaw.com E-mail address

ORDER

The motion is set for hearing on _____

_____ _____
Signature of arbitrator or commissioner Date

ORDER

The motion is ___ Granted ___ Withdrawn ___ Continued to _____
___ Denied ___ Dismissed ___ Set for trial (date certain) on
_____

_____ 1-23-13
Signature of arbitrator or commissioner Date

14IWCC0932

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Victoria Morales, Petitioner,	)	
v.	)	09 WC 29857
Chiquita Brands International, Respondent,	)	

MOTION TO REINSTATE

NOW COMES, Petitioner, Victoria Morales, by and through her attorneys, James Ellis Gumbiner & Associates, and in support of its Motion to Reinstate, states as follows:

1. That Petitioner's attorneys filed an appearance on May 9, 2011.
2. That this matter received a trial date on January 23. 2013.
3. That Petitioner's attorneys did not appear as attorneys of record on the Illinois Workers' Compensation Commission website.
4. That Petitioner's attorneys did not receive notice of the January 23, 2013 trial date.
5. That this matter was dismissed on January 23, 2013.
6. That Petitioner did not receive notice of the date of dismissal.
7. That Petitioner's attorneys did not receive notice of dismissal until December 18, 2013. (See Petitioner's Exhibit 1).
8. That the Petitioner has been diligent in the prosecution of her case.
9. That Petitioner's attorneys contacted Data Entry at the Illinois Workers' Compensation Commission to correct the issue. (See Petitioner's Exhibit 2).
10. That Petitioner has a meritorious cause of action as pled by the Application of adjustment of claim.
11. That Petitioner is available for a hearing date.
12. That this motion was filed within 60 days of notice of the dismissal.

Wherefore, the Petitioner prays that this Honorable Commission vacate the Dismissal of January 23, 2013, and reinstate this matter so it may proceed to a hearing on the merits.

Respectfully Submitted,

Lilia Picazo

Attorney for Petitioner
James Ellis Gumbiner & Assoc.
180 N. Michigan Ave. Ste. 2100
Chicago, IL 60601
312-236-9751

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICTORIA MORALES,

Petitioner,

v.

FRESH EXPRESS,

Respondent.

Court No. 09 WC 29857

RESPONDENT'S MOTION TO DISMISS

NOW COMES the Respondent, FRESH EXPRESS, by and through its attorneys, Nyhan, Bambrick, Kinzie & Lowry, P.C., and moves this Honorable Commission to dismiss the above-captioned matter; and in support thereof, states as follows:

1) Petitioner filed an Application for Adjustment of Claim on July 17, 2009 for an alleged date of accident on February 25, 2009. (Exhibit 1)

2) On May 9, 2011, Petitioner's counsel filed a motion to dismiss himself as the attorney of record. (Exhibit 2)

3) On July 7, 2011, counsel's motion to withdraw as the attorney of record was granted. (Exhibit 2)

4) On June 1, 2012, this case appeared above the three-year line and received a trial date on August 3, 2012 before Arbitrator Thompson-Smith.

5) On August 3, 2012, this case was specially set for a trial on September 28, 2012 before Arbitrator Thompson-Smith.

6) On August 7, 2012, Respondent notified pro se Petitioner via priority mail advising of the trial date and anticipated dismissal of the case for want of prosecution. (Exhibit 3)

7) On November 8, 2012, this case appeared for trial as it was above the three-year line, pro se Petitioner failed to appear and Respondent requested that the case be dismissed for want of prosecution. Under the circumstances of the case, the Arbitrator requested Respondent to send a certified letter to pro

se petitioner notifying her of a specially set hearing date scheduled for December 6, 2012.

8) On November 12, 2012, Respondent notified pro se Petitioner via certified and regular mail advising of the trial date and anticipated dismissal of the case for want of prosecution. (Exhibit 4)

9) On December 3, 2012, Respondent received notification that the certified correspondence to pro se Petitioner's current known address was processed as "undeliverable as addressed." (Exhibit 5)

10) On December 6, 2012, this case appeared for trial before Arbitrator Thompson-Smith, pro se Petitioner failed to appear and Respondent requested that the case be dismissed for want of prosecution. Under the circumstances of the case, the Arbitrator requested Respondent to file a motion to dismiss.

11) As of December 10, 2012, Petitioner remains unrepresented by counsel. (Exhibit 6)

WHEREFORE, Respondent respectfully requests this Honorable Commission to grant this Motion to Dismiss this case with prejudice.

Respectfully submitted,

Barnali Roy-Mohanty
Attorney for the Respondent

NYHAN, BAMBRICK, KINZIE & LOWRY, P.C.
20 North Clark Street, Suite 1000
Chicago, Illinois 60602-4195
Firm: (312) 629-9800
Atty No. 2461

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

JoEllyn Vetter,

Petitioner,

vs.

NO. 02WC 37071 & 00WC 29067

Joliet School District,

14IWCC0933

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, accident, causal connection, medical expenses, prospective medical, permanent partial disability, notice, 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 August 30, 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.

The party commencing the 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 3 1 2014

SJM/sj
o-09/24/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VETTER, JoELLYN
Employee/Petitioner

Case# **02WC037071**

00WC029067

14IWCC0933

JOLIET SCHOOL DISTRICT
Employer/Respondent

On 8/30/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1357 RATHBUN CSEVENYAK & ASSOC
LUIS J MAGANA
3260 EXECUTIVE DR
JOLIET, IL 60435

KEITH M AESCHLIMAN
ATTORNEY AT LAW
168 N OTTAWA ST SUITE 200
JOLIET, IL 60432

0766 HENNESSY & ROACH PC
ERICA LEVIN
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

14IWCC0933

☐ 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

JoEllyn Vetter
Employee/Petitioner

v.

Joliet School District
Employer/Respondent

Case # **02** WC **037071**

Consolidated cases: **00 WC 29067**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **June 13, 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 4/2/02, 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 $34,380.84; the average weekly wage was $661.17.

On the date of accident, Petitioner was 42 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 $4,470.87 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $4,470.87.

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 $440.78/week for 10-1/7 weeks, commencing **April 3, 2002** through **June 12, 2002**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $396.70/week for a further period of 75 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **permanent partial disability to said Petitioner to the extent of 15% thereof.**

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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: 8/29/12

AUG 30 2012

FINDINGS OF FACT

Petitioner, JoEllyn Vetter, last worked for Respondent, Joliet Public Schools in December, 2002. Petitioner testified that she began her tenure with Respondent in the late 1980's. She began working for the district as a janitor and reported to work at various schools around the District. She was responsible for sweeping facilities, taking out trash, cleaning bathrooms, washing chalkboards, mopping classrooms and hallways and dusting throughout the buildings. Petitioner reported these duties as being physical in nature.

Petitioner testified that she had a work related neck injury in February 1999 that required a cervical fusion. The September 1999 operative report shows that Dr. George DePhillips performed a two level discectomy and spinal fusion with bone grafting and instrumentation. The postoperative diagnosis was listed as herniated cervical discs C4/5, C6/7 with C4/5 and C5/6 radiculopathy. (PX 10, RX 16) Petitioner's work capacity summary from February, 2000 show that she demonstrated the capability to return to work at the Light-Medium/Medium physical demand level with permanent restrictions. (PX 10, RX 7) Commission records show that Petitioner resolved her prior claim through settlement on June 5, 2001 for approximately 44% loss of use of man as a whole. (RX. 12) The settlement contract from that case states that Petitioner returned to work for Respondent on March 20, 2000. (RX. 18) On March 8, 2000, Dr. DePhillips returned Petitioner to work with restrictions of no lifting more than 25 pounds overhead, no lifting greater than 35 pounds and no excessive bending or stooping. (PX 10) Petitioner testified that she returned to work and was carrying out all of her work duties in her normal position as a janitor on April 11, 2000.

Petitioner testified that on April 11, 2000, she suffered an injury while cleaning the boy's locker room at Gompers Junior High. Petitioner stated that while sweeping the concrete she slipped and fell on baby oil that was left on the floor. Petitioner indicated that her feet came out from under her and she landed on her rear end. She noticed immediate pain in her tailbone and lower back region. Following her fall, Petitioner reported the accident to her immediate supervisor, Tim Winoski, and filled out an accident report. She testified that because of her symptoms, she proceeded home.

Petitioner testified that during the next few days she had continuing lower back symptoms. On April 14, 2000, Petitioner sought treatment from Dr. George DePhillips. Petitioner reported the accident and indicated she had worsening pain in her neck, lower back and buttocks. Dr. DePhillips prescribed physical therapy and gave sedentary work restrictions. (PX. 11) It appears from the Request for Hearing that Respondent was unable to accommodate the restrictions and Petitioner began receiving TTD benefits. At her next visit with the doctor on May 5, 2000, Dr. DePhillips noted that x-rays of the lumbar spine performed on April 14 showed no evidence of subluxation, fracture or compression deformities. He provided a diagnosis of lumbosacral sprain and recommended physical therapy. Petitioner began physical therapy on May 10, 2000 at Newsome Physical Therapy(PX. 11, 24)

By the time of her next appointment with Dr. DePhillips on May 26, 2000, Petitionerr had ongoing lumbar complaints with burning in her lower back and into her upper lumbar spine. Dr. DePhillips prescribed

further conservative treatment and referred Petitioner to Dr. Ted Cook for chiropractic treatment. The doctor noted that if Petitioner did not improve a MRI would be appropriate.(PX 11) Petitioner underwent a MRI on June 8, 2000. This study was read as normal and showed no abnormalities in the subarachnoid space or in the paraspinal soft tissue. (PX 24)

Petitioner's symptoms continued and she saw Dr. DePhillips again on June 23, 2000. The doctor ordered additional therapy, prescribed trigger point injections which was carried out on June 30, 2000 and authorized Petitioner off work. (PX11, 24)

Dr. DePhillips also authored a narrative report on June 23rd. The doctor notes his treatment for Petitioner's prior work accident in 1999. He also indicated, "[t]he patient was continuing to work with restrictions until April 11, 2000 when she slipped and fell at work. The injury exacerbated her neck pain as well as caused new lower back pain...It is my opinion that within a reasonable degree of medical certainty, the patient's symptoms and her radiographic disk herniations at the C4-C5 and C5-C6 levels are causally related to the injury of February 3, 1999. It is also my opinion that...the injury on April 11, 2000 is causally related to the patient's complaints of lower back pain." With regard to the cervical spine, the doctor diagnosed cervical disk herniations at C4-C5, C5-C6. As it relates to the lumbar spine, Dr. DePhillips provided a diagnosis of lumbosacral strain secondary to soft tissue injury. He stated that Petitioner would require further treatment, most likely conservative in nature, and that it was doubtful that any further surgical intervention would be necessary. (PX 24)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Gary Skaletsky on August 30, 2000. Dr. Skaletsky noted that the findings on examination showed a normal objective study. He noted that there were complaints of pain and limited movement of the lower back. The doctor opined that Petitioner was not disabled in any way. He felt that Petitioner could return to sedentary or light duty. The doctor also noted that he would defer any further treatment until a nuclear medicine bone scan is performed to identify whether or not an occult fracture of the sacrum or coccyx was present. He also indicated that the treatment Petitioner had been receiving appeared causally related to the injury of April 11, 2000. (PX 24)

Dr. Skaletsky authored a second report dated August 30, 2000. In his report the doctor noted that he had the opportunity to review surveillance video of Petitioner which had been taken on August 28th and 29th. Per his report, the video showed Petitioner walking with a normal gait with no limitation in motion and no abnormal posture. Petitioner was seen performing activities which required bending and twisting and it was noted that these activities were performed in an unrestricted fashion. Dr. Skaletsky's report states that Petitioner's presentation at his office was in marked contrast to the video. Based upon this information, Dr. Skaletsky opined that Petitioner was being untruthful with regard to her history of ongoing pain and incapacitation and was not putting forth an honest effort during his physical examination. He stated that she had reached MMI and required no further treatment. It was Dr. Skaletsky's opinion that Petitioner was capable of resuming normal activities, including employment without restriction, at that time. (RX. 10)

On referral from Dr. DePhillips, Petitioner presented to Dr. Arius Patolot on August 31, 2000. On this date, Petitioner reported that she had been experiencing difficulty sitting and walking since her April accident and could only sit for about 5 minutes. Dr. Patolot conducted a physical examination noting that Petitioner had

severely limited range of motion in the lumbar spine. He provided a diagnosis of lumbosacral strain secondary to fall and coccxygeal sprain with a need to rule out coccyx fracture. Dr. Patolot provided Petitioner with prescriptions for OxyCotin, Oxy-IR, Robaxin and Ultram to hopefully break her pain cycle as well as Ambien for facilitation of sleep. (PX 24)

Petitioner underwent the bone scan on September 25, 2000. Same was read as normal. (PX 24)

On October 20, 2000 Dr. DePhillips noted that Petitioner had undergone a total body bone scan which revealed no evidence of a coccyxgeal fracture. On November 17, 2000 Dr. DePhillips stated that Petitioner could return to work with restrictions. At Petitioner's request Dr. DePhillips released Petitioner to return to work full duty on a trial basis as of December 15, 2000. (PX 24) The Arbitrator notes the parties stipulated that Petitioner returned to work on September 23, 2000 and no period of total temporary disability has been placed in issue for the April, 2000 accident.

Petitioner testified that she began experiencing increased neck pain upon her return to work. She stated that her lower back pain was worse than the neck pain and that she was experiencing numbness and tingling in the arms and legs at that time. On January 16, 2001, Petitioner returned to Dr. DePhillips with complaints of increasing lower back pain and numbness and tingling in both upper extremities. Dr. DePhillips ordered an EMG of the upper extremities and noted Petitioner was to continue working on a trial basis. (PX 24)

The prescribed EMG was performed on January 25, 2001 which revealed no evidence of median or ulnar neuropathies on either side, no evidence of radiculopathy on the right side and no evidence of plexopathy on the right side. (Pet. Ex. #8) On February 14, 2001, Dr. DePhillips reported that the EMG showed no evidence of radiculopathy or carpal tunnel syndrome. He stated that Petitioner was complaining of right shoulder pain which she indicated she could live with and would continue to work. (PX 24)

On June 12, 2001, Petitioner returned to Dr. DePhillips. Petitioner reported that she had been working and performing excessively heavy work. She presented with worsening lower back and coccygeal pain. The doctor ordered a caudal epidural steroid injection which was carried out on June 25, 2001 at Provena St. Joseph Medical Center. (PX 8, 24)

Petitioner testified that during the ensuing months, she continued working despite ongoing symptoms. Petitioner testified that she took the position of custodian engineer with the district. In this capacity, in addition to her customary job duties, she was responsible for overseeing the maintenance of Parks School. Petitioner testified that she was working in this capacity on April 2, 2002 when she suffered another work injury. Petitioner indicated that a custodian had left a window open in one of the classrooms. She got up on a chair to shut it. As she was attempting to shut the window, the chair shattered and she fell to the ground striking her left side, her head and rib area on the hardwood floor. Petitioner indicated that she fell with such force that she passed out. Petitioner testified that when she came to an ambulance had arrived and she was taken to Silver Cross Hospital.

Upon arriving at Silver Cross Hospital, the emergency room physician, Dr. Yamout, documented that Petitioner fell and landed on the left side of her body including her left chest wall and left upper quandrant. He

further noted that Petitioner was dazed and ordered a cervical spine x-ray, left rib x-ray and CT scans of Petitioner's chest and abdomen. The clinical indication for the x-rays was "pain, left sided chest pain, patient fell, has neck injury." On exam, Petitioner had normal range of motion in the cervical spine in all positions. A CT of the chest, abdomen and pelvis was normal and negative for traumatic injuries. X-rays of the cervical spine and ribs showed no abnormalities in the chest and left ribs with the post surgical changes from Petitioner's previous fusion identified. (PX. 17)

Petitioner testified that following her release from Silver Cross, she felt dizzy and had lower back, neck and rib pain. Respondent then sent her to Joliet Medical Group on April 4, 2002. During her examination, the doctor noted decreased range of motion in her lower back region. Petitioner was diagnosed with a left chest wall contusion and was provided with restrictions for no highly repetitive motion and sedentary duty with minimal ambulation. Petitioner returned to Joliet Medical Group on April 5, 2002 and was taken off work. (PX. 16)

On April 8, 2002, Petitioner's diagnosis was modified to chest wall contusion and contusion of the left thigh. (PX. 16) She also began a course of therapy at Action Physical Medicine and Rehabilitation. During her April 11, 2002 therapy appointment, Petitioner was noted as uncomfortable and tearful during the examination. During that visit, the therapist indicated Petitioner needed a lumbo-sacral x-ray. (PX. 18)

Follow up x-rays were performed at Joliet Medical Group on April 22, 2002 and were read at that time to show non-displaced fractures of the fifth, sixth and seventh ribs. On April 30, 2002, Petitioner reported that she was experiencing low back discomfort and was diagnosed with low back pain along with the rib fractures. Dr. Louis Papaeliou opined that the back discomfort was from deconditioning and recommended that Petitioner increase her activity as much as possible. (PX. 16) At her May 2, 2002 therapy appointment, Petitioner reported upper thoracic pain and burning and was prescribed a thoracic/lumbar brace. (PX. 18) Petitioner testified that as her rib pain decreased, she noticed increased lumbar and cervical pain.

Petitioner continued her treatment with Dr. Patolot at Physical Medicine and Rehabilitation and with the doctors at Joliet Medical Group. At her May 14, 2002 appointment, Petitioner had increasing complaints of lower back and upper thoracic pain. Dr. Papeliou ordered lumbar and thoracic films. The doctor also released her to return to work with a 5lb. lifting restriction. X-rays of the thoracic and lumbar spine were obtained and were read as normal with no significant change since a prior study on March 13, 1998. (PX. 16)

At Respondent's request, Petitioner underwent a second Section 12 examination with Dr. Skaletsky on June 12, 2002. Petitioner reported that she was feeling somewhat better as of this date and would be returning to work in a light duty capacity the following day. Per her reports, Petitioner was experiencing pain in the left chest wall with some radiation into the lower thoracic and upper lumbar regions which she attributed to an abnormal posture since she had been hurt. On exam, Dr. Skaletsky noted that Petitioner had slightly limited range of motion in her neck secondary to the prior anterior cervical discectomy and fusion. Strength was decreased in all extremities which was attributed to pain caused in the left anterior chest region when using the extremities against resistance. Petitioner had tenderness to palpation along the rib cage anteriorly and posteriorly in the mid-thoracic region with no specific thoracic tenderness. Dr. Skaletsky provided a diagnosis of fractures of the fifth, sixth and seventh ribs on the left side and low back pain secondary to abnormal posture and deconditioning. He noted that this was a musculoligamentous dysfunction and was not related to the spine.

It was noted that Petitioner had an excellent prognosis for complete recovery and that she did not require any additional diagnostic testing or other treatment for the lumbar spine. Dr. Skaletsky opined that Petitioner would reach MMI in six weeks with no permanency or physical restriction from the April, 2002 accident. Additionally, Dr. Skaletsky noted that the accident did not worsen, aggravate or adversely affect any underlying lumbar or cervical spine degenerative changes. (RX. 11)

The parties stipulated that Petitioner returned to work for Respondent on June 13, 2002 and that TTD benefits had been paid from April 3, 2002 through June 12, 2002.

Petitioner continued treating at the Joliet Medical Group and on August 13, 2002, it was determined that Petitioner was orthopedically stable. On that date she was released to return to work without restrictions. (PX 16)

Petitioner testified that shortly after her return to work, her lower back and neck pain symptoms increased significantly. On September 17, 2002, Petitioner saw Dr. Patolot on September 17, 2002 complaining of an increase of pain in the neck which had been present for one month. The record states that Petitioner believed she needed an MRI of the neck. Dr. Patolot provided a diagnosis of cervical strain/sprain and ordered an x-ray of the cervical spine. (PX. 23) The x-ray was performed at Silver Cross Hospital on September 26, 2002 and was read to show no acute cervical pathology. There was progressive fusion when compared with the earlier April 2, 2002 study and disc spaces at C3-C4 and C6-C7 were satisfactorily maintained. (PX. 17)

Petitioner returned to Dr. Patolot on November 19, 2002 with ongoing neck complaints. Dr. Patolot prescribed a "short trial" of Skelaxin and ordered a cervical MRI and CT scan. (PX 23) Petitioner testified that she performed her work duties for Respondent until December 1, 2002 at which time she went off work. Petitioner stated that she has not returned to work at any time since that date, nor has she received any workers' compensation benefits of any kind after December, 2002.

Petitioner returned to see Dr. DePhillips on January 10, 2003. Dr. DePhillips documented that Petitioner was suffering from neck pain with headaches and pain in both shoulders that was present since she fell in April, 2002 and had progressively worsened. Additional x-rays were performed at Glenwood Medical Imaging on this date and were read to show no significant soft tissue abnormalities and no significant interval change. An MRI of the cervical spine was then performed at Glenwood on January 15, 2003. This study was read to show no evidence of new herniations. A CT performed the same day showed that the surgical fusion plate was intact with no evidence of spinal canal stenosis. Dr. DePhillips ordered a cervical MRI to rule out disk herniation at either C3-C4 or C6-C7 levels. The doctor noted there appeared to be lucency in the pedicle at C3 and took Petitioner off work. (PX. 24)

At her next appointment, Dr. DePhillips reviewed the studies on January 20, 2003. The doctor agreed that no disc abnormalities were seen. On this date Dr. DePhillips prescribed physical therapy, recommended a cervical steroid injection and ordered a CT scan of the brain. Petitioner was kept off work until further notice with a listed diagnosis of degenerative cervical disk. (PX. 15, 24) Ms. Vetter testified that she underwent the injection and therapy but her symptoms continued without relief.

Petitioner returned to Dr. DePhillips on March 28, 2003 complaining of numbness and tingling in the bilateral hands. Dr. DePhillips suspected that Petitioner had bilateral carpal tunnel syndrome and recommended an EMG and a cervical discogram. (PX. 11) The EMG was performed on April 9, 2003 and was read to show mild bilateral carpal tunnel syndrome and mild sensory polyneuropathy. The discogram was performed on April 16, 2003 and reproduced concordant pain at C3-C4 and C6-C7. (PX. 22) On April 24, 2003, Dr. DePhillips discussed with Petitioner the possibility of fusing the two additional disks and referred her to Dr. Michel Malek for a second opinion. (PX. 11)

Petitioner presented to Dr. Michael Malek for a second opinion on referral from Dr. DePhillips. Dr. Malek recommended that Petitioner undergo a second discogram to include a control level. It was also recommended that Petitioner undergo an MRI of the brain and thoracic spine. The brain MRI was performed a Silver Cross Hospital on May 27, 2003. This study showed bright signal lesions which where were non-specific findings. The second discogram was performed at Hinsdale Hospital on May 28, 2003. On this study, the C7-T1 level was normal. It was noted that the C2-C3 disc had some abnormal morphology but that this was felt to be non-concordant. Based upon the results of the brain MRI, Dr. Malek recommended a neurologist for further evaluation. He then stated that it may not be unreasonable to extend Petitioner's fusion to C3-C4 and C6-C7 based upon the results of the discograms and Petitioner's reported pain. (PX. 22)

Petitioner returned to Dr. DePhillips on September 15, 2003. At that time the doctor noted Petitioner had failed conservative treatment and wished to proceed with further surgery. (PX. 14)

At Respondent's request Petitioner underwent a Section 12 examination with Dr. Andrew Zelby on October 3, 2003. Dr. Zelby noted Petitioner provided a history of accident in April 2002; that she was diagnosed with retractions and had chest wall pain. Petitioner provided that she returned to work at the end of August 2002 and around September 2002 she began to get pain in the neck that became progressively worse until December, 2002 at which time she stopped working. Dr. Zelby performed a physical exam and noted Petitioner exhibited inconsistent behavioral responses with reports of pain on superficial light touch, diminished pain on distraction, non-anatomic sensory changes and over reaction. It was also noted that her neck range of motion differed with an increase in motion on portions of the exam unrelated to range of motion. Dr. Zelby reviewed the April and May discographies and CT scan to show degenerative changes at C3-C4. Dr. Zelby noted that his review of Petitioner's medical records showed no complaints of neck pain and that the complaints, when they began, were similar to complaints that resulted from the prior accident in 1999. He opined that the April, 2002 accident was completely unrelated to the complaints of neck pain and the underlying degeneration found in her neck. He noted Petitioner had obvious symptom magnification which likely explained her continued reports of pain. Dr. Zelby stated that Petitioner was not a candidate for surgical treatment and should not be subjected to the fusion of two additional levels in the cervical spine. He opined that, based upon her evaluation, inconsistencies, and review of the diagnostic studies and records Petitioner was capable of returning to her regular job duties. Lastly, Dr. Zelby noted that any cervical spine treatment subsequent to April, 2002 was completely unrelated to the April, 2002 accident. (RX. 1)

On November 11, 2003, Petitioner underwent an anterior cervical discectomy and fusion at C3-4 and C6-7 with a revision at C4-5 and C5-6. Following surgery, Dr. DePhillips ordered a bone growth stimulator. The letter requesting approval for this device states that Petitioner had undergone a fusion in 1999 and therefore

the stimulator was prescribed to optimize healing. (PX. 14) Petitioner continued post-operative treatment with Dr. DePhillips and reported improvement in symptoms as of December 23, 2003. However, she later returned to Dr. DePhillips on January 14, 2004 stating that her symptoms had not improved since surgery. The doctor ordered physical therapy. (PX. 14)

On February 13, 2004, Dr. DePhillips drafted a narrative report regarding the April, 2002 work accident. He stated that Petitioner returned to him approximately 7 months after the complaining of neck pain with occipital headaches. He states that he reviewed the medical records and interpreted the Silver Cross records from the date of the accident to show a clinical indication of a neck injury. The doctor noted that the cervical spine x-ray dated April 2, 2002 was not only a routine study based on Petitioner's trauma, but a documentation of a neck injury. Dr. DePhillips referenced the records of the Joliet Medical Group noting Petitioner's treatment was primarily focused for Petitioner's chest wall, rib contusions and later lumbar complaints. The doctor noted there was no documentation of neck pain in the records until June 7th, 2002. After said date, Petitioner's complaints regarding neck pain had been consistent. Dr. DePhillips offered that Petitioner was suffering from significant pain from her rib contusions and said pain was more likely more of a concern to her as opposed to her neck pain. The doctor went on to state that he would have to depose Petitioner to clarify the onset of her neck pain in relation to the injury of April 2002. Dr. DePhillips went on to opine that Petitioner's work injury caused internal disk injury and annular tearing at the C3-C4 and C6-C7 levels above and below her fusion. He based his opinion upon the fact that her discogram was positive and that she became symptomatic at the time of the injury. The doctor noted he relied on the medical records and the information provided by Petitioner. (PX 14)

On March 3, 004, Petitioner continued to complain of cervical symptoms. She also complained of difficulty with swallowing. At that time, Dr. DePhillips felt Petitioner had improved clinically. (PX. 14) Ultimately, Petitioner was evaluated by ENT surgeons Dr. Kron and Dr. Gartlan who indicated her swallowing difficulties would abate if she had the fusion instrumentation removed. (PX. 22) Eventually, on November 16, 2004, Petitioner underwent anterior cervical discectomy with foraminotomies bilaterally at C6/7, anterior interbody arthrodesis at C6/7, exploration of the C3/4 fusion and removal of anterior instrumentation at C3/4 and C6/7. The postoperative diagnosis was listed as pseudoarthrosis C6/7, status post ACDF C3, C4, C6 and C7. (PX. 22)

On December, 20, 2004, Dr. DePhillips noted that Petitioner was complaining of low back pain with pain shooting into her right lower extremity with numbness and tingling (P14) At that time, he indicated that Petitioner's cervical bone graft was in perfect position at the C6-7 level but ordered a lumbar MRI for her low back pain. (PX. 14)

The lumbar MRI was performed on December 22, 2004 and was read to show no focal disc herniation or significant spinal stenosis in the lumbar spine. There was a minimal herniation suggested at L2-L3 through L5-S1 with no other significant abnormality seen. On January 17, 2005 Dr. DePhillips noted that the study showed degenerative disc disease with disc bulging at L3-L4 and L4-L5 and recommended Petitioner undergo epidural steroid injections. Dr. DePhillips further noted that Petitioner's coccydynia has recurred. (PX. 14)

Petitioner returned to Dr. DePhillips on April 18, 2005 with persistent low back complaints. The doctor noted Petitioner had undergone an injection into her coccyx and an epidural injection. The doctor ordered a 2nd epidural injection and stated, "she is at this point, in my opinion, totally disabled and unable to perform any meaningful employment. Her sitting and standing durations are so limited that it makes finding a job almost nearly impossible." The doctor indicated he would consider referring Petitioner to a pain clinic when she reached maximum medical improvement. (PX. 22)

Petitioner continued treatment and a subsequent MRI of the lumbar spine performed on July 11, 2005 was read as normal. A lumbar discogram was then performed on July 20, 2005. Dr. DePhillips' records state that this procedure revealed concordant pain at L4-L5 and L5-S1 but that the discs were not radiographically abnormal enough to consider a spinal fusion.

On September 8, 2005, Petitioner was evaluated at Pain Care Specialist on referral from Dr. DePhillips. The report from this visit states that Petitioner reported having chronic low back pain for about one year's time which had been exacerbated over the past seven months. The social history notes that she had been disabled since June 2005. Following her examination, Petitioner was provided with diagnoses of lumbar degenerative disk disease, lumbar discogenic pain and status post cervical fusion surgery. It was recommended that she proceed with L4-L5 and L5-S1 IDET procedure. (PX. 15)

Petitioner returned to Provena Saint Joseph Medical Center on October 22, 2005 at which time she underwent an MRI and x-rays of the cervical spine. On November 16, 2005, Dr. DePhillips reviewed the studies and noted a suspicion for pseudoarthrosis at the C6-C7 level. He recommended a CT scan of the fusion with a revision and exploration at the C6-C7 level tentatively planned. The CT was performed on November 19, 2005 and was read to show suggestion of a mild broad based bulging disc at C3-C4 with no evidence of acute pathology in the remaining cervical spine. (PX. 22)

On January 20, 2006, Petitioner underwent further surgery with Dr. DePhillips and Dr. Malek. Six procedures are listed on this operative report including anterior cervical diskectomy and foraminotomies at C6-C7, anterior interbody arthrodesis at C6-C7 and removal of instrumentation at C6-C7. The postoperative diagnosis was listed as segmental instability and pseudoarthrosis, C6-C7 status post on the job injury. (PX. 22)

Petitioner returned to Dr. DePhillips on February 1, 2006 reporting that the surgery had not provided relief of her neck and shoulder pain. On March, 2006 Dr. DePhillips noted Petitioner was progressing well clinically. The doctor noted that cervical x-rays showed the interbody cage was in good position with bone growth evident at the C6-C7 level. At that time it was noted that Petitioner was to proceed with the IDET procedure for her lumbar complaints. (PX. 22)

On March 10, 2006, Petitioner was examined by Dr. Mauricio Orbegozo at Pain Centers of Chicago. At this visit she reported a chief complaint of low back pain shooting down the left leg. Petitioner reported that her lumbar pain had been present for almost a year. Following examination, Dr. Orbegozo provided a diagnosis of lumbar degenerative disc disease and lumbar radiculopathy. It was noted that the recommended two level IDET procedure would be scheduled accordingly. (PX. 15)

On May 1, 2006, Petitioner returned to Dr. DePhillips with complaints of worsening low back pain, mid back pain and pain radiating into the right lower extremity. The doctor noted that Petitioner's neck pain had improved. MRI scans of the lumbar and thoracic spine were ordered. On May 17, 2006, Dr. DePhillips noted that the MRI scans showed degenerative disc disease at multiple levels in the lumbar spine. Dr. DePhillips noted that Petitioner would proceed with discography from L2-S1 and then consider the IDET procedure or spinal fusion. (PX. 22)

The discogram proceeded on July 14, 2006 and was reported to show abnormal results at L3-L4, L4-L5 and L5-S1 with normal findings at L2-L3. On August 21, 2006 Dr. DePhillips stated that Petitioner had failed conservative management for her degenerative disc disease and a fusion would be considered. (PX. 22)

Records show that Petitioner continued treatment with Dr. DePhillips and underwent additional MRIs and CT scans of the lumbar and cervical spines. On May 7, 2007, Dr. DePhillips noted Petitioner had been referred for a repeat discogram. The doctor noted the discogram produced the same results as the previous discogram. As a result, Dr. DePhillips felt Petitioner was a candidate for a three (3) level spinal fusion L3-S1. Dr. DePhillips noted that Petitioner provided that the onset of her pain ocuured at work in 2002 when she fell. (PX. 22)

On June 12, 2007, Petitioner presented to Provena Saint Joseph Medical Center for surgery with Dr. DePhillips and Dr. Malek. The operative report lists eight procedures including posterolateral intertransverse arthrodesis at L3-L4, L4-L5 and L5-S1, pedical screw fixation from L3 to S1, and posterior lumbar interbody arthrodesis at the same three levels. Dr. DePhillips noted in his report that Petitioner had suffered a work related injury in 2002 and had developed progressively worsening lower back pain, especially over the past few years. The postoperative diagnosis was segmental instability, diskogenic low back pain, L3-L4, L4-L5, L5-S1 levels status post work related injury. (PX. 22)

The medical records show that Petitioner entered into physical therapy following the lumbar fusion and underwent treatment with Dr. Sharma and Dr. Patel at Pain and Spine Institute. In addition to medications including Valium, Remeron, Naprelan, Avinza and Dilaudid, Petitioner underwent pain injections and implantation of a pain stimulator. Petitioner was last treated by Dr. DePhillips on November 21, 2007. The record relating to this treatment is not available in the trial exhibits. Petitioner was discharged from physical therapy on November 27, 2007 with the records noting that she had no current therapy referral and intended to follow up with her physician to discuss increased difficulty with all activity.

At hearing, Petitioner testified that the pain management treatment she has continued to receive only temporarily relieves her neck and lower back pain. Petitioner reports having severe neck pain that radiates to her hands and causes headaches. She also experiences lower back pain that causes numbness into her extremities. Petitioner indicated she uses a cane because of her back pain. She indicated that her family physician, Dr. Hordusky, prescribed her cane in 2007. She further testified that she continues to utilize pain medication including Opana ER which only provides temporary pain relief. Petitioner stated that her household chores are severely limited by her neck and lower back symptoms. Petitioner indicated that she is involved in very few activities and does as little as possible.

Dr. Dephillips offered deposition testimony on four (4) separate occasions, February 9, 2005, April 11, 2005, September 17, 2007, and March 31, 2011. During his February 9, 2005 testimony, Dr. DePhillips indicated that Petitioner's April 11, 2000 injury caused her chronic lower back pain that resulted in residual chronic disability. He further opined that her low back pain and coccygodynia is causally related to her work related injury, April 11, 2000. (PX3, p.14) The doctor continued, "...I believe that is was my impression that it was ultimately shown that she might have had diskogenic pain due to the tearing of the annulus in one of her disks which was ultimately show through discography." (PX3, p.15) Dr. DePhillips further testified that injury at work caused internal disk disruption at the C3-C4 and C6-C7 and diskogenic pain for which Petitioner ultimately underwent surgery. The doctor went on to explain that "any patient who has a cervical fusion is prone to injury above and below the level of that fusion, and unlike injuries where there is no previous surgery, less trauma is necessary to cause an injury." (PX.3, p.25) When posed as to whether the medication Petitioner was taking, regarding treatment for her rib injuries, could mask diskogenic pain in her cervical spine, the doctor relpied, "... the OxyContin dosage and the Norco frequency could certainly mask or relieve diskogenic cervical pain, especially early in the course of treatment..." (PX.3, p.30)

During the April 11, 2005 deposition, Dr. DePhillips testified regarding Petitioner's prior multi level fusion from C4 through C6. The doctor testified that the development of pain at the levels either/or above or below the fusion site is one of the common risks associated with multi level fusions. The doctor indicated same can happen in the absence of trauma. The doctor stated, "[t]he multiple level fusion does place stress on the adjacent levels, and over time there's typically acceleration of degenerative disk disease or disk herniations above or below the levels of the fusion despite there not being trauma." The doctor also testified that you can see the development of annular tears on occasion on either the level above or below a fusion site. (PX. 4, p.9)

The parties conducted the third deposition of Dr. DePhillips on February 17, 2007. On this date Dr. DePhillips continued to opine that Petitioner's low back condition of ill-being was causally related to the April 2000 accident and that the work injury in April 2002 caused internal disc disruption at C3-C4 and C6-C7 along with discogenic pain. Dr. Dephillips testified that he had no comment on Petitioner's current neck condition as it had been awhile since he had discussed it with her. He stated that he had kept Petitioner off work from 2005 until the present noting that any patient who undergoes a fusion does not return to work for several months after surgery. Dr. DePhillips stated that, based upon the restrictions and her condition, both the cervical and lumbar spine, he did not feel that Petitioner was capable of meaningful employment. However, he stated that Petitioner would require a functional capacity evaluation along with a further examination and assessment of her condition in order to make a final disposition in terms of her work capacity. (PX. 5, p. 37-38) Dr. DePhillips later noted that he had not fully established restrictions for Petitioner with regard to her lower back condition. (PX. 5, p. 41)

Dr. Zelby, Respondent's Section 12 examiner, offered deposition testimony on August 15, 2005. The doctor testified regarding his examination of Petitioner on October 3, 2003. Dr. Zelby testified that based on the history taken, performing an examination, and reviewing medical records, Petitioner's injury at work in April 2002 caused rib fractures and back pain. He indicated that Petitioner's neck complaints were not present for months subsequent to the injury. He noted that when her neck complaints commenced, they were similar to the complaints she had prior to the April 2002 accident. He opined that her neck complaints were completely unrelated to the April 2, 2002 accident and also were unrelated to the degeneration that was found in her neck.

The doctor felt that Petitioner exhibited symptom magnification which likely explained her continued complaints of pain, noting that Petitioner had degenerative changes present prior to the accident. Dr. Zelby testified that Petitioner was not a candidate nor should she be subjected to fusing two additional levels in the cervical spine. He reiterated that any treatment Petitioner received to the cervical spine after April 2002 was completely unrelated. (RX. 2, p.16-17)

On June 13, 2008, Petitioner presented for a vocational evaluation with Joseph Belmonte of Vocamotive at her attorney's request. Mr. Belmonte obtained a subjective history from Petitioner and reviewed her medical records, including a September 17, 2007 deposition transcript from Dr. DePhillips. On this date, Petitioner advised that she had begun receiving Social Security Disability Income in 2005. There was no indication for reason she was awarded these benefits. Mr. Belmonte noted that no further information was available which provided any detail as to the physical restrictions possessed by Petitioner or with regard to the degree to which she was impaired by pain, medication or consistent tolerance for any level of activity. Mr. Belmonte recommended that Petitioner undergo vocational testing under the supervision of a Certified Vocational Evaluator. He noted that per the statements from Dr. DePhillips' deposition transcript, a final determination with regard to Petitioner's overall physical capacity was yet to be determined and this issue remained unresolved. He stated that definitive resolution of this issue would be necessary. (PX. 6, 7)

Mr. Belmonte opined that Petitioner had lost access to her usual and customary occupation and that she was no longer able to perform any of the work that she had historically performed. He further opined that, on the basis of the medical information available at that time, Petitioner's disability was total. He stated that there was no information available on the date of his evaluation to determine if vocational rehabilitation would benefit Petitioner and that he would be willing to reevaluate the issue of employability and placement if further medical information was provided. Mr. Belmonte recommended that Petitioner undergo a comprehensive evaluation by a skilled orthopedic specialist and a competent internal medicine specialist to assess her current condition. He further stated that physical capabilities/restrictions should be identified as appropriate by either independent medical examining physicians or via functional capacity evaluation. (PX. 6,7)

Petitioner returned to Dr. Zelby for a second Section 12 examination on January 22, 2010. At that time she advised that none of the treatment she has received has helped her in any way and stated that she feels that everything has actually made her worse. On exam, Petitioner was noted to have tenderness to palpation in the cervical and lumbar spine, even with non-physiologic touch but she reported feeling nothing in the lumbar spine when the area was tested for sensation to pinprick. Petitioner exhibited inconsistent behavioral responses positive for pain on superficial light touch, with pain on simulation, diminished pain on distraction and non-anatomic sensory changes. On exam, Petitioner was noted to have range of motion measured at less than 5 degrees on all ranges in the lumbar and cervical spine. However, Dr. Zelby noted that she was able to forward flex her lumbar spine to 60 degrees when reaching for something and that she demonstrated at least 50 degrees of lateral rotation in the cervical spine during conversation in the history portion of the examination. (RX. 3)

Dr. Zelby's report shows that numerous medical records and diagnostic tests were reviewed in connection with this examination. He notes some diagnostic tests revealed normal findings while others showed miniscule bulging at cervical and lumbar levels and that degenerative disc disease was seen in the lumbar spine. He specifically notes that the findings on the December 22, 2004 MRI of Petitioner's lumbar

spine were normal for her age. Dr. Zelby reported that he had reviewed surveillance video of Petitioner from May 3, 2008 which showed her walking normally without any assistive devices. The video also showed Petitioner was able to bend, squat and pull weeds. It was Dr. Zelby's assessment that these activities were performed without difficulty or evidence of infirmity.

Dr. Zelby provided a diagnosis of lumbar strain with a history of anterior cervical discectomy and fusion and lumbar fusion. He reiterated his opinion from 2003 that Petitioner's cervical condition was completely unrelated to the injury of April 2002. Dr. Zelby stated that Petitioner's lumbar spine diagnostic studies were essentially normal before and after April 2002 with typical degeneration that comes with age. He further stated that her subjective neck complaints were not related to any abnormality in the cervical discs and that she had not been a candidate for extension of the fusion and that there had been no indication to pursue a lumbar fusion. Dr. Zelby expanded upon his diagnosis to state that Petitioner had ongoing subjective pain in the context of previous cervical and lumbar fusions. He opined that her inconsistencies and symptom amplification as well as the disparity between her subjective complaints and reported infirmity indicated that there was no medical basis for her ongoing complaints. Dr. Zelby stated that Petitioner was qualified to return to all of her usual vocational and avocational activities without restrictions as it relates to her work injuries or work activities. He further stated that her objective medical condition following the clearly unnecessary surgeries left her qualified to return to work at least at a light-medium physical demand level. (RX. 3)

A second deposition of Dr. Zelby was conducted on August 6, 2010. The testimony elicited was consistent with Dr. Zelby's report dated January 22, 2010. (RX. 4)

The parties conducted a final deposition of Dr. DePhillips on March 31st, 2011. At that time, Dr. DePhillips stated that Petitioner had reached MMI with regard to her cervical spine as of April 2007, when her cervical fusion was noted to be completely solid. (PX 25, p. 17) Dr. DePhillips stated that, in terms of her cervical spine, Petitioner would be unemployable and stated that an FCE would not be a tool he would use to determine restrictions. (Id, p. 18-19) With regard to the lumbar spine, Dr. DePhillips stated that he would be speculating as to her condition as of the date of the deposition as there would be too many unknowns without having evaluated her condition as he had never placed her at MMI. Dr. DePhillips stated that as of his last examination of the lumbar spine on November 21, 2007, Petitioner was totally disabled and unemployable and most likely would have remained unemployable on a permanent basis. (Id, p. 20) He later stated that it was possible that Petitioner could find work in a sedentary or light capacity depending on the final results of her lumbar fusion and that he could not opine on permanency as of the date of the deposition. (Id, p. 21)

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

The Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the work accident on April 2, 2002. The credible medical evidence supports the conclusion that her current condition with regard to the lumbar and cervical spine is the result of her underlying degenerative condition and the work accident suffered in 1999. The Arbitrator specifically notes that all diagnostic studies of the cervical spine performed on April 2, 2002 were normal with no evidence of traumatic injuries or abnormalities. Petitioner suffered fractures of the fifth, sixth and seventh ribs and back pain as a result of the April, 2002 accident. As noted by Joliet Medical Group, the back pain following the April, 2002 accident was likely due to

deconditioning as a result of being off work given that diagnostic studies performed approximately one month after the work accident revealed no abnormal findings. Petitioner subsequently reached maximum medical improvement as of August 13, 2002. On that date, Petitioner was released to return to work without restrictions and was noted to be orthopedically stable per the records of Joliet Medical Group. These records support the opinions of Dr. Skaletsky who opined that Petitioner would reach MMI approximately six months after his evaluation on June 12, 2002. The Arbitrator's findings are further supported by the fact that Petitioner returned to her regular work duties, as stipulated by the parties, on June 13, 2002 and continued to perform these duties until December, 2002.

The medical records show that Petitioner continued her medical treatment after August 13, 2002, but the diagnostic studies continued to show normal results with progression of the cervical fusion noted in September, 2002. According to the medical records, Petitioner did not present any complaints of cervical pain for several months after the April, 2002 injury. When these complaints were expressed, they were similar to the complaints she had prior to the 2002 accident. Petitioner's return to treatment with Dr. DePhillips on January 10, 2003 was the first time that she reported that her cervical complaints were a result of the April, 2002 accident. However, the records from that date contain only Petitioner's subjective comments and do not provide any causal connection opinion from Dr. DePhillips. The subsequent diagnostic tests ordered by Dr. DePhillips revealed no evidence of new disc herniations or other abnormalities in the cervical spine.

Dr. DePhillips first discusses causation with regard to Petitioner's ongoing cervical complaints on April 24, 2003 stating that the plate from the prior cervical fusion was causing additional stress on the two discs above and below. As such he recommended additional treatment and possible extension of the fusion. The record from this date can be read to suggest that Petitioner's complaints were causally related to the 1999 work accident which necessitated the fusion, not the accident in 2002.

Based upon the medical evidence up to October 3, 2003 and the surveillance video obtained in August, 2003, the Arbitrator finds the opinions of Dr. Zelby persuasive as provided in his October 3, 2003 report. At that time Petitioner exhibited inconsistencies on physical examination and symptom magnification which led Dr. Zelby to conclude that any treatment regarding the cervical spine after April 2002 was completely unrelated to the April 2, 2002 work accident. Of note, Petitioner was captured on video bending, driving and performing other activities with what appeared to be normal motion in the neck, normal pace of activities and no evidence of pain behaviors. The Arbitrator is persuaded by Dr. Zelby's opinion that the diagnostic studies reviewed revealed no evidence that Petitioner was a candidate for surgical treatment and Dr. Zelby specifically noted that she should not be subjected to fusing two additional levels in her cervical spine.

Petitioner proceeded with extension of her cervical fusion. Dr. DePhillips' operative report states that Petitioner had suffered a work accident which caused the need for this surgery, but it does not specify the date of the work accident. In his postoperative letter of necessity requesting approval for a bone stimulator, Dr. DePhillips relates the need to Petitioner having undergone a prior fusion in 1999. This suggests that the accident referred to in the November, 2003 operative report is Petitioner's original work accident in 1999.

The first clear opinion from Dr. DePhillips relating Petitioner's ongoing cervical complaints to the 2002 accident was provided on November 20, 2003, more than 18 months after the occurrence. At that time he stated

that the 2002 accident caused injury above and below the fusion noting that the previous fusion placed more stress on the discs but that Petitioner would not have developed discogenic pain at those levels but for the 2002 accident. This opinion is provided despite the radiographic evidence immediately following the 2002 injury which showed no evidence of acute trauma or other abnormalities. The Arbitrator therefore finds that this causation opinion is unpersuasive.

Dr. DePhillips then provided a narrative report in February 2004. Dr. DePhillips interpreted the hospital records from April 2, 2002 to show evidence of a neck injury on that date but then concedes that the records contain no complaints of neck pain until more than one month later. He also states that the accident caused annular tearing in the levels above and below the cervical fusion. The Arbitrator notes that these conclusions are not contained in any of the diagnostic reports that were generated prior to February 2004.

Dr. DePhillips stated that his opinion with regard to causation in February 2004 was based upon Petitioner having become symptomatic at the time of the accident but states that it would be necessary to depose Petitioner to determine her onset of neck pain symptoms. Despite the fact that Dr. DePhillips provided Petitioner with the specific statements he would anticipate her to make, Petitioner provided no such testimony at trial. While she did testify that she began experiencing neck pain immediately after the April 2002 work accident, she was unable to provide any explanation for her delay in complaints and merely stated that she did not know why she didn't report this. The Arbitrator finds that this testimony is unreliable as Petitioner had ample opportunity to report her symptoms to her treating doctors in the month following her accident. She also had ample opportunity to voice the statements Dr. DePhillips recommended in her treatment and reporting to IME physicians after February 2004 but did not do so.

Based upon all of the above, the Arbitrator finds that Petitioner failed to prove that her cervical spine treatment is causally connected with her April 2002 work accident.

Returning to the lumbar spine, the Arbitrator notes that Petitioner did not resume active treatment until December, 2004. At that time, Petitioner's diagnostic studies revealed degenerative disc disease which was confirmed by Dr. DePhillips. The Arbitrator notes that all of the treating records relating to the lumbar spine, from various doctors and hospitals, after December 2004 state that Petitioner's condition was degenerative in nature. The Arbitrator notes that when she sought treatment on September 8, 2005, Petitioner reported that she had been disabled since June, 2005 and that her lumbar condition had only been present for about one year.

The first medical opinion connecting Petitioner's lumbar treatment to the April 2002 work accident was provided by Dr. DePhillips in the operative report for Petitioner's lumbar fusion. This report references Petitioner's 2002 accident; however, this statement was made more than five years after the work accident and ignores the doctor's prior conclusion that Petitioner's lumbar condition was degenerative in nature without providing any explanation for the change in causation. Thus, the Arbitrator finds this opinion unpersuasive.

After a review of all diagnostic test and medical records, the Arbitrator is persuaded by the opinions reiterated by Dr. Zelby in January 2010. Dr. Zelby stated that Petitioner's condition never progressed to the point that her spine was radiographically abnormal enough to consider fusion as the surgery would not provide relief. The Arbitrator finds that the work restrictions provided to Petitioner after August 13, 2002 were

necessitated by surgeries for which there was no medical indication to pursue and did not result in any way from Petitioner's work accidents or work activities.

Further, the Arbitrator is not persuaded by DePhillips opinion in March, 2011 suggesting that Petitioner would be unemployable as a result of her condition. As noted by the doctor's own testimony, he had not placed Petitioner at MMI for the lumbar spine and had not conducted any updated examinations or diagnostic testing to assess the progression of her fusion or to assess her physical capabilities. Dr. DePhillips himself stated that any opinion he provided on that date with regard to the lumbar spine would be based upon speculation and hypothetical information. Dr. DePhillips specifically noted in September, 2007 that a functional capacity evaluation would be necessary in order to assess Petitioner's physical capabilities. Yet, he provided his statements regarding Petitioner's work capacity in 2011 without the review of any such evaluation.

The Arbitrator also notes the opinion of Dr. DePhillips that Petitioner was unemployable as a result of her cervical spine is not persuasive. Dr. DePhillips did not provide this opinion until his deposition in March, 2011. At that time, Dr. DePhillips noted that the cervical fusion had been completely solid and Petitioner had reached MMI for the cervical spine as of April, 2007. However, the medical records show that Dr. DePhillips ordered a follow up CT of the cervical spine in April 2007 but they contain no indication that he subsequently reviewed the report from that test. In fact, Dr. DePhillips provided no opinion with regard to Petitioner's restrictions relative to the cervical spine between April 2007 and March 2011. There is also no evidence that any further cervical evaluation was performed.

Based on all the above, notably the unreliability of the work restrictions provided by Dr. DePhillips, the inconsistencies in Petitioner's reports of physical capability versus the surveillance footage and the Arbitrator's conclusion that any treatment after August 13, 2002 was unrelated to the April, 2002 work accident, the Arbitrator finds that Petitioner failed to satisfy her burden of proof that she has a medical permanent total disability as a result of the April 2, 2002 work accident.

Furthermore, the Arbitrator finds that the odd-lot permanent total disability opinion provided by Joseph Belmonte lacks credibility as it was based upon an inaccurate understanding of Petitioner's history of work restrictions and the incomplete deposition testimony of Dr. DePhillips. Specifically, the Arbitrator notes that Mr. Belmonte relied upon the assumption that Petitioner had not been release to return to any level of work greater than a sedentary level following the FCE in 2000. This assumption ignores the full duty release provided by Dr. DePhillips shortly thereafter and the fact that Petitioner had returned to her regular work duties on multiple occasion. Mr. Belmonte testified that he was not provided with the opinions of Dr. Skaletsky or Dr. Zelby. As a result he was unable to consider any of the conclusions reached by these doctors when forming his opinion. Mr. Belmonte also recommended that Petitioner undergo additional medical evaluation and/or a functional capacity evaluation in order to accurately assess her physical capabilities and that she undergo vocational testing in order to determine her level of reading and literacy. Finally, Mr. Belmonte stated that he would be willing to re-examine the issue of employability and placement potential for Petitioner if further information was provided. No such information was provided. As a result, Petitioner fails to present a reliable opinion with regard to her access to a stable job market and her ability to return to work. Additionally, there is no evidence of a failed job search. Petitioner specifically reported that she had made no attempts to find

employment. As such, Petitioner has failed to satisfy her burden of proof that she has an odd-lot permanent total disability as a result of the work accident on April 2, 2002.

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?

Having found that Petitioner reached MMI with regard to the injuries from her April 2, 2002 work accident on August 13, 2002, the Arbitrator finds that Respondent is not liable for any medical bills incurred after that date. Furthermore, the Arbitrator specifically finds that Respondent is not liable for any medical bills incurred in connection with Petitioner's multiple surgeries and treatment with Dr. DePhillips as the treatment was not reasonable and necessary.

K. Is the petitioner entitled to any additional TTD benefits?

The parties stipulated that Petitioner received TTD benefits while off work from April 3, 2002 through June 12, 2002. Therefore, having found that Petitioner reached MMI on August 13, 2002, the Arbitrator finds that Respondent is not liable for any additional TTD benefits.

Petitioner has alleged entitlement to additional TTD beginning on December 1, 2002. However, the Arbitrator notes that Petitioner presented no evidence that she underwent medical treatment or received any work restrictions on or around that date.

Petitioner later obtained a disability certificate from Dr. DePhillips on January 10, 2003 which stated that she was to remain off work. A second disability certificate was provided at Petitioner's examination on February 3, 2003. None of the treating records or prescription forms after that date contain any reference to Petitioner's objective physical capabilities or work capacity. The next reference regarding work capacity was made in Dr. DePhillips' deposition in November, 2007. At that time, Dr. DePhillips noted that Petitioner had been off work and that a final determination with regard to work capacity could not be made until an FCE was performed. The Arbitrator notes that Dr. DePhillips provided Petitioner with several disability certificates and made numerous references to Petitioner's work capacity prior to February 3, 2003. Additionally, Petitioner had previously been provided with permanent work restrictions following her 1999 work accident. Based upon all of this, it cannot be presumed that Petitioner remained authorized off work entirely at all times subsequent to February 3, 2003. The evidence is silent in this regard.

Noting that Petitioner removed herself from work in December, 2002 without a medical basis and provided no evidence regarding ongoing total disability or work restrictions from her treating physicians after February 3, 2003, the Arbitrator finds that Petitioner failed to satisfy her burden of proof with regard to her entitlement to TTD benefits after June 12, 2002.

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

As noted above, the Arbitrator finds that Petitioner suffered three non-displaced rib fractures and unspecific low back pain as a result of the April 2, 2002 work accident. Petitioner failed to prove that she is entitled to an award of permanent total disability benefits on a medical or odd-lot basis. Based on all of the information above and the credible medical evidence, the Arbitrator finds that the injuries suffered by Petitioner in connection with the April 2, 2002 work accident resulted in permanent partial disability in the amount of 15% loss of use of man as a whole.

M. Should penalties or fees be imposed on the respondent?

The Arbitrator finds that no penalties or fees are to be imposed upon Respondent in connection with the work accident suffered on April 2, 2002. With regard to the payment of medical bills, the Arbitrator finds that a real controversy existed as to the cause of Petitioner's cervical and lumbar spine complaints.

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

Kasandra D. Parker,

Petitioner,

vs. NO. 13WC 12696

Champaign-Urbana Mass Transit District, 14IWCC0934

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent disability, temporary disability, and 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 17, 2013 is hereby affirmed and adopted.

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

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

Notice of Intent to File for Review in Circuit Court.

DATED:
SJM/sj OCT 3 1 2014
o-9/24/2014
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARKER, KASANDRA D
Employee/Petitioner

Case# **13WC012696**

14IWCC0934

CHAMPAIGN-URBANA MASS TRANSIT DIST
Employer/Respondent

On 12/17/2013, 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 0.09% 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:

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PETER T BORICH
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0522 THOMAS MAMER & HAUGHEY LLP
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CHAMPAIGN, IL 61820

14IWCC0934

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

KASANDRA D. PARKER
Employee/Petitioner
v.
CHAMPAIGN-URBANA MASS TRANSIT DIST.
Employer/Respondent

Case # 13 WC 12696

An *Application for Adjustment 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 **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 **March 12, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the alleged injury, Petitioner earned **$50,620.69**; the average weekly wage was **$973.47**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$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 injury of March 12, 2013 did not arise out of her employment with Respondent. All compensation in this matter 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

12/10/2013
Date

DEC 17 2013

14IWCC0934

STATE OF ILLINOIS)
) SS
COUNTY OF CHAMPAIGN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KASANDRA D. PARKER
Employee/Petitioner

v. Case # 13 WC 12696

CHAMPAIGN-URBANA MASS TRANSIT DIST.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Kasandra D. Parker, testified that she was employed as a bus driver with Respondent, the Champaign-Urbana Mass Transit District, on March 12, 2013, when she approached her usual location of employment at the Illinois Terminal Building in Champaign, Illinois. On that date, she parked her car in the parking lot and walked to her bus. In route to her bus, she fell, sustaining injuries. Petitioner's fall was captured by video. (Petitioner's Exhibit (PX) 4). The video depicts Petitioner walking down the sidewalk toward her bus and falling. Petitioner testified that she tripped over a defect in the sidewalk. Petitioner's Exhibits 2 and 3 are photographs of the area in which Petitioner fell, and show an increase in height in the area that Petitioner fell of approximately a sixteenth of an inch.

The evidence established that the area in which Petitioner fell was a public area in which members of the public entered and exited buses. This was confirmed via the testimony of Petitioner, as well as the presence of numerous public citizens on the video. (PX 4).

As a result of her fall on March 12, 2013, Petitioner sustained a left knee contusion and a left wrist strain. She underwent a course of physical therapy as a result of these injuries. (PX 6; PX 7). Petitioner was subsequently released from conservative care, and returned to her job with Respondent.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's accident did not arise out of her employment with Respondent, and bases his decision two important factors.

First, there was no defect present on the sidewalk. Petitioner went to great length to provide close up pictures of the area in which she fell. When looking at the video, Petitioner is approximately 12 inches from the base of the pillar. At this point in the sidewalk the difference in height is *de minimis*. Petitioner's Exhibit 3 shows that the difference in height between the two bricks is approximately 1/8 to 1/16 of an inch. In *Caterpillar Tractor Co. v.*

Industrial Comm'n, 129 Ill.2d 52, 63, 541 N.E.2d 665 (1989), the court stated that "while it is true that [the claimant] regularly crossed this curb to reach his car, there is nothing in the record to distinguish this curb from any other curb" This notion is true in the current case, as the difference in height was *de minimis*. Moreover, there is voluminous case law establishing that the act of standing and walking does not constitute a risk greater than that to which the general public is exposed. *See, e.g., Caterpillar Tractor Co.* (cited *supra*); *Oldham v. Industrial Comm'n*, 139 Ill. App. 3d 594, 487 N.E.2d 693 (2d Dist. 1985); *Elliot v. Industrial Comm'n*, 153 Ill. App. 3d 238, 505 N.E.2d 1062 (1st Dist. 1987).

Lastly, the area in which Petitioner fell was used by the public on a frequent basis, and thus she was not exposed to a risk greater than that to which the general public was exposed. The area in which Petitioner fell was directly adjacent to a line of buses. It was the area in which the bus drivers would enter and exit the buses, but it was also the area that the passengers would enter and exit the buses. This was confirmed by the testimony of Petitioner, as well as the video of the fall, which shows numerous passengers within the direct vicinity of Petitioner as she fell. (PX 4). Additionally, there was no evidence entered by Petitioner that she was forced to traverse the area any more frequently than the general public. In fact, Petitioner testified that she used this area only to enter and exit her bus, which would imply the fact that she traversed this area only twice a day when she was working.

The seminal case in this regard is *Caterpillar Tractor Co.*, cited *supra*, which provides that a claim may be compensable if "an employee is exposed to a risk common to the general public to a greater degree than other persons." *Caterpillar Tractor Co.*, 129 Ill.2d at 58. There is no evidence in the record that Petitioner was exposed to a risk that was common to the general public to a greater degree than other persons. In fact, it is reasonable to imply that Petitioner used this area an equal or lesser amount than the general public utilizing the bus service. Petitioner was present at the location of the accident due to her employment, but as the positional risk doctrine is not the law in Illinois, Petitioner must prove an increased risk, and this was not proved.

Based on the foregoing, Petitioner has failed to prove she sustained an accident that arose out of her employment, and all claims for benefits in this matter are therefore denied.

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

As Petitioner failed to prove a compensable accident, the issue of causal connection is rendered moot.

Issue (G): What were Petitioner's earnings?

Based upon Respondent's Exhibit 2, Petitioner's average weekly wage was $973.47.

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 upon the Arbitrator's decision concerning the issue of accident, discussed above, all claims for compensation and benefits are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard A. Mundy,

Petitioner,

vs.

NO. 10WC 43539

14IWCC0935

City of West Frankfort,

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, permanent disability and 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 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.

No bond is required for removal of this cause to the Circuit Court.

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

DATED: OCT 3 1 2014
SJM/sj
o-9/25/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MUNDY, RICHARD A
Employee/Petitioner

Case# **10WC043539**

CITY OF WEST FRANKFORT
Employer/Respondent

14IWCC0935

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:

0250 HOWERTON DORRIS & STONE
DOUG DORRIS
300 W MAIN ST
MARION, IL 62959

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

14IWCC0935

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

Richard A. Mundy
Employee/Petitioner

v.

City of West Frankfort
Employer/Respondent

Case # **10** WC **43539**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Herrin**, on **10/8/13**. 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 **Estate's entitlement to PPD if finding for Petitioner on causation**

FINDINGS

On **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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$43,453.80**; the average weekly wage was **$835.65**.

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 ***is not liable for remaining charges*** for reasonable and necessary medical services.

Respondent shall be given a credit of **$12,256.86** for TTD, **$0** for TPD, **$0** for maintenance, and **$4,583.35** for other benefits, for a total credit of **$16,840.21**.

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

January 3, 2014
Date

JAN 8 - 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD A. MUNDY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10 WC 43539
	)	
CITY OF WEST FRANKFORT,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner, Richard Mundy, was employed as a laborer for the respondent. On October 23, 2009, he was injured at work when he slipped while exiting a piece of equipment and injured his right hip. At the time of the accident, the petitioner was under the care of his primary care physician, Dr. Thompson, for management of his chronic Norco prescription for treatment of chronic back pain from an unrelated injury.

The petitioner did not seek immediate medical attention. On October 30, 2009, he saw Dr. Thompson. X-rays of the right hip taken that day showed no acute fracture or dislocation to either the hip or the femur, and with normal positioning of the femoral head. See PX1, red tab #5. Due to persistent symptoms, Dr. Thompson referred him for an MRI of the hip. This was performed on December 3, 2009. It revealed bilateral ischemic necrosis in the hips, right greater than left. PX1, red tab #6. Dr. Thompson noted the results and referred the petitioner to an orthopedist.

On December 9, 2009, the petitioner saw Dr. Roland Barr, an orthopedist. Dr. Barr noted a long history of smoking and stiffness in the spine. He noted the MRI of the hips and assessed the petitioner with symptomatic avascular necrosis in the right hip with a recent hip strain. Dr. Barr noted that the necrosis was a preexisting condition which had begun more than six months and possibly more than a year prior. Dr. Barr wrote in his report that patients with this disease who would end up requiring surgery "are likely to progress along this course with or without any demonstrable injury" and that "injuries such as the one the patient sustained in October can be the cause of a flare up and pain but are not essentially a causative factor" in the need for any surgery. He recommended conservative treatment at that point and prescribed the petitioner off work at that time. See PX1 red tab #1. The petitioner did undergo physical therapy following that appointment. PX1 red tab #8.

On January 13, 2010, the petitioner returned to Dr. Barr. He reported ongoing pain despite narcotic use. X-rays taken that day demonstrated a collapse of the femoral head, which was a new finding. Dr. Barr recommended discontinuation of therapy at that point and instructed him to follow up; he noted that if no improvement occurred, surgery would be an option and Dr. Barr noted that an independent medical evaluation would be appropriate to determine any work relationship. PX1 red tab #1. Dr. Barr, in his follow-up, did recommend hip surgery.

The respondent commissioned a Section 12 evaluation with Dr. Joseph Williams, an orthopedic surgeon. This took place on March 3, 2010. See generally PX1 red tab#10 and RX1. Dr. Williams took the petitioner's history and examined the petitioner and took new X-rays that day. The X-rays demonstrated Ankylosing Spondylitis in the low back and avascular necrosis in both hips with significant collapse of the right hip. Dr. Williams noted that the avascular necrosis was a chronic disease process which would likely manifest over years and is most commonly associated with alcoholism or chronic disease. Dr. Williams opined that while the petitioner did require hip surgery, the injury at work caused at most a leg strain and did not affect the necrotic process. Dr. Williams noted a history of smoking, alcohol and narcotic usage, and the spondylosis causing additional strain on the hip joints as the contributing causes to the avascular necrosis and opined that the work injury neither caused nor accelerated any current condition of ill-being. In a supplemental report he noted that he had reviewed the petitioner's history of using Vicodin since 2005 (see RX3) and noted that it would have masked any developing symptoms of the necrotic process.

On July 6, 2010, Dr. Barr performed right hip replacement. PX1, red tab#1. No complications were noted in the surgery.

On July 19, 2010, the petitioner retired from his work with the respondent; the parties concurred that this was a scheduled non-disability related and seniority based retirement rather than a disability pension or the like.

On September 29, 2010, the petitioner saw Dr. Barr in a postoperative follow-up appointment. He was still using a cane, but could walk without it. Dr. Barr recommended weaning off the cane and prescribed gradual reduction of the Vicodin and thereafter to a non-narcotic pain medication. He was instructed to return for X-rays in a year but otherwise discharged from active care. PX1, red tab #1.

On September 22, 2011, the petitioner saw Dr. Barr. At that point the petitioner "states he is doing well, has no pain or problems." He had ceased use of the cane. The petitioner reported some left hip pain, but was not ready for surgical intervention. X-rays demonstrated good positioning of the hip and he had good range of motion and no limp. He was instructed to return for a routine X-ray series in two years or to call if needed. PX1 red tab #1. The petitioner did not return to Dr. Barr.

Dr. Barr testified in deposition on October 14, 2011. See PX2. He opined that the petitioner would have effectively reached MMI as of September 30, 2010. He

testified that the avascular necrosis had predated the injury at work, but that the accident had played a part in accelerating the petitioner's surgery. However, he admitted that the collapse of the femoral head was due to the avascular necrosis.

Dr. Williams testified in deposition on November 30, 2011. See RX1. He opined that the avascular necrosis was a preexisting and progressive condition, and that the injury in October was a temporary injury only. He opined it would not have caused the collapse of the femoral head, as the femoral head was intact at the time of the December MRI and that the collapse occurred in January, months after the injury. He agreed that the surgery was appropriate, but that the incident at work did not cause the surgery.

From November 2010 through May 2012, the petitioner periodically treated at Norris City Health Clinic, the primary reasons for which involved chronic and persistent pain in his back and left hip. Diagnoses provided included arthritis and ankylosing spondylitis, for which he was treated with medication, including narcotic pain medication. See PX1, Red Tab 11.

The petitioner died of an accidental overdose of hydrocodone on September 26, 2012; the parties stipulated his death was not related to the accident at issue. See PX4. He was never married and left two adult children, Shane Eric Craft and Cory Alan Kime, who were both adults on the date of the accident. See PX6. Mr. Craft was appointed administrator of the petitioner-decedent's estate and testified at the hearing. PX5. Neither son lived at home at the time of the accident or the date of death. Neither son was financially dependent on the petitioner-decedent. Mr. Craft stated that to his observation the petitioner was less active following the accident than before.

OPINION AND ORDER

Causal Relationship to the Injury

A claimant has the burden of proving by the preponderance of credible evidence all elements of the claim, including a causal connection to the employment accident. See, e.g., *Parro v. Industrial Commission*, 260 Ill.App.3d 551 (1st Dist. 1993). The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill.2d 24 (1977).

The physicians in this matter are in accord that the petitioner had a singificant preexisting condition of avascular necrosis of the hip. The Arbitrator has reviewed both the treating records and the deposition of Dr. Barr; while Dr. Barr's deposition demonstrates patient advocacy, his earlier skepticism is more persuasive and is further corroborated by the well-reasoned opinions of Dr. Williams, which are supported by the findings of chronic conditions consistent with the claimant's age and health. Moreover, the trauma suffered by the petitioner did not cause fracture or dislocation, which would be consistent with the collapse of the femoral head. The Arbitrator is persuaded by the fact that the collapse of the femoral head was not present in December 2009 when the

MRI occurred, and took place months after the injury. The Arbitrator finds that the collapse of the femoral head and the resultant hip arthroplasty were not causally related to the accident of October 2009, but were rather the natural and inevitable result of the petitioner's idiopathic pre-existing and progressive condition.

Medical Services Provided

Medical costs related to initial diagnosis and treatment were paid. The respondent shall hold the petitioner-decedent's estate harmless from any recoupment efforts from any group carrier relative to those payments. The medical services provided with regard to his hip replacement surgery are not causally related, and they are denied.

Temporary Total Disability

The respondent has stipulated TTD to be due and owing from October 26, 2009, through March 29, 2010, apparently when they received Dr. Williams' assessment. This is a period of 22 weeks. The Arbitrator finds this stipulation binding and awards this period of temporary disability benefits to the claimant, a total value of $12,256.20. The Arbitrator notes that the respondent had previously paid TTD prior to trial in the amount of $12,256.86, thus extinguishing its TTD liability.

With regard to the asserted period of Temporary Total Disability following March 29, 2010, as well as any issue as to TTD eligibility following voluntary retirement, the Arbitrator's finding as to causal connection renders such issues moot.

Nature and Extent of the Injury, Dependency and Inheritor's Benefits under 8(e) 19 and/or 8(h), and Potential Abeyance of Benefits Following Claimant's Death

Given the above findings, these issues have been rendered moot.

14IWCC0935

ILLINOIS WORKERS' COMPENSATION COMMISSION
PETITION FOR REVIEW OF ARBITRATION DECISION

To appeal an arbitration decision, file two copies of this form within 30 days of receipt of the decision.

RICHARD A. MUNDY
ployee/Petitioner

Case # 10 WC 43539

CITY OF WEST FRANKFORT
ployer/Respondent

e petitioner ☒ respondent ☐ requests the Commission to review the arbitration decision for this case,
:d on 01/08/2014 and received on 01/13/2014, and to take the following steps:

Furnish a transcript of the arbitration hearings, including all exhibits, to be presented to the Commission.

I guarantee to pay for the cost to prepare the transcript within 30 days from the court reporter's written request, even if I later withdraw this appeal, and enter myself as surety therefor. *Note:* The first party to file a petition will be charged fo the cost to prepare the transcript (original rate).

Provide 1 copy/copies of the transcript. I similarly guarantee payment at the copy rate.

Extend the time allowed to file the transcript or the agreed statement of facts by 30 days past the time allowed by statute or stipulation.

Consider the issues checked below to which I take exception:

ACCIDENT
- ☐ Did it occur?
- ☐ Did it arise out of employment?
- ☐ Was it in the course of employment?
- ☐ Is the date correct?

BENEFIT RATES
- ☐ Are the benefit rates correct?
- ☐ Are the wage calculations correct?

EMPLOYMENT
- ☐ Was there an employer-employee relationship?

JURISDICTION
- ☐ Does the Commission have jurisdiction?

MEDICAL EXPENSES
- ☒ Is there a causal connection?
- ☐ Is the charge reasonable?
- ☐ Was the treatment reasonably necessary?
- ☐ Is prospective medical care necessary?

NOTICE
- ☐ Was the respondent given proper notice?

OCCUPATIONAL DISEASE
- ☐ Was there an exposure?
- ☐ Was there a disease?
- ☐ Did it arise out of employment?
- ☐ Was it in the course of employment?
- ☐ What was the last date of exposure?

OTHER (explain) ____

PENALTIES AND FEES
- ☐ Section 16
- ☐ Section 19(k)
- ☐ Section 19(l)

PERMANENT DISABILITY
- ☒ Is there a causal connection?
- ☒ What is the nature and extent of th disability?

STATUTE OF LIMITATIONS
- ☐ Was the case filed within the statute of limitations?

TEMPORARY DISABILITY
- ☐ Is there a causal connection?
- ☐ Is the duration of the disability correct?

Oral argument: Requested ☒ Waived ☐

ıature

Douglas N. Dorris (250)
ıe (please print; attorneys, include IC attorney code#)

(618) 993-2616
Telephone number

300 West Main Streeet
Street address

Marion, IL 62959
City, State, Zip code

14IWCC0935

ILLINOIS WORKERS' COMPENSATION COMMISSION
APPLICATION FOR ADJUSTMENT OF CLAIM (APPLICATION FOR BENEFITS)

ATTENTION. Please type or print. Answer all questions. File three copies of this form.

Workers' Compensation Act ☒ Occupational Diseases Act ☐ Fatal case? No ☒ Yes ☐ Date of death ____

RICHARD A. MUNDY
Employee/Petitioner

v.

CITY OF WEST FRANKFORT
Employer/Respondent

Case # (Office use only) 10WC043539

Location of accident or last exposure: **West Frankfort, IL** (City, State)

Richard A. Mundy
Injured employee's name [i]

2555 Gordon Lane, West Frankfort, IL 62896
Street address, City, State, Zip code

City of West Frankfort
Employer's name

201 East Nolen, West Frankfort, IL 62896
Street address, City, State, Zip code

Employee information: Social Security # **318-50-0377** Male ☒ Female ☐ Married ☐ Single ☒

Dependents under age 18 **0** Birthdate **12/18/1953** Average weekly wage $ **840**

Date of accident [ii] **10/23/2009** The employer was notified of the accident orally ☒ in writing ☒.

How did the accident occur? **Stepping off backhoe and right leg slipped in mud and splayed out.**

What part of the body was affected? **Right hip/leg.**

What is the nature of the injury? **Injury to right hip/leg.** Return-to-work date [iii] ____

Is a *Petition for an Immediate Hearing* attached? Yes ☐ No ☒

Is the injured employee currently receiving temporary total disability benefits? Yes ☐ No ☒

If a prior application was ever filed for this employee, list the case number and its status ____

ATTENTION, PETITIONER. This is a legal document. Be sure all blanks are completed correctly and you understand the statements before you sign this. Refer to the Commission's *Handbook on Workers' Compensation and Occupational Diseases* [iv] for more information.

Signature of petitioner

11/04/2010
Date

APPEARANCE OF PETITIONER'S ATTORNEY
Please attach a copy of the *Attorney Representation Agreement.*

Signature of attorney

300 West Main Street
Street address

Douglas N. Dorris (250)
Attorney's name and IC code # [v] (please print)

Marion, IL 62959
City, State, Zip code

Howerton, Dorris & Stone
Firm name

(618) 993-2616
Telephone number

E-mail address

RECEIVED
WORKERS' COMP COMM'N
2010 NOV -9 AM 11:19

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.

nie Franklin, affirm that I delivered ☐ mailed with proper postage ☒

city of Marion, Illinois, a copy of this form

)0 PM on 01/29/2014 to each party at the address(es) listed below.

nes K. Keefe, Jr.
efe and De Pauli, P.C.
Executive Drive
rview Heights, IL 62208

Signature of person completing *Proof of Service*

l and sworn to before me on 1/29/14

Public

"OFFICIAL SEAL
RACHAEL L SHURTZ
Notary Public, State of Illinois
My Commission Expires: 07/25/2016

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.
If you prefer, you may submit the front of this application form with the *Proof of Service* on a separate page.

14IWCC0935

I, **Pennie Franklin**, affirm that I delivered ☐ mailed with proper postage ☒

in the city of **Marion, Illinois,** a copy of this form

at **5:00** PM on **11/04/2010** to the respondent listed on this application and to each

additional party, if any, at the address listed below.

Pennie Franklin
Signature of person completing *Proof of Service*

Signed and sworn to before me on 11/4/10

Rachael L Shurtz
Notary Public

"OFFICIAL SEAL"
RACHAEL L SHURTZ
Notary Public, State of Illinois
My Commission Expires: 07/25/2012

---

[i] In most cases, the injured employee files this application and is referred to as the petitioner. If the injury was fatal, or if the worker is a minor or incapacitated, another person (as allowed by law) may file. In those cases, the person filing the application is the petitioner, and the worker is referred to as the injured employee. Please complete information related to age, etc., for the injured employee.

[ii] This may be the date of the accident, last exposure, disability, or death.

[iii] If the employee has not returned to work, leave this space blank.

[iv] The Commission publishes a handbook that explains the workers' compensation system. If you would like a copy, please call any Commission office.

[v] The Commission assigns code numbers to attorneys who regularly practice before it. To obtain or look up a code number, contact the Information Unit in Chicago or any of the downstate offices at the telephone numbers listed on this form.

14IWCC0935

ILLINOIS WORKERS' COMPENSATION COMMISSION
REQUEST FOR HEARING

ATTENTION. Please give this form to the Arbitrator after you obtain a trial date.

Case # 10 WC 43539

RICHARD MUNDY
Employee/Petitioner

v.

CITY OF WEST FRANKFORT
Employer/Respondent

Consolidated cases: _____

Setting Herrin

Petitioner and Respondent are prepared to try this matter to completion on 10/7/13, unless the Arbitrator approves other arrangements.

1. Petitioner claims that, on 10/23/09, Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act, and their relationship was one of employee and employer.

   Respondent agrees ☒ disputes ☐ .

2. Petitioner claims that, on the above date, he or she sustained accidental injuries or was last exposed to an occupational disease that arose out of and in the course of employment.

   Respondent agrees ☒ disputes ☐ .

3. Petitioner claims Respondent was given notice of the accident within the time limits stated in the Act.

   Respondent agrees ☒ disputes ☐ . If in dispute, Petitioner states that on _____, notice was given to _____, with the job title _____.

4. Petitioner claims his or her current condition of ill-being is causally connected to this injury or exposure.

   Respondent agrees ☐ disputes ☒ . [Death agreed unrelated]

5. Petitioner claims his or her earnings during the year preceding the injury were $ 43,453.80 approximately, and the

   average weekly wage, calculated pursuant to Section 10 of the Act, was $ 835.65.

   Respondent agrees ☒ disputes ☐ and claims _____

6. At the time of injury, Petitioner was 55 years old; married ☐ single ☒; with 0 dependent children.

   Respondent agrees ☒ disputes ☐ and claims _____

7. Petitioner claims Respondent is liable for the following unpaid medical bills: *Attach a list, if necessary.*
   Dr. Roland Barr $8,623.36; Brigham Anesthesia $1,615.00; Cape Radiology $62.48; Memorial Hospital $37,863.94; Dr. Bob Thompson $176.42; Alpha Home Health Care $32.25; Norris City Health Clinic $374.00. Petitioner paid $1,094.90 to Fred's Xpress Pharmacy and $410.00 to Norris City Health Clinic.

   Respondent agrees ☐ disputes ☒ and claims _____ TO PETIONER IF LIABLE

   Respondent claims it paid $ IF ANY in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

   Petitioner agrees ☑ disputes ☐ and claims _____

Arb I

8. Petitioner claims to be entitled to *(Attach a sheet if necessary to list additional periods.)*

TTD period(s): **10/24/09 - 9/29/10 (340 days)**, representing **48.571** weeks.
First day of lost time through Last day of lost time

Respondent agrees ☐ disputes ☒ and claims **Petitioner was entitled to receive TTD from 10/26/09 - 3/29/10 (154 days), 22 weeks @$557.10 per week = $12,256.86, which Respondent has paid.**

TPD period(s): _____, representing _____, weeks.
First day through Last day

Respondent agrees ☐ disputes ☐ and claims _____

Maintenance period(s): _____, representing _____ weeks.
First day through Last day

Respondent agrees ☐ disputes ☐ and claims _____

9. Respondent claims it paid $**12,256.86** in TTD, $ **0** in TPD,

$ _____ in maintenance, $ 4,583.25 in nonoccupational indemnity disability benefits,

and $_____ in other benefits, for which credit may be allowed under §8(j) of the Act.

Petitioner agrees ☒ disputes ☐ and claims _____

10. The nature and extent of the injury is ☒ is not ☐ in dispute.

11. Petitioner claims to be entitled to penalties/attorney's fees under §19(k) ☐ §19(l) ☐ and/or §16 ☐.
Petitioner has ☐ has not ☒ filed a penalty petition.

12. A petition for attorney's fees by a former attorney is ☐ is not ☒ pending. Petitioner's attorney has notified the former attorney of the date of this hearing.

13. Other issues, not listed above, are: Inhertance / Liens

14. STENOGRAPHIC STIPULATION. Both parties agree that if either party files a *Petition for Review of Arbitration Decision* and orders a transcript of the hearings, and if the Commission's court reporter does not furnish the transcript within the time limit set by law, the other party will not claim the Commission lacks jurisdiction to review the arbitration decision because the transcript was not filed timely.

☒ A written decision, including findings of fact and conclusions of law, is requested pursuant to Section 19(b).

10/8/2013
Date submitted

Signature of Petitioner or Petitioner's attorney

Douglas N. Dorris (250)
Attorney's name and IC code #

Howerton, Dorris & Stone
Name of law firm

300 West Main Street
Street address

Marion, IL 62959
City, State, Zip code

(618) 993-2616 _____
Telephone number Email address

CCMSI
Name of Respondent's insurance or service company

Signature of Respondent or Respondent's attorney

James K. Keefe, Jr.
Attorney's name and IC code #

Keefe and De Pauli, P.C.
Name of law firm

#2 Executive Drive
Street address

Fairview Heights, IL 62208
City, State, Zip code

(618) 624-2444 _____
Telephone number Email address

NOTE: The arbitration decision will be sent by certified mail to the addresses listed above. IC9 p. 2

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

Carlos Maldonado,

Petitioner,

vs.

NO. 05WC 19054 & 06WC 07499

Organics/Lagrange Inc.,

14IWCC0936

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions 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, causal connection, medical expenses, prospective medical care, penalties and fees, permanent disability, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

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

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the 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 3 1 2014
SJM/sj
o-10/2/2014
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

14IWCC0936

MALDONADO, CARLOS
Employee/Petitioner

Case# **05WC019054**

06WC007499

ORGANICS/LAGRANGE INC
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:

1042 OSVALDO RODRIGUEZ PC
1010 LAKE ST
SUITE 424
OAK PARK, IL 60301

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

14IWCC0936

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)

CARLOS MALDONADO,
Employee/Petitioner

Case # **05 WC 19054**

v.

Consolidated cases: **06 WC 07499**

ORGANICS/LAGRANGE, INC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **LYNETTE THOMPSON-SMITH**, Arbitrator of the Commission, in the city of **CHICAGO**, on **March 1, 2013** and **March 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, **April 15, 2005**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **55,069.04**; the average weekly wage was $ 1,059.02.

On the date of accident, Petitioner was 49 years of age, married with one dependent child.

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

Respondent shall be given a credit of $17,502.80 for TTD, $0 for TPD, $ 0 for maintenance, and $0 for other benefits, for a total credit of $ 17,502.80 .

Respondent is entitled to a credit of $12,881.32 under Section 8(j) of the Act.

ORDER
As Petitioner has failed to prove, by a preponderance of the evidence, that his current condition of ill-being is causally related to the April 15, 2005 accident, Respondent shall Petitioner temporary total disability from April 15, 2005 to October 24, 2005.

Respondent shall pay Petitioner all necessary and related medical bills pertaining to treatment for his lower back from April 15, 2005 to October 24, 2005.

Petitioner failed to prove by a preponderance of the evidence that he is entitled to any prospective medical care regarding his lower back and therefore none is awarded pursuant to the Act.

No penalties or attorney's fees 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.

L. Thompson Smith
Signature of Arbitrator

May 20, 2013

ICArbDec19(b)

MAY 20 2013

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) medical bills; 3) payment of temporary total disability; 4) attorney's fees; 5) penalties; and 6) future medical treatment. *See*, AX2.

Previous history of lower back injuries

The parties stipulated that at the time of the subject accident, Petitioner was 49 years old and injured in the course of his employment with Respondent on April 15, 2005. The petitioner testified at trial that he had a chronic back problem. He originally injured his back on February 5, 1992, while attempting to roll a 450-pound drum, at work. Following that injury, Dr. Charles Slack treated him for complaints of back pain. He testified that at that time he gave Dr. Slack a history of radiating pain in both legs. He underwent an MRI of his lumbar spine on February 18, 1992, a myelogram and post-myelogram CT scan on May 28, 1992. Petitioner testified that Dr. Slack performed a lumbar laminectomy on July 13, 1993. The petitioner filed a workers' compensation claim, i.e. case number 92 WC 10490 for that February 5, 1992 accident, which settled for 60% loss of use of a person as a whole.

The petitioner testified that he presented to Dr. Slack again approximately eleven (11) years later, on July 28, 2004. At that time, he told the doctor that he was having severe lumbar back pain, radiating to his calf and that this pain started two months, earlier while playing softball. On July 28, 2004, Dr. Slack prescribed a lumbar MRI, which Petitioner underwent on August 26, 2004. This MRI was interpreted as revealing a broad-based left paracentral disc herniation at L5-S1; with possible compression of the left nerve root with facet degenerative changes at L4-L5; and with compression of the right L5 lumbosacral nerve. He returned to Dr. Slack complaining of back pain on November 3, 2004; and was treated and released to return to work in a light duty capacity; with a 15-pound lifting restriction.

April 15, 2005 accident

Petitioner testified that he injured his back at work on April 15, 2005, when he slipped and fell forward while descending wet stairs; hitting his lower back against a ladder. Petitioner was taken by ambulance to St. Francis Occupational Health ("St Francis"). He underwent x-rays of his lumbar spine and was diagnosed with low back contusion/ strain. He was given Ibuprofen and Flexeril. *See,* PX16.

On April 18, 2005, Petitioner again presented to St Francis and the doctor conducted an examination including a negative straight leg-raising test. On that date, he was released to return to work, with restrictions of no lifting over 20 pounds; and limited bending, stooping or twisting. Petitioner testified that Respondent accommodated those restrictions.

On April 25, 2005, the doctors at St. Francis referred Petitioner to Dr. Sclamberg. On April 26, 2005, Dr. Sclamberg prescribed an MRI. On May 2, 2005, Petitioner presented to his family physician, Dr. Knapp, who also prescribed an MRI, which Petitioner underwent on May 3, 2005, at St. Francis Hospital.

On May 5, 2005, Dr. Sclamberg referred Petitioner to Dr. Foydel who took him off work and administered epidural steroid injections to Petitioner's lower back, on May 11, 2005, and June 1, 2005. Petitioner stated that he experienced only slight improvement from the injections and that the pain was still radiating into his right heel, with numbness in the right leg. On June 25, 2005, Petitioner underwent another MRI of the lumbar spine, which was interpreted as revealing a broad-based rightward disc protrusion or asymmetric disc bulging, contacting the right S1 nerve root, at the L5-S1 disc level. On July 6, 2005, Dr. Slack examined Petitioner and recommended lumbar disc excision surgery.

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On August 22, 2005, Dr. Andrew Zelby, examined petitioner, at Respondent's request, for purposes of an independent medical examination ("IME"). In addition to conducting a physical examination, Dr. Zelby took a medical history from Petitioner and reviewed his medical records. He initially concluded that the petitioner's complaints were consistent with a right S1 radiculopathy and a subsequent herniated disc, at L5-S1, which appeared to be related to his work injury. He noted however, that the petitioner told him that he did not have recurrent leg symptoms until after the work accident, which was not accurate, based on his medical records from Dr. Slack. Dr. Zelby then requested that he be allowed to compare the MRI films from August 2004 and June of 2005 to see if there was any interval change. Dr. Zelby stated that if there was an interval change, then petitioner's work injury did result in the need for surgery. If, on the other hand, there was no interval change, then his injury was related to the 2004 softball injury.

Dr. Zelby reviewed the petitioner's August 26, 2004 MRI of the lumbar spine with and without contrast and on October 24, 2005 and issued an addendum report. The doctor concluded that the Petitioner did have right S1 radiculopathy from a herniated disc at L5-S1. He went on to state that Petitioner had both the radicular symptoms and the same herniated disc on his August 2004 MRI; and that this disc herniation and the radicular symptoms were related to the herniation from playing softball, in June of 2004. The doctor now concluded that Petitioner's current complaints were related to that same disc herniation seen on the 2004 MRI and that it had undergone no interval change. He stated that Petitioner's need for the prescribed surgery was related to a disc herniation that occurred because of his softball activities, and not his work injury. On December 20, 2005, Dr. Slack performed L5-S1 re-exploration surgery. *See,* RX4 & 5, pgs. 13-15.

On August 27, 2007, when Dr. Zelby's deposition was taken, he testified that when he requested the petitioner's medical history, the petitioner did not report a

history of the 2004 softball injury. He indicated that the history petitioner provided to him was that he did not have recurrent leg symptoms until after his April 15, 2005 work injury; and that that information was inaccurate, based on the medical records that he reviewed. Dr. Zelby also testified that the petitioner's current condition, regarding his lower back, was not related to the April 15, 2005 work accident. *See,* RX3 & 5 at p.7.

On February 16, 2006, Petitioner received a job offer from DSM Nutritional Products. Petitioner refused that job offer and according to the subpoenaed records from the company, the job paid $939.00 per week; and the petitioner refused the offer because of "some family problem." *See,* RX8.

Post-operatively, Petitioner underwent a functional capacity evaluation ("FCE") on April 25, 2006 after which Dr. Slack found him to be at maximum medical improvement ("MMI") except for needing medication.

On February 2, 2007, the deposition of Dr. Slack was taken and a careful reading of the transcript elicits the following facts:

1) Dr. Slack has been Petitioner's treating doctor and surgeon since February 10, 1992 and has examined and treated all three (3) of his back injuries discussed herein, i.e. the 1992 work injury, which required surgery, the Arbitrator notes that the operative report was never provided; the 2004 softball injury; and the 2005 work injury;

2) That in all three injuries Dr. Slack found that the petitioner's right-sided straight leg raising pain threshold was 45 degrees;

3) Diagnostic tests were performed on Petitioner's lumbar region in each case which showed a central disc herniation at L5-S1 and right-sided disc protrusions with lateral recess stenosis, more on the right side;

4) In the 2004 softball incident Dr. Slacker concluded that the petitioner had persistent right-sided radiculopathy, with L4-5 hypertrophy and the MRI revealed a broad-based left paracentral disc herniation a L5-S1 with possible

compression of the left nerve root with facet degenerative changes at L4-L5, with compression of the right L5 lumbosacral nerve;

5) On November 3, 2004, Dr. Slack advised the petitioner to work in a light duty capacity and imposed a 15 pound lifting restriction;

6) After the April 15, 2005 work accident Dr. Slack diagnosed the petitioner as having a persistent right-sided radiculopathy due to recurrent herniated lumbar disc at L5-S1;

7) On November 9, 2005, Dr. Slack noted that the petitioner "clarified the situation" by telling him that he had returned to work in a full duty capacity, without restrictions, in January of 2005; even though Dr. Slack had not taken him off those restrictions;

8) On December 20, 2005, Dr. Slack performed a right-sided excision of a recurrent disc herniation, at L5-S1;

9) Dr. Slack bases his opinion that the 2005 work accident necessitated the second surgery and the petitioner's condition was not related to the 2004 softball incident because, in his opinion, the 2004 MRI did not show a right-sided herniation. It is his opinion that the MRI showed right-sided post-surgical changes and degenerative facet joint changes, subsequent to the April 2005 accident. The subsequent MRI showed a herniation on the right side. The doctor testified initially "if there were a herniation caused by the softball incident, it would have been apparent by the MRI of 2004, which it wasn't". Then he corrected himself and testified that after the softball incident, there was a herniation but it was on the left side. *See,* PX7 pgs. 31-53.

On November 20, 2007, Petitioner returned to Dr. Slack and told the doctor he had been doing reasonably well, until he sneezed. Dr. Slack ordered another MRI.

The subpoenaed records from DSM National Products indicate that on June 29, 2008, Petitioner accepted a second job offer from the company. He began working there on June 29, 2008 with the job title of production operator. He was

earning $25.85 per hour and worked 40 hours per week. Petitioner testified that he began working at DSM Nutritional Products, in June of 2008; and that he left in January of 2009 because he "could not perform the job any more because he was having too much back pain." The subpoenaed records indicate that he worked approximately seven months for that company and then took a voluntary leave of absence from January 26, 2009, through November 30, 2009. Petitioner testified that he voluntarily resigned from DSM Nutritional Products on March 30, 2009 because he could not do the work. The Arbitrator notes that the records from DSM Nutritional Products do not contain any documentation of Petitioner's alleged inability to perform the job; in fact, they found him to be a very pleasant, competent worker and would hire him again, if the opportunity arose. *See*, RX8.

Dr. Zelby again examined petitioner, on May 7, 2010. The doctor also reviewed updated medical records. He concluded there was no reason for Petitioner to have an EMG. He also stated that Petitioner was not a candidate for any surgical intervention in that his MRI clearly documented an absence of any persistent neural impingement. The doctor stated that Petitioner's ongoing complaints and treatment; as well as any suggested disability or infirmities, were not related to any work injury or the sequelae of any work injury. Dr. Zelby stated that Petitioner may pursue all of the same vocational and avocational activities that he had pursued, prior to April of 2005; without any restrictions or any increased risk of injury. He stated that Petitioner's medical records clearly documented that he had the same symptoms prior to April of 2005 and worked without restrictions. Dr. Zelby concluded there was nothing about his condition that would preclude his ability to work in the same manner now. *See,* RX6.

January 6, 2011 intervening accident

The next time the Petitioner received any medical treatment related to his lower back was on January 6, 2011, when he presented to Christ Medical Center. He gave a history of slipping on black ice and landing on his back and right hand.

After the January 6, 2011, fall, he presented to Maximum Rehab Services and also treated with Dr. Kumar of Pain Management Center.

Petitioner also followed up with Dr. Slack on April 4, 2011. Dr. Slack diagnosed recurrent right-sided L5-S1 disc herniation and recommended considering lumbar disc excision. He referred Petitioner to Dr. Caleb Lippman who performed a right-sided L5-S1 facetectomy, foraminotomy on May 19, 2011. Thereafter, on November 14, 2011, Dr. Lippman performed lumbar laminectomy with fusion and instrumentation.

Petitioner continued to treat with Dr. Kumar and at Maximum Rehab Services. On March 30, 2012, Dr. Kumar administered injections. On April 3, 2012, Maximum Rehab Services found that Petitioner had reached a plateau and discharged him with a home exercise program. Petitioner saw Dr. Kumar in May of 2012 and November of 2012.

Petitioner has attached a list of medical bills to his Request for Hearing in the instant case and alleges that they are related to the April 15, 2005, accident. He has included bills, in the amount of, $151,148.20 from treatment following the January 6, 2011, fall i.e., bills from Maximum Rehabilitation Specialists, Ltd. and Advocate Christ Medical Center.

At trial, Petitioner denied ever making a statement to anyone that the medical bills incurred for treatment to his back after January 6, 2011, were related to the January 6, 2011, slip and fall accident on black ice, in the Baker's Square parking lot. On cross-examination, Respondent's attorney showed Petitioner a copy of his signed Answers to Interrogatories in case number 2011 L 13117C, Carlos Maldonado, Plaintiff, vs. American Blue Ribbon Holdings, LLC, d/b/a Baker's Square, Defendant, and impeached Petitioner's testimony. The Arbitrator notes that Petitioner's Answers to Interrogatories were signed by Petitioner on March 20, 2012, and were duly notarized. In those Answers to Interrogatories,

Petitioner listed $145,357.30 from Advocate Christ Medical Center as expenses that he sustained, as a result of the January 6, 2011, accident. He also listed medical bills from Maximum Rehabilitation Services, Ltd., as expenses he sustained, as a result of the January 6, 2011, accident. Accordingly, contrary to his testimony, he did make a prior statement that medical bills, incurred for treatment to his back after January 6, 2011, were related to the January 6, 2011 accident. *See,* RX1; PX22 & attachment to AX2.

Petitioner testified that he was fired by Respondent in 2006, because he was not able to perform his job duties. He was then on work restrictions of not lifting over thirty-five (35) pounds and the respondent was not able to accommodate those restrictions. He normally lifted bags of chemicals weighing approximately fifty (50) pounds. He also testified that he has not worked anywhere since he voluntarily stopped working for DSM Nutritional and that he currently collects Social Security Disability benefits for his back injury.

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CONCLUSIONS OF LAW

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

The Petitioner bears the burden of proving every aspect of his claim by a preponderance of the evidence. *See, Hutson v. Industrial. Commission*, 223 Ill App. 3d 706 (1992). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence..." *Shell Petroleum Corp. v. Industrial Commission*, 10 N.E. 2d 352 (1937). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment there is no right to recover. *Revere Paint & Varnish Corp. v. Industrial Commission*, 41 Ill.2d. 59 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that, which has more evidence for it than against it. *Spankroy v. Alesky*, 45 Ill. App.3d 432 (1st Dist. 1977).

To obtain compensation under the Illinois Workers' Compensation Act, an employee must show by a preponderance of credible evidence that he suffered a disabling injury arising out of and in the course of his employment. *See, Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 203, 797 N.E.2d 665, 278 Illinois Decision 70 (2003). For an employee's workplace injury to be compensable under the Workers' Compensation Act, (s)he must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *See, Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App.3d 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accidental injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. *See, Board of Trustees of the University of Illinois v. Industrial Commission, i.d.*

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n, 203 Ill. App. 3d 809, 815-16* (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

The Arbitrator finds that Petitioner has failed to establish, by a preponderance of the evidence, that his current condition of ill-being, is causally related to the April 15, 2005, accident. The Petitioner has established a causal relationship between the April 15, 2005, accident and a lumbar strain and temporary aggravation of pre-existing degenerative disc disease condition, which resolved on or about October 24, 2005.

In support of these findings, the Arbitrator relies upon the October 24, 2005 opinion of Dr. Andrew Zelby, a board-certified neurosurgeon. Dr. Zelby reviewed and compared the MRI films from August of 2004; following Petitioner's softball injury; and June of 2005, following Petitioner's April 15, 2005, work-related accident. Contrary to Dr. Slack's opinion, Dr. Zelby concluded that Petitioner's pre-existing L5-S1 disc herniation had undergone no interval change and that his need for the prescribed surgery at that time was, therefore, related to a disc herniation that had occurred as a result of his softball activities and not his work injury. The Arbitrator finds the opinions of Dr. Zelby to be more persuasive that those of Dr. Slack.

The Arbitrator further notes that Petitioner worked 40 hours a week for over seven months for a new employer, i.e., DSM Nutritional Products, from June 29, 2008 to January 26, 2009; with no documented complaints of pain. Additionally, the Petitioner received no active medical care during that period. *See,* RX8. The Arbitrator additionally notes that the Petitioner sustained an

intervening accident to his lumbar spine on January 6, 2011, when he slipped on black ice in a restaurant parking lot. Before that slip and fall, he had not received medical treatment for his back since August 20, 2009. After that January 6, 2011, intervening injury, Petitioner underwent significant medical treatment to his lumbar spine including a May 19, 2011, L5-S1 facetectomy and a November 16, 2011, lumbar fusion surgery.

For these reasons, the Arbitrator finds that the Petitioner has failed to establish, by a preponderance of the evidence, a causal relationship between the April 15, 2005, accident and his current condition of ill-being.

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

It is the burden of every Petitioner before the Workers' Compensation Commission to establish with evidence, every disputed issue litigated at trial, including the issues establishing Respondent's liability to pay benefits. *See, Board of Trustees of the University of Illinois v. Industrial Commission,* 44 Ill.2d 207 at 214, 254 N.E.2d 522 (1969), *Edward Don v. Industrial Commission,* 344 Ill. App.3d 643, 801 N.E.2d 18 (2003).

The Petitioner offered into evidence, various medical bills, at trial. Respondent objected to all bills for treatment after October 24, 2005, alleging that they were not causally connected to the subject accident and that Respondent is not liable for payment of the bills.

For the reasons stated in the preceding section on causation, the Arbitrator finds that Petitioner has failed to establish, by a preponderance of credible evidence, that Respondent is liable for medical bills for any treatment after October 24, 2005. The Arbitrator adopts Respondent's fee schedule analysis, which shows

the total amount of necessary and related medical bills, from April 15, 2005 through October 24, 2005, to be $ 7,725.21. Respondent has paid $3,161.75 in outstanding medical bills for Petitioner; and will receive a credit. *See*, RX9.

K. Is Petitioner entitled to any prospective medical care?

For the reasons stated in the preceding section on causation, the Arbitrator finds that the Petitioner has failed to establish, by a preponderance of the evidence, that he is entitled to prospective medical care. In support of this finding, the Arbitrator finds that the Petitioner reached maximum medical improvement relative to the lumbar strain no later than October 24, 2005. This is the date that Dr. Zelby concluded the Petitioner's herniated disc had no interval changes after comparing the MRIs taken in August 2004 and June of 2005.

L. What temporary benefits are in dispute?

Based on the preceding section on causation, the Arbitrator finds that the Petitioner has failed to establish, by a preponderance of credible evidence, that he is entitled to TTD after October 24, 2005; the date on which Dr. Zelby concluded that Petitioner's then condition of ill-being was causally related to his non-work-related softball injury. Therefore, Respondent shall pay to Petitioner any and all TTD owed from the date of accident until October 24, 2005; and will receive a credit for TTD already paid.

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that no penalties or attorney's fees are warranted in this matter, therefore none are awarded.