11 WC 44029
15 IWCC 332



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

CASEY FLECTHER,
Petitioner,

vs. NO. 11 WC 44029
15 IWCC 332

ASPLUNDH TREE EXPERT CO.,
Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

A Petition to Recall Decision pursuant to Section 19(f) of the Illinois Workers' Compensation Act to correct a clerical error in the Decision and Opinion on Review of the Commission dated May 7, 2015 having been filed by Petitioner herein, and the Commission having considered said Petition, the Commission is of the opinion that the Petition should be granted.

IT IS THEREFOR ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated May 7, 2015 is hereby recalled pursuant to Section 19(f) for clerical error contained therein.

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

DATED: JUN 5 - 2015

RWW/dw
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Ruth W. White

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

CASEY FLETCHER,

Petitioner,

vs.

NO: 11 WC 44029
15 IWCC 332

ASPLUNDH TREE EXPERT CO.,

Respondent.

## CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, permanent partial disability, wage differential, vocational rehabilitation, medical expenses both current and prospective, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

***Findings of fact and Conclusions of Law***

1. Petitioner testified he lives in Aurora. He was currently unemployed and he was last employed with Respondent until June 21, 2012. He was initially hired by Respondent on October 29, 2002. Respondent prunes trees as a contractor for Naperville Electric. Petitioner's employment was exclusively within Naperville. Respondent did not have an office there and Petitioner operated out of a car dealership where Respondent parked its trucks. Every morning he would be given his assignment of where to trim trees. Besides climbing and trimming trees, he also controlled traffic and cleaned debris. He had been foreman for six years, which entails the same activities but also includes delegation of duties and paperwork.

2. Petitioner further testified that on October 13, 2011, he was "cutting a tree down in an alleyway and part of the tree had fell into the resident's yard." The gate to the yard was locked and nobody was at home. Petitioner tried to retrieve the branch, which he estimated was 10-15,' and about 4" around, with a 10-12' pole pruner. As he was retrieving the branch he felt pain in his right wrist. He told the general foreman, Loren Peterson, that he "just tweaked the 'S' out of" his wrist. The injury occurred between 11 am and noon. He continued to work despite the pain. However, the general foreman excused him from performing his regular duties.

3. Petitioner reported to work the next day, but was unable to perform his regular duties because of the continued pain in his wrist. He was still able to delegate jobs and fill out the necessary paperwork. Petitioner continued to have pain in his wrist when he reported to work on October 21, 2011. He tried to resume his normal work activities. He had to yank the pole pruner pretty hard and he reinjured his wrist. He could not complete his task and came back to the ground. He called Mr. Peterson by radio telling him he injured his wrist again. Mr. Peterson told him to shut the crew down for the day and to rest over the weekend. He also stated he would take Petitioner to a doctor if it did not improve. On neither occasion did Mr. Peterson give him an accident report to fill out.

4. The following Monday, Mr. Peterson took Petitioner to Concentra Urgent Care. Petitioner reported the mechanisms of injury. Petitioner's hand and wrist were examined and x-rays were taken. The Concentra doctor provided Petitioner a brace and placed a 10-lb restriction on him. Respondent accommodated his restrictions. Later, Petitioner was restricted to no use of the right hand and Respondent was able to accommodate that restriction as well.

5. Petitioner also testified he had physical therapy which did not help his condition. An MRI was ordered but not authorized. He had the MRI on December 19, 2011, but through his personal insurance and not through workers' compensation. According to Dr. Giannoulias, the MRI did not show a tear and he was stumped. He raised Petitioner's weight limit to 40 lbs.

6. Petitioner saw Dr. Velagapudi, at Castle Orthopedics, on April 26, 2012. He administered an injection, reduced Petitioner's restrictions from 40 lbs to 20 lbs, and recommended a bone scan. The parties stipulated that the results of the bone scan were consistent with ulnar lunate impingement. Petitioner continued to work with whatever restrictions were imposed on him up to June 21, 2012. However, he "definitely" continued to experience pain in his wrist.

7. Dr. Velagapudi performed surgery on June 25, 2012. He released Petitioner to work with the restriction of one-handed work on July 3, 2012. Petitioner reported to Respondent, but was not allowed to work. After the surgery all benefits stopped. The parties stipulated that Respondent eventually paid temporary total disability benefits in the amount of $29,557.89 representing the period from June 25, 2012 to August 19, 2013. He received that payment about a year after the surgery.

8. Petitioner had a Functional Capacity Evaluation ("FCE") and Dr. Velagapudi released him from care with permanent restrictions based on the results. He recommended that Petitioner have the hardware removed, but that would have necessitated him being off work for about another month. Petitioner testified that Respondent informed him that he could return to work as a "ground person" as of April 15th. He filled out the necessary paperwork and had required the drug testing. However, he was then told that the ground job in Naperville had been eliminated. Petitioner believed he was offered a position as a work planner and flagger in Gary and Valparaiso Indiana, respectively.

9. Petitioner indicated that initially he did not take those offers because one was not union, he would lose seniority, there would be a cut in pay, and the distance required for travel; "it was like 84 miles one way from his home to Valparaiso." Later he tried to accept the work planner job in Gary after the deadline Respondent imposed, but his four phone calls were not returned. Petitioner has not returned to work with Respondent or anyone else within his restrictions. He was currently working with Vocamotive and wanted to continue. He has applied for "numerous" jobs through the agency and on his own.

10. Petitioner also testified that his wrist was "unfortunately" "pretty much the same way as before the surgery to a point. It's just that the steady pressure is relieved off the bone, but certain movements still cause it pain." He has a little limited range of motion. He takes over-the-counter Aleve "pretty much almost every day." His right hand has ¼ strength of the left. He writes with his left hand, but his right hand is his "power;" he is somewhat ambidextrous.

11. On cross examination, Petitioner testified as foreman he supervised the crew and delegated tasks. As foreman he was require to have a Class B CDL. He operated a boom on the truck which involved using hand levers about once a week or so. He used a computer in supervisory jobs. He did "not really" recall Dr. Giannoulias telling him his lunate capitate condition was degenerative in nature. Petitioner agreed he was able to work for a week after the first accident. He did not seek medical attention during that period and had no treatment between 1/19/12 and 4/26/12. He was able to work with restrictions up to his surgery and Respondent accommodated his restrictions.

12. Petitioner agreed that the FCE rated him capable of working at a medium physical demand level. Petitioner filed a grievance through the union to get his job back with Respondent. He did not look for work with any other employer for four months. He agreed that he was offered a job in Gary on August 5th @ $19.71 an hour and had until August 19th to accept it. He did not contact the person about accepting the job within that time period. He did not contact him until September 17th to accept the job. He was also offered a job as a flagger at the same rate of pay previously and turned down that job.

13. Petitioner worked his entire career with Respondent in Naperville. He applied for the job in Naperville and got it. However, he knew that other Respondent's employees were sent to different locations, but "pretty much within their region."

14. Petitioner became aware that Naperville was within the Indiana region, but he did not know why. Petitioner disagreed that he worked for another tree company in the summer of 2013. Getting a Class A CDL was not part of his vocational plan. Petitioner agreed that he previously worked in collections, as a forklift driver, a warehouse worker, and for Caterpillar as a supervisor for about two years.

15. Petitioner agreed he was referred to Vocamotive by his lawyer. He told the counselor that he had full range of motion in both wrists at the initial interview. Petitioner agreed that he was not unemployable and would "love to find a job." He disagreed that the jobs Respondent offered in Indiana were within 70 miles of his home.

16. On redirect examination, Petitioner testified that the FCE indicated he could lift 40 lbs occasionally; medium physical demand level requires a 50 lbs lifting capability. There are some medium level jobs he cannot perform. While he was at work after the first accident, he was told not to strain his right hand. He was able to climb the smaller trees but not the larger ones. He was not required to lift anything. Dr. Giannoulias imposed a 40-lb restriction when he released Petitioner from his care on January 19, 2012. Respondent accommodated that restriction through April of 2012. He was still having pain in his wrist which was why he sought treatment from Dr. Velagapudi.

17. Petitioner also testified that there were negotiations about his returning to his job in Naperville before he was offered the first job in Indiana. He would have accepted a job in Indiana if it included reimbursement for mileage. He agreed to accept the job in Gary after a pretrial conference. However, Respondent's representative never returned his calls.

18. Petitioner stated that every once in a while he has some pain in his wrist when turning a steering wheel. He has gripping restrictions and all tractor-trailers have manual transmissions. He has not tried to drive a manual transmission "up to this point." Respondent's employees are transferred temporarily to address storm damage.

19. On re-cross examination, Petitioner agreed he might have indicated on his job application that he was willing to travel; he said "anything to get the job, man." On re-redirect, Petitioner testified he was still willing to travel.

20. On questioning from the Arbitrator Petitioner testified he believed he was terminated by Respondent because he did not return to work after his FMLA leave. He was sent material for COBRA insurance. He applied for, and received, unemployment benefits. He no longer received unemployment benefits after he "received his back pay." As foreman for Respondent, he did the same job activities as other members of the crew. He has a plate and seven screws in his forearm.

21. Sergio Benavidez was called by Petitioner pursuant to subpoena. He was employed by Respondent on October 13 and October 21, 2011 in Naperville. He worked with Petitioner, who was his foreman. On October 13th, Petitioner's "boss," the general foreman, told Petitioner to get a branch out from a yard with a pruner; it was heavy.

22. After Petitioner started lifting the branch, Mr. Benavidez and the general foreman, Mr. Peterson, raised it over the 6' fence. Petitioner told the general foreman that his wrist hurt and "he [jokingly] told him to stop jagging off." Mr. Peterson then told Petitioner to take it easy. On October 21, 2011, Mr. Peterson told Petitioner to cut a branch of an oak tree. Petitioner tried but could not complete the task "because his hand was hurting." Thereafter, Petitioner continued to complain about pain in his wrist. He saw Petitioner come to work with a cast on his arm.

23. Lisa Helma testified she works for Vocamotive. She was referred to Petitioner by his lawyer. She interviewed Petitioner and evaluated his medical records including his FCE. Dr. Velagapudi agreed with the assessment in the FCE. Petitioner reported pain associated with raising his arms, gripping, twisting, and torquing motions, as well as driving. He reported decreased grip strength and a grinding and popping sensation over the hardware in his wrist. Petitioner did not complete high school but did later obtain a GED. Petitioner indicated he was not keyboard proficient and did not have any software skills. He used a computer at Caterpillar but simply to look up parts. He did not have any skills in mechanical repair.

24. Ms. Helma also testified a Class B CDL license can be valuable depending on the physical capabilities of the holder. Most jobs associated with the license involved medium physical demand capacity. Petitioner's restrictions do not qualify him for all medium physical demand jobs. Medium physical demand required up to 50 lbs occasional lifting and 25 lb frequent lifting, while Petitioner's maximum occasional and frequent lifting was rated at 40 and 20 lbs respectively. In addition, in the experience of the witness a lot of the jobs actually involve greater than medium physical demand. Petitioner also worked as a debt collector and forklift operator, which is also classified as at least medium physical demand job if not higher.

25. Ms. Helma prepared an initial assessment and recommended "testing by a certified vocational evaluator." However, that testing was not done because no rehabilitation plan was authorized. Vocamotive does not do such testing in house; it is outsourced. Petitioner's job as tree trimmer was classified as a semi-skilled heavy demand level job.

26. Ms. Helma concluded Petitioner did not have any transferable skills. She also concluded that the jobs Respondent offered Petitioner did not provide him a stable labor market. 59.3% of flaggers in Illinois work only part time and the mean hourly wage was $9.93. The only posting for such a job she found within 75 miles of Naperville was in Michigan City Indiana and that required the candidate to lift 50 lbs. In addition, in her experience, flaggers often also work as laborers, which require a very heavy physical demand capability. She could not find any reference to "job planner" positions.

27. Ms. Helma opined that based on her labor market survey, Petitioner would be qualified to work jobs that would pay between minimum wage and $10 an hour. He would benefit from vocational rehabilitation services. Besides the testing, she recommended computer training and "job seeking skills instruction and placement activities."

28. Petitioner has provided Ms. Helma job search reports. Petitioner is conducting a job search based on her targets as well as those identified in a job analysis report by Mr. Minnick, a vocational rehabilitation counselor retained by Respondent. He identified target jobs including bus driver and truck driver. Mr. Minnick simply identified available jobs without noting their requirements. She also thought other bus/truck driving jobs would exceed his 40-lb restriction. Some truck driving jobs required a Class A CDL, which requires a DOT physical and some required previous driving experience, which Petitioner did not have. Petitioner also did not have retail experience which would disqualify him for some jobs targeted by Mr. Minnick. She disagreed with Mr. Minnick's assessment of Petitioner's transferable skills.

29. On cross examination, Ms. Helma agreed that the first goal of vocational rehabilitation would be to return a client to his previous employment. Alternative employment from the employer within a client's restrictions would only eliminate the need for vocational rehabilitation as long as it represented a stable job market. She did not review an official job description of flagger for Respondent. She was not aware of the pay Respondent was going to pay Petitioner to work as a flagger. She did not contact Respondent to determine the job duties of a job planner. She agreed that Petitioner's jobs included supervising and interacting with customers; those are skills. Ms. Helma had no knowledge of Petitioner seeking employment other than with Respondent prior to her initial evaluation. She was not familiar with any "tree companies" and did not contact any about work planning positions. She was unaware that Respondent had 1,200 work planners on staff.

30. On redirect examination, Ms. Helma testified she believed Respondent was a national company and would not know where the work planning positions were located. A salary of $19.71 an hour would exceed the normal pay for work only as a flagger without a connection to other labor. His pay would be less if he lost that job with Respondent. Petitioner worked for Rent-A-Center for two months in which he had interaction with customers; "it takes a minimum of three months to develop a skill." She still opined that Petitioner would benefit from vocational rehabilitation training/counseling to obtain suitable employment within his restrictions.

31. On re-cross examination, Ms. Helma testified she did not contact Respondent about activities involved in work planning positions and did not know the internal stability of that position or the position of flagger in Respondent's company. She did not inquire about such positions at other tree trimming companies, but did an internet job search.

32. On re-redirect examination, Ms. Helma testified she did not find any work planning positions in her internet search. It would not be customary in her profession to contact tree companies through the yellow pages. Petitioner informed her that the jobs offered were no longer available, which was why he came to Vocamotive.

33. On re-re-cross examination, Ms. Helma testified she was not aware that Petitioner turned those jobs down.

34. Stephen Williams testified he worked for Respondent for 10 years, seven as a general foreman and the last three as regional manager. Respondent is a billion dollar company with 38,000 employees. He testified he puts 9,000 miles a month on his vehicle working for Respondent. He has employees who travel 80 one way to work every day. They do large circuits in Indiana on a contract with NIPSCO. "Once the circuit is complete" his "job is actually to bid more work," which is why he has his "work planners go out there and actually measure the trees, shoot the footage of the pole spans. They document exactly what" the witness needs to price a job. If an employee specifies a travel limit, Respondent tries to accommodate it. Petitioner's job application indicated he was willing to travel and in the question as to how far, he answered "open." Mr. Williams interpreted that answer to indicate "he'd go wherever we want him to go within the region or if there's a storm emergency."

35. Mr. Williams related that Respondent had only two contracts in which the trimmers are based in a single location; one in Naperville and one in Monticello Indiana. Those crews can be sent all over the US for storm duty. Last year they sent crews from Naperville to New York for storm duty. Such duty usually lasts two-four weeks, working seven days a week. Mr. Williams thought Petitioner probably had the opportunity to work storm duty, but he never was on it. Mr. Williams testified that a foreman had to know the business, deal with customers, utilities, and homeowners, and manage the crew. To the best of his knowledge Petitioner satisfies all the requirements needed to be a foreman.

36. Mr. Williams also testified it is not unusual for employees to drive 60-70 miles each way to a job. A job can take a couple of days or a couple of months. The employees would have to drive back and forth each day. Respondent does not reimburse for mileage; it is the nature of the business. Employees can carpool and they accept the travel because they can work overtime.

37. Mr. Williams further testified that if Respondent lost the Naperville contract, the workers would be offered jobs in Indiana because Naperville and Indiana is his region. Since the alleged injury, the witness has offered Petitioner three jobs. By letter dated May 21, 2013, he offered Petitioner a job as flagger in Valparaiso. It is cheaper to have his employees flag rather than outsourcing. Petitioner refused that job. He believed Petitioner had a week to respond to that offer. He was notified about the issue of mileage, but he had guys that travel that mileage all the time, and it was all highway miles. Petitioner turned down the job citing the length of commute.

38. By letter dated June 3, 2013, he offered Petitioner another flagger job in Valparaiso. Petitioner was given two weeks to respond, and he again rejected it. He uses flaggers every day somewhere in his region. It is actually a very skilled position because he has to know "proper radio communication," the laws of each state, where to stand, and that no one is allowed in the work zone when he is flagging. The flagger position with Respondent is "very stable." The duties of a flagger definitely comply with Petitioner's restrictions. There is no heavy labor involved in flagging for Respondent. The flagger job paid $1.32 cents an hour less that Petitioner's previous job.

39. By letter dated August 5, 2013, he offered Petitioner a job as work planner stationed out of Gary also at $19.71 an hour. He had to respond by August 19th. He would report there and go where he needed work planning. He could have to drive 10 minutes to a site or up to two hours, but he would get paid for it. It was not unusual for work planners to travel such distances. Petitioner would work four, 10-hour days a week. He offered Petitioner the job because he knew the business and requirements of various trimming jobs.

40. After Petitioner failed to respond, Mr. Williams hired someone else on August 26th at a rate of $16 an hour. He received a voicemail from Petitioner on September 17th indicating he would accept the job and to return the call if it was still available. He did not return the call because the job was no longer available. The job of work planner with Respondent is very stable. No job as work planner was currently available, but if one opened up he would offer it to Petitioner. To the best of Mr. Williams' knowledge Petitioner has not been terminated and the witness filled out no such paperwork.

41. In his 10 years with Respondent, Mr. Williams has never known of an employee failing the Class B CDL medical test. It took the witness three days to obtain a Class A CDL after having a Class B. The physical exam for a Class A license is exactly the same as that for a Class B. To the best of his knowledge Petitioner had never applied for a Class A CDL.

42. Mr. Williams explained that all competing tree companies employ flaggers and work planners. Respondent is much larger than its competitors; it is "the largest of all tree companies." The bigger companies would employ full time flaggers with no additional work requirements. It takes between three and six weeks to be certified as a flagger. It would only take a couple of hours training for Petitioner to be a work planner because of his experience. One does not have to be certified to be a planner but he has to be trusted.

43. On cross examination, Mr. Williams testified that each employee in Naperville was trained as a flagger "because they have to be self-regulated." They did not hire full time flaggers in Naperville. The foremen would handle trees that the less experienced trimmers felt uncomfortable trimming. There were other foremen other than Petitioner in Naperville. If one was not working with Petitioner, he would have to handle the difficult trees. The witness did not designate crews, the general foremen did; they come from the utility. There is one general foreman in Naperville and three crews consisting of two to three people. Petitioner could not be employed as a foreman because he would have to trim trees. There are no planners assigned to Naperville. The witness would bring one in from Indiana if he needed planning work done, but the general foreman pretty much does all the planning there.

44. Mr. Williams understood that Petitioner voluntarily terminated his employment when he did not return from FMLA leave in September 2012. Mr. Williams was transferred to his current region in 2011. In that period he had not transferred any employee from Naperville to Indiana. He did not specifically tell Petitioner the duties of a work planner, "because people with experience in trees should know what a work planner position is."

45. Mr. Williams explained that in the work planning job, Petitioner would have parked his car in Gary and then taken a company truck to his job location, as he did every day in Naperville. He would be paid for the time he was driving to his job but not driving to Gary. Petitioner never called and asked about the duties of a work planner or whether he would be working four-day weeks. Respondent has work planners in the ComEd area of Illinois, but that is not in Mr. Williams' region. If Petitioner wanted to be transferred to another region he would have to contact that region and ask them. He did not know if there were openings out of his region. There is not a high turnover rate for work planners and flaggers.

46. Mr. Williams also testified that Petitioner was not returned to work in Naperville because he could no longer climb trees and they did not want another ground person in Naperville. There was already one and the position was to be eliminated after her retirement.

47. Mr. Williams agreed the fact that Petitioner filled out paperwork to apply for work with Respondent and took a drug test indicated he wanted to return to work. He would have had to take a drug test for the jobs of flagger and work planner. Those offers were conditional on his passing the drug test. Flagger and work planner are not union positions. Naperville is the only place in his region that has union employees. Those jobs include retirement and health benefits, but that was not mentioned in the offer letters.

48. On redirect examination, Mr. Williams testified that no employee is guaranteed a job for life in Naperville and there is no union agreement about such a right. Respondent has no control of the number of people employed in Naperville; the utility determines the number of workers and the distribution of jobs. The witness is not in human resources, is not expected to explain job duty information in a job offer, and has never provided such information. Mr. Williams can hire within his region outside of Naperville, but he has no authority to hire somebody in any other region. Some employees in the ComEd region have to drive an hour and a half each way to and from work.

49. On re-cross examination, Mr. Williams agreed that while union membership does not provide any job guarantees, there were different termination procedures for union and nonunion employees; "union boys get more protection." There was a union grievance regarding Petitioner's termination. He has not worked in the ComEd region and the general foreman generally takes care of Naperville. He was not personally familiar with the ComEd region but they had more than 400 employees there. He has not had any discussion with human resources about Petitioner.

50. On re-redirect examination, Mr. Williams testified Petitioner's local union is based in Illinois and not Indiana. He was sure it was possible for Petitioner to seek employment in Illinois through his union. He could have applied for jobs with Respondent within Illinois. The witness has no say in the actions of the union and it would be Petitioner's responsibility to seek help from his union to obtain employment in Illinois. He had no knowledge of Petitioner seeking such help.

51. The medical records indicate that Petitioner treated at Concentra, on Respondent's referral, from October 31, 2011 through January 19. 2012. An MRI taken on 12/11/11, showed mild to moderate joint effusion and ulnar lunate degeneration. Dr. Giannoulias noted that Petitioner's symptoms had not improved with six physical therapy sessions and an injection.

52. On January 19, 2012, Dr. Giannoulias diagnosed lunate-capitate degenerative changes and noted that most of the symptoms were degenerative in nature. He had no pain over the TFCC. Dr. Giannoulias informed Petitioner that the condition would ultimately bother him with heavier activities. He recommended a 40-lb lifting/pushing/pulling restriction with no repetitive squeezing. Petitioner indicated that restriction could be accommodated at work. Dr. Giannoulias released him from care prn.

53. Thereafter, Petitioner sought treatment from Dr. Velagapudi at Castle Orthopedics. He ordered a bone scan and imposed a 20-lb lifting restriction. The bone scan was "compatible with provided history of right lunate impingement." On June 25, 2012, Dr. Velagapudi performed right ulnar shortening osteotomy for ulnar lunate abutment.

54. On November 19, 2012, Dr. Vender, a board certified orthopedic surgeon, testified by deposition. He performed a review of Petitioner's medical records at Respondent's request and later physically examined him. He noted the MRI showed changes in the lunate bone, which is associated with end-stage ulnar abutment indicative of a long developing degenerative process. "When you have a condition that is already present, use will change the level of symptomology. You'll have symptomology variance. You'll have ups and downs, temporary changes in the level of symptoms depending on how you use it." Dr. Vender opined that it had nothing to do with work, but anything he did with his hands.

55. Dr. Vender opined that Petitioner did not really suffer a sprain which represents a true acute injury. Rather he experienced TFCC wore out due to the chronic pressure of the underlying ulnar abutment syndrome. That is "the first thing that gets worn out" from the long-term pressure.

56. On cross examination, Dr. Vender disagreed that ulnar deviation can cause ulnar abutment; it is a degenerative condition. However, anything of sufficient force can aggravate it. Lifting something heavy is a normal activity and not an injury. He agreed that if somebody "were to rotate in a supinated, beyond what was normal" that could cause injury. A healthy joint can withstand normal repetitive stress indefinitely. A trauma "of sufficient magnitude that causes separate tissue damage to the wrist, aside from the underlying condition" could aggravate the condition.

57. On redirect examination, Dr. Vender testified he did not believe the medical records showed that Petitioner sustained any separate tissue damage. One would expect significant swelling from a sprain and some swelling would be present from the underlying condition. Knowledge of the height of the fence or that Petitioner used a utensil would not change his opinion he did not sustain a separate injury.

58. On re-cross examination, Dr. Vender did not remember whether the medical records identified swelling. He reviewed the MRI which showed some effusion. However, that may not be considered swelling if it were simply from his underlying condition. Dr. Vender agreed that Petitioner could not return to his job as tree trimmer after his physical examination, which was conducted after the surgery.

59. Petitioner's surgeon, Dr. Velagapudi testified by deposition on November 29, 2012, prior to Petitioner's FCE and prior to his last visit. Dr. Velagapudi is a certified orthopedic surgeon; over 50% of whose practice involves injury to the arm and mainly hand, wrist, and fingers. After his examination of Petitioner and a bone scan, he recommended an ulnar shortening osteotomy to take away about four mm sliver of bone from the ulna in order to eliminate the ulnar lunate from abutting against each other. The surgery was performed on June 25, 2012.

60. Dr. Velagapudi opined that in his work-related accidents Petitioner suffered an acute aggravation of the preexisting lunate impingement condition making it symptomatic. He based that opinion on the fact that apparently he was asymptomatic prior to his work incident. Dr. Velagapudi did not believe Petitioner would need prospective treatment. His permanent restrictions and ability to return to work in his previous job would be based on the results of the FCE.

61. On cross examination, Dr. Velagapudi agreed that edema should resolve within a year. However, he disagreed that Petitioner suffered only a temporary exacerbation because he complained of continued symptoms. Dr. Velagapudi explained that "bones together" which is the characteristic of the ulnar laminate abutment, generally "might do fine," but "if you have a sudden force between the two of them you now have an aggravation." He ordered the bone scan to determine "what the activity level is."

62. On October 31, 2013, in his last treating note, Dr. Velagapudi indicated Petitioner had an FCE on October 29, 2013 which was considered valid. "His strength testing really not anywhere as most appropriate to evaluate and that is that of 10 lbs on the affected side and 40 lbs on the opposite side." The deficit of strength on the affected side was ¼ of the other. The FCE concluded Petitioner could not return to work as a tree trimmer which was heavy labor. Petitioner was at maximum medical improvement but could consider removal of the hardware which would require him to off work for a couple of months.

63. On December 10, 2013, a vocational rehabilitation counselor, Mr. Minnick prepared a vocational assessment of Petitioner at Respondent's request. He criticized the evaluation of Ms. Helma and found Petitioner had transferable skills in management, customer service, and truck driving. He thought there was no basis for vocational testing or computer training because he already has transferrable skills. Rather he thought that Petitioner should convert his Class B CDL to a Class A which would increase his employability and earning potential. Mr. Minnick then included a Labor Market Survey. He concluded that as a Class B truck driver he could earn between $16.78 and $22.81 an hour.

In finding Petitioner sustained his burden of proving accident and causation, the Arbitrator based his decision on the weight of the testimonial evidence and medical records. He specifically found the causation testimony of Dr. Velagapudi more persuasive than that of Dr. Vender, whom he characterizes as not sufficiently familiar with Petitioner's work activity to make a causal opinion. In addition, Dr. Vender actually acknowledged that a significant trauma could aggravate his underlying condition.

Respondent argues the Arbitrator erred and that the testimony of Dr. Vender **"proved that an accident did not occur despite Petitioner's pain"** (emphasis in original). The condition was not work related because ***"anything Petitioner does with his hands could cause symptoms"*** (emphasis in original). Respondent also asserts that Petitioner's testimony was not credible. On causation, Respondent argues that Petitioner simply experienced the symptoms from his underlying condition in October of 2011, which does not connote causation.

The Commission agrees with the analysis of the Arbitrator regarding the issues of accident and causation. We note that Petitioner's report of accident was corroborated by Mr. Benavidez and Dr. Vender's opinion testimony was more persuasive than Dr. Vender. Dr. Vender seemed unclear that Petitioner had swelling soon after the accident, which would connote a traumatic injury causing tissue damage which he acknowledged could aggravate Petitioner's preexisting condition. The Commission also notes that Petitioner apparently worked in the heavy physical demand level occupation of tree trimmer for a period of nine years with the underlying condition without symptomology. It was only after the accidents that he had persistent symptoms leading up to his surgery. The Commission also agrees with the analysis of the Arbitrator that the medical treatment Petitioner received was necessary and reasonable. Therefore, the Commission affirms and adopts those portions of the Decision of the Arbitrator.

The Arbitrator awarded Petitioner 78 and 2/7 weeks of temporary total disability/maintenance benefits, representing the period between June 21, 2012, the date Respondent no longer would accommodate his restrictions after his surgery and the date of arbitration. The Arbitrator indicated that the job offers provided to Petitioner were basically sham offers which were made only in an attempt to limit Respondent's liability. The Commission disagrees with that characterization. Mr. Williams testified persuasively about the need of tree trimming companies to hire flaggers and work planners in their operations. These are real jobs fulfilling a real need on the part of Respondent. While the offers did require considerable travel on the part of Petitioner he had indicated that he was willing to travel and the distance he was prepared to travel was "open." In addition, long-distance travel appears to be endemic in the jobs associated with the business of trimming trees and it is evident that all of the jobs Respondent offered Petitioner were well within his restrictions. Finally, although the jobs offered Petitioner involved slightly less compensation than his previous job, ($1.32 an hour), that diminishment of income is relatively minor and Petitioner did not even make a demand that he be paid his previous salary in his new job. Rather by letter from his lawyer, he declined the job offers citing only the length of commute. The Commission finds that all three jobs Respondent offered Petitioner were reasonable within Respondent's industry. Therefore, the Commission modifies the Decision of the Arbitrator terminating temporary total disability benefits as of May 28, 2012, the date by which Petitioner had to accept the first offer of work within his restrictions.

The Arbitrator also awarded Petitioner a wage differential award of $317.47 a week. He based that award on his conclusion that the jobs Respondent offered Petitioner were sham offers and on the vocational assessment of Ms. Helma from Vocamotive. As we noted above the Commission disagrees with the characterization that the jobs Respondent offered Petitioner were sham offers. On the contrary, we believe they were reasonable in the context of Respondent's industry. In addition, we do not find the vocational assessment of Ms. Helma to be persuasive. Ms. Helma was not familiar with the tree trimming industry and the job classifications applicable to the industry.

Again, Mr. Williams testified that the jobs of flagger and work planner within Respondent's operation were "very stable," and they experienced very little attrition. In order to be entitled to a wage differential award, the claimant must show inability to return to his customary employment and a diminution of earning capacity. In the case now before the Commission, Petitioner has established that he cannot return to his previous job of tree trimmer. However, he has been offered employment within the field of his previous occupation at virtually the same rate of pay. The Commission concludes that the actual offers were more relevant than Ms. Helma's vocational assessment. Therefore, the Commission finds that Petitioner has not sustained his burden of proving that he is entitled to a wage differential award and vacates that award.

Petitioner appears to have had a good result from his surgery. Dr. Velagapudi noted excellent range of motion, no impingement, and declared Petitioner at maximum medical improvement four months after surgery. The FCE rated Petitioner to be able to work at a medium level of physical demand. Petitioner did not testify persuasively about any substantial persistent ongoing impairment. In looking at the record as a whole and taking into consideration Petitioner's age, occupation, medical records, and potential future earnings, the Commission concludes that Petitioner suffered the permanent loss of 30% use of his left hand.

In awarding more than $44,000 in penalties, the Arbitrator found that Respondent had not met its burden of proving it had reasonable belief to justify the non-payment of temporary total disability benefits of 16 and 3/7 weeks or outstanding medical bills of $8,954.17. The Commission does not believe the imposition of penalties is justified here. It is clear that Petitioner had a significant preexisting condition that arguably caused his impairment. In addition, Respondent had the accident/causation opinion of Dr. Vender, who is a respected hand surgeon, even if he may have an inaccurate conception of the legal standards for determining causation under the Act. Finally, Respondent paid more than $29,000.00 in medical expenses, and more than $29,500.00 in temporary total disability benefits some of which were incurred after Petitioner refused the first offer to return to work. Therefore, the Commission concludes that Respondent's actions were neither unreasonable nor vexatious in this case and vacates the award of penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $487.23 per week for a period of 48&6/7 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 $431.51 per week for a period of 61.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of the use of 30% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $$45,005.96 for medical expenses and $813.28 in vocational rehabilitation services subject to the applicable medical fee schedule under §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award for wage differential pursuant to §8(d)1 of the Act is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties of $20,903.70 and $23,450.00 pursuant to §§19(k) and 19(l) of the Act, respectively are vacated.

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

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

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

DATED: JUN 5 - 2015

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-4/22/15
46

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**FLETCHER, CASEY**
Employee/Petitioner

Case# **11WC044029**
12WC013097

**ASPLUNDH TREE EXPERT COMPANY**
Employer/Respondent

**15IWCC0332**

On 4/22/2014, 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.

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

0019 FAY FARROW & ASSOC
DONALD M PHELAN
1730 PARK ST SUITE 109
NAPERVILLE, IL 60563

4866 KNELL O'CONNOR DANIELEWICZ PC
BRADLEY C KNELL
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

15IWCC0332

15IWCC0332

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

**CASEY FLETCHER**
Employee/Petitioner

v.

**ASPLUNDH TREE EXPERT COMPANY**
Employer/Respondent

Case # 11 WC 44029

Consolidated cases: 12 WC 13097

An *Application for Adjustment 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 Wheaton and Chicago, on December 12, 2013, January 8, 2014, and 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 **Vocational rehabilitation.**

FINDINGS

On **October 13, 2011 and October 21, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$38,004.05**; the average weekly wage was **$730.85**.

On the date of accident, Petitioner was **36** 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 **$29,557.89** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$29,557.89**.

Respondent is entitled to a credit of **$29,024.42** under Section 8(j) of the Act.

ORDER

*TEMPORARY TOTAL DISABILITY*

Respondent shall pay Petitioner temporary total disability benefits of $487.23/week for 78 2/7 weeks, commencing June 21, 2012 to December 12, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $29,557.89 for temporary total disability benefits that have been paid from June 21, 2012 to August 19, 2013.

***Medical benefits***

Respondent shall pay reasonable and necessary medical services of $45,005.96 and reasonable and necessary vocational services of $813.28, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $29,024.42 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

***Permanent Partial Disability: Wage differential***

Respondent shall pay Petitioner permanent partial disability benefits, commencing December 13, 2013, of $317.47/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

***Penalties***

Respondent shall pay to Petitioner penalties of $20,903.70, as provided in Section 19(k) of the Act, and $23,450.00, 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

04-22-14
Date



APR 2 2 2014

15IWCC0332

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

| | | |
|---|---|---|
| CASEY FLETCHER,<br>Petitioner, | ) | |
| v. | ) | 11 WC 44029<br>12 WC 13097 |
| ASPLUNDH TREE EXPERT CO.,<br>Respondent. | ) | |

## I. FACTS

Petitioner was hired by Respondent on October 29, 2002 as a tree trimmer, corroborated in the Schedule Of Weekly Earnings (PX #1). Respondent is in the business of clearing tree limbs from power lines. Petitioner worked for Respondent exclusively in the City of Naperville from the date of hire until September 12, 2012, the date Respondent terminated Petitioner for not returning to full duty work on expiration of Family Medical Leave Act (FMLA) (PX #24) following surgery on his right arm after the injury he sustained at work.

Respondent did not maintain an office in the City of Naperville where Petitioner would report to work. Petitioner reported to work at an automobile dealer's parking lot in the City of Naperville where Respondent parked its trucks. Petitioner would drive one of Respondent's trucks to an area of Naperville where his work was assigned that day and he returned to the automobile dealer's parking lot at the end of the work day.

Petitioner and Respondent stipulate on the dates of October 13, 2011 and October 21, 2011, Petitioner and Respondent had an employee-employer relationship. Petitioner was working for Respondent as a Foreman and his duties included climbing trees, cutting branches, cleaning debris, roadside set up, supervising crew and preparing paperwork.

Petitioner testified on October 13, 2011 he reported to work, without right arm pain, and was assigned to work at an area of Ogden Avenue in Naperville, Illinois. At approximately 11:00 a.m. on that date, Petitioner sustained a work accident injury his right wrist and arm while using a pole pruner tool to lift a heavy branch, approximately 10 to 15 feet in length and 4 inch in diameter. At the time of the accident, Petitioner was standing in a tree 7 feet off the ground on one side of a fence and the branch he was lifting was on the other side of the fence on the ground. Petitioner reached over the 6 foot fence with the 10 foot pole pruner, lifted the branch off the ground to pull it over the fence and felt a pop and immediate pain in his right wrist and arm. Petitioner's general foreman, Loren Peterson and co-worker, Sergio Benavitez, were assisting Petitioner pull the heavy branch over the fence. Mr. Peterson and Sergio Benavitez witnessed Petitioner's work accident and injury to his right wrist and arm. Mr. Benavitez testified corroborating Petitioner's testimony describing the accident and injury. Mr. Peterson did not testify. After the accident, Mr. Peterson, told Petitioner to take it easy until his right arm felt better. Mr. Peterson did not offer Petitioner an accident report and Petitioner did not seek medical attention that day.

Petitioner testified he worked on easy tasks for Respondent until October 21, 2011. On this date, Petitioner attempted to cut tree branches off a tree using the 10 foot pole pruner for the first time since the October 13, 2011 injury. Petitioner was standing in an Oak tree gripping the pole pruner with his left hand and yanked the pruner cord with his right hand to cut a branch and felt immediate and severe pain in his right wrist and arm. Petitioner was unable to cut the branch and climbed down from the tree. Petitioner immediately reported the accident to the General Foreman, Loren Peterson, and Mr. Peterson told Petitioner he did not have to cut tree branches

but continue to work on his other Foreman duties. Again, Mr. Peterson did not offer Petitioner an accident report and Petitioner did not seek medical attention that day.

Petitioner testified his right wrist and arm pain failed to resolve and he sought medical attention on October 31, 2011 at Concentra Urgent Care (PX #2 p.5-16). Mr. Peterson drove Petitioner to Concentra Urgent Care for the medical evaluation. Petitioner saw Dr. Sonal Bhatt at Concentra Urgent Care that day and he reported the history of right wrist and arm injury at work on October 13, 2011. Dr. Bhatt ordered an x-ray as part of her examination which "demonstrated some angulation in the distal ulna." Dr. Bhatt assessed Petitioner's injury as "a right wrist sprain" and prescribed physical therapy at Concentra for two weeks and restrictions of "no lifting over 10 pounds, no pushing/pulling over 10 pounds of force and use of a wrist brace." (PX #2 p.6 and 14). Concentra records report Mr. Peterson was present and informed of Petitioner's diagnosis and restrictions. (PX #2 p.7-8). Petitioner returned to work with those modified activity restrictions.

On November 2, 2011, Petitioner returned to Concentra Urgent Care for follow up care and was examined by Dr. Julia Dyer. Dr. Dyer examined Petitioner, assessed "right wrist sprain" and continued physical therapy and work restrictions prescribed by Dr. Bhatt (PX #2 p.17). On November 10, 2011, Petitioner returned to Concentra Urgent Care reporting "no improvement with physical therapy" (PX #2 p.27). Dr. Mahmuda Mohsin examined Petitioner that day and his findings were "decreased grip strength, mild pain with motion and tenderness over the 2nd, 3rd and 4th metacarpal area and over the wrist joint." (PX #2 p.27) Dr. Mohsin modified Petitioner's work restrictions to "no use of right hand" (PX #2 P.31) and continued physical therapy (PX #2 p.27). On November 14, 2011, Petitioner returned to Concentra Urgent Care reporting "No improvement in right wrist/hand pain" (PX #2 p.35). On examination, Dr.

Bhatt reports "pain increases with twisting, lifting and direct pressure on medial part of right wrist." (PX #2 p.35). On this date Dr. Bhatt ordered an MRI of the right wrist and right hand, continued physical therapy and activity status to "no use of right hand" and "must wear brace." (PX #2 p.35-36). On November 23, 2011, Petitioner returned to Concentra Urgent Care reporting "physical therapy sessions have made the pain worse" (PX #2 p.45). Dr. Julia Dyer examined Petitioner on this date reporting "decreased active and passive range of motion all directions." Dr. Dyer discontinued physical therapy and Dyer continued work restrictions until MRI results (PX #2 p.45).

Petitioner testified on December 19, 2011 he obtained an MRI Scan of his right wrist and right hand at Fox Valley Imaging (PX #3) using his group health insurance plan. Petitioner returned to Concentra Urgent Care on December 23, 2011 with the MRI. The MRI findings report: "There is joint A effusion. There is degenerative change in the lunate with edema and cyst formation near the volar aspect. There is degenerative change of the capitate with edema and cyst formation" (PX #3). Dr. Bhatt referred Petitioner for orthopaedic evaluation after her examination findings and review of the MRI findings and Petitioner's ongoing pain (PX #2 p.58). Dr. Bhatt restricted Petitioner's activity status to "no use of right hand" (PX #2 p.59, 61 and 63) until orthopaedic evaluation.

On December 29, 2011, Petitioner saw Dr. Giannoulias at Occupational Specialists for an orthopaedic consultation. Dr. Giannoulias examined Petitioner's right wrist finding "tenderness over the Dorsum of the wrist and swelling over the palmer aspect of the ulnar pad of the wrist." (PX #2 p.65). Dr. Giannoulias assessed Petitioner's condition of ill-being as "right wrist pain with some mild metacarpal degenerative joint disease" (PX #2 p.65). Dr. Giannoulias injected Petitioner's lunate-capitate joint with Depo-Nedrol and Lidocaine that day, (PX #2 p.65) and

modified Petitioner's work activities to "no lifting over 5 pounds and no pushing and/or pulling over 5 pounds of force" (PX #2 p. 69 and 70). On January 19, 2012, Petitioner returned for follow up care with Dr. Giannoulias. Dr. Giannoulias' examination findings were consistent with previous findings and he released Petitioner from his care that day with restricted activity of "no lifting over 40 pounds, no pushing/pulling over 40 pounds of force, and no repetitive gripping with right hand" (PX #7).

Petitioner testified he continued to work for Respondent with the restricted activity prescribed by Dr. Giannoulias, however, he continued to feel right wrist pain performing work activities. Petitioner sought medical attention for his right wrist pain from Dr. Velagapudi at Castle Orthopaedics on April 26, 2012. Petitioner reported a history of an accident and injury at work consistent with the history reported to Concentra Urgent Care and complaint of right upper extremity pain, stiffness, numbness and tingling (PX #4 p.6 and 7). Dr. Velagapudi conducted an examination, reviewed the MRI from Fox Valley Imaging (PX #3) and assessed Petitioner's symptoms are "arising from lunate and ulnar impingement." (PX #4 p.7). Dr.Velagapudi recommended a bone scan limited to the right wrist and modified Petitioner's lifting restrictions to "no lifting over 20 pounds" (PX #4 p.7-8).

Petitioner testified he obtained a bone scan at Rush Copley Medical Center on May 18, 2012 (PX #4 p.10) using his group health insurance and returned to Dr. Velagapudi on May 30, 2012 with the bone scan. Dr. Velagapudi's assessment of the bone scan is" consistent with ulnar lunate impingement". Dr. Velagapudi's recommended ulnar shortening osteotomy surgery (PX #4 p.14). A right ulnar shortening osteotomy was performed by Dr. Velagapudi at Rush Copley Medical Center on June 25, 2012 (PX #4 p.15).

Castle Orthopaedics (Dr. Velagapudi), Fox Valley Imaging, Guardian Anesthesiologists and Rush Copley Medical Center submitted their billing to Petitioner's group health insurer, BlueCross/BlueShield, because Respondent denied to authorize and timely pay the medical providers (PX #6).

Prior to surgery on June 25, 2012, Respondent accommodated Petitioner's varied work restrictions and Petitioner testified he was paid wages from the date of his injury on October 13, 2011 until June 20, 2012. However, Petitioner testified Respondent did not accommodate his work restrictions from June 21, 2012 to the Arbitration (PX #4, PX #8, p.9 and p.19), nor timely pay Petitioner temporary total disability from June 21, 2012 to June 14, 2013. On June 28, 2013, Respondent paid Petitioner $24,848.90 for retroactive temporary total disability benefits of $487.23 per week from June 21, 2012 through June 14, 2013 (PX #16 p.1), after Petitioner filed a Section 19(b) Petition for Medical and Temporary Total Disability Benefits. Respondent timely paid Petitioner temporary total disability benefits of $487.23 per week from June 15, 2013 to August 20, 2013 (PX #16 p.2-5), when Respondent, without notice, stopped temporary total disability benefits, based on Petitioner's failure to accept a position of Work Planner at Gary, Indiana by August 19, 2013 (PX #4).

Respondent's Regional Manager, Steve Williams, testified he presented Petitioner a position of Work Planner at Gary, Indiana, in a August 5, 2013 letter (RX #4). Only the position "Work Planner", the location "Gary, Indiana", the rate of pay "$19.71 per hour", and the report date "August 19, 2013", were described in the letter (RX #4). Petitioner responded to Respondent's job offer, his attorney's letter of August 15, 2013 (PX #15), responding the distance to the job in Gary, Indiana from his home in Aurora, Illinois (140 mile round trip) is not a reasonable accommodation and requested a reasonable accommodation job offer in the Aurora,

Illinois geographical area. Mr. Williams did not reply to Petitioner's request for accommodation in Illinois and Respondent terminated temporary total disability benefits on August 20, 2013. Mr. Williams testified he assumed Petitioner voluntarily terminated his employment with Respondent, as stated in his August 5, 2013 letter (RX #14). Mr. Williams admitted in his testimony Petitioner was terminated by Respondent on September 12 2012 after FMLA expired. Petitioner filed a 19(b) Petition on September 3, 2013 for Section 8(a) benefits including, but not limited to temporary total disability, vocational rehabilitation, functional capacity test, medical bills and Section 19(l) penalties. (See file for Petition for Immediate Hearing under Section 19(b) of the Act). Respondent filed a Response to Petition for Immediate Hearing under Section 19(b) of the Act on September 13, 2013 (RX #5), agreeing "the alleged accident or disease arose out of and in the course of employment", and Petitioner's allegations regarding the "nature of the injury", "the medical providers and treatments" and "employer's receipt of a statement from a medical provider indicating employee cannot work" (RX # 5). Respondent disagreed with Petitioner's "description of the accident", "employer's refusal to pay proper compensation and/or medical benefits", "medical bills are in dispute" and "August 19, 2013 is the last payment of temporary total disability benefits" (RX #5).

Prior to a hearing on Petitioner's 19(b) Petition, Petitioner testified on September 17, 2013 he contacted Mr. Williams by telephone and left a voice mail accepting the position of Work Planner. On September 19, 2013, Petitioner's attorney confirmed by letter sent to Stephen Williams, Petitioner accepts the position of Work Planner (PX #17). Mr. Williams acknowledged in his testimony he did not respond to Petitioner's September 17, 2013 telephone call, nor the September 19, 2013 letter from his attorney because he had filled the position of Work Planner from within the company prior to receiving Petitioner's phone call and his

attorney's letter. Mr. Williams testified he filled the position of Work Planner internally at $16.00 per hour.

Petitioner testified after he did not receive a response from Mr. Williams when to report to work in the position of Work Planner, he obtained a Functional Capacity Evaluation (FCE) at Improved Functions on October 29, 2013 (PX #19).

The Functional Capacity Evaluation Reports Summary reports "The Dictionary of Occupational titles places Mr. Fletcher's occupation as a tree trimmer in the heavy strength category. Therefore, Mr. Fletcher does not meet the strength requirements and may not return to work as a tree trimmer," and "based on the strength classifications as established by the Dictionary of Occupational Titles, Mr. Fletcher is capable of assuming a position in the medium strength category. His maximum lifting capacity is 40.0 pounds, and his maximum carrying capacity is 25.0 pounds. According to the Dictionary of Occupational Titles, the medium strength category is defined as having the ability to lift 20 to 50 pounds and carry 10 to 25 pounds."

Petitioner's Job Factor Restrictions state: In order for Mr. Fletcher to successfully return to work in the medium strength category the following job factor restrictions must be met: (1) no crawling, (2) no tip-pinching with the right hand, (3) no palmer pinching with the right hand. Patient strength capacities are: (1) occasional lifting up to 40 pounds, frequent lifting up to 20 pounds and constant lifting up to 8 pounds; (2) occasional carrying up to 25 pounds, frequent carrying up to 13 pounds and constant carrying up to 5 pounds.

Petitioner testified on October 31, 2013 he brought the FCE to Dr. Velagapudi to obtain a medical release. Dr. Velagapudi had recommended a Functional Capacity Evaluation (FCE) to determine permanent restrictions (PX #4 p.28). Dr. Velagapudi reviewed the Functional Capacity Evaluation (FCE) (PX #19) and assessed "Petitioner to be at MMI with permanent deficits in strength based on the findings in the FCE where his strength in the right arm is apparently one-fourth of the opposite side." In addition, Dr.Velagapudi recommended "hardware removal to relieve the crepitis related to the screws or plate in Petitioner's forearm" (PX #4 p.30).

Petitioner testified on November 20, 2013 he met with Lisa Helma, a certified vocational counselor at Vocamotive for an initial interview, vocational evaluation and rehabilitation plan, corroborated by Ms,. Helma in her testimony. On December 2, 2013, Ms. Helma testified she prepared her Initial Evaluation Report (PX #20) and her Section 7110.10 Rehabilitation Plan (PX #21). In her Initial Evaluation Report, Ms. Helma opines "Petitioner has lost access to his usual and customary line of occupation as a tree trimmer as a result of his physical restrictions outlined in the Functional Capacity Evaluation (PX #19), however Petitioner is employable in available job targets of Parts Clerk, Sales Representative, Cashier, along with other similar types of occupations, (PX #20 p.8) based upon Petitioner's age, education, work experience, physical capacity, transferable skills and elements of acquired disability" (PX #20 p.6-8). As part of her Initial Evaluation Report, Ms. Helma conducted a Labor Market Survey for the aforesaid job targets and opines "Petitioner would have a probable wage earning potential of $8.25 to $10.00 per hour" (PX #20 p.8). Ms. Helma testified it is her opinion "vocational rehabilitation services should be offered to Petitioner, including comprehensive vocational testing by a Certified Vocational Evaluator in order to complete the most thorough assessment of aptitude, interest and

temperament." Additional vocational services recommended by Ms. Helma include "onsite development of computer literacy to level of marketable skill, facilitation of on-the-job training opportunities, assistance with letter development, completion of mock interviews and participation in self directed and supervised job search." Ms. Helma testified her Rehabilitation Plan conforms to and is consistent with guidelines articulated in the National Tea Company v The Industrial Commission, 97 Ill. 2d 424; 454 N. E. 2d 672; 1983 Ill. Lexis 440; 73 Ill. Dec. 575 (1983).

Vocamotive charged Petitioner $85.00 per hour for the Initial Evaluation Report and Rehabilitation Plan, a total charge of $813.28 through December 2, 2013. Vocamotive continued to provide Petitioner vocational counseling services at $85.00 per hour after December 2, 2013 through the dates of Arbitration on December 12, 2013, January 7 and January 8, 2014.

Edward Minnich, C.R.C., a rehabilitation Consultant at Select Case Management Services, prepared a Vocational Report for Respondent in response to the Report prepared by Ms. Lisa Helma, C.R.C. (RX #20). In his December 10, 2013 Vocational Report Mr. Minnich agrees Petitioner has lost access to his usual and customary line of work and has been released to medium work per the Functional Capacity Evaluation and the records of Dr. Velagapudi (PX #4), Petitioner's treating physician and the Section 12 Independent Medical Examination of Dr. Michael Vender (RX #19). Mr. Minnich interprets the findings identified in the Functional Capacity Evaluation as being in line with the medium work level, as defined in the Dictionary of Occupational Titles (DOT). He reports the Dictionary of Occupational Titles defines "medium work" to be "exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects." Of note, Mr. Minnich does not address the Functional Capacity Evaluation job factor restriction

stating "Petitioner's maximum lifting capacity at 40 pounds of force occasionally and 20 pounds of force frequently", which is less than the medium level defined in the Dictionary of Occupational Titles (DOT). Mr. Minnich did not meet with Petitioner prior to preparing his Report and he states he relies on Ms. Helma's December 2, 2013 Initial Evaluation Report for an accurate history and compilation of Mr. Fletcher's background for his opinions in the Vocational Report. Mr. Minnich is critical of Ms. Helma's failures to capitalize on Mr. Fletcher's vocational factors of being a Foreman, an Account Manager, a "Lead Person" and having Class B CDL which flaws her Rehabilitation Plan (PX #2 and #3). Mr. Minnich opines "Petitioner has these transferrable skills that allow him to return to work to cover his income loss." Mr. Minnich disagrees Petitioner needs vocational testing or computer skills courses recommended by Vocamotive. The basis for Mr. Minnich's opinion is Petitioner already has transferrable skills of a Class B CDL-Truck Driver (medium level work), or skills as a Foreman that are transferrable to many Bus and Truck Driver jobs and managerial jobs including sales, or skills as a warehouse worker transferable to a warehouseman/forklift operator, or warehouse supervisor or transferable skills as salesman/collections. Mr. Minnich conducted a Labor Market Survey, attached to his Vocational Report as an Addendum, that focused on those afore-described transferable skills from Petitioner's background and opines "Petitioner has sufficient transferable skills to return to work through a direct job placement process, not vocational services or retraining", as recommended by Ms. Helma (RX #20 p.3).

Mr. Minnich prepared a Rule 7110.10 Rehabilitation Plan as part of his Vocational Report (RX #20). Mr. Minnich states his 7110.10 Plan calls for "supported employment when and if the goal of full remuneration is not obtained in the first job." Mr. Minnich opined

"Petitioner will benefit from direct job placement services from Select Case Management Services as outlined in his 7110.10 Plan" (RX #20 p.5).

Ms. Lisa Helma of Vocamotive, in her January 2, 2014 Evaluation Report, states her opinions on the employability of Petitioner following her review of the Labor Market Survey conducted by Mr. Minnich. Ms. Helma's opines "Petitioner would not be qualified for the occupations named in Mr. Minnich's Labor Market Survey, to-wit: Bus Driver, Heavy and Tractor Trailer Driver, Light Truck or Delivery Service, Industrial Truck, First Line Retail Supervisor, Parts Salesperson, Sales Representative and Transportation Storage and District Manager" (PX #22 p.1). The basis of her opinion is her research of the available occupations in Mr. Minnich's Labor Market Survey. The available Bus Driver positions entail transporting children and maintaining vehicle functionality on a regular basis (PX #22 p.2). Ms. Helma reports though the Dictionary of Occupational Titles classifies Bus Driver as semi-skilled at the medium level of physical demand, and most available Bus Driver jobs transport children on a part-time schedule and only "during student attendance days." It was Ms. Helma's experience school Bus Drivers are required to pass a background check, which is a negative socioeconomic factor for Petitioner because of his felony conviction. For the occupation of Bus Driver, Ms. Helma reports wage information obtained from Occupational Employment Statistical Data from the State of Illinois states the starting wage for a bus driver is $8.89 hourly and the average hourly wage is reported at $13.17 hourly (RX #22 p.1), an impairment of earnings for Petitioner, if employed as a bus driver.

The position of Tractor-Trailer Truck Driver is described in the Dictionary of Occupational Titles as semi-skilled at the medium level of physical demand. Wage information obtained by Ms. Helma from Occupational Employment Statistical Data from the State of Illinois

states a starting wage is $12.54 hourly and the average hourly wage is reported as $19.98 hourly (RX #22 p.3), an impairment of earnings for Petitioner, if employed as a Tractor-Trailer Truck Driver. Ms. Helma testified Petitioner does not qualify for available jobs for Tractor-Trail Truck Driver for reasons including, but not limited to the necessity of unloading/delivering boxes of cargo weighing in excess of 40 pounds occasionally or 20 pounds frequently (FCE), the requirement of a valid Class B CDL medical card, passage of a Department of Transportation physical examination and proven commercial driving experience from 6 months to 5 years (PX #22 p.4).

The position of Light Truck Driver is described by the Dictionary of Occupational Titles as semi-skilled at the medium level of physical demand. Wage information obtained by Ms. Helma from Occupational Employment Statistical Data from the State of Illinois indicates a starting wage pay is $9.19 hourly and the average hourly wage is reported as $15.24 hourly (RX #22 p.5), an impairment of earnings for Petitioner, if employed as a Light Truck Driver. Ms. Helma testified it was her opinion Petitioner does not qualify for the available positions in this job category because they require a Class B CDL with a valid medical card and verifiable CDL B driving experience one to four years. Additionally, Ms. Helma testified it is her experience this job category requires passage of pre-employment screening and loading and unloading packages which may exceed Petitioner's restrictions.

The position of Industrial Truck Operator is described by the Dictionary of Occupational Titles as semi-skilled at the medium level of physical demand. Wage information obtained by Ms. Helma from the Occupational Employment Statistical Data from the State of Illinois indicates the starting wage of an Industrial Truck Operator is $9.90 hourly and the average hourly wage is reported as $14.26 hourly (PX #22 p.6), an impairment of earnings for Petitioner,

if employed as an Industrial Truck Operator. Ms. Helma opines Petitioner's lifting restrictions disqualify him from this position which typically requires lifting in excess of 40 pounds occasionally and 20 pounds frequently and requires reach truck and/or motorized pallet jack experience from 6 months to 2 years as well as and the ability to pass a background check (PX #22 p.6-7).

The position of Retail Store Manager is described by the Dictionary of Occupational Titles as skilled at the light level of physical demand. The wage information obtained by Ms. Helma from Occupational Employment Statistical Data from the State of Illinois indicates the starting wage in this category is $11.36 hourly and the average hourly wage is reported as $17.38 hourly (PX #22 p.8), an impairment of earnings for Petitioner, if employed as a Retail Store Manager. Ms. Helma opined, based on upon her research, available jobs in this position require retail management experience in many facets of the operations of a retail store including, but not limited to, execution of business plans, recruitment, training and management of personnel and operations. Additional disqualifying requirements of this position are computer skills and the ability to lift greater than 20 pounds regularly and 40 pounds occasionally (PX #22 p.8-9).

The position of Sales Representative is described by Dictionary of Occupational Titles as skilled at the light level of physical demand. Wage information obtained by Ms. Helma from Occupational Employment Statistical Data from the State of Illinois indicates the starting wage is $13.21 hourly and the average hourly wage is reported as $25.97 hourly ((PX #22 p.9-10). Ms. Helma reported, on the basis of her research, available jobs in this job category require direct selling and servicing of identified customers with the purpose of gaining new customers and expanding existing business. It is Ms. Helma's experience sales positions require a minimum 3 to 5 years of sales experience, strong relationship building skills and require proficiency with

personal computers. Some Sales Representative positions only pay commission or require a Bachelor's Degree (PX #22 p.9-11).

The position of Warehouse Manager is described by the Dictionary of Occupational Titles as highly skilled at the light level of physical demand. Wage information obtained by Ms. Helma from Occupational Employment Statistical Data from the State of Illinois indicates the starting wage in this capacity as $22.98 hourly and the average hourly wage is reported as $38.80 hourly (PX #22 p.11). Ms. Helma testified, based upon her research, that Petitioner is not qualified for the position of Warehouse Manager due to his lack of supervisor or distribution experience, his lack of computer skills in Microsoft Word and Excel, and his inability to move and/or lift in excess of 40 pounds and the preference for candidates with Bachelor degrees (PX #22 p.11-12).

Ms. Helma opines in her January 2, 2014 Evaluation Report (PX #22) "Petitioner has insufficient transferable skills to obtain employment in job targets identified by Mr. Minnich in his Vocational Report (RX #20) without further training and/or education." It is the opinion of Ms. Helma the positions identified by Mr. Minnich were either outside of Mr. Fletcher's physical capabilities, or he would not be a qualified candidate for them based upon his experience, as "Mr. Fletcher's previous position did not provide him with any type of transferability of skills as he had working in a narrow capacity" (PX #22 p.16).

Ms. Helma opines "Petitioner's experience as a Foreman would not be considered a transferable skill because Petitioner was needed to be able to perform the physical requirements of a tree trimmer", contrary to Mr. Minnich's opinion "Petitioner's experience as a Foreman is transferable to many managerial jobs including sales" (PX #22 p.16). Ms. Helma reports "it has been her experience that working as a Foreman is generally industry specific and the supervisory

experience that is developed as a Foreman does not transfer into any other industry and is non-transferable to other job targets without gaining the necessary experience in those job target areas." Ms. Helma also considered various CDL B driving positions identified by Mr. Minnich to be a "transferable skill" and opines based upon her experience "many driving positions would be outside Mr. Fletcher's physical capabilities and not a valid job target" (PX #22 p.16-17). Even if Petitioner would be employed in Mr. Minnich's targeted areas of Bus Driver, Tractor-Trailer Truck Driver, Light Truck Driver, Industrial Truck Driver, Retail Store Manager or Sales Representative/Salesperson, it is apparent he would be employed at starting wages in any other job outside the business of tree trimming, all of which pay less that Petitioner's hourly wage of $21.03 per hour. Mr. Minnich and Ms. Helma concur a rehabilitation plan is necessary for Petitioner to return to work. They differ in their plan for rehabilitation service. Ms. Helma's Plan calls for comprehensive vocational testing to include assessment of aptitude, interest and temperament and training/education to increase Petitioner's wage earning capacity (PX #21), whereas, Mr. Minnich's Plan calls for direct job placement assistance utilizing Petitioners transferable skills to provide him full remuneration (RX #20 – Rehabilitation Plan).

Ms. Helma reports Petitioner's vocational activities to January 2, 2014 (PX #22). Petitioner reports to Vocamotive and her Rehabilitation Plan was reviewed. Petitioner completed the vocational testing interview and reviewed the Client Handbook. Schedules were prepared for Petitioner and he was supplied with training materials. Petitioner completed the keyboard test and was introduced to Word 2010 Fast Track Curriculum. Petitioner prepared his Resume and job leads were identified for Automotive Parts and Warehouse Worker. Petitioner applied for these positions online with assistance. Vocamotive installed Microsoft Word 2007 to Petitioner's personal computer to utilize Microsoft Word documents at home for job search

purposes. Employment opportunities have been identified in target job areas of Forklift Operator and Warehouse Worker and Petitioner applied to these positions with online applications. The Arbitration Hearing commenced December 12, 2013 and continued to January 7, January 8, and February 11, 2014.

## II. FINDINGS:

**In support of the Arbitrator's Decision relating to (C) whether Petitioner sustained accidental injuries that arose of and in the course of his employment, the Arbitrator finds the following facts:**

It is uncontroverted, Petitioner worked for Respondent ten years prior to his work accidents that occurred on October 13, 2011 and on October 21, 2011. Petitioner testified he was working for Respondent on October 13, 2011 in the position of a Foreman-Tree Trimmer and one of his duties was trimming tree branches from electrical lines. On October 13, 2011, Petitioner was standing in a tree to cut a branch, 10 to 15 feet in length and 4 inches in diameter, with a 10-12 foot pole pruner. He cut the branch and it fell to the ground on a different side of a 6 foot fence from the tree he was standing in. Petitioner testified he was told by his General Foreman, Loren Peterson, to reach over the fence with the 10 foot pole pruner and lift the branch and pull it over the fence. Petitioner, while standing in the tree, 7 feet off the ground, reached over the fence with the pole pruner and lifted the heavy branch over the fence and felt a pop in his right wrist and immediate pain. Petitioner testified he was working for Respondent on October 21, 2011, in the position of a Foreman-Tree Trimmer. On this day, he was standing in a tree to cut a branch from an Oak tree. As he gripped the pole pruner with his left hand he yanked on the pole pruner cord with his right hand to cut the branch he felt immediate and severe pain in his right wrist.

On October 13, 2011, and on October 21, 2011, Petitioner notified his General Foreman, Loren Peterson, of the afore described accidents and injuries to his right wrist in the course of his employment. Mr. Peterson and co-worker Sergio Benavitez witnessed Petitioner's work accidents and to his right wrist. Mr. Benavitez testified corroborating Petitioner's history of accident's and injury to his right wrist. Mr. Peterson did not testify to dispute Petitioner's work accident's or the right wrist injury. On October 31, 2011, Loren Peterson drove Petitioner to Concentra Medical Clinic to assess Petitioner's work injury to his right wrist/arm. Petitioner reported a consistent history of work injury on October 13, 2011 resulting in right wrist pain to his medical providers.

Based on the weight of the evidence, the Arbitrator finds Petitioner sustained an accidental injury on October 13, 2011 and an accidental aggravation injury on October 21, 2011, arising out and in the course of his employment with the Respondent.

**In support of the Arbitrator's Decision relating to (F) whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator finds the following facts:**

Petitioner's treating physician, Dr. Velagapudi of Castle Orthopaedics, testified in his opinion the work accident, as heretofore described in (C), was "an acute aggravation of an asymptomatic pre-existing condition of ulnar lunate impingement" (PX #18 p.37). Based on Petitioner's complaints consistent with the history of work injury, the demonstration and description of the mechanism of the work accident and his findings upon objective medical exams (PX #18 p.7-12 and p.14-19). In addition to the testimony of Dr. Velagapudi, and Petitioner's medical records in evidence from Concentra (PX #2), Fox Valley Imaging (PX #3)

and Castle Orthopaedics (PX #4), the Arbitrator has had the opportunity to consider the testimony of Dr. Michael Vender. Dr. Vender was retained by Respondent to review Petitioner's medical records (PX #2 p.3 and 4) to opine whether Petitioner's condition of ill-being is causally related to the accident's that arose out of and in the course of Petitioner's employment on October 13, 2011 and on October 21, 2011. Dr. Vender reported on August 6, 2012, and testified, to having an opinion "Petitioner did not have an acute sprain injury that would be considered an exasperation of a pre-existing condition, but the onset of symptoms consistent with ulnar abutment" (RX #17 p.15). However, on cross examination Dr. Vender acknowledges "a trauma of sufficient magnitude can cause an aggravation of a pre-existing degenerative condition of ulnar abutment (RX#17 p.27). Of note, Dr. Vender admitted in his testimony he did not meet or examine the Petitioner (RX #17 p.19) nor have an independent recollection of the history of the work activity (RX #17 p.21-22).

The Arbitrator finds Petitioner's current condition of ill-being is causally related to the work injury on October 13, 2011, aggravated at work on October 21, 2011, based upon the opinion of Dr. Velagapudi of Castle Orthopaedics there was an "acute aggravation injury of a pre-existing condition of ulnar abutment caused by the work accidents" described in Petitioner's testimony and the medical records (PX #18 p.18).

The Arbitrator finds it to be significant Dr. Vender did not meet or examine Petitioner, or have sufficient recollection of the history of the work activity to form his opinion Petitioner's condition of ill-being is not causally related to the work injury, but more importantly, his acknowledgment on cross examination "a trauma of significant magnitude can aggravate a pre-

existing condition of ulnar abutment" rendering his opinion Petitioner's condition of ill-being is not causally related to the work accident, unpersuasive in the context of chain of events.

Based upon the opinion of Dr. Velagapudi of Castle Orthopaedics, this Arbitrator finds Petitioner's condition of ill-being to his right arm is causally related to his work accidents on October 13, 2011 and aggravated on October 21, 2011.

**In support of the Arbitrator's decision relating to (J) were the medical services that were provided to Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services, and (N) is Respondent due any credit, this Arbitrator finds the following facts:**

The medical services provided to Petitioner were reasonable and necessary to treat the condition of ill-being, and the evidence shows Respondent has not paid all appropriate charges for all reasonable and necessary medical services as provided in Petitioner's Medical Summary including attachments (PX #6).

Respondent shall pay reasonable and necessary medical services of $42,773.22, as provided in Section 8(a) and 8.2 of the Act. Respondent shall be given a credit of $29,024.42 for medical benefits that have been paid, as stipulated by the parties, 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 support of the Arbitrator's Decision at (K), whether temporary and (O) vocational benefits are in dispute, the Arbitrator finds the following facts:**

Petitioner's medical providers at Concentra (PX #2) and Castle Orthopaedics (PX #4) restricted his work activities from October 31, 2011 through June 20, 2012 with various and

different restrictions including, but not limited to "no use of right arm", "10 to 40 pound lifting restrictions" and "no forcible grasping or pulling." Petitioner continued to work for Respondent as a Foreman with accommodation after the October 13, 2011 work accident until June 20, 2012. On June 21, 2012, Petitioner's restrictions were "no lifting over 20 pounds" (PX #3 p.8); on July 7, 2012, "may work - no use of right arm" (PX #8); on July 31, 2012 "5 pounds" (PX #8); on October 9, 2012 "no climbing or gripping/grasping" (PX #9); on November 2, 2012, "MMI, FCE (Functional Capacity Evaluation) to base permanent restriction" (PX #3); and on October 31, 2013, MMI with deficit in strength based on FCE (PX #4 p.30). October 29, 2013 Improved Functions FCE job factor restrictions are as follows: now crawling, no tip-pinching with right hand, no palmer-pinching with right hand, no lifting over 40 pounds occasionally, 20 pounds frequently or 8 pounds constantly, no carrying over 25 pounds occasionally, 13 pounds frequently or 5 pounds constantly.

Respondent did not accommodate Petitioner's work restrictions from June 21, 2012 to the date of the date of Arbitration. Respondent did not timely pay temporary total disability benefits from June 21, 2012 to June 14, 2013. Respondent did pay retroactive temporary total disability benefits of $24,848.90 on June 28, 2013, a period of 51 weeks from June 21, 2012 to June 14, 2013. Respondent timely paid Petitioner weekly temporary total disability benefits from June 15, 2013 to August 19, 2013, (PX #16). On August 19, 2013, Respondent stopped paying Petitioner weekly temporary total disability on the basis Petitioner failed to accept work from Respondent by August 19, 2013 as a Work Planner in Gary, Indiana (PX #4). Prior to August 19, 2013, on August 15, 2013, Petitioner responded to Respondent, through his attorney, the Work Planner job in Gary, Indiana was not a reasonable accommodation and requested

accommodation of a job closer to his home in Aurora, Illinois (PX #15). Petitioner testified the Work Planner job was non-union (he is a member of IBEW), the rate of pay ($19.71) was less than the amount he earned at the time of his accident ($21.03) and the location of the job was 70 miles from his home. Respondent's Regional Manager, Stephen Williams, testified he did not respond to Petitioner's August 15, 2013 letter (PX #15) requesting accommodated for work closer to Aurora, Illinois. Petitioner testified he contacted Mr. Williams by telephone on September 17, 2013 and left Mr. Williams a voice mail message he will return to work for Respondent as a Work Planner in Gary, Indiana. On September 19, 2013, Petitioner's attorney notified Mr. Williams by letter Petitioner accepts the position of Work Planner in Gary, Indiana (PX #10). Mr. Williams testified he did not reply to Petitioner's September 17, 2013 telephone message, nor reply to his attorney's September 19, 2013 letter that Petitioner will return to work as a Work Planner because he had filled the Work Planner position internally with an employee in Indiana at the rate of $16.00 per hour after Petitioner failed to report to work on August 19, 2013.

Petitioner obtained a Functional Capacity Evaluation on October 29, 2013, returned to Dr. Velagapudi for a medical release on October 31, 2013 and initiated vocational rehabilitation services at Vocamotive. At Vocamotive Petitioner was provided counseling from Lisa Helma, a certified rehabilitation counselor. Ms. Helma met Petitioner on November 12, 2013 to evaluate Petitioner's capacities to return to work with the knowledge Respondent did not respond to Petitioner's telephone call and letter to return to work for Respondent as a Work Planner. Lisa Helma testified she continues to work with Petitioner to assist him in obtaining employment up

to the day of her testimony. She testified Petitioner has cooperated in all training in her Rehabilitation Plan.

This Arbitrator finds Respondent's job of Work Planner was designed to avoid further liability under Section 8(a) and 8(d)(l) of the Workers' Compensation Act for temporary total disability and vocational rehabilitation benefits per Reliance Elevator Company v Industrial Commission, 309 Ill. App. 3d 987, 243 Ill. Dec. 294, 723 N. E. 2d 326 , 1999 Ill. App. Lexis 890, on the basis the rate of pay of $19.71 offered Petitioner is more than the rate of pay of $16.00 offered to the employee hired for the Work Planner job, and the job location was not in Gary, Indiana, but Gary, Indiana is merely a ruse to lessen the miles Petitioner would commute. Mr. Williams testified Petitioner would drive to Gary, Indiana, park his car, pick up Respondent's truck and drive to other destinations in Northern Indiana and Central Indiana. At the end of the work day, Petitioner would return to Gary, Indiana park the truck and drive 70 miles home to Aurora, Illinois. It is uncontroverted, Respondent has employees working in Illinois, therefore, Petitioner request for return to work accommodation in Illinois was reasonable and the job offer in Gary, Indiana was a sham. The Arbitrator finds Respondent's job offer of Flagger in Valparaiso, Indiana was withdrawn when Respondent commenced paying retroactive and active temporary total disability benefits from June 21, 2012 through August 19, 2013, after the May 21, 2013 and June 3, 2013 job offers.

Respondent shall pay Petitioner temporary total disability benefits of $487.23/week for weeks commencing June 21, 2012 through October 31, 2013, Dr. Velagapudi MMI date with permanent restrictions (PX #4 p.30), as provided in Section 8(b) of the Act. The Arbitrator further finds Respondent shall pay Petitioner maintenance benefits of $487.23/week

commencing November 1, 2013 and ongoing until Petitioner is employed in a stable labor market, or alternatively Petitioner is awarded wage differential benefits under Section 8(d)(l). Respondent shall pay Vocamotive $813.28 for vocational rehabilitation services through provided to Petitioner through December 2, 2013 (PX #23) and ongoing vocational rehabilitation services at Vocamotive until Petitioner becomes employed in a stable labor market under Section 8(a) of the Act, or alternatively until Petitioner is awarded Section 8(d)(1) benefits under the Act.

Respondent shall be given a credit of $29,557.89 for temporary total disability paid commencing June 21, 2012 through June 14, 2013, as stipulated by the parties (ARBX #1).

**In support of the Arbitrator's Decision (L) Nature and Extent and (O) is Petitioner entitled to a wage differential pursuant to Section 8(d)(l) of the Act, the Arbitrator finds as follows:**

Respondent contends Petitioner is not entitled to wage differential under Section 8(d)(l) of the Act and should receive a permanent partial disability award (Arbitrator's X #1).

In order to be entitled to a wage differential under a Section 8(d)(1), Petitioner must prove (1) partial incapacity which prevents him from pursuing his "usual and customary line of employment", and (2) impairment of earnings. Ricky J. Gallianetti v Industrial Commission of Illinois, 315 Ill. App. 3d 721, 730; 734 N. E. 2d 482; 2000 Ill. App. Lexis 635; 248 Ill. Dec. 554. The Illinois Supreme Court mandated that once a claimant has presented sufficient evidence to demonstrate a loss of earning capacity, an award under Section 8(d)(1) is to be given and not a percentage of a person as a whole. I.d. at 728.

In this case, Petitioner presented undisputed facts of a permanent and disabling injury that prevents him from pursuing his "usual and customary line of employment." Petitioner's

orthopaedic physician, Dr. Velagapudi, on October 31, 2013, assigned permanent restrictions per the FCE (PX #4 p.30). The Functional Capacity Evaluation (FCE) on October 29, 2013 assigns (PX #19 p.4) Petitioner's strength category and job factor restrictions. In the strength category, it reports "Petitioner does not meet the heavy strength category of a tree trimmer based on the strength classifications established by the Dictionary of Occupational Titles (DOT), but Petitioner is capable of assuming a position in the medium strength category." The medium strength category is defined in the Dictionary of Occupational titles as "having the ability to lift 20 to 50 pounds and carry 10 to 25 pounds." The FCE Report Summary Job Factor Restrictions state:

> "in order for Petitioner to successfully return to work in the medium strength category the following job factor restrictions must be met: no crawling, no tip-pinching with the right hand, no palmer-pinching with the right hand, occasional lifting of 40 pounds, frequent lifting of 20 pounds, constant lifting of 8 pounds and occasional carrying of 25 pounds, frequent carrying of 13 pounds and constant carrying of 5 pounds."

Respondent's Section 12 physician, Michael Vender, examined Petitioner on February 20, 2013 opined:

> "Either now, or with further treatment, I do not expect that Mr. Fletcher would be able to return to his previous work activities as a tree trimmer. I would not recommend that he climb to heights, either up a tree or up a ladder. However, he could perform ground work that is more under his direct control." (RX #19).

After Dr. Vender opined Petitioner could perform ground work, Petitioner testified Respondent had him complete an employment application for the position of Grounds Person in Naperville, Illinois at the same rate of pay he earned as a Foreman, $21.03 per hour, and a pre-employment drug test. Petitioner testified he thought he would return to work in Naperville, Illinois on April 15, 2013 (PX #10). Respondent's Regional Manager, Stephen Williams testified the City of Naperville, a third party contractor, rebuked Respondent's request to return Petitioner to work in Naperville, Illinois in the position of Groundsman, stating the City was going to eliminate the position of Groundsman in its next contract. Instead, on May 21, 2013 Respondent offered Petitioner a Flagger job in Valparaiso, Indiana, a distance of approximately 80 miles from his home in Aurora, Illinois at a pay of $19.71 per hour, which was less than Petitioner's rate of pay of $21.03 on the date of accident (PX #1). Petitioner testified the Flagger job did not state the hours of employment or whether Petitioner would retain his 10 year seniority and other union benefits. Petitioner responded in a letter from his attorney (RX #2) expressing the job offer at Valparaiso, Indiana was not a reasonable distance to travel to and from his home in Aurora, Illinois and requested a reasonable accommodation of a job closer to his home. On June 3, 2013, Respondent sent Petitioner a similar offer for the Flagger position at Valparaiso, Indiana and Petitioner filed a 19(b) Petition for Section 8(a) benefits. Prior to a hearing on the 19(b) Petition, Respondent agreed to pay Petitioner retroactive temporary total disability from June 21, 2012 to June 14, 2013 and ongoing temporary total disability benefits while Respondent looked into job opportunities for Petitioner closer to his home in Aurora, Illinois.

On August 5, 2013, Respondent offered Petitioner the position of Work Planner at Gary, Indiana, at the same rate of pay, $19.71 per hour, as the Flagger position at Valparaiso, Indiana, (RX #4), though Petitioner had earned $21.03 per hour as a Foreman in Naperville, Illinois on the date he was injured. Respondent's Regional Manager, Steve Williams testified on cross examination the address at Gary, Indiana stated in his August 5, 2013 letter is a parking lot for Petitioner to park his vehicle and pick up a company truck for work assignments outside the Gary, Indiana area. Mr. Williams testified Petitioner's work assignment as a Work Planner would be most anywhere in Northern and Central Indiana. On August 15, 2013 Petitioner responded through his attorney, by letter Respondent's job offer was an unreasonable accommodation and requested an accommodation in the Aurora, Illinois geographical area (PX #15). Petitioner filed a Section 19 Petition for Section 8(a) benefits on September 3, 2013. Prior to a hearing on Petitioner's 19(b) Petition, Petitioner testified at Arbitration he called Mr. Williams on September 17, 2013 and left a message accepting the Work Planner position. Petitioner testified Mr. Williams did not respond to his telephone call, nor did he respond to his attorney's September 19, 2013 letter accepting the Work Planner position (PX#17). Mr. Williams testified he did not return Petitioner's telephone call, or his attorney's letter, because he had already filled the Work Planner position from within the company in Indiana at the rate of pay of $16.00 per hour.

In Reliance Elevator Company v Illinois Industrial Commission, 309 Ill. App. 3d 987; 243 Ill. Dec. 294; 723 N.E. 2d 326; 199 Ill. App. Lexis 890; 243 Ill. Dec. 294, the Court provided guidance on assessing whether a job offer from a Respondent is bona fide or a sham job offer. In Reliance, Respondent offered a job to claimant after a vocational assessment

determined that he would not be able to find employment. Id. at 329. The position offered by Respondent would pay claimant over $44.00 per hour, when the position usually paid $10.00 per hour. Id. The Court determined that Respondent's job offer to claimant was a sham, in that the job offer was designed to circumvent Reliance's responsibility under the Act. Id. The Court reasoned that "such practice must be strongly discouraged and even condemned. To countenance such practice would severely jeopardize injured workers ability to obtain relief and would undermine the spirit and purpose of the Act." Id. at 331.

After Petitioner indicated his willingness to return to work for Respondent on September 17, 2013 and September 19, 2013 (PX # 17) by accepting the position of Work Planner, Respondent did not contact Petitioner for a position of employment, but instead discontinued temporary total disability benefits after August 20, 2013 (PX # #16 p.5). This is further suggestion Respondent's job offer of Work Planner was a sham under Reliance to avoid paying Section 8(a) temporary benefits and to circumvent Respondent's responsibilities under the Act..

The history of the case shows Respondent accommodated Petitioner's varied restrictions (PX #2 and #3) from the date of Petitioner's right wrist injury on October 13, 2011 to June 20, 2012, as a Foreman-Tree Trimmer. After Petitioner's surgery on his right arm on June 25, 2012, Respondent did not accommodate Petitioner's varied restriction (PX # #4). On September 12, 2012, Respondent terminated Petitioner when he did obtain full duty release after his 12 weeks FMLA absence (PX #24). Respondent waited three (3) months after Respondent's Section 12 physician, Dr. Vender reported on February 20, 2013 that Petitioner could not return to work as a tree trimmer (RX #19) before Respondent offered Petitioner the position of Flagger at

Valparaiso, Indiana (RX #1 and #3) and six (6) months before Respondent offered Petitioner the position of Work Planner at Gary, Indiana (RX #4).

It is apparent Respondent does not dispute the Flagger position at Valparaiso, Indiana was not a bona fide job offer because after the position was offered to Petitioner on May 21, 2013 (RX #1) and June 3, 2013 (RX #3), Respondent withdrew the offers and paid Petitioner $24,848.90 on June 28, 2012 for retroactive temporary total disability benefits from June 21, 2012 o June 14, 2013 and current temporary total disability benefits from June 15, 2013 to August 20, 2013, when Respondent stopped paying Petitioner when Petitioner did not accept the position of Work Planner in Gary, Indiana by August 19, 2013. Even if Respondent's position is believes the Flagger position was a reasonable accommodation, the rate of pay of $19.71 per hour offered is contrary to the opinion expressed by Ms. Helma, Petitioner's Certified Vocational Counselor, who reports the mean hourly wage in the occupation of Flagger is reported to be $9.39 hourly according to the Occupational Employment Survey in the State of Illinois (PX #20 p.7), which suggests per the guidelines in Reliance, the job was a sham designed to circumvent Respondent's responsibility under the Act. Ms. Helma further reported 59.3% of the Flagger positions nationwide work on a part time basis according to the Dictionary of Occupational Titles (PX #20 p.7), and it has been her experience independent Flagger positions are difficult to locate and generally do not exist in a stable labor market, and many are also required to perform the physical demands of a laborer, which is a heavy level of physical demand (PX #20 p.7-8).

The Arbitrator finds Respondent's job offers for Petitioner positions of employment of a Flagger at Valparaiso, Indiana, and a Work Planner at Gary, Indiana were not bona fide job offers but sham offers to avoid both vocational benefits under Section 8(a) and wage differential

benefits under Section 8(d)(1) benefits of the Act. The two positions and titles were clearly different than Petitioner's pre-injury position of Foreman, however both positions paid exactly the same rate of pay, $19.71 per hour, which is less than the rate of pay of $21.03 Petitioner earned as a Foreman, and the two positions were located in Northwest Indiana, more than 70 miles from Petitioner's home in Aurora, Illinois when, in fact, Respondent employs hundreds of employees in Illinois closer to Petitioner's home.

The Arbitrator finds after Petitioner accepted the Work Planner offer on September 17, 2013 and September 19, 2013, and Respondent did not contact Petitioner, or his attorney, these facts more than suggest Respondent's position of Work Planner was not bona fide, but a sham to avoid paying temporary total disability, vocational benefits and maintenance benefits under Section 8(a) of the Act to circumvent paying Petitioner wage differential benefits under Section 8(d)(1) of the Act.

This is the scenario envisioned by the Court in Reliance and condemned as undermining the spirit and purpose of the Act.

Following Respondent's failure or refusal to respond to Petitioner's request for a reasonable work accommodation closer to his home in Aurora, Illinois, Petitioner obtained a Functional Capacity Evaluation (PX #19) on October 29, 2013, previously recommended by Dr. Velagapudi (PX #28), and met with Lisa Helma, a Certified Rehabilitation Counselor at Vocamotive on November 12, 2013 for vocational assessment. Ms. Helma testified she prepared a December 2, 2013 Initial Evaluation Report, including a Labor Market Survey (PX #20) and a Section 7110.10 Rehabilitation Plan (PX #21) for Petitioner. Ms. Helma offers the opinion in her Report that "Mr. Fletcher is employable in the target job areas of Parts Clerk, Sales

Representative and Cashier, along with other similar types of occupations in a pay scale range of $8.25 per hour to $10.00 per hour (PX #20 p.8). It is uncontroverted, Petitioner has proven he sustained a permanent partial incapacity that prevents him from pursuing his usual and customary line of employment as a tree trimmer-foreman. The Arbitrator finds Petitioner has also proven that he has an impairment of earnings.

Though Respondent agrees Petitioner sustained a permanent partial incapacity that prevents him from pursuing his usual and customary line of employment (RX #20 p.1), the controversy is Respondent disagrees Petitioner has an impairment of earnings, on the basis of Petitioner did not timely accept the Work Planner position in Gary, Indiana at the pay rate of $19.71 per hour and Mr. Edward Minnich's Labor Market Survey that states "Petitioner has transferable skills for direct job placement in the job target areas of Truck Driver, Foreman, Warehouseman/Fork Lift Operator, Warehouse Supervisor or Salesman/Collection" (RX #20 LMS p.1). Based on his Labor Market Survey, Mr. Minnich opines "Based upon Mr. Fletcher's transferable skills and medium level restrictions, he is employable at or near his previous income levels", a pay rate of $21.03 per hour at the time of the accidental injury (RX #20, LMS p.2-3).

Although, Mr. Minnich disagrees with the findings in the Vocamotive Labor Market Survey (PX #20), the Arbitrator finds the Vocamotive Labor Market Survey to be thorough and Ms. Helma's findings and opinions to be credible. Lisa Helma testified based upon her findings in her Labor Market Survey, there is a stable labor market for Petitioner's skills, abilities and physical capacities for positions of Parts Clerk, Sales Representative, Cashier and other similar position with wages that range from $8.25 to $10.00 per hour (PX #20 p.8-9). The Arbitrator finds the mean wage is $9.125 per hour, ($8.25 + $10.00 = $18.25 ÷ 2) or $365.00 per week.

Based upon rate of pay of $21.03 on the date of accident, Petitioner's weekly wage differential would be $841.20 per week ($21.03 per hour x 40 hours) minus $365.00 per week = $476.20 x 2 ÷3 = $317.47 per week.

Based upon the weight of the evidence the Arbitrator finds Ms. Helma's January 2, 2014 Report (PX #22) and testimony that Petitioner has an impairment of earnings more credible than the Report and opinion of Mr. Minnich (RX #20) that Petitioner does not have an impairment of earnings.

Respondent shall pay Petitioner permanent wage differential partial disability benefits of $317.47 per week commencing on December 13, 2013 until Petitioner reaches 67 years of age because the injury sustained caused a loss of earnings, as provided in Section 8(d)(1) of the Act. Further, Respondent shall pay Petitioner $813.28 for vocational rehabilitation services at Vocamotive from November 1, 2013 through December 2, 2013, the date of arbitration.

Respondent shall be given a credit of $2,000.00 paid to Petitioner for an advance of permanent partial disability, as stipulated by the parties.

In support of this Arbitrator's Decision at (M), should penalties be imposed upon Respondent, the Arbitrator finds:

> If an employer delays paying compensation, the employer has the burden of showing that it has reasonable belief that the delay was justified. Howlett's Tree Service v Industrial Commission, 160 Ill. App. 3d 190, 513 N. E. 2d; 1987 Ill. App. Lexis 3089; 111 Ill. Dec. 836.

Respondent did not meet its burden of showing it had reasonable belief to justify the delay in paying compensation on June 28, 2013 for temporary total disability benefits from June 21, 2012 through June 14, 2013, a total of 51 weeks at the rate of $487.23 per week for the total

amount of $24,848.73. The Arbitrator finds further Respondent has not met its burden of showing it had reasonable belief to justify the non-payment of compensation of temporary total disability benefits from August 20, 2013 through December 12, 2013, a total amount of 16 3/7$^{th}$ weeks at the rate of $487.23 per week for the total amount of $8,004.49 and for the non-payment of medical bills of $8,954.17. As a result, Respondent shall pay Petitioner $12,424.36 for penalties as provided in Section 19(k) and $10,000.000 for penalties as provided in Section 19(l) for the 373 day delay of payment on June 28, 2013 of temporary total disability benefits accrued from June 21, 2012 through June 14, 2013; $4,002.25 for penalties as provided in Section 19(k) and $3,450.00 for penalties as provided in Section 19(l) for 115 day for non-payment of temporary total disability benefits accrued from August 21, 2013 through December 12, 2013, the arbitration date; and, $4,477.09 for penalties as provided in Section 19(k) and $10,000.00 for non-payment of unpaid medical bills of $8,954.17 from June 25, 2012 through December 12, 2013, the arbitration date.

STATE OF ILLINOIS )
) SS.
COUNTY OF WINNEBAGO )

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey L. Backenger,

Petitioner,

vs.

NO: 13 WC 15229
15 IWCC 0396

Wal-Mart Stores, Inc.,

Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Decision of the Commission dated May 27, 2015, having been filed by Petitioner herein. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated May 27, 2015 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

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

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

DATED: JUN 5 - 2015
MJB:ell
52

Michael J. Brennan

STATE OF ILLINOIS )
) SS.
COUNTY OF WINNEBAGO )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey L. Backenger,

Petitioner,

vs.

NO: 13 WC 15229
15 IWCC 0396

Wal-Mart Stores, Inc.,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by Respondent herein and notice given to all parties, the Commission after considering the issues of causation, medical expenses, temporary total disability benefits, wage rate, and penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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).

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 based on our complete review of the record we find the following:

On the issue of Petitioner's wages, we note that the wage statement provided by Respondent (RX7) shows that Petitioner had six pay periods for work from July 1, 2011 through July 15, 2011 ($1,190.83) and from May 4, 2012 through June 29, 2012 ($2,925.08) totaling $4,115.91. The pay periods cover two week intervals. In his Response to Respondent's Statement of Exceptions, Petitioner's computations include pay from the June 17, 2011 pay

period, which is from when Petitioner was off work. The Commission notes that 52 weeks before the accident starts at July 1, 2011 and while Petitioner may claim that the June 17, 2011 pay period includes hours worked from June 18, 2011 through July 1, 2011, there is nothing in the wage statement to support such a claim. The Commission can only go by the evidence provided and cannot and will not make assumptions. The wage statement only indicates what was paid for each pay period. Based on the wage statement provided, Petitioner earned $4,115.91 over a 12 week period (6 pay periods). Therefore, taking Petitioner's earnings and dividing that by the time worked, $4,115.91÷ 12=$342.99, which would be Petitioner's average weekly wage. The Commission finds that Petitioner's average weekly wage is $342.99. Two-thirds of $342.99 would be $228.66; however, the minimum temporary total disability rate for a married individual with no other dependents for an accident date of June 29, 2012 was $253.00. As such, Petitioner's temporary total disability rate is $253.00.

Regarding Petitioner's period of temporary total disability, the Commission notes that the record shows that Petitioner was taken off work from August 17, 2012 through October 29, 2012 (PX5) and from April 19, 2013 (when Respondent stopped accommodating Petitioner's restrictions (T.36-37,41,AX1) through the date of hearing. The Arbitrator awarded temporary total disability benefits from July 1, 2012 through July 7, 2012; however, as noted by Respondent in its Statement of Exceptions, there is nothing in the record showing that Petitioner was taken off work from July 1, 2012 through July 7, 2012. As such, the award of temporary total disability benefits from July 1, 2012 through July 7, 2012 is not supported by the record. Therefore, the Commission finds that Petitioner has established entitlement to temporary total disability benefits from August 17, 2012 through October 29, 2012 and from April 19, 2013 to May 19, 2014, totaling 67-1/7 weeks.

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 Respondent shall pay to the Petitioner the sum of $253.00 per week for a period of 67-1/7 weeks, 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 pay to Petitioner the sum of $339.93 for medical expenses under Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical care in the form of the treatment as recommended by Dr. Orwin.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $7,676.45 as provided in Section 19(k) of the Act, $10,000.00 as provided in Section 19(l) of the Act, and attorney's fees of $3,070.58 as provided under Section 16 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,200.00. 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: JUN 5 - 2015
MJB/ell
o-04/06/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

**BACKENGER, JEFFREY L**
Employee/Petitioner

Case# **13WC015229**

**15IWCC0396**

**WAL-MART STORES INC**
Employer/Respondent

On 7/7/2014, 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:

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

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

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)

Jeffrey L. Backenger
Employee/Petitioner

v.

Wal-Mart Stores, Inc.
Employer/Respondent

Case # 13 WC 15229

Consolidated cases: _____

15IWCC0396

An *Application for Adjustment 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 cities of **Rockford and Woodstock**, on **5/19/14 & 6/4/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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, , Respondent *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 **$20,939.88**; the average weekly wage was **$402.69**.

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

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

Respondent shall be given a credit of **$3690.16** for TTD, **$0.00**for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$3690.16**.

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 $268.43/week for 63 2/7 weeks, commencing 7/1/12 through 7/7/12, 8/17/12 through 10/29/12, and 4/19/13 through 5/19/14 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 6/29/12 through 6/4/14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $339.93, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner penalties of **$17,798.98 in total** , as provided in Section 16 of the Act; **$7,899.49**, as provided in Section 19(k) of the Act; and **$10,000.00**, as provided in Section 19(l) of the Act and attorney fees of $3577.89 as provided in Section 16 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of 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.

Robert E Mc

Signature of Arbitrator

June 17, 2014

Date

ICArbDec19(b)

JUL 7 - 2014

15IWCC0396

## FINDINGS OF FACT

On June 29, 2012 Petitioner was employed as a lead assembler for Wal-Mart Stores at their Rockton, Illinois store. He had been employed there since 2007 as a lead assembler. Mr. Backenger had a variety of duties ranging from assembling items for sale to working on the floor. He is right hand dominant and testified that he did not have a history of any prior right shoulder injuries.

Mr. Backenger testified that he had previously injured his left shoulder while working for Wal-Mart. The medical records indicate that this incident occurred in September 2010 and ultimately resulted in a subacromial decompression and Mumford procedure being performed by Dr. John Orwin on July 25, 2011. He participated in an extensive physical therapy both prior to and subsequent to the left shoulder surgery. He underwent a functional capacity evaluation for the left shoulder condition on February 7 and 8, 2012. On February 14, 2012, Dr. Orwin released Mr. Backenger to return to work. Dr. Orwin also released Petitioner from his care. On June 19 and June 26, 2012, Petitioner saw Dr. Henry Juan, his physician for general medical care. The medical records contain no complaints involving either the right or left shoulder at that visit.

On June 29, 2012, Petitioner sustained an undisputed accident to his right shoulder and arm. He was working in the meat department and entered a cooler to retrieve some meat. He had climbed a ladder to pull a piece of meat off a rack. While on the ladder, his foot slipped and he fell backwards. While falling, he struck his neck and right shoulder upon a rack. He noted immediate pain in his right shoulder and reported the incident. He attempted to work the following day, but had to go home because of pain.

On July 3, 2012 Mr. Backenger sought treatment from Dr. Juan, a primary physician. Dr. Juan's records contain a history that is consistent with that given by Petitioner at trial. Dr. Juan noted Mr. Backenger to be in moderate to severe pain. Upon examination, he noted that the right shoulder had a decreased range of motion. He also noted tenderness at the AC joint, glenohumeral joint, deltoid muscle, trapezius, biceps, triceps, and latissimus dorsi muscles. An x-ray was taken and Dr. Juan subsequently imposed restrictions of no working above shoulder height, no ladders or climbing, no lifting over five pounds, and no use of the right shoulder and right upper extremity. Dr. Juan referred Petitioner to Dr. Ronald Garcia who saw him on July 5, 2012. Dr. Garcia's history is also consistent with Petitioner's testimony. Dr. Garcia noted right shoulder tenderness along with flexion limited to 90° as compared to 180° on the left. Abduction was similarly restricted. The Neer and Hawkins impingement signs were both positive on the right. Dr. Garcia recommended physical therapy and performed a steroid injection into the right shoulder joint. The employer offered Mr. Backenger light duty on July 7, 2012. In this job, he answered the phone and performed zoning with the left hand. During this time he was receiving physical therapy at Mercy Health. A July 18, 2012, note from physical therapy noted decreased

range of motion and strength, and considerable loss of use of the dominant right upper extremity. Petitioner returned to see Dr. Garcia on July 19, 2012. The doctor noted that the previous steroid injection did not help; therefore, Dr. Garcia took Petitioner off work and recommended an MRI. The MRI was performed on August 6, 2012. This showed mild to moderate osteoarthritic degenerative changes along with abnormal fluid within the joint space and the bicipital tendon and sheath. A small tear was suspected through the anterosuperior labrum. There was also mild right acromioclavicular joint arthropathy with edema within the joint. Petitioner returned to Dr. Garcia the following day. The doctor referred Mr. Backenger to Dr. Craig Lyons, an orthopedic surgeon. Dr. Garcia also imposed restrictions of no reaching above shoulder with the right arm, no lifting greater than five pounds with the right arm and no pushing/pulling greater than twenty pounds with the right arm.

Mr. Backenger was seen by Dr. Lyons on August 9, 2012. The doctor noted that the previous physical therapy and injections had not provided any significant relief. He also noted a positive Hawkins and Neers test during the examination. Dr. Lyons diagnosed "impingement and significant biceps tendonitis after fall". He recommended an arthroscopic decompression along with a distal clavicle resection and biceps tenotomy. Petitioner underwent surgery on August 17, 2012. In addition to the decompression and tenotomy, the doctor performed a partial thickness rotator cuff repair.

Petitioner began therapy approximately one month post surgery. During the initial evaluation, the therapist noted significant pain and limitation in his active and passive range of motion. On October 2, 2012, Petitioner returned to his family physician who evaluated the right shoulder. He noted pain at the 6 out of 10 level, which was aggravated with movement such as turning a steering wheel and lifting. He noted tenderness at the deltoid muscle, trapezius muscle, AC joint, and glenohumeral joint. On October 12, 2012 Mr. Backenger saw Dr. Lyons physician assistant. The PA performed a right shoulder injection and told Mr. Backenger to continue with physical therapy. Around that same time, the PA completed a return to work slip that indicated that Petitioner could only return to work with a restriction of no use of the right arm. (PX 11). On November 16, 2012, Mr. Backenger was seen by the PA, who once again noted pain at the 6 out 10 level causing difficulty sleeping. He was using a TENS unit and attending physical therapy. The PA noted that the post-operative course was being slowed by glenohumeral joint arthritis and stiffness. He recommended continued physical therapy, the TENS unit and a home exercise program. Petitioner was last seen by Dr. Lyons on December 28, 2012. He noted that Mr. Backenger's evaluation showed crepitus, pain, loss of active motion, night pain and disability secondary to his shoulder. Continuing conservative treatment was recommended.

Shortly thereafter, Mr. Backenger chose to return to Dr. John Orwin, the doctor who had surgically repaired the left shoulder. Mr. Backenger saw Dr. Orwin on February 6, 2013 in the Beloit office. An examination along with x-rays was performed. After the examination, Dr. Orwin recommended a fluoro-guided glenohumeral joint injection. In addition, he gave Mr. Backenger a slip that limited him to one-handed work. (PX 10). Mr. Backenger testified that he gave a copy of the slip to the night manager of Wal-Mart store. He was not offered any employment.

Petitioner did undergo the joint injection, which was performed by Dr. Lee at UW Madison, on February 14, 2013. Physical therapy was initiated at Beloit Health System on February 21, 2013. Shortly after this, Petitioner underwent an EMG/NCS at the University of Wisconsin Hospital in Madison. This did not show any specific nerve involvement in the right arm. Petitioner returned to Dr. Orwin on April 23, 2013. Dr. Orwin noted that the glenohumeral joint injection had given 5-6 days of relief. He noted the continuing limited range of motion of the right shoulder. His diagnosis was right shoulder glenohumeral degenerative changes exacerbated by a fall at work along with failed conservative measures. Therefore, he recommended arthroscopic debridement of the glenohumeral joint. On March 27, 2013 a "peer review report" was prepared by Dr. David Trotter at the request of Wal-Mart. Dr. Trotter did not evaluate the Petitioner but instead performed a medical record review. Around this same point in time, Petitioner received a settlement offer letter from Wal-Mart's Claims Management Services. Shortly after this, he was sent home after being told there was no work available because Wal-Mart had determined the case not to be compensable. Petitioner has had no further medical treatment since the surgery recommendation by Dr. Orwin. Petitioner also testified that there have not been any intervening injuries since the original accident on June 29, 2012. He further indicated that he does wish to proceed with the surgery recommended by Dr. Orwin.

## CONCLUSIONS OF LAW

### Issue F – Is Petitioner's Current Condition and Need for Surgery Causally Related to the June 29, 2012 Accident?

The Arbitrator finds that Petitioner's current condition of ill being and need for surgery to the right shoulder is causally related to the injury of June 29, 2012. The Arbitrator bases his finding upon the opinion of the treating physician, Dr. John Orwin, and the totality of the medical records. (PX 9). The Arbitrator finds Dr. Orwin to be a highly qualified shoulder surgeon at the University of Wisconsin – Madison as evidenced by his curriculum vitae. (PX 10). He was not hired to provide a forensic medical/legal opinion by either party. Instead, he has been Petitioner's treating physician since May 24, 2011, when he began treating his left shoulder condition. The fact that he was familiar with Petitioner's right shoulder condition, both before and after the work accident, places him in the best position to determine whether or not that accident caused the need for the surgery that he is proposing. In his report, Dr. Orwin states:

> "It is my opinion to a reasonable degree of medical certainty, that Mr. Backenger was having little, if any, problems with his right shoulder joint at the time of his accident on June 29, 2012. It is my opinion, however, that Mr. Backenger most likely did have glenohumeral arthritis in his shoulder, but he was completely asymptomatic. It is my opinion that the accident aggravated the arthritis in his shoulder beyond the normal progression necessitating his index [*sic*] surgery by Dr. Lyons and the subsequent treatment." (PX 10).

Later in his report, he states the following:

> "I do feel that Mr. Backenger most certainly had this arthritis in his shoulder prior to the accident, but he was asymptomatic. Therefore, the accident aggravated this arthritis

beyond the normal progression therefore making it compensable by workman's compensation. I don't believe that Dr. Lyons surgery made his overall condition any worse. Unfortunately, it just didn't make him significantly better."

These opinions are consistent with the medical records that were offered into evidence. The records from Mercy Beloit Medical Center (PX 3), Mercy Health Sports Medicine (PX 4), and Mercy Health Walworth (PX 5) all document the fact that prior to the accident of June 29, 2012, Petitioner made no complaints of any kind pertaining to his right shoulder. These include 27 physical therapy visits at the Research Park Sports Medicine Physical Therapy Center between July 26, 2011 and November 23, 2011, as well as treatment at the Beloit Memorial Hospital physical therapy department from December 14, 2011 through February 3, 2012. (PX 8). Probably the most significant document from Beloit Health is the Functional Capacity Evaluation performed on February 7, 2012 and February 8, 2012. That evaluation showed full strength in all movements of the shoulder. In addition, his range of motion was as follows: Flexion 165°; Extension 135°; Abduction 165°; External rotation 80°; and Internal rotation to T8.

Mr. Backenger made numerous complaints of pain in his left shoulder while performing the specific tasks of the Functional Capacity Evaluation. There are no complaints noted in regard to the right shoulder. During the evaluation, he was asked to ascend and descend a ladder with 25 and 35 pounds on his right shoulder. He was able to perform this task with no problem. The fact that Petitioner had a completely normal assessment both objectively and subjectively just five months prior to the June 29, 2012 accident documents the fact that any pre-existing arthritis that existed before the accident was totally asymptomatic. The Arbitrator further notes that an unrelated evaluation with Dr. Juan performed three days before the work injury contains no mention of any difficulties with the right shoulder.

In contrast, an evaluation performed a week later, and just four days after the June 29, 2012, accident shows a dramatic change in his condition. When Petitioner saw Dr. Juan on July 3, 2012, he rated his pain as 8 out of 10. His right shoulder had decreased range of motion, and there was tenderness noted in multiple muscles and joints in the front and back of the right shoulder. By July 5, 2012, Dr. Garcia noted right shoulder flexion and abduction to be 90°, an almost 50% reduction from normal. Approximately five weeks post accident, Dr. Lyons noted asymptomatic underlying arthritis. He further noted that Petitioner had full range of motion and strength prior to the fall but now had very painful range of motion with numerous objective tests. The MRI demonstrated significant fluid within the biceps consistent with an extensive biceps tendonitis as well as a downward slopping of the acromial tip and some degenerative acromioclavicular joint changes. His diagnosis was "impingement and significant biceps tendonitis after fall". A review of the medical records shows that Petitioner's impaired range of motion did not improve and that his pain level remained constant from the time of injury through the date of Dr. Orwin's recommendation for a second surgery. This evidence supports Dr. Orwin's opinion that the June 29, 2012, fall aggravated, both subjectively and objectively, the pre-existing arthritic condition.

In support of its refusal to authorize the surgery recommended by Dr. Orwin, Respondent presented four medical reports – two from Dr. David Trotter and two from Dr. Peter Hoepfner. Dr. Trotter never examined Petitioner, but instead performed a "peer review" consisting of a

review of a portion of Petitioner's medical records. Dr. Hoepfner did examine Petitioner on September 17, 2013. Neither Dr. Hoepfner nor Dr. Trotter had Petitioner's pre-injury treatment records, and in particular the records related to the prior left shoulder injury. Both doctors also stated that Mr. Backenger had only suffered a soft tissue injury as a result of his fall on June 29, 2012. Both doctors opined that they believed the need for surgery proposed by Dr. Orwin was solely related to pre-existing arthritis in the glenohumeral joint. Dr. Trotter went so far as to state that Mr. Backenger likely had previous "periods of impingement syndrome and painful arthritis of the right shoulder." The Arbitrator notes there is no evidence to support this statement and is mere conjecture. There is absolutely no evidence of any symptomatic or painful arthritis of the right shoulder before the incident in question. Dr. Trotter also states on numerous occasions that one would have expected complaints of "markedly greater severity and frequency of painful motion after the June 29, 2012 incident".

Similarly, Dr. Hoepfner states that Petitioner only described moderate anterolateral shoulder discomfort at the time and "waited several days before seeking treatment", and therefore is consistent with a shoulder strain/sprain and tendonitis. The treatment records show that Mr. Backenger went to his physician four days after the incident. At that time was complaining of an 8 out 10 pain level and had an almost a 50% loss of range of motion in the shoulder.

The Arbitrator choses to give little weight to these opinions due to the fact that the opinions do not correlate to the evidence of record. In addition, it is clear that the doctors did not review all of the medical records that have been presented to the Arbitrator. In particular, there is no indication that they reviewed the physical therapy records from 2011 and 2012. Those records contain no complaints of any right shoulder problems. Nor did they review the Functional Capacity Evaluation performed just five months prior to the accident in question. The FCE showed normal right shoulder strength, full range of motion, and the ability to climb a ladder with a thirty-five pound weight on the right shoulder. Ultimately, Drs. Trotter and Hoepfner have not directly addressed the question of an aggravation of a pre-existing condition. In particular, they have not addressed the question of why the change between an asymptomatic shoulder pre-injury and a significantly limited and painful shoulder post injury does not constitute an aggravation of a pre-existing condition. The evidence presented by Petitioner supports Dr. Orwin's opinion regarding aggravation and acceleration and therefore, the Arbitrator finds in Petitioner's favor on the issue of casual relationship.

**Issue G – What were Petitioner's Earnings on the Date of Accident?**

Respondent offered an earnings history report as Respondent's Exhibit 7. In reviewing the report, it appears that there were only twelve pay periods in which Petitioner had earnings during the 52 weeks before the accident. The remainder of the time, Mr. Backenger was out of work due to his prior to his left shoulder injury. The payroll records show that Mr. Backenger is normally paid every two weeks. The records reveal that during those two-week periods, he would normally work between 45-65 hours. This is consistent with his testimony that he would normally work approximately 36 hours per week. The records also reveal that he apparently worked two one-week periods of less than 36 hours. This first occurred during the week before he started missing time due to his left shoulder injury (7/15/11 pay period). The second time was

when he returned to work after being off work (5/4/12 pay period). Therefore, between July 1, 201, and June 29, 2012, there were five two-week pay periods and two one-week pay periods resulting in a total of twelve pay periods. The total earnings for those twelve pay periods (7/1/11-7/15/11 and 5/4/12-6/29/12) is $4,429.59. Dividing that gross amount by twelve renders an average weekly wage of $402.69. Based upon the Arbitrator's judgment that this method most accurately describes the average weekly wage during the year before the accident, the Arbitrator finds that Petitioner's average weekly wage as of the date of injury was $402.69.

**Issue J – Has Respondent Paid All Appropriate Charges for All Reasonable and Necessary Medical Expenses?**

Petitioner submitted a medical bills exhibit marked as Petitioner's Exhibit 1. The sole bill not paid by Respondent are charges owed to Beloit Health Systems for physical therapy to Petitioner's right shoulder rendered in March 2013. The bill total is $339.93. Since both the medical provider and the Petitioner reside in Wisconsin, the Act requires that out of state treatment be paid at the lesser of the Wisconsin Fee Schedule or the Illinois Fee Schedule, if Wisconsin does not have a Fee Schedule. Should Wisconsin not have a fee schedule, the bill should be paid pursuant to the Illinois Fee Schedule, as it would apply in Rockford, the designated hearing site. Since the Arbitrator has already ruled in Petitioner's favor on the issue of casual relationship, the Arbitrator finds that Respondent is liable for payment of the unpaid medical charge owed to Beloit Health System.

**Issue K – Should Prospective Medical Care be Ordered?**

There is no dispute that Petitioner is in need of further treatment to the right shoulder. Neither of Respondent's examining doctors stated that Dr. Orwin's proposed surgery to the right shoulder was unnecessary. Dr. Orwin discusses the need for surgery both in his office notes as well as his narrative report. Noting that conservative measures have failed to improve Mr. Backenger's range of motion and right shoulder pain, Dr. Orwin recommends that an arthroscopic debridement of the glenohumeral joint is needed. In addition, if this procedure does not give Petitioner symptomatic relief, it may be necessary to perform a joint arthroplasty in the future.

Having previously determined that Petitioner's condition of ill being is causally related to the fall at work, the Arbitrator orders Respondent to authorize and pay for treatment to the right shoulder recommended by Dr. Orwin.

**Issue L – Should Respondent Pay Temporary Total Disability Benefits?**

Petitioner claims three distinct periods of temporary total disability. The first is July 1, 2012 through July 7, 2012. The second is August 17, 2012 through October 29, 2012. Finally, Petitioner claims that he has been disabled from April 19, 2013 through the date of hearing. The Respondent agrees to the period of disability from August 17, 2012 through October 29, 2012, and claims credit of $3,690.16. Petitioner testified that he attempted to work the day after the accident but could not tolerate the pain. He did return to work on July 8, 2012, he then worked up until August 17, 2012, when surgery was performed by Dr. Lyons. He was released to return

to work with restrictions of no use of the right arm as of October 29, 2012. (PX 12). Respondent accommodated the restriction until April 19, 2013. In the interim, he had seen Dr. Orwin on February 6, 2013. Dr. Orwin also restricted Mr. Backenger to one-handed work with no use of the right arm. (PX 11). On April 19, 2013, Respondent made an offer to Mr. Backenger to settle his worker's compensation claim for the June 29, 2012 incident. Shortly thereafter, he was informed by the night manager that accommodated work would no longer be provided, based on their position that the claim was no longer compensable. Petitioner has not worked since that time.

There is nothing to indicate that Petitioner is no longer employed by Wal-Mart. He is under a restriction of no use of the right arm by both Dr. Lyons and Dr. Orwin. He still has significant loss of motion of that arm and is experiencing moderate to severe pain in the shoulder. Petitioner was performing accommodated work for the Respondent until he was sent home, apparently based on Dr. Trotter's opinion regarding causation. Based upon the above and the fact that the Arbitrator has previously found in favor of the Petitioner on the issue of casual relationship, the Arbitrator finds that Petitioner has been temporary totally disabled since April 19, 2013 and has continued to be so through the date of hearing.

**Issue M – Should Penalties and Attorney Fees be Awarded?**

The intent of Sections 16, 19(k) and 19(l) of the Worker's Compensation Act is to expedite the compensation of injured workers and penalize an employer who unreasonably or in bad faith delays or withholds compensation due to an employee. The Arbitrator notes that Respondent initially acted reasonably in its handling of Mr. Backenger's claim. They paid all of Mr. Backenger's bills except for a physical therapy bill in March 2013. Respondent stipulates that Petitioner was temporarily and totally disabled from August 17, 2012 through October 29, 2012. At that point, Respondent began accommodating Petitioner's restriction s and provided one-handed work for him to do. It was not until Respondent obtained the "peer review" report from Dr. Trotter that Respondent's conduct became unreasonable.

The test is not whether there is some conflict in a medical opinion; instead it is whether the Respondent's conduct in relying upon the medical opinion of its examiner to dispute liability is reasonable given the circumstances presented. In the present case, Respondent relied upon the opinions of a physician who reviewed only a portion of Petitioner's medical records. He never spoke with the Petitioner or examined him. It is clear that he did not have any of the pre-injury medical history when he rendered his first two opinions, nor did he obtain any x-rays or review any imaging studies. Based on the information that he reviewed, Dr. Trotter stated that Petitioner merely sustained a soft tissue injury when he fell off the ladder at work. He further stated that this soft tissue injury healed within approximately four weeks of the incident, despite the fact that Petitioner ultimately went on to surgery with Dr. Lyons. Dr. Trotter does not indicate the medical or scientific basis for his opinion other than "his experience". The Arbitrator notes that the Dr. Trotter's opinions are inconsistent with Respondent's acknowledgement that Petitioner was totally disabled from August 17, 2012 through October 29, 2012, the period of post operative recovery. The Arbitrator further notes that Dr. Trotter no longer practices in Illinois and is licensed to practice in a number of states. Petitioner obtained copies of 1099's from Dr. Trotter's 2013 tax return. These documents reveal the fact that Dr.

Trotter provides substantial medical/legal consulting for a variety of insurance companies. In light of all of the medical evidence and Petitioner's testimony, the Arbitrator finds that Dr. Trotter's opinions are entitled to little or no weight, and the employer's reliance upon those reports to dispute compensability of the claim is unreasonable.

Respondent's other expert physician, Dr. Hoepfner also failed to review all of the relevant medical records. In particular, he failed to review the physical therapy records, and the functional capacity records that showed full function of the right arm just five months prior to the work injury. The Arbitrator finds that Respondent's reliance upon this report is also unreasonable. Dr. Hoepfner also opined that Petitioner only sustained a sprain or strain of the shoulder when he fell off the ladder. The basis of this statement was his belief that Petitioner only had moderate anterolateral shoulder discomfort at the time of injury and waited several days before seeking treatment. As noted above, this is a mischaracterization of the evidence in that Petitioner complained of severe pain in the shoulder when he went to the doctor four days after the accident. Petitioner also testified that he attempted to return to work the day after the accident and had to go home because of the pain in the shoulder. Like Dr. Trotter, Dr. Hoepfner never addresses head on the fact that Mr. Backenger's arm was fully functional before the accident and became severely impaired shortly after the accident. The failure to provide a medical basis for the opinion of no aggravation in the face of evidence showing an asymptomatic and fully functional right arm prior to the accident makes Dr. Hoepfner's opinion also unreasonable.

The Arbitrator notes that the only opinion rendered by a truly independent physician in this case is that of Dr. Orwin. The Arbitrator notes that Dr. Orwin is an extremely qualified and extensively published shoulder specialist. He serves as the team physician for the University of Wisconsin football and basketball teams. His opinion that the fall aggravated and accelerated the underlying degenerative arthritis is consistent with the facts presented in this case. Respondent's refusal to accept the opinions of the treating physician and refusal to pay benefits after April 19, 2013 was unreasonable and vexatious.

Section 19(k) allows the Commission to award compensation in addition to that otherwise payable equal to 50% of the amounts payable at the time of the award. When a delay has occurred in the payment of benefits, the employer has the burden to justify the delay. Section 19(l) penalties are appropriate when there has been a delay in payment of fourteen days or more. In such cases, the Arbitrator shall allow the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Sections 8(a) and 8(b) that have been withheld, not to exceed $10,000.00. Finally, Section 16 of the Act allows that when an employer has been guilty of unreasonable or vexatious delay within the provisions of Section 19(k), the Arbitrator can assess attorney fees and costs against the employer. Based upon the evidence cited above, the Arbitrator awards 19(k) penalties of $7,899.49 based upon 50% of the outstanding TTD benefits of $15,798.98. Based upon 19(l), the Arbitrator awards $10,000.00 in penalties based upon a $30.00 a day for a total of 422 days. Finally, considering Section 16 of the Act and based upon the penalties awarded above, the Arbitrator awards attorney fees of $3,577.89 pursuant to Section 16 of the Act.

STATE OF ILLINOIS )
) SS.
COUNTY OF LAKE )

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGEL BLANCO,

Petitioner,

vs.

NO: 09 WC 24303
15 IWCC 205

LAKE COUNTY FOREST
PRESERVE DISTRICT,

Respondent,

ORDER OF RECALL UNDER SECTION 19(f)

This cause comes before the Commission pursuant to Petitioner's Motion to Correct the Commission's Decision pursuant to Section 19(f) of the Workers' Compensation Act. Petitioner's Motion to Correct the Commission's Decision was filed on April 10, 2015. For reasons unknown to the Commission, a copy of said Motion was not delivered to the Commissioner's office until June 17, 2015, by Petitioner. The Commission grants Petitioner's 19(f) Motion and hereby recalls its Decision and Opinion on Review dated March 23, 2015 due to a clerical error contained therein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated March 23, 2015, is hereby recalled pursuant to Section 19(f) of the Act and a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order. The parties should return their original Decision to Commissioner Michael J. Brennan.

DATED: JUN 2 4 2015
MJB/tdm
052

Michael J. Brennan

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 up | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGEL BLANCO,

Petitioner,

vs.

NO: 09 WC 24303
15 IWCC 205

LAKE COUNTY FOREST PRESERVE,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

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

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

Based on the totality of the evidence, the Commission finds that the Petitioner established that his current condition of ill-being is causally related to his undisputed work-related injury of March 13, 2007. The Commission awards Petitioner TTD benefits from September 9, 2010 through June 3, 2011, and medical expenses of $52,830.56. The Commission finds Petitioner is entitled to 15% man-as-a-whole. All else is affirmed and adopted.

Mr. Blanco sustained an undisputed work-related injury on March 13, 2007. The Respondent offered no evidence to rebut Mr. Blanco's testimony that he had no back issues prior

to March 2007. Following the accident, Petitioner underwent treatment to his low back and returned to work on two occasions. The Commission notes that there is a gap in medical treatment from June 16, 2008 to March 2009. However, Petitioner testified that despite his return to work, he still experienced back pain and had to have assistance performing some of his job duties. His testimony was not contradicted.

The Respondent argues that Petitioner failed to prove causal connection after June 18, 2008. In support of its contention, they argue that Ms. Lurel Diver testified that Petitioner did not have any job modifications after June 2008 as such information was not in his personnel file. The Commission is not persuaded by Respondent's argument. The Commission notes that Ms. Diver stated on cross-examination that the performance evaluation would not mention if Petitioner needed help performing his job duties; rather, it would only show if Petitioner did not meet his job expectations. Further, Ms. Diver testified that since she did not bring Petitioner's personnel file to the hearing, she did not know if Petitioner made a request for treatment after May 2007.

Petitioner testified that he informed his supervisor of his continued back issues after June 2008. Ms. Diver testified that she did not know if Petitioner made any complaints to his supervisor. The Respondent did not offer any evidence or testimony to rebut Petitioner's assertion of continued back issues.

The Respondent asserts that Petitioner worked overtime on 16 separate occasions, which established that he did not have continued low back complaint. It implies that Ms. Diver's unrebutted testimony was that these overtime hours were likely voluntary for snow removal. The Commission is again not persuaded by this argument. The fact that Petitioner worked overtime between June 16, 2008 and March 20, 2009 is not indicative whether Petitioner's condition has healed or not. There is no testimony that establishes whether the overtime was voluntary, like Respondent contends, or mandatory. Ms. Diver testified that overtime could be mandatory and there was no way of knowing by looking at the payroll sheet. No testimony was proffered to contradict Petitioner's testimony that he had to do more work during the winter months as he had no seasonal help during the winter season.

Lake County Forest Preserve suggests that Petitioner did not mention any low back issues to Dr. Nemickas during February 2009. The Commission notes that Petitioner was seen by Dr. Nemickas for shoulder issues that were unrelated to his back. The medical records do not indicate that Dr. Nemickas ever examined Petitioner's back. Rather, Dr. Nemickas' medical records indicate that the Petitioner did not sustain any new trauma. This supports Mr. Blanco's testimony that he did not sustain a new injury after June 2008.

While there is a gap in Blanco's medical treatment between June 16, 2008 and March 2009, the objective medical evidence establishes no significant change in his medical condition.

The Commission notes that the MRI film taken between April 2007 and June 2008 does not show any significant change. The April 2007 MRI revealed a diffuse disc bulge with a small left central disc protrusion/early herniation at L4-L5, and a diffuse disc herniation at L5-S1. The July 2008 MRI revealed a posterior annular tear and a diffuse disc bulge at L4-L5, and a mild diffuse disc bulge and facet arthrosis without stenosis at L5-S1. The August 20, 2009 MRI

revealed a lateral protrusion at L5-S1 and a small posterior annular tear at L4-L5. All the MRIs revealed a disc bulge and do not reveal any significant change. The Respondent's argument that the April 2007 MRI showed no pathology for a herniated disk is without merit. The 2007 MRI noted a disc protrusion/early herniation at L4-L5 and a herniation at L5-S1. There was pathology as early as April 2007.

The Commission takes note that as of April 6, 2007, Mr. Blanco was found to have a mild positive straight leg raise test on the left. He also had pain radiating into the left buttock. While the June 16, 2008 medical record indicated that Petitioner was at maximum medical improvement (MMI), and noted that Petitioner was at MMI barring further changes. During the June 16, 2008 appointment, Petitioner had continued back pain with intermittent left lower radicular symptoms. His symptoms were still present as of June 16, 2008 and never fully went away.

The Commission finds Dr. Citow's opinions to be persuasive. Each of the treating doctors has recommended surgery. Dr. Bernstein, Respondent's Section 12 examiner has not. Dr. Citow's opinions are supported by the objective medical evidence. Also, the Respondent's argument that Dr. Hebel, Dr. Chhabria and Dr. Adamson never provided causal connection opinions is not accurate. Petitioner stated on the record that the medical records were being offered into evidence with the specific understanding that each doctor would testify to a causal connection between the accident, his current condition and the need for surgery. The Respondent never objected.

Due to the work injury, Petitioner underwent a left sided L5 and S1 hemilaminectomy with medial facetectomy and L5 and S1 foraminotomies with partial diskectomy with microdissection. Petitioner testified that he is still not 100 percent. He struggles every day and awakens most nights because of left leg numbness. He moves more slowly because of his back.

Based on the evidence, the Commission finds Petitioner established that his current low back condition is causally related to his undisputed work-related injury of March 13, 2007. The Petitioner further established that he is entitled to medical expenses totaling $52,830.56. The Petitioner is entitled to TTD from September 9, 2010 through June 3, 2011, in addition to the TTD previously awarded for the period of March 14, 2007 through May 14, 2007. The Commission finds Petitioner sustained 15% loss of use 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 11, 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 $666.66 per week for a period of 46-5/7 weeks, March 14, 2007 through May 14, 2007 and September 9, 2010 through June 3, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $600.00 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $52,830.56 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $40,276.10 under §8(j) of the Act for medical expenses paid by Blue Cross Blue Shield; 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 proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUN 2 4 2015

MJB/tdm
O: 2-2-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS )
) SS
COUNTY OF KANE )

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rosa Ruiz,
Petitioner,

vs.

NO. 07 WC 37471
07 WC 37472
09 WC 27931

SKF Sealing Solutions,
Respondent,

ORDER OF RECALL UNDER SECTION 19(f)

The Commission on its own Motion pursuant to Section 19(f) of the Workers' Compensation Act recalls the Review Decision dated June 8, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated June 8, 2015 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein. The parties should return their original decisions to Commissioner Mario Basurto.

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

DATED: JUN 25 2015

Mario Basurto

MB/jm
43

STATE OF ILLINOIS )
) SS.
COUNTY OF KANE )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rosa Ruiz,
Petitioner,

vs.

SKF Sealing Solutions,
Respondent.

NO: 07 WC 37471
07 WC 37472
09 WC 27931
15 IWCC 0425

CORRECTED DECISION AND OPINION ON REVIEW

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

In Claim No. 07 WC 37471, the Commission finds that while Arbitrator Flores gave no credit in her July 17, 2014 Remand Arbitration decision, the parties agreed that Respondent is entitled to an earlier credit of $36,408.90 for the payment of temporary total disability and/or maintenance benefits and to a credit under Section 8(j) for any amounts so paid under Respondent's group medical insurance plan. Said earlier credit was awarded at the time of the initial May 19, 2010 Section 19(b) hearing before Arbitrator Hennessy. Additionally, Respondent is entitled to a credit of $10,124.40 in Claim No. 09 WC 27931 for a total credit of $46,533.30 due and owing for both claims.

In Claim No. 09 WC 27931, the Commission finds that there is sufficient language contained within the Commission's May 2, 2011 Review decision to indicate that the majority of the Commission found Petitioner's left elbow is casually related to the March 12, 2009 work accident. Specifically, the Commission finds while portions of pages three and four of the Commission's decision are vague in nature, the decision as a whole is sufficient to address the causation issue. The Commission notes that on page two and portions of page three, the Commission specifically addressed the causation issue. More specifically, on page two of the Commission's decision, the Commission states that in so finding (causal connection) it relied on

the testimony of Petitioner, Mark David Payton as well as the expert opinion testimony of Dr. Lamberti. The Commission finds that this is both clear and specific in terms of the Commission's position regarding the causation issue. The Commission also infers, by virtue of fact that prospective medical was awarded and the dissent's comments regarding Dr. Lamberti's causation opinion, that the causation issue was addressed in the majority's decision. Additionally, while Respondent refers to Commissioner Lindsay's position in the dissent as basis for finding that Dr. Lamberti was given an incorrect hypothetical and that his opinion should not be used to support the issue of caudsation, the Commission notes that at the time that the hypothetical was posed during the deposition Respondent did not raise an objection to inaccuracy of the hypothetical. Moreover, the Commission finds that Respondent did not file a Section 19(f) Motion, claiming that the ambiguity is a scribner's error and Respondent did not raise this issue on appeal to the Circuit Court. As such, the Commission finds that its May 2, 2011 decision became final and law of the case principle was established in terms of the causation issue. While the Commission acknowledges that there is an ambiguity contained within the May 2, 2011 decision, the Commission finds that there is sufficient supporting language contained within the decision to determine the Commission's position on causation and to find that at this late stage Respondent has waived this issue and has not preserving the same. Thus, the Commission finds that as such Arbitrator Flores was correct in finding in her remand decision that the Commission had earlier found causation exists in terms of Petitioner's current left elbow condition and it relationship to the March 12, 2009 work accident and in proceed accordingly in determining the issues of unpaid medical and permanency.

IT IS THEREFORE ORDERED BY THE COMMISSION that in Claim No. 07 WC 37471 Respondent pay to Petitioner the sum of $454.30 per week for a period of 67 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 in Claim No. 09 WC 27931 Respondent pay to Petitioner the sum of $454.30 per week for a period of 27-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that in Claim No. 07 WC 37471Respondent pay to Petitioner the sum of $868.74 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that in Claim No. 09 WC 27931Respondent pay to Petitioner the sum of $1,931.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that in Claim No. 07 WC 37471 Respondent pay to Petitioner the sum of $408.87 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 a man as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that in Claim No. 09 WC 27931 Respondent pay to Petitioner the sum of $408.87 per week for a period of 75.9 weeks, as

provided in §8(e) of the Act, for the reason that the injuries sustained caused the 30% loss of use of the left arm.

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

IT IS FURTHER ORDERED BY THE COMMISSION that in Claim No. 07 WC 37471 Respondent shall have credit in the amount of $36,408.90 for all amounts paid to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that in Claim No. 09 WC 27931 Respondent shall have credit in the amount of $10,124.40 paid to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of Claim No. 07 WC 37471 to the Circuit Court by Respondent is hereby fixed at the sum of $15,400.00. 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.

Bond for the removal of Claim No. 09 WC 27931 to the Circuit Court by Respondent is hereby fixed at the sum of $35,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUN 2 5 2015

MB/jm

O: 5/7/15

43

Mario Basurto

David L. Gore

Stephen Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**RUIZ, ROSA**
Employee/Petitioner

Case# **07WC037471**

07WC037472

09WC027931

**SKF SEALING SOLUTIONS**
Employer/Respondent

15IWCC0425

On 7/17/2014, 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 0.06% 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:

2932 LAW OFFICE OF KUGIA & FORTE PC
MARTIN KUGIA
711 W DUNDEE ST
WEST DUNDEE, IL 60118

0081 BRAUN LORENZ & BERGIN PC
MARK BRAUN
33 N LASALLE ST SUITE 1210
CHICAGO, IL 60602

15IWCC0425

STATE OF ILLINOIS )
)SS.
COUNTY OF KANE )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

**Rosa Ruiz**
Employee/Petitioner

v.

**SKF Sealing Solutions**
Employer/Respondent

Case # **07** WC **37471**

Consolidated cases: **07** WC **37472**
**09** WC **27931**

An *Application for Adjustment 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 **Geneva**, on **May 28, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On July 30, 2007, April 5, 2007 and March 12, 2009, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being *is, in part,* causally related to these accidents as explained *infra.*

In the year preceding the injuries on July 30, 2007, April 5, 2007 and March 12, 2009, Petitioner earned $35,435.40; the average weekly wage was $681.45.

On the April 5, 2007 and July 30, 2007 accident dates, Petitioner was 45 years of age. On the March 12, 2009 accident date, Petitioner was 47 years of age. On all three dates of accident, Petitioner was *married* with 3 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 and for any and all other such benefits paid as agreed by the parties. *See* AX1.

Respondent is entitled to a credit of $0 and for any such further amounts as agreed by the parties under Section 8(j) of the Act.

**ORDER**

*Temporary Total Disability*

As agreed by the parties, Respondent shall pay Petitioner temporary total disability benefits of $454.30/week for 27 & 5/7th weeks, commencing August 22, 2012 through March 3, 2013, as provided in Section 8(b) of the Act. *See* AX1.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from June 30, 2007 through May 28, 2014, and shall pay the remainder of the award, if any, in weekly payments.

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

*Medical Benefits*

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule from MedSource ($1,091.00) and NCNS ($840.00) totaling $1,931.00 as provided in Sections 8(a) and 8.2 of the Act.

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

*Permanent Partial Disability: Person as a whole (Low Back – Case No. 07 WC 37472)*

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner failed to prove causal connection between her claimed low back condition of ill being and her accident at work. By extension, all other issues related to the low back are rendered moot and all requested compensation and benefits related to the low back are denied.

*Permanent Partial Disability: Person as a whole (Left Shoulder – Case No. 07 WC 37471)*

Respondent shall pay Petitioner permanent partial disability benefits of $408.87/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

*Permanent Partial Disability: Schedule injury (Left Arm/Elbow – Case No. 09 WC 27931)*

Respondent shall pay Petitioner permanent partial disability benefits of $408.87 /week for 75.9 weeks, because the injuries sustained caused the Petitioner 30% loss of use of the left arm (elbow), 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

July 10, 2014
Date

JUL 17 2014

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION *ADDENDUM*

**Rosa Ruiz**
Employee/Petitioner

v.

**SKF Sealing Solutions**
Employer/Respondent

Case # **07** WC **37471**

Consolidated cases: **07** WC **37472**
**09** WC **27931**

## FINDINGS OF FACT

*Procedural History*

Petitioner's cases originally went to arbitration on May 19, 2010 at which time the first hearing was held pursuant to her Sections 19(b) and 8(a) petition. Petitioner's Exhibit[1] 6. The arbitration decision addressing all three of Petitioner's cases dated August 13, 2010 was timely reviewed by Petitioner. *Id.* The Commission issued its decision on May 2, 2011. *Id.* It appears from the Commission's records that a subsequent Circuit Court appeal was filed, but no order was entered on the merits rendering the Commission's decision final.

Of note, the Commission affirmed and adopted the Arbitrator's decision in Case No. 07 WC 37471 finding that Petitioner suffered an accident on July 30, 2007 to her left shoulder (denying any causation to any other body parts). *Id.* The Commission modified the awarded temporary total disability period to July 31, 2007 through November 18, 2008. *Id.* In Case No. 07 WC 37472, the Commission affirmed and adopted the Arbitrator's decision finding that Petitioner sustained an accident on April 5, 2007 to her low back, and that there was no lost time or additional medical care required for her back. *Id.* With regard to Case No. 09 WC 27931, the Commission reversed the Arbitrator's decision finding that Petitioner did suffer a repetitive trauma accident to her left elbow which manifested itself on February 12, 2009. *Id.* The Commission ordered Respondent to pay for the reasonable and necessary cost for a re-examination by Dr. Lamberti to determine the status of Petitioner's left elbow and any need for surgical intervention. *Id.* This Arbitrator is bound by the findings and conclusions[2] as reflected in the Commission's May 2, 2011 decision and, thus, hereby incorporates those by reference.

A second consolidated hearing was held before this Arbitrator on May 28, 2014. The issues in dispute in Case No. 07 WC 37471 are causal connection and the nature and extent of Petitioner's left shoulder injury. Arbitrator's Exhibit ("AX") 1. The issues in dispute in Case No. 07 WC 37472 are causal connection and the nature and extent of Petitioner's low back injury. *Id.* The issues in dispute in Case No. 09 WC 27931 are causal connection, Respondent's liability for certain unpaid medical bills, and the nature and extent of Petitioner's left elbow injury. *Id.*

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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.

[2] "The rule of the law of the case is a rule of practice, based upon sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 125 Ill.App.3d 1083, 1086-1087 (1st Dist., 1984). The Appellate Court went on to state that the "trial court order becomes the 'law of the case' only if there is a final and appealable order." *Id.*, (citation omitted).

In accordance with the law of the case, and in consideration of the evidence presented at this hearing, the Arbitrator makes findings on the disputed issues as stated herein.

*Additional Evidence*

Petitioner testified that after the last hearing Respondent authorized her to return to Dr. Lamberti for evaluation of the left elbow. The medical records reflect that Petitioner saw Dr. Lamberti on September 8, 2011. PX1 at 1-2, 11. Dr. Lamberti noted that Petitioner was tender on both epicondyles and he diagnosed her with medial and lateral epicondylitis and cubital tunnel syndrome. *Id.* He ordered an EMG of the left arm. *Id.* Petitioner underwent the recommended EMG on October 13, 2011. PX1 at 4-5. The EMG report indicates that there was no evidence of median neuropathy at the carpal tunnel, left cervical radiculopathy, or left ulnar neuropathy at the elbow. *Id.*

Petitioner returned to Dr. Lamberti on December 22, 2011 and reviewed the EMG results. PX1 at 9-10. He noted that her EMG was negative and indicated that he would not address either carpal tunnel syndrome or cubital tunnel syndrome, although she had vague neurologic symptoms in her hand. *Id.* He also noted that Petitioner had severe tenderness consistent with medial epicondylitis and some mild-to-moderate soreness on the lateral side. *Id.* He recommended surgery to address her medial and lateral epicondylitis, indicating the difficulty of recuperating from surgery to both. *Id.* Petitioner elected to go with surgery, however. *Id.*

*Section 12 Examination – Dr. Belich*

Prior to authorizing the elbow surgery, the Respondent sent the Petitioner back to Dr. Paul Belich for a repeat independent medical evaluation on February 23, 2012. RX2. At that time, Petitioner reported continued left elbow pain and progressive worsening of her symptoms since 2007, although she had not worked since that time. *Id.* Dr. Belich took additional history from Petitioner subsequent to his prior evaluations, reviewed additional medical records, examined Petitioner, and rendered various opinions. *Id.*

He diagnosed Petitioner with medial epicondylitis with possible chronic ulnar neuritis, left elbow. *Id.* He reiterated his opinions as stated in his prior reports that Petitioner's left elbow symptoms were unrelated to her alleged work event in 2007. Dr. Belich also noted that it was unusual for Petitioner to have such severe, unrelenting pain for five years with no improvement whatsoever in her clinical symptoms. *Id.* He noted that she was overly demonstrative, or dramatic, during his examination and that his objective findings during her examination did not correlate to her subjectively reported symptomatology at that time. *Id.* Dr. Belich acknowledged that Petitioner has some objective findings of a medial epicondylitis and indicated that a medial epicondylectomy could be tried, but he noted that the recommendation for a lateral procedure was not indicated and should not be performed. *Id.*

*Continued Medical Treatment*

Petitioner eventually underwent the surgery recommended by Dr. Lamberti on August 22, 2012. PX1 at 13-14. Pre- and post-operatively, he diagnosed Petitioner with left elbow medial epicondylitis and he performed medial and lateral epicondylectomies. *Id.*

Dr. Lamberti ordered post-surgery physical therapy to the left arm which Petitioner underwent at Sherman Hospital. PX1 at 15, 20-21. Petitioner also continued to follow up with Dr. Lamberti; on August 28, 2012 he noted that things were going well and she had her splint changed at Sherman Hospital. PX1 at 17. As of

September 4, 2012, Petitioner had mild ulnar-sided numbness, but her radial-sided numbness was much better and almost gone. PX1 at 18. He also noted good range of motion. *Id.*

By October 2, 2012, Petitioner was feeling weak, but doing much better and taking Advil for pain because the Norco was "too much." PX1 at 23. As of November 13, 2012, Dr. Lamberti released Petitioner back to work with a three pound lifting restriction and two daily breaks of 10 minutes each. PX1 at 24. On December 13, 2012, Dr. Lamberti placed Petitioner off work during four weeks of prescribed work conditioning. PX1 at 29-30.

*Work Conditioning*

Respondent offered several records from Athletico. RX6. In a work conditioning evaluation dated January 7, 2013, Petitioner reported left upper extremity pain, continued soreness in her left elbow, carrying/lifting heavy things causes pain down the inside of her elbow, feeling very weak in her left arm and that she will drop things because she is unable to hold them, pressure near the scar on her elbow where she experiences sharp pain, and pain with movement to bathe, dress or fix her hair. *Id.* Petitioner reported taking Advil for pain. *Id.*

The physical therapist noted Petitioner's active range of motion and the strength of her upper extremities. *Id.* Specifically, he noted loss of range of motion with pain as follows:

- shoulder flexion (158° on the right vs. 145° on the left)
- shoulder abduction (165° on the right vs. 120° on the left)
- shoulder internal rotation (right to T12 vs. left to L2)
- shoulder external rotation 40° on the right vs. 15° on the left)
- wrist flexion (75° on the right vs. 70° on the left)
- wrist extension (85° on the right vs. 80° on the left)
- grip strength (hand dynamometer) on the right at 15 pounds and at 5 pounds on the left

*Id.* Petitioner reported pain with all range of motion and strength testing and demonstrated weakness bilaterally left greater than right. *Id.*

On January 23, 2013, Petitioner returned to Athletico reporting pain at a level of 5-7/10 in the left elbow, a sharp pain on the inside of her left elbow especially near her scar, soreness at a level of 2/10 and left shoulder, soreness in the right shoulder and elbow at a level of 1/10, and that she does not have a lot of strength in her arms and feels like she cannot do a lot of activities both in work conditioning and at home. *Id.*

The physical therapist noted Petitioner's active range of motion and the strength of her upper extremities. *Id.* Specifically, he noted loss of range of motion with pain as follows:

- shoulder flexion (160° on the right vs. 135° on the left) showing a 2° improvement on the right and 10° loss on the left compared with her initial evaluation
- shoulder abduction (160° on the right vs. 135° on the left) showing a 5° loss on the right and a 15° improvement on the left compared with her initial evaluation
- shoulder internal rotation (right to T12 vs. left to L2) showing the same ability as her initial evaluation
- shoulder external rotation 55° on the right vs. 30° on the left) showing a 15° improvement on the right and 15° improvement on the left compared with her initial evaluation

- elbow flexion (140° on the right vs. 130° on the left) showing a 10° loss on the left compared with her initial evaluation
- wrist flexion (65° on the right vs. 60° on the left) showing a 10° loss on the right and 10° loss on the left compared with her initial evaluation
- wrist extension (85° on the right vs. 70° on the left) showing a 10° loss on the left compared with her initial evaluation
- grip strength (hand dynamometer) on the right at 10 pounds and at 1 pound on the left showing a 5 pound loss on the right and 4 pound loss on the left compared to her initial evaluation

*Id.* Petitioner also reported pain with all range of motion and strength testing and demonstrated weakness bilaterally left greater than right. *Id.*

*Continued Medical Treatment and Functional Capacity Evaluation*

When Petitioner returned to see Dr. Lamberti on January 24, 2013, he ordered a functional capacity evaluation. PX1 at 31.

Petitioner underwent the functional capacity evaluation on February 12, 2013. PX2. The evaluating physical therapist, Mr. Toman, determined that "[o]verall test findings, in combination with clinical observations, suggest the presence of low levels of physical effort on [Petitioner's] behalf." PX2 at 1. He also determined that "[o]verall test findings, in combination with clinical observations, suggest inconsistency the reliability and accuracy of [Petitioner's] reports of pain and disability." PX2 at 1-2. Finally, Mr. Toman determined that "[b]ased on [Petitioner's] physical effort and reliability of subjective reports findings, the evaluator cannot validate this examination as being a representation of her maximum function." PX2 at 2.

Of note, during strength grip testing of the right hand using the hand dynamometer Petitioner exhibited low effort and that her left hand grip scores produced "a lack of full effort on the left." PX2 at 12-13. Also, when tested for active right shoulder elevation, Petitioner noted significant apprehension whereas when a heart rate monitor was placed on her right wrist, "she elevated her right arm with ease and held it in sustained flexion for approximately 20 seconds (which was inconsistent with formal assessment). In addition, [Petitioner] could not push/pull with 5 pounds of force bilaterally, though was observed to push our facilities door open when exiting our facility and pull the door open when entering our facility, which required greater than 15 pounds of force." PX2 at 14.

Despite the invalidity of the examination results, Mr. Toman recommended the following as Petitioner's maximum functional capabilities to the extent that the functional capacity evaluation was intended to determine Petitioner's work restrictions: limited standing, walking and sitting on an occasional basis, limited material handling to within the sedentary physical demand level, and to avoid significant reaching, crouching, stooping and handling tasks. *Id.*

On June 25, 2013, Dr. Lamberti reviewed the functional capacity evaluation findings and, "[k]nowing her results, her grip strength and generally what her arm can do…" he recommended that Petitioner could work in an assembly-type position limited to tasks that were up to two pounds on a frequent/repetitive basis, up to five pounds on an occasional basis, and up to 15 pounds on a rare or infrequent basis (2-3 times per day). PX1 at 32.

*Final Section 12 Examination – Dr. Belich*

Respondent sent Petitioner back to Dr. Belich for an independent medical evaluation on February 14, 2013. RX2. Dr. Belich took additional history from Petitioner, reviewed additional medical records, examined Petitioner, and rendered various opinions. *Id.* He opined that Petitioner had an unsuccessful elbow surgery noting that Petitioner "continues to have the same amount of pain, functional disability, and behavioral-type chronic pain patterns that she had even prior to this surgery." *Id.* Dr. Belich recommended no further treatment and placed Petitioner at maximum medical improvement. *Id.*

Dr. Belich subsequently reviewed the results of Petitioner's functional capacity evaluation, a short letter from Dr. Lamberti, and a job description indicating that Petitioner's job required her to lift one pound rods and stack them in a receptacle that weighed 11 pounds. RX2. In an addendum, he opined that Petitioner "could perform this job with a two handed lift of 10 to 11 pounds[,]" based on Petitioner's sub-maximal functional capacity evaluation test results. *Id.*

In a second addendum dated May 6, 2014, Dr. Belich reiterated that, based on Petitioner's invalid exam and lack of maximum effort, "it certainly appears plausible to me that this patient could lift up to 20 pounds with a two handed lift, particularly at the waist level and table level as she is required to do." *Id.*

*Video Surveillance*

Respondent offered into evidence video surveillance of Petitioner on four dates: February 14, 2013, October 4, 2013, December 4, 2013 and December 5, 2013. RX5.

On February 14, 2013, the video depicts Petitioner holding keys and papers or a bundle in the flexed left arm, entering her car and guarding her left arm or holding it in a flexed position. *Id.* She then used her right arm to fasten her seatbelt and began driving with both hands. *Id.*

The October 4, 2013 footage at 11:22 a.m. depicts Petitioner walking with no apparent difficulty from her car to the rear of her house with both arms moving in an ordinary fashion at her sides. *Id.* At 11:36 a.m. she is seen walking toward her car with a coffee cup held in the left hand then transferred to the right. *Id.* At 12:33 p.m. Petitioner is seen sitting in a salon without significant observation of any upper body movement. *Id.* At 1:28 p.m. she is seen exiting the salon heading toward her car with unguarded motion of the left hand and arm. *Id.* At 1:37 p.m. Petitioner is seen pushing a grocery cart containing multiple white plastic bags of unknown weight and placed in her car, although the latter motions of placing the bags in her car are obscured. *Id.* She returned the grocery cart by pushing it with both hands and at one point pulling the empty shopping cart with her left hand only. *Id.*

On December 4, 2013, the video footage shows Petitioner at 7:51 a.m. handling garbage, bags of recycling materials, and containers with both hands. *Id.* Petitioner is seen lifting garbage and recycling bin covers well above shoulder level. *Id.* She is also seen lifting a plain wooden chair for disposal with both hands without any apparent restriction and with extension of both arms. *Id.*

Petitioner viewed the video surveillance and acknowledged that it showed her getting into the driver's seat of her car. When she sat in the driver's seat, Petitioner reached to the door with her right arm to close it. She testified that this was because of pain in her left arm. Petitioner also testified that, before her injury, she would use her left arm to close the driver's side door and fasten her seatbelt.

*Education and Training*

With regard to her education, Petitioner testified that he went to the 12th grade education in Mexico, but she did not obtain her diploma. She also testified that she did not obtain a G.E.D. in the United States, although she tried to do so.

Petitioner testified that she has no other certifications or training. She testified through a translator at trial. She testified that, while she is able to speak some English, it includes basic things such as good morning, how are you, how do you feel and short phrases. Petitioner also testified that she is able to write some English, such as inputting her name and address, height, marital status and number of children; however, she testified that she cannot write full paragraphs in English. Respondent offered its exhibit 7, which is an application for FMLA dated June 13, 2003. RX7. The application contains a paragraph written by Petitioner in English. *Id.* Petitioner testified that the remainder of the application was completed by a staff member of her doctor's office. *Id.* She signed and dated the application. *Id.* Petitioner acknowledged that she wrote these words in English, but explained that she copied the words in English that had been written down by someone for her in the doctor's office so that she could submit the application. *Id.*

Petitioner also testified that she was not employed anywhere at the time of her left elbow surgery and that she last worked on July 30, 2007, the date of her left shoulder and arm accident. She has not worked for anyone since last working for Respondent. Petitioner testified that her employment was terminated when Respondent's plant closed on March 22, 2009.

*Job Search*

After completing her medical treatment, Petitioner testified that she looked for work by going around in her neighborhood and sometimes she would use a Hispanic newspaper or ask her neighbors or friends if they needed personnel in the factories where they worked. She testified that she had the most experience working in a factory, but it is usually very heavy work required in a factory.

Petitioner offered her job search records into evidence. PX4. She testified that she found these places where she would go buy things and generally in the places known to her. For example, on March 28, 2014, Petitioner applied at a bakery. PX4 at 1. Petitioner testified that she went and spoke with the lady in charge, Yolanda, and she told Petitioner that she did not need anyone. Petitioner also applied at a place called Armando's, a grocery store where they sell food. *Id.* Petitioner testified that she asked a young man if they needed cashiers and the response was that they did not need any.

Petitioner testified that she applied at McDonald's and requested an application, but was told that the applications were done on the internet. PX4 at 2. She testified that she applied with help of her daughter, but they did not respond.

On April 3, 2014, Petitioner testified that she went to Quality Labor, a factory where they make balloons. PX4 at 2. She testified that she knows several ladies there and she was interviewed by Ms. Mercado who told her that she would need to work with boxes that weighed over 15 pounds and would need to use her arms. Petitioner testified that the application asked whether she could carry more than 20 pounds and Petitioner did not answer that question. She testified that Ms. Mercado said that they did need personnel, but that she did not believe that Petitioner was qualified for the job and she was not hired. *Id.* Petitioner also applied at Taco Bell that day. *Id.* Petitioner testified that she knows someone there and the lady told her that they needed workers so

the manager asked her questions and told her that he would call her back for an interview. Petitioner testified that she went to the Taco Bell location herself, but they never contacted her.

On April 23, 2014, Petitioner testified that she went to a Sbarro located in a mall food court and left an application which they told her they would give to the manager; Petitioner testified that she never heard back from them. PX4 at 5. Petitioner also applied at Dunkin' Donuts on Route 72 that day. *Id.* She testified that she called them and they told her to go there, which she did, but the person in charge was not there and they gave her the phone number for a woman named Suzy who did not return Petitioner's call.

Petitioner testified that she made contact with all of the other prospective employers listed in PX4, but no one offered her a job. On cross examination, Petitioner acknowledged that the first time that she looked for work was in February 2014.

*Vocational Rehabilitation Opinions*

Petitioner was evaluated by Craig Johnston ("Mr. Johnston") of Johnston Vocational Consulting on December 6, 2013 at the request of her attorney. PX3. Mr. Johnston has a Ph.D and is a certified rehabilitation counselor. *Id.*

Mr. Johnson met with Petitioner and reviewed her educational and employment history. *Id.* His report indicates that she attended high school in Mexico, but has no high school diploma. *Id.* Petitioner testified at trial that she attended high school in Mexico, but never passed the final tests in order to obtain a diploma. She also testified that she was later enrolled in the Spanish GED program in the U.S., but was unable to complete the program.

Mr. Johnston noted her prior employment in Mexico as a receptionist as well as her prior employment in the U.S at Walmart as a stock clerk where she reported that a co-worker provided her verbal instructions in Spanish and working temporary jobs cleaning houses and in the production setting. PX3 at 1. He noted that her last job for Respondent required her to stand all day working in the metal preparation department handling seals, and that she had to lift up to 50 pounds. *Id.*

Mr. Johnston based his vocational opinion on the restrictions imposed by Dr. Lamberti through June 25, 2013, Dr. Belich's February 14, 2013 and February 21, 2013 independent medical evaluation reports, and Petitioner's February 12, 2013 invalid functional capacity evaluation report. PX3 at 2. Ultimately, Mr. Johnston opined that, taking all relevant vocational factors into consideration, Petitioner is totally disabled from the workforce. PX3 at 3.

Respondent also offered a report dated May 14, 2014 regarding Petitioner's employability from Edward Minnich ("Mr. Minnich"), a certified rehabilitation counselor, per its request. RX3. Mr. Minnich did not personally interview Petitioner, but he reviewed various documents including an excerpt of Mr. Payton's transcript from the first hearing regarding Petitioner's job requirements, Petitioner's February 12, 2013 invalid functional capacity evaluation report, Dr. Lamberti's reports through June 25, 2013, and all four of Dr. Belich's reports from February 14, 2013 through May 6, 2014. *Id.* He also reviewed Mr. Johnston's report. *Id.*

In reaching his conclusions, Mr. Minnich focuses several issues. *Id.* First, he notes the inconsistencies identified in Petitioner's functional capacity evaluation results by the physical therapist. Next, he notes that the work restrictions imposed by Dr. Lamberti were offered despite Petitioner's invalid functional capacity evaluation results and he cites two publications standing for the proposition that a physician should take into

account the patient's capabilities as determined, in this case, by functional capacity evaluation results in returning a patient to work. *Id.* Mr. Minnich finds Dr. Lamberti's work restrictions to be unsupported by other medical evidence, the functional capacity evaluation results in particular. *Id.*

Finally, Mr. Minnich relies heavily on the opinions of Dr. Belich and reviews the report of Petitioner's vocational rehabilitation expert, Mr. Johnston, and takes issue with several of his conclusions. *Id.* Specifically, he takes issue with the fact that Mr. Johnston makes "[n]o mention of the glaring inconsistency that her surgery was to her left elbow and that this should have nothing to do with standing, sitting, walking, crouching and stooping[,]" and that his limitation of Petitioner's capabilities to sedentary work is based on Mr. Johnston's reliance on the invalid functional capacity evaluation results. *Id.* Mr. Minnich also takes issue with Mr. Johnston's conclusion that Petitioner was totally incapacitated from work based on her limited English language skills (given that she filled out various employment papers in English, lived in the U.S. for decades, and worked in the U.S.) and her limited education and training (given that she was employed as an assembler, sorter, and hand packer as noted in her employment application with Respondent). *Id.*

Mr. Minnich repeatedly notes that Petitioner's case is "wrought with inconsistencies" and reaches his ultimate conclusion that Petitioner would be able to work at some level (most likely light duty given the aforementioned issues with the bases on which Dr. Lamberti imposed work restrictions, relied upon by Mr. Johnston) assuming that she was motivated to do so, which he believed that she was not.

*Additional Information*

Regarding her current condition, Petitioner testified that when she tries to do her activities for example when she is making something simple to eat she cannot carry anything heavy (e.g., with a gallon of milk, a pan) with her left arm because she feels a pinch as though it was a needle going into her elbow from the inside to the outside and she loses strength. She has to hold it with her other hand or leave the item.

With regard to her shoulder, Petitioner testified that if she does not have a lot of activity she does not experience a lot of pain. Petitioner testified that she has to do very simple things for food, nothing where she has to chop because the next day or in the afternoon she will feel a lot of pain in her shoulder, elbow and her whole arm.

Petitioner testified that she takes Naproxen pain medication for her pain and inflammation. When she has a lot of pain, Petitioner testified that her doctor told her that she could also combine it with Advil.

Petitioner testified that she lives at home with her husband, her two children, and another son comes over the weekends because he is in college now. The two sons that live with her full time are 20 and 17 years old. Petitioner testified that her children do most of the cleaning, but each child washes their own clothes and they alternate cleaning the bathroom. Petitioner tries to help cleaning, but not too much. As an example, Petitioner testified that she tries to make something for her children to eat, very simple things; but when she does not feel well she will call her children and tell them to go to a Subway or tell her husband to go to the Mexican store because that day she did not prepare anything.

With regard to cleaning, Petitioner testified that she cleans the dishes that she uses and her husband will clean the bathroom after Petitioner puts cleaning fluid there. Or, for example, Petitioner will perform light disinfecting-type cleaning of the bathroom sink. If Petitioner tries to do more cleaning than that, for example when her kids have been too busy and the house is really dirty, she notices strong pain afterwards and the

following day she cannot move her arm because it gets very swollen; especially her elbow where she has a lot of pain and she feels tendonitis in both hands.

Petitioner also testified that there are certain activities that she used to do that she can no longer do. For example, she had a pool that she would help her husband clean, but she no longer does. They do not use the pool anymore because it is a lot of work and money. Inside the house, Petitioner used to bring garbage out or clean so that her home would look nice (like the cabinets), which she does not do anymore.

Petitioner further testified that she used to go out more with her husband and go dancing with friends or help at the food pantry at the church, but she no longer engages in these activities because the pain is uncomfortable. She can no longer pull the carts or carry the food that was being donated because it was too heavy.

With regard to the medical bills at issue, Petitioner testified that she is familiar with these charges for the MedSource bill, which is for a device that gives her "shocks" and calms her pain and the rigidity in her arm. Petitioner testified that Dr. Lamberti ordered this machine for her and she obtained it at Sherman where she was having therapy, which she still uses so that she does not have to take more medication. Petitioner testified that she uses this once a day usually in the evening or after she has a lot of activity.

*Mark Payton*

Respondent called Mr. Payton as a witness. Mr. Payton is the director of buildings and grounds. He was previously employed by Respondent from approximately May 2001 to September or October 2009. During time that Mr. Payton worked at Respondent, he knew Petitioner because she reported to him in the metal preparation department as a metal preparation operator.

Mr. Payton also testified that about Petitioner's duties at work for Respondent. However, the Arbitrator is bound by the findings and conclusions as reflected in the Commission's May 2, 2011 decision. As relevant to Petitioner's duties at work, about which Mr. Payton testified at the first hearing in these cases, the Commission has determined Petitioner's job description as follows:

> Petitioner credibly testified that her job required her to load circular, metal car seals into a machine for processing, unload them from the machine after processing, place seals in boxes, and lift the loaded boxes onto a skid. Before loading the metal seals into the machine, the seals were delivered to Petitioner in a large box. Petitioner removed the seals from the box. The seals contain a hole in the center which allowed her to insert them one by one onto a bar. She would then lift the loaded bar onto an iron rack. Each bar held 20 seals. Each rack held 20 bars. Petitioner testified she utilized "heavy" force to push the loaded rack to an area/machine we are the seals would be coated with chemicals. Petitioner testified that the seals vary in size. Generally, Petitioner loaded twenty 2 lb. seals on each bar and placed twenty bars in each rack. The topmost bar was as high as her head while the lowest bar was knee high. A loaded rack weighed approximately 45 lbs. after completion of the chemical process, Petitioner would pull the loaded rack out of the machine and unload the bars, tilting each parcel the seals could slide off. Petitioner testified that the 2 lb. seals came in boxes of 980 and she handled between three and five boxes of them per day (or approximately 2940 - 4900 seals per day). Once the seals were boxed up, she would lift the loaded boxes (weighing over 50 lbs.) onto a skid for transporting (just as she did on July 30, 2007, the date of accident in 07 WC 37471). Petitioner testified she had a partner and they would alternate the tasks of pushing and pulling the loaded rack to and from the coating machine.
>
> ...
>
> Respondent's supervisor, Mark Payton, acknowledged that Petitioner's job could require her to load up to twenty of the 2 lb. seals per bar and he further acknowledged that while he believed she only had to load 10 of the small seals per bar, there could have been a point in time when she was required to load twenty pieces per bar. He also agreed

that there were 980 of the 2 lb. seals per box and that it took "effort" to push the loaded racks. While Mr. Payton testified Petitioner was required to load/unload a lesser number of seals, the Commission finds that his description also suffices to establish the repetitive nature of Petitioner's job duties for Respondent.

PX6 at 2-3.

Mr. Payton also testified that that during the time that he worked with Petitioner he was in contact with her multiple times per day. Mr. Payton testified that he understood Petitioner when she spoke in English and had no problem speaking with her. He added that he does not speak Spanish. He testified that generally their conversations related to what parts to process and mechanical issues. Mr. Payton also testified that Petitioner would write in productivity logs the work that was accomplished and note any safety issues. RX4. He added that Petitioner would note output, how many parts or skids or pieces completed, safety issues such as a leaking pipe or a trip or slip hazard, etc. On cross examination, Mr. Payton acknowledged that the productivity logs did not require much writing, only numbers really.

After Petitioner stopped working in 2007, Mr. Payton continued as the supervisor of the department. The work continued after Petitioner stopped working through 2009 and it was available until the plant closed.

Petitioner testified that she had never seen this productivity log form and that she did not have to fill out any papers while employed for Respondent. *See* RX4. She testified that she did have to fill out very simple forms however (i.e., a safety checklist and operation log) that were very simple. She testified that these forms required her to input the part number, the time that she had finished it, and who made the part (because the person that picked up the box would scan it and document the number of the part, but that was not her job anymore).

Petitioner testified that she did not every have to write sentences describing problems with the machines. Immediately after the machine would break down, Petitioner testified that she would let the mechanic or Mr. Payton know about it and they would fix it. Petitioner testified that she did not ever have to write anything down describing how the machine had to be fixed. Petitioner testified that Mr. Payton would write the part number in and Petitioner would input that he finished the part and who did it (her and her partner) and other guys would fill in the rest of it. Petitioner testified that she would indicate the number of boxes that they did of certain parts and that the boxes had to be finished otherwise they would not count.

## ISSUES AND CONCLUSIONS

After reviewing all of the evidence and due deliberation, the Arbitrator finds on the issues presented 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:**

First, the Arbitrator addresses Petitioner's claimed low back condition and finds that it is not causally related to her accident at work on April 5, 2007 (Case No. 07 WC 37472). In so concluding, the Arbitrator notes that no medical records were submitted evidencing ongoing treatment to the low back, Petitioner did not testify about any continuing problems or symptomatology in the low back at this hearing, and that the Commission, on May 2, 2011, affirmed and adopted the original Arbitrator's decision that Petitioner sustained an accident to her low back on April 5, 2007, but denied compensation for the injury. *Id.* Thus, the Arbitrator finds that Petitioner's claimed low back condition of ill being is not causally connected to her work accident. By extension, all other issues related to the low back are rendered moot and all requested compensation and benefits are denied.

Next, the Arbitrator finds that Petitioner's claimed current condition of ill being in the left shoulder is causally connected to her accident at work on July 30, 2007 (Case No. 07 WC 37471). In so concluding, the Arbitrator notes that the medical records submitted do not reflect treatment to the left shoulder; rather, Dr. Lamberti's records reflect a focus on Petitioner's left elbow condition. However, the Commission, on May 2, 2011, affirmed and adopted portions of the original Arbitrator's decision including findings that Petitioner had rotator cuff impingement, AC joint arthritis, and biceps tenderness resulting in the need for an arthroscopic surgery, a surgical approach with which Respondent's Section 12 examiner concurred. The Commission also awarded additional temporary total disability benefits to extend through November 18, 2008. At this hearing, Petitioner testified about continuing problems in the left shoulder including pain when she performs too much activity and a negative effect on the type and amount of activities of daily living that she can comfortably perform. Thus, the Arbitrator finds that Petitioner's claimed left shoulder condition of ill being is causally connected to her work accident.

Finally, the Arbitrator finds that Petitioner's claimed current condition of ill being in the left elbow is causally connected to her accident at work on March 12, 2009 (Case No. 09 WC 27931). In so concluding, the Arbitrator relies on the additional evidence submitted at this hearing which reflects that Petitioner continued to undergo medical treatment for her left elbow with Dr. Lamberti after the first hearing in this case and submitted to additional independent medical evaluations at Respondent's request. The Arbitrator also incorporates by reference the Commission's May 2, 2011 decision in which it determined that Petitioner's left elbow condition was causally related to a repetitive trauma injury sustained on March 12, 2009. Thus, the Arbitrator finds that Petitioner's claimed left elbow condition of ill being is causally connected to her work accident.

**In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:**

Petitioner seeks payment for an EMG charge of $840.00 and a Med Source charge of $1,091.00. The record reflects that the EMG ordered by Dr. Lamberti was approved as reflected in letter from Respondent's counsel. The record also reflects a bill and correspondence from Med Source for an "electrodes" or "stim xp" machine from referring physician Dr. Lamberti, which correlates to Petitioner's testimony that she received a device during physical therapy that gives her "shocks" and calms the pain and rigidity in her arm as ordered by Dr.

Lamberti. Thus, the Arbitrator awards payment of these charges to be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive any credit for payments already made.

**In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:**

*Low Back*

As explained in the causal connection analysis above, no evidence was presented at this hearing regarding any ongoing disability to the Petitioner's back and, moreover, Petitioner's claim for compensation and benefits was denied at arbitration and affirmed by the Commission in its May 2, 2011 decision. Thus, no compensation is awarded with regard to Petitioner's back injury (Case No. 07 WC 37472).

*Left Shoulder*

Also as explained in the causal connection analysis above, the Arbitrator finds that Petitioner's claimed left shoulder condition of ill being is causally connected to her work accident. The Commission's decision affirmed the original Arbitrator's findings that Petitioner had rotator cuff impingement, AC joint arthritis, and biceps tenderness resulting in the need for an arthroscopic surgery. Petitioner also testified at this hearing about ongoing symptomatology that limits her ability to engage in various activities of daily living. Additional records produced at trial, including work conditioning notes, also reflect loss of range of motion and strength in the left shoulder as compared to the right shoulder. Thus, based on the record as a whole, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 10% loss of use of the person as a whole pursuant to Section 8(d)(2) for the injury to the left shoulder (Case No. 07 WC 37471).

*Left Arm/Elbow*

Finally, the Arbitrator finds that Petitioner has established permanent partial disability to the left arm as a result of her left elbow medial and lateral epicondylitis condition. While Petitioner asserts that she is permanently and totally disabled pursuant to Section 8(f) of the Act, and Respondent asserts that Petitioner has failed to establish any disability in the left arm, the Arbitrator views the evidence differently.

The Commission found that Petitioner sustained a repetitive trauma injury to the left elbow and it made detailed findings regarding Petitioner's job duties while employed by Respondent, which forever resolves those issues. Petitioner later received the requested medical treatment after the Commission's order of May 2, 2011 and continued to see Dr. Lamberti for treatment of her left elbow. She underwent lateral and medial epicondylectomies, post-operative physical therapy, and some work conditioning until Dr. Lamberti recommended a functional capacity evaluation and shortly thereafter imposed permanent work restrictions.

The parties' dispute with regard to the nature and extent of Petitioner's left elbow injury fundamentally centers on her credibility. The additional evidence proffered at this trial included Petitioner's own testimony, records regarding Petitioner's subsequent medical treatment, Respondent's independent medical evaluation opinions rendered by Dr. Belich, and the opinions of Mr. Johnston and Mr. Minnich regarding Petitioner's employability.

Petitioner's testimony at trial about her capabilities is, essentially, that she cannot perform most activities involving her left arm anymore without pain, if she can perform them at all. Respondent offered video surveillance of Petitioner on four dates engaged in general daily activities including grocery shopping, throwing

out garbage and driving generally with little use of her left arm. This footage shows Petitioner having some difficulty with the use of her left arm, primarily using her right arm to perform functions. It also shows Petitioner using her left arm and hand limitedly, such as while holding a coffee cup or on one occasion using both arms to throw away a simple wooden chair. While the footage shows her in a few instances carrying more than what appears to be over five pounds with both hands (i.e., when she is throwing away the chair which appears to be inconsistent with her functional capacity evaluation and work conditioning testing results) or reaching above shoulder level (i.e., while flipping over a garbage can lid), the footage does not show complete, free use of her left arm in the performance of significantly heavy range of motion and strength activities that would suggest she has no ongoing disability whatsoever in the left arm. In the Arbitrator's view, these activities are generally consistent with Petitioner's claim of ongoing disability, but not to the extent she claims.

Petitioner testified about a much more severe lack of ability in the left arm. However, objective evidence in the record reveals troubling variability in Petitioner's physical abilities that do not correlate to the extent of permanent and total disability due to the left arm injury as claimed. Indeed, Petitioner's shows inconsistencies in the use of her uninjured right arm and while using her lower extremities during testing.

An initial work conditioning evaluation performed on January 7, 2013 approximately five months after her surgery reveals loss of range of motion in the left upper extremity as compared to the right upper extremity that was specifically documented with regard to various activities (i.e., shoulder rotation, elbow, flexion, grip strength, etc.). Inexplicably, however, Petitioner's abilities in the left and right arms approximately two weeks later on January 23, 2013 changed somewhat dramatically.

She exhibited 2° improvement in shoulder flexion on the right and a 10° loss on the left, a 5° loss of shoulder abduction on the right and a 15° improvement on the left, a 15° improvement in shoulder external rotation on the right and 15° improvement on the left, a 10° loss of elbow flexion on the left, a 10° loss of wrist flexion on the right and 10° loss on the left, a 10° loss of wrist extension on the left, and a 4 pound loss of grip strength in the left hand as well as a 5 pound loss on the right. Certainly an individual's physical capabilities in an affected body part can vary from day to day resulting from a variety of factors, but these findings also reflect a decrease in ability in the uninjured right upper extremity. Taken in conjunction with Petitioner's functional capacity evaluation results, which Dr. Lamberti and Mr. Johnston sidestep in rendering their opinions, the record contains objective information that raises serious doubt about Petitioner's actual physical capabilities.

The results of Petitioner's February 12, 2013 functional capacity evaluation, which are extensively addressed by both parties, are undisputedly invalid. The report contains several caveats from the evaluating physical therapist, Mr. Toman, who highlighted "low levels of physical effort on [Petitioner's] behalf[,]" "inconsistency the reliability and accuracy of [Petitioner's] reports of pain and disability[,]" and he was ultimately unable to "validate this examination as being a representation of her maximum function." PX2 at 1-2.

Indeed, during strength grip testing of the right hand using the hand dynamometer Mr. Toman noted that Petitioner showed low effort and her left hand grip scores produced a lack of full effort. These findings further highlight the inconsistent grip strength test scores of Petitioner in the affected left arm and unaffected right arm during work conditioning testing just weeks earlier. Also, when formally tested for active right shoulder elevation Mr. Toman noted that Petitioner had significant apprehension whereas she was able to elevate her unaffected right arm with ease and hold it in sustained flexed position for approximately 20 seconds when he placed a heart rate monitor on her wrist. Mr. Toman specifically noted that this ability in the unaffected right arm was inconsistent with Petitioner's reported apprehension of moving her right arm during the formal assessment. Finally, Mr. Toman noted that Petitioner could not push/pull with 5 pounds of force bilaterally,

although she was observed pushing and pulling the facility entrance and exit doors which required greater than 15 pounds of force. This notation highlights the inconsistencies of Petitioner's reports with objective testing and highlights the inconsistencies viewed in the video surveillance including Petitioner pushing a grocery cart containing bags of unknown weight and later pulling the empty shopping cart with her left hand only; activities that Petitioner could not perform if Dr. Lamberti's limiting work restrictions are to be accepted at face value.

Thus, the Arbitrator finds that objective testing of Petitioner's physical abilities during the functional capacity evaluation and work conditioning as ordered by Dr. Lamberti render her testimony about the almost complete loss of range of motion and strength suspect and place the extent of Dr. Lamberti's work restrictions based on "[k]nowing her [functional capacity evaluation] results, her grip strength and generally what her arm can do…" in doubt. In so concluding, the Arbitrator acknowledges that the Commission found Dr. Lamberti's prior opinions to be more persuasive than those of Respondent's Section 12 examiners after the first hearing. However, the evidence adduced at this trial indicates that he assigned permanent restrictions in spite of objective evidence of Petitioner's capabilities as reflected in her functional capacity evaluation and work conditioning progress notes.

It is also noteworthy that Dr. Lamberti does not specifically note objective test findings of his own about Petitioner's capabilities throughout his treatment and simply opines that Petitioner could work in an assembly-type position limited to tasks that were up to two pounds on a frequent/repetitive basis, up to five pounds on an occasional basis, and up to 15 pounds on a rare or infrequent basis (2-3 times per day). On the other hand, Respondent's examiner, Dr. Belich, does not release Petitioner back to full duty work either. He estimates her capabilities to include lifting up to 20 pounds with a two-handed lift particularly below shoulder level. He recommended that she undergo a functional capacity evaluation to determine her capabilities and, presumably, he expected that Petitioner's physical capabilities could be based on valid test results. Given the inconsistencies noted above between objective evidence of Petitioner's capabilities and her subjective reports, the Arbitrator does not place more weight on the opinions of Petitioner's long-time treating physician, Dr. Lamberti, over those of Dr. Belich, but also finds that these physicians seem to agree—whether they realize it or not—that Petitioner cannot return to work for Respondent in the job definitively delineated by the Commission in its May 2, 2011 decision.

Finally, the parties provide the opinions of Mr. Johnston and Mr. Minnich regarding Petitioner's employability or lack thereof. Given the totality of this record, the Arbitrator is not persuaded by the opinion of Petitioner's vocational rehabilitation expert, Mr. Johnston, regarding Petitioner's lack of employability.

Mr. Johnston relies heavily on the permanent restrictions imposed by Dr. Lamberti despite the invalid functional capacity evaluation results that he reviewed and the lack of Dr. Lamberti's own objective findings to substantiate his permanent work restrictions. It also does not appear that Mr. Johnston had the benefit of Petitioner's work conditioning evaluations when rendering his opinions. On the other hand, Mr. Minnich relies heavily on the opinions of Respondent's Section 12 examiner, Dr. Belich, including Dr. Belich's findings during some evaluations that were addressed previously by the Commission in Petitioner's favor.

Both Mr. Johnston and Mr. Minnich agree that Petitioner did not complete high school in Mexico, that she did not attain her G.E.D. in the U.S. despite attempts in a Spanish language G.E.D. program, and that she has worked in the U.S. for decades. They diverge in terms of the extent of Petitioner's English language abilities. Given Mr. Payton's testimony regarding the requirements of Petitioner's job to write limited things in English while employed by Respondent, the record evidence reflecting Petitioner's English language writings, Petitioner's testimony at this hearing through an interpreter, and after careful observation of Petitioner at trial,

the Arbitrator finds that Petitioner is, as she contends, primarily a Spanish language speaker with limited English proficiency.

Mr. Johnston and Mr. Minnich also diverge with regard to Petitioner's work history and training, and whether Petitioner could perform duties beyond the sedentary level. As explained above, the inconsistencies in Petitioner's objective test results, particularly related to body parts that were unaffected by her injuries at work, raise serious doubt about the true extent of her abilities. Moreover, after reviewing the record the Arbitrator finds that Petitioner had a slightly more diverse work background as indicated by Mr. Minnich than that reflected in Mr. Johnston's report even if she was able to perform those duties as an assembler, sorter, and hand packer without much English language proficiency. In addition, it is notable that Petitioner did not search for work on her own after being released by Dr. Lamberti until over nine months later on March 28, 2014 and only then for two months through May 23, 2014. This supports Mr. Minnich's opinion that Petitioner is unmotivated to find work and further highlights the lack of effort noted by Petitioner's own work conditioning physical therapist and Mr. Toman, the functional capacity evaluator. In light of the foregoing, the Arbitrator finds that Mr. Johnston's assessment that Petitioner is totally disabled and unable to work to be unpersuasive.

In sum, based on the record as a whole—which reflects that Petitioner sustained a severe repetitive trauma injury to her left arm resulting in the need for medial and lateral epicondylectomy surgery resulting in disputed permanent restrictions that establish, nonetheless, that she cannot return to her job for Respondent with continued symptomatology, daily use of an assistive stimulator device, difficulty performing activities of daily living and lifestyle changes to accommodate those difficulties—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 30% loss of use of the left arm/elbow pursuant to Section 8(e) of the Act.